Filed 1/26/12 P. v. Kidd CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JORDAN ISIAH KIDD, Defendant and Appellant.	C062075 (Super. Ct. No. 07F01299)
THE PEOPLE, Plaintiff and Respondent, v. ZACHARY TYLER et al., Defendants and Appellants.	C062512 (Super. Ct. No. 07F01299)

Following a home invasion that escalated into a kidnapping, sexual assault and attempted murder, defendants Zachary Tyler, David Griffin, Jordan Kidd, Lashea Merritt and Kimberly Knorr,

all of whom were either members or associates of a criminal street gang named the 29th Street Crips, were variously convicted of the following crimes: robbery in concert, burglary, kidnapping, oral copulation in concert, participation in a criminal street gang, conspiracy to commit murder, attempted murder, unlawful possession of a firearm, and unlawful possession of ammunition. Many of the offenses were also found to have been committed for the benefit of a criminal street gang.

All five defendants appeal various aspects of their convictions and/or sentences, and we have consolidated those appeals for argument and decision. We conclude there is insufficient evidence to support Knorr's robbery conviction, and the gang enhancement imposed on the burglary count for all defendants must be reduced from 10 years to five because it was not alleged the burglary was a violent felony within the meaning of Penal code section 667.5, subdivision (c). (Further undesignated section references are to the Penal Code.) We also conclude a fine imposed pursuant to section 667.6 must be stricken and various corrections must be made to the abstracts of judgment. We further conclude the sentence imposed on Merritt, who was only 15 years old at the time of the offenses and who will not be eligible for parole until she is over 100 years old, constitutes cruel and unusual punishment. Finally, we conclude the determinate portion of the sentence imposed on Kidd violates section 1170.1 and shall remand for resentencing. In all other respects, we affirm the judgments.

FACTS AND PROCEEDINGS

At all times relevant to this matter, defendants Zachary Tyler, David Griffin and Lashea Merritt were members of a criminal street gang called the 29th Street Crips, which is based in South Sacramento. Tyler's gang name was "Smash," Merritt was called "Lady Smash," and Griffin went by the name of "Baby Attitude." Defendant Jordan Kidd was a member of the Valley High Crips, which is an "ally" of the 29th Street Crips. His gang name was "Five." Defendant Kimberly Knorr was an "associate" of the 29th Street Crips who was in a dating relationship with Kidd. Her gang name was "Lady Five."

In January 2007, Destiny Doe and Knorr were living at the residence of Nate E. in Sacramento. Doe worked as an assistant preschool teacher while also moonlighting as a prostitute for Nate's "escort" service. Knorr also worked for Nate. While they lived together, Knorr often bragged to Doe about things she and her "Crip homies" did together.

On the evening of January 22, 2007, Doe and Knorr were returning home in Doe's car when Doe received a call from Nate telling her Knorr had been kicked out of the residence and not to bring her to Nate's house. Doe dropped Knorr off at a gas station on the corner of Fruitridge and Franklin Boulevard.

Knorr's sister, B.K., was dating Tyler at around this time and, on the evening of January 22, was with him at the home of A.S., who was Merritt's mother and was known by the gang name of

"Mama Solo." Also present were A.S., Griffin, Kidd, Merritt, and Merritt's brother, L.M., who is known as "Baby Solo."

After Knorr was dropped off, she called B.K. and told her she had argued with Nate and was moving out of his residence. Knorr said she had been dropped off by Doe and needed a ride to pick up her things. Tyler drove to Knorr's location and brought her back to the A.S. residence.

When Knorr arrived, she was upset and said Nate had insulted the gang. In particular, Knorr told them Nate had said, "fuck them--fuck Smash and them. They're not no 29th Street Garden Block Crips." Garden Block Crips is another name for the 29th Street Crips.

The others in the room jumped up and "started talking shit to one another about--about it." Tyler said, "fuck that nigga, let's go smoke him." In gang culture, to "smoke" means to kill. Tyler also said they should rob Nate. Tyler, Kidd, Griffin, Knorr, Merritt and L.M. departed in two cars, a white and a blue Buick.

