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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO GUTIERREZ, Defendant and Appellant.	B251621 (Los Angeles County Super. Ct. No. BA361997)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed in part and remanded.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Francisco Gutierrez (defendant) appeals from the judgment entered after he was convicted of murder (count 1) and possession of a firearm by a felon (count 2). He contends that the trial court made improper comments to the jury, that count 2 was not supported by substantial evidence, and that the trial court erred in failing to impose sentence as to count 2 before staying it pursuant to Penal Code section 654.[1] We find no judicial misconduct or prejudice from the court's comments, and we find substantial evidence to support defendant's conviction of count 2. However, we agree that the trial court should have imposed sentence on count 2 before it was stayed. We observe that the trial court failed to impose or strike a gang enhancement as to count 2. As the sentence on count 2 requires the trial court to exercise its discretion, we remand for that purpose and to add any mandatory fines and fees. We affirm the judgment in all other respects.

BACKGROUND

Procedural history

Defendant and codefendant Santos Martinez (Martinez) were jointly charged in count 1 with the murder of Angel Mendoza Bautista (Bautista), in violation of section 187, subdivision (a). Defendant alone was charged in count 2 with possession of a firearm by a felon, in violation of former section 12021, subdivision (a)(1).[2] In addition, the information alleged as to count 1 that a principal personally discharged a firearm causing death within the meaning of section 12022.53, subdivisions (b), (c), (d), (e), and (e)(1). As to both counts, the information alleged, pursuant to section 186.22, subdivision (b)(1), that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang. Also, as to both counts, the information alleged that defendant had suffered a prior serious or violent felony for purposes of

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] Former section 12021, subdivision (a)(1) was repealed as of January 1, 2012, and reenacted without substantive change as section 29800, subdivision (a)(1). (See *People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2; Stats. 2010, ch. 711, § 6.)

section 667, subdivision (a)(1), which constituted a "strike" under the "Three Strikes" law (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d).)

Defendant and Martinez were tried together. A jury found them both guilty of count 1 as charged, found defendant guilty of count 2 as charged, and found true the gang and firearm allegations. Defendant waived his right to a trial regarding the prior conviction and admitted that allegation. On September 6, 2013, the trial court sentenced defendant to life with a minimum parole eligibility period of 25 years, doubled to 50 years under the Three Strikes law (count 1), plus an additional 25 years to life for the firearm enhancement under subdivision (d) of section 12022.53, and five years for the serious felony conviction enhancement under section 667, subdivision (a)(1), to be served first. Without imposing a term of punishment, the trial court stayed count 2 pursuant to section 654. Defendant agreed to a joint and several victim restitution award of $7,430, and the trial court ordered defendant to pay mandatory fines and fees, including one court security fee of $40 and one court facilities assessment of $30. Defendant was given 1,626 actual days of presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.[3]

Prosecution evidence: the shooting and investigation

On the evening of August 31, 2007, sometime between 10:00 and 11:00 p.m., Abdon Solis and Bautista were waiting outside the Best Buy market on Pico Boulevard while Abdon's father, Jorge Solis, was inside buying beer.[4] While they were waiting, a Latino man with tattoos on his neck and wearing a black baseball cap approached. He asked Bautista, "Where you from?" When Bautista replied, "Drifters," the man threw a punch at him. Bautista returned the blow, and the two men fought. Abdon denied any involvement in gangs or the fight, but testified that Bautista was associated with the Drifters.

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[3] Codefendant Martinez is not a party to this appeal.

[4] To avoid confusion, we refer to Abdon Solis as Abdon and to his father Jorge Solis as Jorge.

When Bautista appeared to get the better of his opponent, another man got out of the driver's side of a nearby dark colored or black vehicle. The second man wore black clothing and a black ski mask and was holding a shotgun. Abdon observed that both car doors were open at that time, but he could not tell whether there were other people in the car. The second man approached Bautista to within about nine feet of him, and then fired the shotgun. Abdon turned and ran into the store.

