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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DANNELL LEE RICHARD et al., Defendants and Appellants.	B230579 (Los Angeles County Super. Ct. No. KA089939)

APPEALS from judgments of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed, as modified.

Allison H. Ting, under appointment by the Court of Appeal, for Appellant Dannell Lee Richard.

Juliana Drous, under appointment by the Court of Appeal, for Appellant Jovan Ricky Guillory.

Robert L.S. Angres, under appointment by the Court of Appeal, for Appellant Aisha Najean Douglas.

Alan Siraco, under appointment by the Court of Appeal, for Appellant Ashlee O. Reed.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Dannell Lee Richard, Jovan Ricky Guillory, Ashlee Olivia Reed and Aisha Najean Douglas appeal from the judgments entered following their convictions on charges arising from the home invasion robbery of a drug dealer and his girlfriend. With the exception of some corrections to Richard's sentence, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Robbery and Arrest of the Defendants*

On the morning of March 10, 2010 Misty Salinas was getting ready for work while her four-year-old daughter sat on the couch watching cartoons. Someone knocked on the door. Looking through the peephole, Salinas saw a young woman she did not know. She woke her boyfriend Graylynn Reed, who was asleep in the bedroom, to see if he wanted to answer the door. Graylynn,[1] assuming the woman was a neighbor, told Salinas to open the door. As she opened the door, Richard pushed into the apartment and struck Salinas on her face, neck and chest. Salinas fell over the couch, grabbed her daughter and lay on the floor. Ashlee Reed, the woman who had knocked at the door, also came into the apartment, followed by Guillory.

Hearing a commotion, Graylynn came out of the bedroom and saw someone pointing a gun at Salinas. He ran toward a closet to retrieve his own gun, but, after realizing he would not make it, tried to lock himself in the bathroom. Richard pointed a gun at Graylynn, struck him in the head with the gun and pulled him out to the hallway. Richard and Guillory bound Graylynn and Salinas with duct tape and demanded to know where Graylynn kept his "stuff." Graylynn directed them to the closet, where they retrieved Graylynn's gun, a large quantity of marijuana and cash. After threatening Graylynn, hitting him again with the pistol and slashing at him with a knife, Richard apparently concluded nothing else of value remained in the apartment. The three assailants left the apartment, taking the couple's cell phones, keys, a video game console and two purses belonging to Salinas, in addition to the gun, marijuana and cash.

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[1] Because Graylynn Reed and Ashlee Reed, although not related, bear the same last name, we refer to Graylynn Reed by his first name for convenience and clarity. (See *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 424, fn. 1.)

Graylynn and Salinas were able to free themselves and went to the manager's office to report the robbery. When an officer from the West Covina Police Department arrived, Graylynn initially claimed the apartment had been burglarized when the couple had been away. Graylynn reported the missing items but omitted mention of the marijuana. While the officer was at the apartment, he received a call from another officer who had detained a car with four occupants nearby. A search of the car revealed two guns, several cell phones, a large quantity of marijuana, a video game console, cash and two purses. Graylynn and Salinas accompanied the officer investigating the burglary to the detained car. Along the way they decided to admit they had been in the apartment at the time of the crime and the suspects had stolen Graylynn's marijuana. When they arrived at the location, both Graylynn and Salinas identified Richard, Guillory and Reed as the persons who had robbed them. Graylynn also identified Douglas, who had been driving the car, as someone he had known for several years.

2. *Pretrial and Trial Proceedings*

Richard, Guillory, Reed and Douglas were charged by information with three counts (Graylynn, Salinas and Salinas's four-year-old daughter) of first degree in-concert home invasion robbery (Pen. Code, §§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A))[2] with special allegations Richard, Guillory and Reed had personally used a firearm (§ 12022.53, subds. (b), (e)(1)) and the crime had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C) & (b)(4)). Richard and Douglas were also charged with one count each of possession of a firearm by a felon (§ 12021, subd. (a)(1)), and Guillory was charged with one count of unlawful firearm activity (§ 12021, subd. (d)(1)). Richard was alleged to have suffered two prior serious or violent felony convictions within the meaning of section 667, subdivision (a)(1), and the "Three Strikes" law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)).

The charges were tried before two separate juries: one for Richard, and the second for Guillory, Reed and Douglas. At trial Graylynn admitted he had sold marijuana he had

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[2] Statutory references are to the Penal Code.

purchased with a medical marijuana license, sometimes in quantities of a pound or more.[3] He also testified he knew Douglas because he had provided her with marijuana and they had frequently engaged in sex during the previous four years. Graylynn had observed what he believed to be gang-related tattoos on Douglas's body, and she had admitted on one occasion she was a member of the East Coast Crips (ECC). He also knew her husband was incarcerated.