Meanwhile, Doe had returned to Nate's residence and was resting in her room. Nate was also present. Later, Doe heard a disturbance in front of the residence caused by a prior girlfriend of Nate named Mia. When Doe first moved into the house, Knorr and Mia were also living there, but Mia had since moved out. On this evening, Mia was banging on the window and trying to get Nate to come outside and talk with her. Doe got up and moved to what had been Knorr's bedroom, which was toward the back of the residence. She fell asleep on Knorr's bed.

Some time later, Doe awoke and saw a silhouette outside the bedroom window. She then saw four or five people wearing bandanas enter the bedroom through the window. They pointed guns at her and told her not to say anything. Doe was held at gunpoint while others searched the residence for Nate, who had fled upon seeing what was happening. Doe was told to get dressed and was taken into the living room. Meanwhile, the intruders took off their bandanas and rummaged through the house looking for things to steal. Doe heard the names Smash and Five mentioned and saw the intruders put clothes and a stereo inside a sheet which they later took with them.

When the intruders departed, they took Doe as well. She got into the blue Buick with three of them, and they followed the white Buick away from the scene. Doe later identified the three in the car with her as the one called Five along with Griffin and Merritt.

They all stopped at an apartment complex on 29th Street that had been the birthplace of the gang. Tyler took Doe aside and said to her that "you're with us now and I'll take care of you, and why don't you work for me?" They later got back in the cars and drove away, telling Doe they are the "mob" and this is the "mob life" and "you're with the mob now."

They eventually arrived at the home of A.S., where Doe was taken inside. She saw Knorr, B.K., A.S., another woman and a young boy, as well as the others from the home invasion. Doe was taken to a bedroom, where Tyler, Kidd and Griffin talked about "running a train" on her and forcing her to perform oral

sex. Tyler yelled at Doe, "you're gonna suck up all my homies," and Kidd and Merritt ordered her to orally copulate "Little Homie." Merritt further said, "give my little homie some head, you're a ho anyway." Tyler told Doe she was going to go out and start making money for him.

Doe was eventually told she had to orally copulate L.M. and was left alone in the room with him. She did as directed and, after eight minutes or so, L.M. departed. Tyler then came in the room and forced Doe to orally copulate him as well.

Later that evening, Doe was again placed in the white Buick and departed with Tyler, Kidd, Griffin, and Knorr. It is unclear whether Merritt accompanied them on this trip. Kidd and Griffin were both armed with handguns. Before leaving, B.K. overheard Kidd and Tyler say, "If somethin' is gonna be done, the bitch has gotta be iced." She also heard Tyler say something to A.S. like, "we brought the bitch here so she couldn't tell."

After stopping at another residence for 15 or 20 minutes, they drove to an area near railroad tracks and an empty field. Doe was told to get out of the car and to start walking through the field. She did as directed. After a while, Doe started hearing gunshots. She began walking faster and then running and continued to hear gunshots. She also saw bullets hit the ground around her. One of the shots hit Doe in the back just below the shoulder blade.

Doe ran toward the light of a house and eventually reached the house, where she yelled for help. A man came outside, saw

Doe and carried her onto the porch. He called 9-1-1 for help. Doe told the man the 29th Street Crips had shot her.

According to the prosecution's gang expert, all of the foregoing actions of the defendants were for the benefit of the 29th Street Crips.

On February 3, 2007, police officers contacted Tyler and Merritt in a hotel room. They found a handgun and ammunition in the room. On February 13, police officers found Griffin in a residence along with a gun and ammunition. On February 28, police officers discovered Kidd in a residence with a handgun and ammunition.

All five defendants were charged with robbery in concert, burglary, aggravated kidnapping, conspiracy to commit murder, and attempted murder. On each offense, they were further charged with enhancements for firearm use and committing the offenses for the benefit of a criminal street gang. They were also charged with a separate offense for active participation in a criminal street gang.

Tyler and Merritt were additionally charged with two counts of oral copulation in concert along with street gang enhancements. Tyler and Kidd were charged with unlawful possession of a firearm and ammunition. Kidd was also charged with battery of the mother of his child stemming from a separate incident. However, that charge was later dismissed.