Best Buy employee Amelia Muniz testified that she was working at one of the registers near the entrance to the market when she heard two or three gunshots, looked outside, saw a kind of van parked right in front of the store, and heard a young man scream that someone had been killed. After calling the police, she went outside, where she saw the headless victim and a lot of blood on the ground. She also saw a black SUV leaving at a high rate of speed.

Later that night, Abdon and Jorge spoke to Officer Tony Rodriguez of the Los Angeles Police Department (LAPD). Abdon described seeing an SUV approach and stop in the driveway of the market. He said that the man who fought with Bautista got out of the driver's side, whereas the shooter got out of the passenger side. Jorge told Officer Rodriguez that he saw his son run into the market and heard two gunshots; Jorge then ran outside, where he saw a man wearing dark clothing and a ski mask firing a shotgun from the area of a black SUV. The man with the shotgun then got into the SUV, which sped off at a high rate of speed.

Officers investigating the area found a blue Ford Explorer SUV that had crashed into a wall in an alley near the Best Buy market. They found no one inside, but observed that the keys were in the ignition and the air bags had deployed. A more thorough search of the car revealed, among other things, a cell phone in the center console, two black baseball caps on the front passenger floorboard, and a social security card in the name of Pedro Bonilla in the dashboard compartment. Blood was found on the airbags, most of it on the driver's side, as well as on the cracked rearview mirror recovered from a door sill, the driver's door, the backseat, the front passenger floorboard, the exterior of the left rear passenger door, and the right rear armrest.

LAPD Officer George Diego, an officer on the scene after the shooting, recognized the Ford Explorer from a traffic stop he had conducted earlier that month in the area of 15th Street and either Mariposa or Kenmore Avenues, inside the territory of the Playboys gang. Martinez, a member of that gang, was driving the SUV at the time of the stop. Martinez gave his name as Pedro Bonilla and produced a California driver's license in that name.[5] Officer Diego still had a copy of the ticket he gave Martinez and he passed that information on to other officers.

Investigators found two spent Schonebeck shotgun shells near Bautista's body. A part of a shotgun shell (a "wad") and slug fragments were also found near the body. The medical examiner Dr. Juan Carrillo recovered shotgun fragments and a wad from inside Bautista's body when he performed the autopsy. Dr. Carrillo testified that Bautista died of multiple shotgun wounds. He was struck three separate times: one in the upper right back; one in the left lower back; and a third in the head. The shooter was within three or four feet when he inflicted one of the back wounds, and very close when he inflicted the head wound. The shotgun barrel touched or nearly touched the victim's head when the shotgun was fired. Each of the back wounds would have been fatal, and it was apparent to Dr. Carrillo that the head wound was the last to be inflicted. Dr. Carrillo inferred from the direction of the scattering of the victim's brain matter that his head was supported by the ground; thus Bautista was already incapacitated by the back wounds and lying on the ground.

One month after the shooting, a shotgun was found by residents in their little used garage on Magnolia Avenue, about a quarter mile from the Best Buy Market. They called the police, and LAPD Officer Anne Michelle Green and her partner collected the gun. When Officer Green examined the shotgun, she found a spent 12-gauge Schonebeck shell inside. She testified that in her experience most shootings were done

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5 The former owner of the Explorer, Jose Parraga, testified he sold the car to Pedro Bonilla in May 2007. The buyer was to make monthly payments. The last payment was made August 15, 2007, not long before Parraga was notified that the car had been towed to a storage yard.

with handguns; shotgun shootings were rare. The shotgun was later inadvertently destroyed, but not before it was swabbed for DNA.

DNA was extracted from the headbands of the two baseball caps and the blood found in the SUV, as well as from the recovered shotgun. Martinez's DNA matched that found on one of the caps, and defendant's DNA matched that found on the other cap. DNA extracted from the blood found on the airbags, the rear window sill, and broken rearview mirror (item Nos. 26-31) matched Martinez's DNA. The DNA extracted from blood in the backseat (item Nos. 32-35) matched defendant's DNA. The DNA extracted from each blood item was from a single source, whereas the DNA on the caps and the shotgun came from more than one contributor. The analysis of the DNA extracted from the caps showed that defendant and Martinez were the major contributors to the respective caps. The analysis of the shotgun resulted in a partial profile that matched part of defendant's profile, as just one in one million would.