Erik Shear, a detective with the Los Angeles Police Department, testified as an expert on criminal street gangs. Shear had been assigned to investigate the ECC gang for the past six years. The Q102 clique of that gang engages in various gang-related crimes but has been particularly known for its "dope rip-offs," that is, robberies of drug dealers. Shear identified four crimes committed by ECC members, including two robberies of drug dealers. Richard and Guillory had admitted to being members of the ECC gang and bore gang-related tattoos, including tattoos linking them to the Q102 clique. Reed bore a "5150" tattoo, indicating someone who is not afraid, or half crazy, but her tattoos were not specific to ECC. Based on an extensive hypothetical question echoing the details of the robbery of Graylynn and Salinas, Shear opined the crime had been committed for the benefit of the ECC gang.

Douglas was the only defendant who testified. Douglas denied ever having sex with Graylynn but admitted she had bought marijuana from him on more than 200 occasions. She also denied any gang affiliation and claimed her tattoos were not gang-related. Although Richard, who is her brother, had once been a member of the ECC gang, he was no longer associated with them. Guillory was the son of a friend, and she had never known him to be involved with a gang and had never noticed his tattoos. She also did not believe Reed, who was Richard's girlfriend, was involved with a gang.

According to Douglas, she had purchased marijuana from Graylynn the evening before the robbery, and he had shorted her on the quantity. Richard, Guillory and Reed

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[3] Graylinn and Salinas were granted use immunity in exchange for testifying truthfully at trial.

were at Douglas's house in Baldwin Park that evening. Later that evening, she became even angrier when she learned Graylynn had sold marijuana to her pregnant, teenage daughter and had also recruited her daughter to sell drugs at her high school. Still angry the next morning, Douglas called Graylynn and confronted him for shortchanging her. After he refused to rectify the problem, Richard, Guillory and Reed got into Douglas's car and headed to Graylynn's apartment. Douglas denied anyone had planned to rob Graylynn; she believed they were only going to get the additional marijuana she was owed. Moreover, Douglas believed he lived alone and did not know Salinas or her child would be there.

When they arrived at Graylynn's West Covina apartment, Douglas decided to stay in the car because she felt ill (she had ingested Ecstasy provided by Graylynn twice over the previous 12 hours) and directed Richard, Guillory and Reed to the apartment. Richard, Guillory and Reed returned to the car several minutes later with a bag. Douglas smelled marijuana and assumed they had obtained the additional marijuana Graylynn owed her. She drove away from the apartment but was stopped a short time later by West Covina police.

3. *Verdicts and Sentencing*

Douglas, Reed and Guillory were each convicted of two counts of robbery (Graylynn and Salinas) perpetrated in an inhabited dwelling by the defendants acting in concert. Their jury found true the related firearm enhancement allegations but found the gang allegations not true. Douglas admitted she had previously suffered a prior felony conviction and was additionally convicted of possession of a firearm by a felon. The jury also convicted Guillory of unlawful firearm activity after he admitted he had been on probation at the time of the offense and had been ordered not to possess any firearm as a condition of probation. Guillory was sentenced to an aggregate state prison term of 21 years four months; Douglas was sentenced to an aggregate state prison term of 11 years; and Reed was sentenced to a state prison term of six years on each count, to run concurrently.

Richard was convicted by the second jury of three counts of home invasion robbery (including Salinas's child) and one count of possession of a firearm by a felon. The jury found true all firearm and gang enhancement allegations. In a bifurcated proceeding, the court found true the allegation Richard had suffered two prior strike convictions. Richard was sentenced to an aggregate state prison term of 207 years to life: On the first home invasion robbery count, 15 years to life, tripled to 45 years to life under the Three Strikes law, plus 10 years for the firearm enhancement under section 12022.53, subdivision (b), plus another 10 years under section 12022.53, subdivisions (b) and (e)(1), plus 10 years pursuant to section 667, subdivision (a)(1), plus two years pursuant to section 667.5, subdivision (a)(1); on the second home invasion robbery count, 15 years to life, tripled to 45 years to life under the Three Strikes law, plus 10 years for the firearm enhancement under section 12022.53, subdivision (b), plus another 10 years under section 12022.53, subdivisions (b) and (e)(1), to run consecutively to the first count; and on the third home invasion robbery count, 15 years to life, tripled to 45 years to life under the Three Strikes law, plus 10 years for the firearm enhancement under section 12022.53, subdivision (b), plus another 10 years under section 12022.53, subdivisions (b) and (e)(1), to run consecutively to the first two counts. A concurrent sentence of two years was imposed on the unlawful firearm possession count.