The case was tried to two juries, one for Kidd alone and the other for the remaining defendants. After his arrest, Kidd had been interviewed by police, and the videotape of that

interview was played to his jury alone. In that interview, Kidd first denied any involvement in the matter. However, he eventually admitted he went to Nate's house, but only to steal something and not to kidnap or shoot anyone. He denied kidnapping or shooting anyone. He also denied having a gun and claimed that he departed with Knorr before the others came out of the house and did not know Doe had been taken with them. He denied accompanying the others to the home of A.S.

Tyler was the only defendant to testify at trial. He acknowledged that he went with Knorr to Nate's residence that night, but claimed he went there only to allow Knorr to pick up her things. Tyler claimed he waited in the car while Knorr went inside and that Doe came out with Knorr and departed with them voluntarily. Tyler asserted that, when they left, Doe asked to be taken to a school where she met up with some of her "homeboys." Doe got out and spoke with four men. Tyler overheard her say "fuck Nate" and told the guys they could go to his house and take whatever they wanted because she left the front door unlocked. Tyler then drove them to the residence of A.S. and hung out there for a while. Later, Tyler took Doe to meet up with a "date" she had that evening. According to Tyler, that was the last time he saw Doe.

Tyler, Griffin and Kidd were convicted on all charges, and all enhancements were found true.

Knorr was found not guilty of aggravated kidnapping but guilty of the lesser offense of simple kidnapping. She was also acquitted of attempted murder. The jury was unable to reach a

verdict on the charge of conspiracy to commit murder, and the court declared a mistrial on that charge. Knorr was convicted on all other charges and all other enhancements were found true. The People later dismissed the conspiracy charge.

Merritt too was acquitted of attempted murder. The jury was not able to reach a verdict on one count of oral copulation, for which a mistrial was declared. Merritt was convicted on all other charges and all other enhancements were found true. The People later dismissed the oral copulation charge on which the jury could not reach a verdict.

Tyler was sentenced on the burglary charge to the upper term of six years plus 10 years and one year respectively for the gang and firearm use enhancements. On the two oral copulation counts, he received full consecutive terms of seven years, plus 10-year gang enhancements. Sentence on the substantive gang offense was stayed. Tyler received a one-third middle term of eight months on the firearm possession count and the same sentence on the ammunition count, with the latter stayed. He also received sentences of two years eight months, and one year on two unrelated charges. Finally, Tyler received an indeterminate term of 25 years to life plus an enhancement of 25 years to life for conspiracy to commit murder, a consecutive term of 15 years to life for aggravated kidnapping, and indeterminate terms for robbery in concert and attempted murder, with the latter two stayed. In all, Tyler was sentenced to 55 years four months, plus 65 years to life.

Griffin was sentenced on the burglary count to the upper term of six years, plus 10 years for the gang enhancement and one year for the firearm enhancement. On an unrelated attempted murder charge on which he had been convicted earlier, Griffin received a consecutive, one-third middle term of two years four months, plus four months for firearm use. On the separate gang charge, Griffin received a one-third middle term of eight months, stayed pursuant to section 654. For conspiracy to commit murder, Griffin received an indeterminate term of 25 years to life, plus a separate term of 25 years to life for the firearm enhancement. On the aggravated kidnapping charge, Griffin received a consecutive, indeterminate term of 15 years to life. Finally, on the charges of attempted murder and robbery in concert, Griffin received further indeterminate terms that were stayed pursuant to section 654. The total sentence imposed on Griffin was 19 years 8 months, plus 65 years to life.

Kidd was sentenced on the conspiracy to commit murder charge to an indeterminate term of 25 years to life, plus a consecutive enhancement of 25 years to life for the firearm use. On the aggravated kidnapping charge, he received a consecutive, indeterminate term of 15 years to life, with a 10-year enhancement for firearm use. On the robbery in concert charge, the court imposed but stayed an indeterminate term of 15 years to life. On the attempted murder, the court imposed an indeterminate term of 15 years to life plus an enhancement of 25 years to life for firearm use, but stayed these terms as well. On the burglary charge, the court imposed a one-third middle

term of one year four months, with gang and firearm enhancements of two years. On the firearm possession charge, Kidd received a consecutive, one-third middle term of eight months. On the gang charge and possession of ammunition charge, he received stayed, one-third middle terms of eight months. The total sentence imposed on Kidd was four years plus 75 years to life.