Martinez proved difficult to locate and was finally taken into custody on April 30, 2009. He was charged with an unrelated crime and interviewed by Detective Gilbert Alonso, the investigating officer in this case. Martinez told Detective Alonso that he had been aware that the police were looking for him since the day after his car had been stolen. Martinez claimed he was near Pico Boulevard and Fedora Street when members of a different gang pulled up in a white van, got out armed with bats, beat him, and took his car. Martinez admitted that he never reported the car theft or the beating.

Detective Alonso placed Martinez in a jail cell equipped with a recording device. Excerpts of recorded conversations were played for the jury. Martinez told a cellmate that he knew he was "fighting a murder case" and that the police had obtained his DNA and his car when he crashed it and bled. He explained: "That same day that I did . . . that I pulled the job, fool, the cops were following me. So I crashed my car, fool, but I was able to get the fuck outta there, but I left blood in the car and they just caught me." Asked where he was from, Martinez replied that he was with the Playboys on Pico Boulevard and Vermont Avenue. Martinez said that the police did not have the gun, and added: "That's why I told the detectives, 'No way! They fucked me over. Some guys

took my car and I don't know what the fuck they went and did.' And they don't believe me, fool. And he says, 'What . . . do you mean they stole it from you if you -- we found blood in your car?' So I said, 'Well I don't know. Cuz these guys, they . . . they beat me up -- I said -- Maybe there was some blood left there in my car,' I said. The . . . detectives don't believe me, fool."

Gang evidence

LAPD Officer Nicholas Gallego testified that while working in a gang assignment, he investigated the Playboys gang and served members with gang injunctions that prohibited them from breaking any law and limited their association with other members of a criminal street gang. Officer Gallego was present when defendant was served in 2006 in the area of Pico Boulevard and Fedora Street. Officer Gallego had met defendant once before that and knew him.

The location where Officer Diego stopped the Ford Explorer and issued Martinez a traffic citation on August 4, 2007, was in the heart of the Playboys gang territory. Officer Diego testified that he was able to identify Martinez as a gang member during that stop, either because Martinez admitted membership in the Playboys gang or because of his tattoos.

In 2007, LAPD Officer Allan Corrales was assigned to a gang investigation team which focused on the Playboys street gang. On September 22, 2007, he responded to a gang disturbance call at 11th Street and Kenmore Avenue. There he saw defendant, who he photographed. Officer Corrales identified the photo for the jury, pointing out defendant's tattoos: a bunny tattoo on one hand and three dots under the right eye. Officer Michael Boyle was one of the officers with Officer Corrales at the September 22, 2007 call. Officer Boyle testified that he saw defendant there with another gang member, Manuel Garcia, throwing alcoholic beverage containers in public. Officer Boyle was aware that defendant had been served with the gang injunction, and had prior contacts with defendant during which defendant had admitted to being a member of the Playboys gang, with the moniker, "Blanco." One such prior contact was in front of defendant's home on Fedora Avenue, where Officer Boyle saw defendant's tattoos: three dots under

his right eye; a Playboy bunny on his right hand; and the name of the gang on his stomach. Officer Boyle knew defendant to be a member of the CLS or Chicos Locos clique, which was a subgroup of the Playboys gang.

Detective Alonso took photographs of the cell phone found in Martinez's SUV after the shooting. He showed the jury the writings and images on the phone: "Los Angeles" with a backward N and the number 5150; a Playboy bunny smoking a stogie or cigarette; the letters D, K, and S, signifying "Dukes," with "L.A." inside the D; the Los Angeles area code, 213; a rabbit; "Fedo" (short for Fedora); "Bam, bam"; "Fuck the rest"; and "187, police." Detective Alonso explained that "Pico y Fedora" was the name of a clique of the Westside Playboys, and that 187 referred to Penal code section 187, which defines murder.