CONTENTIONS

Richard challenges the expert testimony presented on the criminal street gang allegation as improper and contends the jury's true finding on this enhancement was not supported by substantial evidence. He also challenges portions of his sentence. Guillory, who was 16 years old at the time of the crime, challenges his sentence as unconstitutionally excessive in light of his age. Reed contends the jury was improperly instructed on the elements of robbery in concert and claims the evidence is insufficient to support her conviction. Douglas contends there is insufficient evidence to support her conviction as an aider and abettor to the robbery of Salinas because she did not know Salinas would be in the apartment or to support the finding she acted in concert with the other defendants.

DISCUSSION

1. *The Gang Enhancement Was Properly Imposed on Richard*

To obtain a true finding on a gang enhancement allegation, the prosecution must prove the underlying offense was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) To establish this element of the enhancement allegation, two prongs must be met: First, there must be evidence the underlying felony was "committed for the benefit of, at the direction of, or in association with any criminal street gang." Second, there must be evidence the defendant had "the specific intent to promote, further, or assist in *any* criminal conduct by *gang members*." (See *People v. Albillar* (2010) 51 Cal.4th 47, 51 (*Albillar*); *People v. Gardeley* (1996) 14 Cal.4th 605, 615-616; *People v. Anguiano* (2012) 210 Cal.App.4th 323, 331.)

Richard challenges the jury's true finding on the gang enhancement on two grounds: First, he contends the jury's finding is not supported by substantial evidence because the evidence overwhelmingly demonstrated the robbery was committed to avenge wrongs done to his sister and niece, not for a gang purpose. Second, he contends Detective Shear's opinion was based on a hypothetical that tracked the evidence in this case so closely it amounted to an improper opinion as to Richard's own intent rather than that of a typical gang member in similar circumstances.[4]

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[4] The prosecutor posed the following hypothetical question to Detective Shear: "Assume that you have a female suspect who's a member of the East Coast Crips, and she has had a sexual relation with a male victim for a while; in fact, on prior occasion[s] this male victim had provided marijuana [to] this female suspect. One day this female suspect decided she would drive to the male victim's residence along with two other male members, as well as a female associate, to this victim's home. When they get to the location, the female driver stays in her car because she's concerned she can be identified by the male victim. At that time the female associate, as well as two male gang members, go up to the victim's home. Female associate knocks on the door. Turns out there was another person in the house. It's the male victim's girlfriend and her four-year-old daughter. The female victim opens the door. This group rushes in. They pistol whip the male victim. Make a long story short, they tie the victims up. They rob these victims at

Richard's second argument was expressly rejected by the Supreme Court in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), which was decided after his opening brief was filed.[5] As Richard acknowledges, it has long been the rule that an expert may testify a crime was committed for the benefit of a criminal street gang, provided the opinion testimony is "on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) To be sure, this does not mean an expert may express any opinion he or she may have. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651 (*Killebrew*), disapproved on other grounds in *Vang*, at p. 1047 & fn. 3.) In *Killebrew* the appellate court rejected a gang expert's opinion that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Killebrew*, at

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gunpoint with their own gun. During the course of the robbery they recover the victim male's gun as he was trying to retrieve the gun to protect himself. So they took from this residence a gun, marijuana, money, a PlayStation 3, as well as a bunch of CDs. After the incident, they left the location. The male victim calls the police. He first tells the police someone has broken into his home and has taken his property. He has taken his gun. The male victim lies about what actually happened. He did not see the home invasion. He said when this happened, he and his girlfriend and the daughter—they were not home; and, in fact, he lied about the marijuana, the incident about the marijuana being taken. Shortly thereafter the robbery, this group of suspects are stopped couple blocks from the victim's residence. An officer noticed the odor of marijuana come from the car. They take everybody; recover in the car marijuana, two guns. One gun belonged to the victim; one belonging to the suspects, as well as PlayStation, CDs, and marijuana and cash. During the interview, the female driver admits she's a member. The female who came with the female driver admits she's an associate. Two male suspects admit they were members of East Coast Crips gang. Based on the facts I have you, do you have an opinion whether or not this crime was committed for the benefit and the direction of and association with the East Coast [Crips] street gang?"