Knorr was sentenced on the burglary count to the middle term of four years, plus 10 years and one year respectively for the gang and firearm use enhancements. For simple kidnapping, she received a consecutive one-third middle term of one year eight months, plus three years four months for the firearm use enhancement. Sentence on the separate gang charge was stayed. On the robbery in concert count, Knorr received an indeterminate term of 15 years to life, for a total sentence of 20 years plus 15 years to life.

Merritt was sentenced on the burglary count to the middle term of four years, plus 10 years and one year respectively for the gang and firearm use enhancements. On the one charge of oral copulation in concert, she received a full consecutive term of five years plus a 10-year gang enhancement. Sentence was stayed on the separate gang charge. On the robbery in concert charge, Merritt received a consecutive, indeterminate term of 15 years to life. She also received an indeterminate term of 25 years to life for conspiracy to commit murder, plus an enhancement of 25 years to life for the firearm use. Finally, sentence on the kidnapping charge was stayed. The total sentence imposed on Merritt was 30 years plus 65 years to life.

All five defendants appeal.

DISCUSSION

Each defendant has filed a brief raising various arguments, only a few of which overlap. Nevertheless, each defendant has joined in all arguments raised by the others. We shall address the arguments of each defendant in turn. While we identify each argument as that of the party raising it, we acknowledge the joinder of the others.

I

Kimberly Knorr

Knorr raises the following contentions on appeal: (1) there is insufficient evidence she participated in the robbery; (2) she received inadequate notice of the nature of the robbery charge; (3) because Knorr was a resident of Nate's house, she cannot be convicted of burglarizing her own home; (4) there is insufficient evidence of kidnapping; (5) there is insufficient evidence supporting the gang conviction and enhancements; (6) the sentence on the burglary count must be stayed; (7) the trial court erred in excluding testimony from B.K. regarding Knorr's state of mind; and (8) Knorr was denied due process when she was handcuffed in front of the jury. We find merit in the first contention only.

A

Sufficiency of the Evidence--Robbery

Knorr contends there is insufficient evidence under either an aider and abettor or conspiracy theory to support her

conviction for robbery. According to Knorr, there is no evidence she intended that the others rob either Doe or Nate. On the contrary, she argues, "[w]hen someone suggested that they rob Nate, [Knorr] said no, she just wanted to get her stuff." Knorr argues her presence at the scene, without more, is insufficient to convict her as an aider and abettor. As for conspiracy, Knorr argues there is no evidence that she agreed with the others to commit a robbery.

In reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) In making this determination, we consider the record as a whole, not isolated bits of evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 577-578.) Reversal on the basis of insufficient evidence is not warranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

The People disagree there is insufficient evidence to support the robbery conviction. According to the People, Knorr was angry at Nate and told the others Nate had disrespected the gang. She also told them Nate had a Mercedes SUV in his garage. When the defendants left for Nate's residence, some were armed, and it is reasonable to infer Knorr knew it. Knorr led the others to the residence in order "to get Nate and her

belongings." According to the People: "It is reasonable to infer that Knorr agreed with going to Nate's house, doing a home invasion, and robbing Nate. She did not just want her clothes back. She was upset at being kicked out and at having *her gang, which included her boyfriend Kidd ('Five')*, disrespected. Like everyone, she went back to Nate's seeking revenge. She knew her group would take whatever valuables they could find, and she knew that [Doe] and Nate would likely be in the house." According to the People, "[f]rom this evidence and reasonable inferences, the jury could reasonably conclude that Knorr intended to facilitate the home invasion and robbery of [Doe]."

We have difficulty following the People's leap of logic. Knorr and the others were charged with the robbery of Doe, not Nate. The People argue that, because there is evidence suggesting Knorr intended that the others rob Nate, she also intended that they rob Doe. But there is no evidence Knorr was angry at Doe or sought revenge against her. She did not inform the others that Doe had disrespected the gang. She did not mention that Doe had a Mercedes at the residence.

The People argue that, "[s]ince the invaders asked [Doe] about specific items, they most likely got that information from Knorr who had lived there." However, the only items the intruders asked Doe about were the location of a safe, the money and the keys to Nate's truck. There is no reason to believe any of these items were the property of Doe. The People further argue defendants brought two cars "to carry everyone and the

loot." Again, however, there is nothing to suggest the anticipated loot was that of Doe.