LAPD Officer Shane Bua testified as the prosecution's gang expert. He was regularly assigned to monitor gangs, and had training and experience in the culture of Hispanic gangs, especially the Playboys. Officer Bua described the Playboys territory, which changed occasionally, but remained centered near Pico Boulevard, Fedora Street, and Normandie Avenue. He explained why territory was so important to gangs: making other gangs afraid to enter its territory elevated the gang's status and prevented narcotics sales by anyone unaffiliated with the gang. Tagging and graffiti were intended to remind rival gangs of the boundaries, rather like gang street signs. The Drifters gang was one of the main rivals of Playboys. On August 31, 2007, there were over 600 documented members of the Playboys gang and its cliques, and at least 200 of them were then active or semi-active. Violence was an everyday part of gang life. It was used to intimidate enemies and the community, in order to discourage the reporting of crimes or other gang activity. Committing violent acts made them look strong, and encouraged other gangs to become their allies.

In Officer Bua's opinion, the Playboys gang was an active criminal street gang whose primary activities were narcotics sales, robberies, assaulting rivals, witnesses, and others, extortion, tagging, assaults with a deadly weapon, murder, and coming together to intimidate the community. Weapons commonly used were knives, bats, handguns,

shotguns, rifles, and vehicles. Officer Bua produced the certified conviction records of two Playboys gang members: Juan Carlos Delgado (Juan), who committed an assault with a deadly weapon in 2005, and Sergio Delgado (Sergio), who was a felon in possession of a firearm in 2005. Officer Bua was acquainted with both men and knew them to be Playboys gang members. The assault with a deadly weapon occurred in an area claimed by the Playboys, when several Playboys gang members encountered a person who was not a gang member, and Juan "hit him up" by asking, "Where are you from?" Officer Bua explained that asking someone to name his neighborhood or gang affiliation was the ultimate gang challenge, and in that case, when the person replied that he was not a gang member, Juan and his fellow Playboys gang members robbed him at gunpoint and physically assaulted him. Sergio was considered one of the most active, hardcore Playboys gang members at the time of his crime. He had multiple gang related tattoos, which only active gang members were allowed to have, as they signified that work had been performed for the gang.

The Playboys gang's common signs and symbols included a hand sign consisting of bunny ears formed with the ring and middle fingers. Officer Bua identified a photograph of Martinez with visible tattoos displaying a Playboys hand sign. He explained that facial tattoos indicated a very high level of dedication to the gang, as they were meant to intimidate people as well as exposing the member to the gang's enemies. Officer Bua was acquainted with Martinez prior to the shooting. He was also familiar with Martinez's tattoos, as photographs of them were posted on the station bulletin board during 2008. Martinez's tattoos included a face wearing a Fedora on the back of his head with two guns and the words "Fuck L.A.P.D.," Playboy bunny symbol on his arm, and the letters P, B, and S, meaning Playboys, between the bunny ears. In Officer Bua's opinion, on August 31, 2007, Martinez was an active member of the Playboys gang and he belonged to the Dukes clique.

Officer Bua was also well acquainted with defendant. In Officer Bua's opinion, defendant was also an active Playboys gang member at the time of the shooting, and a member of the Chicos Locos clique. Officer Bua explained that members of different

Playboys cliques were known to associate with one another and to commit crimes together. In 2008, defendant told Officer Bua that he had been a Playboys gang member for about four years, and other gang officers reported contact with defendant since 2004. Officer Bua identified photographs of defendant's gang related tattoos: Playboys related tattoos on his abdomen and hand, and three dots next to one of his eyes, which was a gang expression meaning "my crazy life."

The hub of Drifters territory was the neighborhood surrounding Pico Boulevard and Magnolia Street. This neighborhood shared some middle and high schools with Playboys territory. At the time of the shooting the Playboys gang and the Drifters were involved in an ongoing struggle for control of the schools, resulting in fights designed to make students want to join the stronger gang and afraid to join the weaker gang. In August 2007, the Playboys gang was dominating the Drifters. Playboys territory was vast compared to the Drifters's territory, and Drifters were victims about five times more often than Playboys.