[5] Richard has forfeited this second argument by failing to raise it in the trial court. (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 505 [defendant's failure to object to propriety of allowing expert opinion concerning gang motive and affiliation forfeits issue on appeal]; accord, *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.) His generic motion to dismiss the gang allegation before trial was inadequate to preserve the specific objection to the format of the hypothetical question posed to Detective Shear. Nonetheless, in the interest of judicial economy we address the merits under the relevant constitutional standards as Richard has also raised an ineffectiveness-of-counsel claim.

p. 652.) As the court explained, a gang expert's opinion may address the ultimate issue in the case, but it is improper for an expert to opine that a "specific individual had specific knowledge or possessed a specific intent." (*Id.* at p. 658.) Because the expert's testimony provided the only evidence to establish the elements of the crime, it "did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id*. at p. 658; accord, *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197-1198 ["Similar to *Killebrew*, the expert in this case testified to 'subjective *knowledge and intent*' of the minor. [Citation.] 'Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.'"].)

In *Vang, supra,* 52 Cal.4th 1038, however, the Supreme Court affirmed imposition of a gang enhancement based on hypothetical questions that "tracked the evidence in a manner that was only 'thinly disguised.'" (*Id.* at p. 1041.) As the Court explained, the expert witness "could not testify directly whether [the defendants] committed the assault for gang purposes" because the witness lacked personal knowledge as to whether they had committed the charged assault, "and if so, how or why; he was not at the scene." (*Id.* at p. 1048.) The expert witness, however, "properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Ibid*.)

Vang emphasized the "critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves" (*Vang, supra,* 52 Cal.4th at p. 1049),[6] a difference

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[6] Opinions that specific defendants committed a crime for a gang reason are inadmissible not because they embrace the ultimate issue in the case, but because they offer the jury nothing of value. (See *Vang, supra,* 52 Cal.4th at p. 1048 ["[T]he reason for the rule is similar to the reason expert testimony regarding the defendant's guilt in general is improper. 'A witness may not express an opinion on a defendant's guilt.' [Citations.] The reason . . . is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt."""].)

Richard claims was vitiated by the exceedingly specific nature of the hypothetical question posed here. As inartful as the question posed here may have been, and as predictable as the answer given by Detective Shear was, *Vang* leaves no room for doubt that an expert on criminal street gangs is permitted to opine on the issue of gang benefit, based on a hypothetical question that mirrors the evidence presented in a particular case. The testimony offered by Shear was entirely proper under *Vang.*

Richard's argument there was insufficient evidence to support the jury's true finding on the gang enhancement allegation similarly fails.[7] Richard argues not every crime committed by a gang member is a gang-related crime for purposes of section 186.22, subdivision (b)(1). (See, e.g., *Albillar, supra,* 51 Cal.4th at p. 60.) Here, he contends, no one called out a gang name, displayed a gang sign or indicated in any way a gang motive. According to Richard, "something more than an expert witness's unsubstantiated opinion that a crime was committed for the benefit of, at the direction of, or in association with any criminal street gang is required to justify a true finding on a gang enhancement." (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 660.)

Richard is correct that "something more" is required than an unsupported expert opinion, but Detective Shear's testimony was sufficient to permit the jury to find the robberies were committed to benefit the ECC gang and Richard had the requisite specific intent. "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was

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[7] "In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*Albillar, supra,* 51 Cal.4th at pp. 59-60.)

'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*Albillar, supra,* 51 Cal.4th at p. 63; see *Vang, supra,* 52 Cal.4th at p. 1048.) Shear testified extensively about predicate crimes committed by members of the ECC gang, including the gang's signature crime of "dope rip-offs," exactly the crime committed here. In addition, the gun stolen from Graylynn could be used for the commission of future crimes, and the stolen marijuana could be resold for profit. In turn, these resources could be used to enhance the reputation of the gang and further recruitment of new gang members.

Similarly, there was sufficient evidence from which it was reasonable to infer Richard committed the underlying offenses with the specific intent to promote, further or assist criminal conduct by gang members. (See *Albillar, supra,* 51 Cal.4th at p. 55 ["[t]he plain language of the statute . . . targets felonious criminal conduct, not felonious gang-related conduct"].) "[T]he scienter requirement in section 186.22(b)(1)—i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members'—is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar,* at p. 66.) "There is no further requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members.*" (*Id.* at p. 67.) From evidence the defendant "intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Id*. at p. 68.)

There was ample evidence here that all four defendants were members or associates of the ECC gang. Richard and Guillory admitted their gang membership, and Detective Shear described the ways in which all defendants' tattoos linked them to the ECC gang in particular or gang culture in general. As Shear explained, it is not uncommon for gang members to be related to each other or to commit crimes together. The failure of the second jury to impose a gang enhancement on Richard's confederates

demonstrates nothing more than the evidence was susceptible to two different conclusions, neither of which we are empowered to overturn.