Knorr did not enter the residence and therefore was not involved in the actions of the others in taking items belonging to Doe. There is no evidence in this record from which it may be inferred Knorr conspired with the others in advance to rob Doe.

As for Knorr's liability under an aider and abettor theory, such liability requires proof the defendant acted "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." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) In this instance, there is no evidence Knorr intended that the others rob Doe, as opposed to Nate, and the jury was not instructed on a theory of natural and probable consequences, i.e., that Knorr could be convicted of robbing Doe if this was a natural and probable consequence of the home invasion.

On the record before us, we agree there is no substantial evidence to support Knorr's conviction for the robbery of Doe. And since Knorr was not charged with robbing Nate, her robbery conviction must be reversed.

B

Due Process--Robbery Charge

Knorr contends she did not receive adequate notice of the robbery charge because, while the charge itself alleged robbery

of Doe, the prosecution argued robbery of Nate, and the verdict form did not identify the victim. Hence, she argues, the jury may well have convicted her on the robbery count on a finding that she aided and abetted or conspired in the robbery of Nate, not Doe, in violation of her due process rights. However, having concluded Knorr's conviction for robbery must be reversed, this contention is moot.

C

Sufficiency of the Evidence--Burglary

Knorr contends her burglary conviction must be reversed for two reasons. First, she argues she retained a possessory interest in Nate's residence and, therefore, cannot be guilty of burglarizing her own residence. She further argues the evidence is undisputed that her intention in going to Nate's residence was to retrieve her own property, not to commit any crime. We reject both arguments.

In *People v. Gauze* (1975) 15 Cal.3d 709, our Supreme Court held that one cannot be guilty of burglarizing his or her own home. According to the court, burglary is "an entry which invades a possessory right in a building" and "must be committed by a person who has no right to be in the building." (*Id.* at p. 714.) In *People v. Salemme* (1992) 2 Cal.App.4th 775, this court expanded on *Gauze* in concluding that "a person who enters a structure enumerated in section 459 with the intent to commit a felony is guilty of burglary *except* when he or she (1) has an *unconditional* possessory right to enter as the occupant of that

structure or (2) is invited in by the occupant who knows of and endorses the felonious intent." (*Id.* at p. 781, second italics added.) Thus, in *People v. Smith* (2006) 142 Cal.App.4th 923, the defendant husband's burglary conviction was upheld where he broke into the family residence with felonious intent sometime after his wife had obtained a restraining order removing him from the home. (*Id.* at pp. 927, 931.)

In this instance, the evidence before the jury was that, prior to the entry by Tyler and the others, Nate had kicked Knorr out of his residence. There was no evidence that Knorr had any ownership or leasehold interest in the residence. Thus, even though some of her belongings remained inside, Knorr did not have an *unconditional* possessory right to the premises.

Knorr argues there is insufficient evidence she shared the others' criminal intent when they entered the residence. According to Knorr, "[i]t has been the law for more than a century that the mere fact one person is with another who enters a dwelling house and steals therefrom, and sees the other steal without interference on his part to prevent it, does not render him guilty of the crime . . . ." Knorr cites as support *People v. Ah Ping* (1865) 27 Cal. 489 (*Ah Ping*), where Ah You and Ah Ping were seen entering another's cabin and putting items of food into two sacks, after which Ah You alone carried them off. At the trial of Ah Ping, Au You testified that he alone committed the crime and that Ah Ping was an innocent stranger whom he had met earlier. (*Id.* at pp. 489-490.) Ah Ping was convicted, but the Supreme Court reversed the conviction. (*Id.*

at pp. 490-491.) The court explained: "The appellant may have been in the house with one who was, himself, there, with felonious intent; he may have seen the latter in the act of committing a felony and have made no attempt to interfere, and still be entirely innocent. These facts, if found, would not necessarily have established the defendant's guilt . . . ." (*Id.* at p. 491.)