Officer Bua explained that the term "going on a mission" and "putting in work" meant going out in association with fellow gang members to do something to benefit the gang, such as going into rival territory to commit crimes, tag, or physically assault the enemy. Each gang member would be assigned a role to play on the mission, such as the getaway driver, the tagger, the robber, or the keeper of the firearm with the responsibility to protect others on the mission. Anyone on the mission who failed to "step up" and fulfill his role could suffer great consequences within the gang. Gang members on missions in rival gang territory went in groups for the backup and camaraderie, and because it was more intimidating to their victims.

As a general rule, gang members took weapons with them on missions, and it would be unlikely for anyone in the car not to know when someone was armed. Officer Bua explained that many gang members had told him at various times that it was a matter of respect to inform a fellow gang member about the presence in the car of a concealed firearm, a large amount of narcotics, or other item that could get one in trouble with the

police if stopped. It would then be up to the individual to decide whether he wanted to be there.

Officer Bua also explained the very important concept of respect in gang culture. Gang members equated fear with respect, and thus earned respect by committing crimes and by dominating and victimizing rival gangs. Individual gang members earned the respect of their gang by committing crimes, and the more hardcore the crimes, the greater the respect for the gang and the individual member within the gang. A rival gang member would be considered completely disrespectful if he came into the gang's territory without just passing through. Starting a fistfight with a rival in the rival's territory would also be a sign of disrespect, and losing the fight would cause the loser's gang to appear weak, which would result in a loss of respect. Being disrespected or losing respect would present a challenge to the gang member and could result in physical or verbal retaliation; he would want to gain back the gang's respect by any means necessary.

Officer Bua gave his opinion that the following hypothetical facts would describe an activity that would benefit a gang: "[T]wo or more gang members from Playboys went into territory for Drifters and one of the occupants of that car had a shotgun and a ski mask going into that rival territory, one of the occupants of the car got out and said to a young man on the sidewalk, 'Where are you from?' the young man responds, 'Drifters,' and a fistfight follows in which the Drifters gang member is winning the fistfight and another occupant of the car gets out with a shotgun and shoots and kills the Drifters gang member." He explained that going on a mission to challenge a rival in his territory, particularly armed with a very visible weapon such as a shotgun, and then killing the rival to prevent him from winning the fight, would demonstrate to the rival gang and the community that the Playboys gang was incredibly bold and to be feared. This enhanced reputation would benefit the gang by enabling its members to get away with committing more crimes. The shooter would also elevate his status within the gang by showing his willingness to commit murder to protect his fellow gang member.

Officer Bua testified that violence would be the expected result of going on a mission in rival gang territory. Gang members expect rivals to defend their territory from those who enter it to commit crimes.

The challenged trial court comments

The prosecutor asked Officer Bua: "Do you have an opinion as to a gang member's expectation of what will result from a fistfight in a rival gang's territory that is initiated by a gang venturing into that rival's territory?" Martinez's counsel objected to the question as calling for an improper opinion. The trial court understood the objection as relating to the expert's opinion regarding specific intent, and the prosecutor assured the court that she was "not asking for any specific intent for any of the participants in our crime." The trial court replied, "I think you're treading very close to the line," but allowed her to continue.

The prosecutor asked the question again, adding "in general" to describe the gang member's expectations. The court interrupted, and told the jury: "Before he answers that, let me just make clear, members of the jury, experts are not allowed to testify about what a particular person actually believed, actually knew or actually thought. Obviously, he cannot get into the minds of these two gentlemen or anybody else. So he's testifying, as I understand it, generally about some general hypothetical gang member, but not -- he cannot opine on what any individual in this case or elsewhere may have thought, intended or known." There was no objection from defense counsel, and Officer Bua replied: "I believe, in general, that a gang member's expectation would be that a fistfight is -- or calling out another gang member in their rival territory could easily lead to an escalation in violence."