2. *Guillory's Sentence Is Not Unconstitutional*

Guillory, who was 16 at the time of the robbery, contends his sentence of 21 years four months in state prison was unconstitutionally excessive in light of his age. Because he failed to raise this issue in the trial court, Guillory has forfeited this claim. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 250 [constitutional objections not properly raised are forfeited]; see also *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8 [forfeiture of claim of cruel and unusual punishment].) Nonetheless, we address his contention on the merits because he alternately argues his counsel provided ineffective assistance by failing to object to the sentence on this ground. (See *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

The Eighth Amendment's ban on cruel and unusual punishment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20-21 [123 S.Ct. 1179, 155 L.Ed.2d 108].) In *Graham v. Florida* (2010) 560 U.S. --- [130 S.Ct. 2011, 176 L.Ed.2d 825]) the United States Supreme Court held that sentencing a juvenile to life without the possibility of parole for a nonhomicide offense violates the Eighth Amendment's prohibition of cruel and unusual punishment. (*Graham*, at p. 2034.) Central to this result was the Court's appreciation for the "fundamental differences between juvenile and adult minds" and its recognition that juveniles are "more capable of change than are adults." (*Id.* at p. 2026.) The Court recently extended the reasoning of *Graham* to hold imposition of a mandatory sentence of life-without-parole on a juvenile convicted of murder also violates the Eighth Amendment. (*Miller v. Alabama* (2012) 567 U.S. --- [132 S.Ct. 2455, 2467-2468, 183 L.Ed.2d 407].) As the Court explained, such penalties "preclude[] consideration of [an offender's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." (*Id.* at p. 2468.) The Court concluded *Graham*'s directive to consider the unique characteristics and

vulnerabilities of juveniles is not "crime-specific" and its "reasoning implicates any life-without-parole sentence for a juvenile." (*Id*. at p. 2458.)

Article I, section 17 of the California Constitution contains a similar prohibition of punishment "not only if it is inflicted by a cruel and unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) To prevail on a claim a sentence constitutes cruel or unusual punishment in violation of the California Constitution, a defendant must overcome a "considerable burden" (*People v. Wingo* (1975) 14 Cal.3d 169, 174) by demonstrating the punishment is so disproportionate to the crime for which it was imposed it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*);[8] see *Dillon*, at p. 478.)

Recently, in *People v. Caballero* (2012) 55 Cal.4th 262, 268, the California Supreme Court held a 110-year-to-life sentence imposed on a juvenile convicted of nonhomicide offenses (three gang-related attempted murders) was the functional equivalent of a life sentence without the possibility of parole and was invalid in light of the decisions in *Graham* and *Miller*. (*Caballero*, at pp. 268-269.) The Court rejected the argument a cumulative sentence for distinct crimes does not present an Eighth Amendment issue and found, when a juvenile is sentenced to minimum terms that exceed his or her life expectancy, the punishment is excessive under *Graham* and *Miller*. (*Caballero*, at pp. 268-269.) As the Court noted, "the state may not deprive [juveniles] at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to

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[8] *Lynch* identified three factors for the reviewing court to consider in assessing this constitutional claim: (1) the nature of the offense and the offender; (2) how the punishment compares with punishments for more serious crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Lynch, supra*, 8 Cal.3d at pp. 425-427.) "The three prongs of *Lynch* are not absolute rules establishing that a given punishment is cruel and unusual, but are merely guidelines to be used in testing the validity of a particular penalty. [Citations.] The importance of each prong depends on the specific facts of each case and application of the first prong alone may suffice in determining whether a punishment is cruel and unusual." (*In re DeBeque* (1989) 212 Cal.App.3d 241, 249.)

reenter society in the future." (*Id.* at p. 268.) A sentencing court must consider mitigating circumstances before determining at which point juveniles can seek parole, including their age, whether they were a direct perpetrator or an aider and abettor, and their physical and mental development. (*Ibid.*)

The sentencing inquiry mandated by these decisions does not make Guillory's 21 year four month sentence unconstitutionally excessive. Guillory was a direct perpetrator of the robbery—not merely an aider or abettor—and personally used a firearm during the crime. He had been a member of the ECC gang since he was 12 years old and had suffered a juvenile adjudication for assault with a deadly weapon (§ 245, subd. (a)), for which he was confined for six months, and was on probation at the time of the instant robbery. The unfortunate influence of his adult co-defendants is certainly a factor to be considered, but Guillory's embrace of the gang lifestyle suggests their influence was by no means isolated or dispositive. While we acknowledge the regrettable impulsivity of teenaged offenders, the harshness of the sentence results directly from the repugnance with which the Legislature viewed the crimes for which he was convicted—home invasion robbery. Although the sentence is severe, Guillory will be eligible for parole in his mid-thirties, hopefully far from the end of his life and, accordingly, not within the ambit of *Graham*, *Miller* and *Caballero*.