Knorr argues, she "was not even in the house with the perpetrators of the crimes therein, and thus even more removed than Ah Ping. She was sitting in her sister's white Buick some distance away from the house. She had rejected [Tyler's] idea to go there to smoke and rob Nate, which was the *only* evidence offered to prove that [Knorr] acted as an aider and abettor, and with criminal intent. Without more, it is sheer speculation to believe that [Knorr] intended to commit burglary, or any other crime. The evidence showed only that she wanted to go there in order to get her belongings--as Nate had said she should. [Citation.] Analogizing to *Ah Ping*, she was in the position of Mr. Ping watching while Ah You carried off the goods."

Knorr's reliance on *Ah Ping* is misplaced. The issue there was not, as here, whether there was sufficient evidence to convict Ah Ping of burglary. Clearly there was. In *Ah Ping*, the jury had been instructed that if the evidence showed the defendant "was with the one who did steal as charged" and "saw him steal without interference on [the] defendant's part to prevent it," then the defendant had the burden of proving his innocence. (*Ah Ping*, *supra*, 27 Cal. at p. 490.) The high court

reversed the conviction because of this clearly erroneous instruction that placed the burden on the defendant to prove his innocence.

In the present matter, the issue is the sufficiency of the evidence. While Knorr may not have shared the intent of the others to rob Doe, there is sufficient evidence to support a jury finding that she shared their intent to commit either robbery or murder, or both, against Nate. Knorr's claim that her only intent in going to Nate's residence was to retrieve her property is belied by the fact that, when the intruders arrived at the residence, Knorr did not accompany them inside to point out her belongings, and by the fact that the others did not simply knock at the front door to gain entry but chose instead to sneak in through a window. Knorr relies on her sister's testimony that Knorr told the others before they departed for Nate's residence that she did not want to rob anyone but just wanted to get her own things. However, the jury was free to reject this testimony on the basis of bias.

We conclude substantial evidence supports Knorr's burglary conviction.

D

Sufficiency of the Evidence--Kidnapping

Knorr contends there is insufficient evidence to support her conviction for kidnapping. Knorr argues there is no evidence she knew Doe would be in her bedroom that night or that the others would kidnap her.

But even assuming Knorr had no reason to believe Doe would be in the residence or that the others would kidnap her, it may nevertheless be inferred she saw the others bring Doe out of the residence with them when they departed. Her continued participation with them, first by leading them to the apartment complex on 29th Street and then to the home of A.S., and then accompanying the others to the field where they attempted to kill Doe, makes Knorr liable as an aider and abettor of the kidnapping.

Knorr's intent to aid and abet the kidnapping need not precede the initial movement against the victim's will. "[T]he crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim and has reached a place of temporary safety . . . ." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159.) In order to be guilty as an aider and abettor of the kidnapping, Knorr need not assist the entire kidnapping. Assistance given during any portion of the offense will suffice. So while Knorr may not have intended that Doe be taken from the residence, she fully participated in the kidnapping thereafter. Her kidnapping conviction is therefore supported by substantial evidence.

E

Sufficiency of the Evidence--Gang Participation

Knorr challenges her conviction under section 186.22, subdivision (a), which makes it a crime to knowingly and actively participate in a criminal street gang.

Section 186.22 defines "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) The term "pattern of criminal gang activity" is defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [33 offenses are identified]." (§ 186.22, subd. (e).)

Knorr contends her conviction for participating in a criminal street gang must be reversed both because there is insufficient evidence she aided and abetted the others in any of their crimes and because there is insufficient evidence the criminal conduct was gang-related. However, we have already rejected Knorr's contention regarding the sufficiency of the evidence that she aided and abetted the others, at least as to the burglary and kidnapping. Contrary to Knorr's arguments, the jury could reasonably have concluded she intended that the

others commit a burglary and actively participated in the kidnapping after it began.

As for Knorr's contention that there is insufficient evidence the offenses were gang-related, she spends considerable time explaining why the law requires that the offenses be gang-related but fails to explain why the specific crimes in this matter are not. She argues simply that there is insufficient evidence of a nexus between her status as an "associate" of the 29th Street Crips and the charged offenses. Where a point is raised in an appellate brief without argument or legal support, "it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.)

At any rate, as discussed later in connection with arguments raised by the other defendants, there was sufficient evidence that all the crimes were gang-related.