DISCUSSION

I. Comments by trial court

Defendant contends that a phrase in the trial court's comments to the jury during Officer Bua's testimony amounted to the expression of an improper opinion that the charged crime had been committed and that the defendants were the perpetrators. Defendant argues that by telling the jury that the gang expert could not "get into the

minds of these two gentlemen," the court was telling the jury, in essence, that the witness could not give an opinion about what the defendants knew or intended *when they committed the crime*.

We agree with respondent that defendant has forfeited this claim by failing to make a specific and timely objection in the trial court. (See *People v. Pearson* (2013) 56 Cal.4th 393, 414.) "'[D]efendant's failure to object at trial . . . particularly where (as here) such action would have permitted the court to clarify any possible misunderstanding resulting from the comments, bars his claim of error on appeal.' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 531.) Regardless, there is no merit to defendant's claim.

"The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Cal. Const., art. VI, § 10.) Although "the constitutional language imposes no limitations on the content or timing of judicial commentary, . . . appellate courts have recognized . . . that this powerful judicial tool may sometimes invade the accused's countervailing right to independent jury determination of the facts bearing on his guilt or innocence. Hence, the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766 (*Rodriguez*); see also, *People v. Proctor* (1992) 4 Cal.4th 499, 542.) However, "the court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness. [Citation.]" (*Rodriguez*, *supra*, at p. 768.)

"We 'evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' [Citation.]" (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 531-532.) "'The propriety and prejudicial effect of a particular comment are judged

both by its content and by the circumstances in which it was made. [Citation.]' [Citation.]" (*Id*. at p. 532.)

Here there was nothing in the trial court's comments that was inaccurate, argumentative, or unfair. The court did not comment on the evidence, give an opinion on the defendants' guilt or innocence, or even come close to expressing a view on the persuasiveness of the expert's opinion. Further, the court's explanation was neutral, as it extended to the state of mind of "anybody else" or "any individual in this case or elsewhere." Defendant argues that the addition of "anybody else" and "any individual" merely served to reinforce the jury's impression that Officer Bua was describing the perpetrator's state of mind and that defendant "was most likely to be the perpetrator whose intent Bua was not to be discussing."

The trial court accurately explained to the jury that the expert could not give an opinion on what *these* defendants thought or intended. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1049.) Officer Bua was not prohibited from expressing an opinion about the hypothetical gang members "expectations" following a fistfight, thus allowing the jury to infer what these defendants thought or expected. (See *id*. at pp. 1044-1046.) Defendant's arguments are apparently based on an assumption that the prosecution and the expert were required to disguise the very purpose of the hypothetical question by pretending that the hypothetical gang members bore no resemblance to the defendants. However, hypothetical questions are properly "based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose." (*Id*. at p. 1046.) This makes such questions probative, not improper. (*Id*. at pp. 1048-1049.)

As we conclude that the trial court's comments were not improper, we also reject defendant's contention that his counsel rendered constitutionally ineffective assistance by not objecting to the comments. A defendant must show both deficient performance by counsel and prejudice from counsel's errors. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) As the trial court's

comments were accurate, neutral, and fair, any objection would most likely have been overruled. Counsel's failure to make a futile or unmeritorious objection is not ineffective assistance. (*People v. Price* (1991) 1 Cal.4th 324, 387.) Moreover, defendant has failed to show any prejudice, as the court's other instructions left no doubt that the jury could reject the expert's opinion. Before the prosecutor asked the hypothetical questions, the trial court admonished the jury: "As you probably know, members of the jury, an expert can be asked a hypothetical question. You're going to get a jury instruction on this that says an expert can be asked a hypothetical and a hypothetical, obviously, asks the witness to assume certain facts are true and to give an opinion based on those facts. Obviously, this witness can't give an opinion about what happened in this case. He can give an opinion based on a hypothetical and it's up to you to decide whether the assumed facts have been proved and what weight to give to his opinion based on the hypothetical."