In sum, Guillory has not demonstrated his case is that "exquisite rarity" where the sentence is so harsh as to shock the conscience or offend fundamental notions of human dignity. (See *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) Accordingly, there is no basis to find his sentence unconstitutional under either the United States or California Constitutions.

3. *Douglas's and Reed's Convictions for Aiding and Abetting an In-concert Home Invasion Robbery Did Not Result from Instructional Error and Were Supported by Substantial Evidence*

An aider and abettor must "act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.] [¶] When the definition of the

offense includes the intent to do some act or achieve some consequence beyond the *actus reus* of the crime [citation], the aider and abettor must share the specific intent of the perpetrator. . . . [A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. [Citations.] The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Reed and Douglas, who were convicted on a theory of aiding and abetting the in-concert, home invasion robberies of Graylynn and Salinas, challenge their convictions on the grounds of instructional error and a lack of evidentiary support for what they claim is a required finding under section 213, subdivision (a)(1)(A), that they *actively* participated in the robbery *inside* of the apartment with Richard and Guillory. None of their contentions is meritorious.

a. *CALJIC No. 9.42.1 properly stated the findings necessary for a conviction for in-concert, home invasion robbery*

Section 213, subdivision (a)(1)(A), creates an alternate punishment for first degree robbery within an inhabited dwelling committed in concert with two or more other persons.[9] CALJIC No. 9.42.1, which instructs the jury on the necessary findings under

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[9] Section 213, subdivision (a)(1)(A), provides: "Robbery is punishable as follows: [¶] (1) Robbery of the first degree is punishable as follows: [¶] (A) If the defendant, voluntarily acting in concert with two or more other persons, commits the robbery within an inhabited dwelling house . . . or the inhabited portion of any other building, by imprisonment in the state prison for three, six, or nine years."

Our colleagues in Division Two of the Fourth Appellate District have held an acting-in-concert finding under this section is a sentencing "enhancement." (See *In re Jonathan T.* (2008) 166 Cal.App.4th 474, 481-482.) An "[e]nhancement" is "an additional term of imprisonment added to the base term." (Cal. Rules of Court, rule 4.405(3).) Section 213, subdivision (a)(1)(A,) appears to us to be a penalty provision, which "sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute." (*People v. Jefferson* (1999) 21 Cal.4th 86, 101; see *People v. Brookfield* (2009) 47 Cal.4th 583, 592-593; *People v. Seel* (2004) 34 Cal.4th 535, 546, fn. 4.) In any event,

section 213, subdivision (a)(1)(A), as given here, provides: "Every person who voluntarily acting in concert with two or more other persons, commits robbery within an inhabited dwelling house or the inhabited portion of any other building, is guilty of violating Penal Code section 213, subdivision (a)(1)(A), a crime. [¶] The term 'acting in concert' means two or more persons acting together in a group crime and includes not only those who personally engage in the act or acts constituting the crime but also those who aid and abet a person in accomplishing it. However, when the crime charged is robbery in concert, there must be at least three persons, including any defendant, acting in concert. To establish that a defendant voluntarily acted in concert with other persons, it is not necessary to prove there was any prearrangement, planning or scheme. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A robbery was committed; [¶] 2. The robbery was committed within an inhabited dwelling house or the inhabited portion of any other building; and [¶] 3. The defendant voluntarily acted in concert with two or more other persons in committing the robbery."

Reed contends her conviction for aiding and abetting an in-concert, home-invasion robbery must be reversed because this instruction failed to inform the jurors that to find the robbery was committed "in concert" required them to conclude Reed and at least two other defendants jointly robbed the couple while all were present inside the apartment.[10]

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as in *Seel*, "[f]or purposes of the issue presented here, the precise distinction between a sentence enhancement and penalty provision is not important. [Citation.] The critical feature is that section [213, subdivision (a)(1)(A),] is 'an allegation of a circumstance that justifies an increased sentence. . . .'" (*Seel*, at p. 546, fn. 4.) As such, there must be a factual basis to support a finding the defendant voluntarily acted in concert with two or more other persons to increase the penalty for first degree robbery.

[10] The People contend Reed has forfeited her challenge to CALJIC No. 9.42.1 by failing to object to the instruction at trial. We review any claim of instructional error that affects a defendant's substantial rights whether or not trial counsel objected. (§ 1259 ["[t]he appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; see *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Of course, we can only determine if the defendant's substantial rights were affected by deciding if the instruction as given was flawed, and, if so, whether the error was

She argues that the language of section 213, subdivision (a)(1)(A), as well as its legislative history, demonstrate the gravamen of the offense requires multiple intruders to act together inside the dwelling to endanger the occupants and does not contemplate liability for alleged aiders and abettors who either are not inside the apartment or who take no action to rob the occupants.