F

Stay of the Sentence for Burglary

Knorr contends section 654 precludes her punishment for both burglary and robbery and, therefore, the sentence on the burglary count must therefore be stayed. However, we have concluded Knorr's conviction on the robbery must be reversed for lack of substantial evidence. Therefore, her section 654 claim is moot.

G

State of Mind Evidence

During cross-examination of Knorr's sister, B.K., Knorr's counsel asked whether B.K. recalled going to Knorr while they were at the home of A.S. and telling Knorr that Doe wanted to go home. B.K. answered yes. Counsel then asked: "And you recall [Knorr] saying that she was --." At that point, the prosecutor interposed a hearsay objection and Knorr's counsel argued the question fell within the state of mind exception to the hearsay rule. Knorr's counsel asserted B.K. would answer that Knorr "told her that she [Knorr] was afraid to do anything because they were going to beat her ass." The trial court ruled B.K.'s anticipated answer was relevant to the case and may well fall within the state of mind exception to the hearsay rule. However, the court excluded it as otherwise untrustworthy.

Knorr contends the trial court abused its discretion in excluding the proffered evidence. She argues her state of mind was central to the charges against her and this evidence demonstrated she was acting out of fear of the others. She further argues there was nothing untrustworthy in the evidence and the trial court should have weighed the probative value of the evidence against its prejudicial effect under Evidence Code section 352 and concluded the probative value far outweighed any possible prejudice to the prosecution. She further argues exclusion of the evidence amounted to a denial of her right to present a defense.

Evidence Code section 1250 states: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. . . ."

Evidence Code section 1252 in turn provides: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." To be admissible under this section, "statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are '"made at a time when there was no motive to deceive."' [Citations.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 820.) A determination under Evidence Code section 1252 "'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.' [Citation.] A reviewing court may overturn the trial court's finding regarding trustworthiness

only if there is an abuse of discretion. [Citations.]" (*Edwards*, at pp. 819-820.)

The People contend the trial court correctly concluded Knorr's statement to her sister was not trustworthy because "Knorr had strong motives to misrepresent her involvement in the crime spree to her sister." According to the People, Knorr "did not want her sister to think badly of her" and "her sister could later claim that Knorr was an unwilling participant and provide [Knorr] with a defense." The People further argue the law does not require the court to conduct an Evidence Code section 352 analysis and, in any event, the probative value of the testimony was minimal in light of other evidence demonstrating Knorr's active participation in the crime spree. Finally, the People point out that, by the time Knorr purportedly made the statement to her sister, the robbery, burglary and kidnapping had already taken place, and Knorr was not convicted of any of the offenses that occurred thereafter.

The People place unwarranted emphasis on the fact the offenses for which Knorr was convicted all occurred before her purported statement to her sister. To the extent Knorr's statement was probative of her state of mind at the time it was made, it was also probative of her state of mind both before and after the statement.

At any rate, assuming the trial court erred in excluding the evidence, we conclude such error was harmless. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous

exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice . . . ." (Evid. Code, § 354.) A miscarriage of justice should be found only where it is reasonably probable a result more favorable to the appealing party would have been reached in the absence of error. (*O'Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 500.)

In this instance, the evidence showed that while Knorr may not have been a gang member, she was heavily involved with the gang. One of the participants in the home invasion was her boyfriend Kidd. She is also the one who first told the others that Nate had disrespected the gang, a clear trigger for gang violence, and that Nate had a Mercedes SUV in his garage. And, as discussed earlier, Knorr readily participated in the kidnapping of Doe after it commenced. She was the one who led the others to the apartment complex and then to the home of A.S.

Knorr was convicted of burglary and kidnapping, both of which occurred before the purported statement about being afraid of the gang. She was not convicted of any of the offenses that occurred thereafter. Since the excluded testimony was coming from Knorr's sister, whom the jury could reasonably view as biased in her favor, it is not reasonably likely a more favorable outcome would have been reached had the evidence come in.

H

Handcuffs

After a lunch break, while Doe was still on the stand, Knorr's attorney moved for a mistrial. As the basis for the motion, he asserted: At the commencement of the lunch break, "first thing I heard was the very distinctive metallic loud clicking sounds of the handcuffs. [A guard] began handcuffing Ms. Knorr.