Prior to closing arguments, the court read CALCRIM No. 332 in addition to other guidance on evaluating expert testimony. CALCRIM No. 332 told the jury: "You may disregard any opinion that you find unbelievable, unreasonable or unsupported by the evidence." The instruction also explained: "A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved." In the final instructions, the trial court read from CALCRIM No. 3550: "It is not my role to tell you what your verdict should be. Do not take anything I said or did during trial as an indication of what I think about the facts or the witnesses or what your verdict should be." We presume that the jurors understood and followed the court's instructions. (*People v. Pearson, supra,* 56 Cal.4th at p. 414.)

II. Substantial evidence of firearm possession

Defendant contends that his conviction of possession of a firearm by a felon must be reversed because there was insufficient evidence that he exercised dominion or control over the shotgun.

The elements of the offense are conviction of a felony and knowing possession, custody, or control of a firearm. (*People v. Snyder* (1982) 32 Cal.3d 590, 592; *People v.*

Jeffers (1996) 41 Cal.App.4th 917, 922.) "A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]" (*People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.) Thus, "more than one person may possess the same contraband . . . [and] [p]ossession may be imputed when the contraband is found in a place which is immediately accessible to the joint dominion and control of the accused and another. [Citations.]" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 410.)

Without discussing any other evidence, defendant contends that the evidence was insufficient because his DNA on the shotgun showed only that he touched it for an unknown reason at an unknown point in time, and because the evidence did not establish who the shooter was. He suggests that this could have been a "'[m]omentary possession' for purposes of disposal" and thus a defense to possession of a firearm by a felon. It is the defendant's burden to prove a "momentary possession" defense. (See *People v. Martin* (2001) 25 Cal.4th 1180, 1191-1192 & fn. 10.) As defendant did not advance such a defense and points to no evidence presented on the issue below, we have no occasion to consider it here. Ordinarily, "*the crime is committed the instant the felon in any way has a firearm within his control*." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410.)

Moreover, we must review *all* the evidence and must do so in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence, and we apply the same standard whether the conviction rests primarily on circumstantial or direct evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We neither reweigh the evidence nor resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Compelling evidence demonstrated that defendant had at least constructive possession of the shotgun. The jury could reasonably conclude from the following facts that the shotgun found in the garage was used in the shooting: shootings with shotguns rather than handguns were rare; the shotgun contained defendant's DNA; it was found just a half mile from the Best Buy market; it was loaded with a spent Schonebeck shell; and spent Shonebeck shells had been found near the victim's body. Substantial evidence placed defendant in the SUV before and after the shooting: the man who fought with Bautista and the shooter were both seen getting out of the SUV, and Martinez's jailhouse conversation left no doubt that he was one of them; defendant's DNA on one of the caps and in his blood was found in the SUV immediately after the shooting; and defendant's blood in the backseat suggested that he bled from injuries incurred during the fight with Bautista or the collision.

Defendant was doubtless aware of the presence of the shotgun in the vehicle before and after the shooting as shotguns are large and easily visible. The following evidence suggested that defendant expected or intended the assault to result in a shooting when they went to the Best Buy market in the SUV: the shooting was the kind of gang mission described by Officer Bua; both defendant and Martinez were active members of the Playboys criminal street gang, whose primary activities include assault with a deadly weapon, murder, assaulting rivals, and coming together to intimidate the community; their gang was in an ongoing violent struggle with the Drifters gang; the shooting was in Drifters's territory and the victim was a Drifters gang member; and during gang missions, the participants usually knew that weapons were present, and one of them would be assigned to use it to protect the others. Consistent with having the assignment of protector, the shooter in this case came prepared with a ski mask and a shotgun, and emerged from the SUV just as the person who issued a gang challenge to Bautista was getting the worst of the fight.

In sum, substantial evidence established that defendant was either in actual possession of the shotgun, or possession was properly imputed to him because it was immediately accessible to his joint dominion and control with Martinez and any other

gang member who may have been along on the mission with them. (Cf. *People v. Miranda*, *supra*, 192 Cal.App.4th at pp. 409-411.)