This argument is simply wrong. The syntax, grammar and punctuation of section 213, subdivision (a)(1)(A), are susceptible of only one reasonable interpretation—that is, the statute authorizes increased penalties for first degree robbery committed by multiple defendants working together. The use of the singular for the words "defendant" and the corresponding verb "commits" reveals that the statute deals with the punishment of a single defendant. If that single defendant commits first degree robbery within an inhabited dwelling house while voluntarily acting in concert with two or more other persons, that defendant is punishable by imprisonment in the state prison for three, six, or nine years. Nothing in the statutory language of section 213, subdivision (a)(1)(A), suggests that the other two or more persons who acted in concert with the defendant must have entered the inhabited dwelling or that a defendant cannot be convicted of aiding and abetting an in-concert, home invasion robbery.

In fact, both CALJIC No. 9.42.1 and its corollary CALCRIM No. 1601,[11] rely on decisions construing section 264.1's in-concert requirement for gang-type sexual assaults

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prejudicial. That is, if Reed's claim has merit, it has not been forfeited. Thus, we necessarily review the merits of her contention there was instructional error.

[11] CALCRIM No. 1601 clarifies the structure of an in-concert, home-invasion robbery and makes patently clear a defendant can be found guilty of aiding and abetting this crime: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant personally committed or aided and abetted a robbery; [¶] 2. When (he/ [or] she) did so, the defendant voluntarily acted with two or more other people who also committed or aided and abetted the commission of the robbery; [¶] AND [¶] 3. The robbery was committed in an inhabited dwelling . . . . [¶] A dwelling . . . is *inhabited* if someone lives there and either is present or has left but intends to return. [¶] . . . To decide whether the defendant[s] . . . committed robbery, please refer to the separate instructions that I have given you on that crime. To decide whether the defendant[s] . . . aided and abetted robbery, please refer to the separate instructions that I

and rejecting the same argument Reed advances here. (See Comments to CALJIC No. 9.42.1 & CALCRIM No. 1601, citing *People v. Lopez* (1981) 116 Cal.App.3d 882, 888 [acting in concert does not require participation or personal presence at the crime; aiding and abetting is sufficient] and *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951-952.) As the *Lopez* court reasoned, it is "difficult to conceive of a factual situation in which mere aiding and abetting would not constitute acting in concert." (*Lopez,* at p. 887.) Although the court declined to equate "in concert" with "aiding and abetting" for all purposes (*id.* at pp. 887-888), we are not aware of any decisions—and Reed has cited none—that would lead us to a different conclusion in this case.

b. *The court's failure to instruct on the doctrine of natural and probable consequences does not require reversal of Douglas's conviction for aiding and abetting the robbery of Salinas*

Douglas contends the court erred by not instructing the jury under the natural and probable consequences doctrine because she did not know Salinas would be inside the apartment.[12] Without such an instruction, she argues, the jury did not have sufficient

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have given you on aiding and abetting. You must apply those instructions when you decide whether the People have proved robbery in concert. [¶] [To prove the crime of robbery in concert, the People do not have to prove a prearranged plan or scheme to commit robbery.]"

[12] The court instructed Douglas's jury on aiding and abetting the commission of a crime as follows: "A person aids and abets the commission or attempted commission of a crime when he or she, one, with knowledge of the unlawful purpose of the perpetrator, and two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and three, by act or advice or by failing to act in a situation where a person has a legal duty to act, aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids or abets the commission or attempted commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed, and in the absence of a legal duty to take every step reasonable to prevent the crime, and failure to prevent it, does not amount to aiding and abetting." (CALJIC No. 3.01.)

The prosecutor and the court agreed, without objection by the defendants, not to instruct the jury under CALJIC No. 3.02, which provides: "One who aids and abets [another] in the commission of a crime [or crimes] is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable

evidence to establish Douglas shared Richard's and Guillory's intent to rob Salinas and necessarily relied on a theory of the case not advanced by the prosecution. (See *People v. Beeman, supra,* 35 Cal.3d at p. 561 ["an aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime"].)