III. Section 654 stay

Defendant contends that the trial court erred in staying count 2 pursuant to section 654, without first imposing a term of punishment. Respondent agrees. "[W]hen a court determines that a conviction falls within the meaning of section 654, it is necessary to *impose* sentence but to stay the *execution* of the duplicative sentence . . . . [Citation.]" (*People v.Duff* (2010) 50 Cal.4th 787, 796.)

Defendant asks that we remand for resentencing on count 2 or in the alternative, to exercise the authority described in *People v. Alford* (2010) 180 Cal.App.4th 1463 (*Alford*), to correct the sentence by imposing the middle term of two years and then staying that term. Also citing *Alford*, respondent requests that this court impose the middle term.

In *Alford*, after finding that the trial court had implemented section 654 erroneously by failing to impose any sentence on a conviction and then purporting to stay it, the appellate court denied the request to remand for resentencing, explaining that remand "would mean pulling defendant out of his prison programming and busing him to [the trial court] for a new sentencing hearing that will not change his actual prison time. The futility and expense of such a course militates against it." (*Alford, supra*, 180 Cal.App.4th at p. 1473.) The appellate court then exercised its "authority to modify the judgment" pursuant to section 1260 by imposing the sentence that the trial court "*undoubtedly* . . . would have imposed" and then stayed execution of that sentence. (*Ibid*., italics added.)[6]

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[6] Section 1260 provides: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

Although an appellate court may substitute the appropriate sentence for an unauthorized sentence, section 1260 does not permit the appellate court to make its own discretionary sentencing decisions. (*People v. Lawley* (2002) 27 Cal.4th 102, 172.) While the middle term may be the most expedient here, we cannot say that the trial court would undoubtedly have imposed the middle term here, or that the middle term was the only appropriate sentence in this case. A defendant convicted of a violation of section 29800, subdivision (a)(1), or former section 12021, subdivision (a)(1), is punished according to section 18, which provides the trial court with a choice of three terms. In such a case, "the choice of the appropriate term shall rest within the sound discretion of the [trial] court." (§ 1170, subd. (b).) We must therefore remand count 2 for resentencing, or more appropriately, for sentencing, as the trial court's failure to impose a sentence on that count resulted in "an unauthorized absence of sentence. [Citation.]" (*Alford, supra*, 180 Cal.App.4th at p. 1472.)

Moreover, the trial court also failed to consider the gang enhancement, which the jury found true. Section 186.22, subdivision (b)(1)(A), requires the court to impose an additional term of two, three, or four years at the trial court's discretion, unless the court exercises its discretion to strike the enhancement in the interests of justice, as permitted by subdivision (g). (See *People v. Sinclair* (2008) 166 Cal.App.4th 848, 855.) Thus, unless the trial court strikes it, a gang enhancement must be added to the sentence for count 2 before the sentence is stayed. (See *Alford, supra*, 180 Cal.App.4th at p. 1469.)[7] As this is also a discretionary sentencing choice, it must be made by the trial court. (See *People v. Lawley, supra*, 27 Cal.4th at p. 172.)

Respondent points out that the trial court also neglected to impose a court security fee and court facility assessment on count 2, as required by section 1465.8, subdivision (a)(1), and Government Code section 70373, respectively. (See *People v. Sencion* (2012)

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[7] The information also alleged the prior serious felony enhancement of section 667, subdivision (a)(1), but that enhancement does not apply to the offense of felon in possession of a firearm, as it is not a serious felony. (See *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

211 Cal.App.4th 480, 483-485.) As we must remand count 2 for sentencing, the trial court will have the opportunity to impose any mandatory fines and fees, as well.

DISPOSITION

The cause is remanded for sentencing on count 2 as follows: the trial court shall impose the appropriate term at its discretion, as well as the appropriate gang enhancement unless the trial court strikes the enhancement in the interests of justice. The trial court shall then stay execution of the sentence so imposed as to count 2. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
FERNS

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.