Under the natural and probable consequences doctrine "an aider and abettor 'is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-107.) As the Supreme Court explained in *People v. Prettyman* (1996) 14 Cal.4th 248, "a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.] Thus, . . . a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*Id.* at p. 261.) A trial court has a sua sponte duty to instruct the jury on the natural and probable consequences doctrine "whenever *uncharged* target offenses form a part of the prosecution's theory of

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consequence of the crime[s] originally aided and abetted. [¶] . . . [You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and targeted crime and that the crime of [charged crime] was a natural and probable consequence of the commission of that target crime.]"

criminal liability and substantial evidence supports the theory." (*People v. Prettyman, supra,* 14 Cal.4th at pp. 266-267, italics added.)

Douglas has thus misconceived the applicability of the natural and probable consequences instruction to this case. Robbery was the target offense charged, and the People did not contend any defendant was guilty of that crime by virtue of the natural and probable consequences doctrine. Instead, the prosecutor argued to the jury that it should find Douglas guilty of all the charges against her as an aider and abettor of the offenses *charged*, that is, the robberies of Graylynn, Salinas and Salinas's daughter. There was no need to instruct the jury that it could rely on the intent to commit an *uncharged* crime to find the requisite intent to commit the charged crime.

Accordingly, in finding Douglas guilty on an aiding and abetting theory, the jury necessarily found she possessed the same culpable intent as Richard and Guillory to commit the crime of robbery. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 261.) No further instruction was required.

c. *There was substantial evidence to support the jury's findings Reed and Douglas aided and abetted an in-concert robbery*

Ample evidence supports the jury's finding Reed and Douglas had knowledge of Richard's and Guillory's criminal purpose and an intent to commit or facilitate commission of the robbery sufficient to impose criminal liability for aiding and abetting the robbery. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["[e]vidence of a defendant's state of mind is almost inevitably circumstantial, [and] circumstantial evidence is as sufficient as direct evidence to support a conviction"].) The jury was free to weigh the evidence and reject Douglas's account of her intentions both before and during the incident. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1258-1259 ["'[i]t is blackletter law that any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses'"]; see also *People v. Lewis* (2001) 26 Cal.4th 334, 361 [""[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to

determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends"""].)

Likewise, Reed cannot prevail on her insufficient evidence claim simply by referring to the evidence she believes supports her version of events and ignoring all the evidence to the contrary. Graylynn testified he saw Reed with a gun and she searched the apartment with Guillory for items to take. Salinas also saw her hold a gun and take property, including Salinas's phone and purse. The testimony also supported the conclusion she acted as a lookout and spoke with Douglas by telephone to verify no one was outside the apartment.

4. *Richard's Sentence Must Be Corrected*

The People concede the trial court made two separate errors in sentencing Richard. First, in keeping with the jury's true findings on the alleged firearm enhancements under section 12022.53, subdivision (b), on the three robbery counts and a second enhancement under section 12022.53, subdivisions (b) and (e), on those counts, the court imposed two 10-year sentences on each count. This was error: Section 12022.53, subdivision (f), expressly provides, "Only one additional term of imprisonment under this section shall be imposed per person for each crime." (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130 ["after a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements and any section 12022.5 firearm enhancements that were found true for the same crime must be imposed and then stayed"].)

Second, the People concede the trial court improperly enhanced Richard's sentence using the same two prior offenses pursuant to both section 667, subdivision (a), and section 667.5, subdivision (b). (See *People v. Jones* (1993) 5 Cal.4th 1142, 1153 [trial court erred in imposing separate enhancements pursuant to §§ 667, subd. (a), and 667.5, subd. (b), based on same conviction; only greatest enhancement applies].) The two additional one-year enhancements, therefore, must be stayed.

Finally, Richard contends his concurrent sentence on count 4 (former § 12021, subd. (a) [felon in possession of firearm], recodified as § 29800, subd. (a)(1)) should have

been stayed pursuant to section 654, which prohibits separate punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of criminal conduct. (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Latimer* (1993) 5 Cal.4th 1203, 1206.)[13] Richard argues his possession of the firearm was not "distinctly antecedent and separate" from the conduct that formed the basis for his convictions.

In cases involving a conviction under former section 12021, subdivision (a), multiple punishment is improper where the evidence "demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . ." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412; accord, *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) It is not improper, however, when the evidence shows the defendant possessed the firearm before the crime. (*Jones*, at p. 1144.) Here, the evidence established Richard entered the apartment with a gun, which provided the predicate for the sentence on count 4. The trial court did not abuse its discretion in failing to stay the sentence on count 4 under section 654. (See *People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

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[13] Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

DISPOSITION

The judgments as to Guillory, Reed and Douglas are affirmed. With respect to Richard, the judgment is modified to stay the firearm enhancements imposed under section 12022.53, subdivisions (b) and (e), and the two one-year prior prison term enhancements imposed under section 667.5, subdivision (b). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.