"I immediately upon hearing that reached over, put my hands on top of his hand and said whoa, whoa, whoa, to try to stop the situation. He did stop. But when I looked over and put my hands up there, I definitely saw that the cuffs were out. They were about waist high, and that would have been on his right side, which is exposed to the Knorr jury, exposed to both juries. All the jurors were here. I do not--I did not look over at the jury because I was so focused on hearing that sound and protecting Ms. Knorr. So I do not know for sure, I cannot say that which [*sic*] jurors saw this, except to say that these jurors here in Mr. Kidd's jury, they were leaving, there were some in the hallway close by."

The court found the guard's action inappropriate and asked if the defense wanted an admonition to the jury. Counsel declined. Instead, counsel for Knorr asked for a mistrial. The court denied the motion.

"[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence,

unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) "When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged. [Citations.] The removal of physical restraints is also desirable to assure that 'every defendant is . . . brought before the court with the appearance, dignity, and self-respect of a free and innocent man.' [Citations.] Finally, the United States Supreme Court has acknowledged that physical restraints should be used as a last resort not only because of the prejudice created in the jurors' minds, but also because 'the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" (*Id.* at p. 290.) "[I]n any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*Id.* at p. 291.)

Knorr cites several cases where the courts have said shackling of a defendant in open court is not authorized absent a showing of manifest need. However, the present matter does not involve court authorization to maintain Knorr in shackles before the jury. Rather, Knorr's claim is that, on one occasion, a deputy inadvertently began placing handcuffs on her before the jury departed from the courtroom. Thus, the question whether there was a showing of manifest need is a red herring.

The People contend there was no prejudice to Knorr, because there is no evidence the jury actually saw the incident in question. We agree. (See *People v. Majors* (1998) 18 Cal.4th 385, 406.) Furthermore, even assuming one or more members of the jury saw it, there is nothing in the record to suggest Knorr was adversely impacted thereby. On the contrary, Knorr was convicted on fewer charges than any of the other defendants, despite the fact she initiated everything and appeared to be the one calling the shots, at least initially. The evidence of Knorr's involvement in the various offenses for which she was convicted was uncontradicted. Thus, any error in the deputy's inadvertent actions was harmless beyond a reasonable doubt.

II

Lashea Merritt

Merritt raises the following contentions on appeal: (1) the trial court erred in failing to instruct on mistake of fact as a defense to conspiracy to commit murder; (2) the court gave erroneous instructions on conspiracy; (3) the court gave erroneous instructions on aggravated kidnapping; (4) sentence on the burglary count must be stayed pursuant to section 654; (5) the sentence for the gang enhancement on the burglary charge must be reduced because the offense was not charged as a violent felony; (6) the fine imposed under section 667.6 must be stricken; (7) the overall sentence imposed constitutes cruel and unusual punishment; and (8) the abstract of judgment must be corrected on the firearm enhancement for the conspiracy offense.

We agree the gang enhancement on the burglary charge must be reduced, the section 667.6 fine must be stricken and the abstract must be corrected. We also conclude the overall sentence imposed on Merritt, which amounts to a life sentence without any meaningful opportunity for parole, constitutes cruel and unusual punishment.

A

Mistake of Fact Instruction

Merritt contends the trial court erred in failing to instruct on mistake of fact as a defense to the charge of conspiracy to commit murder. The jury was instructed on conspiracy and the defense of withdrawal, which requires that the defendant affirmatively announced to the others her intention to withdraw. Merritt argues there was evidence the defendants entered into a conspiracy to murder Doe but, before following through, they made statements which led Merritt to believe they had abandoned the conspiracy. Thus, she argues, there was no occasion for her to announce her abandonment of the plan as well. According to Merritt, a defendant "who honestly but mistakenly believes that a conspiracy has terminated by abandonment, prior to the commission of any overt acts, does not have the mental state required for conviction of conspiracy."

Merritt did not request a mistake of fact instruction. Nevertheless, the trial court has a duty to instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Kimble* (1988) 44 Cal.3d 480, 503.) The court in fact

has a sua sponte duty to instruct on a particular defense "if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

Merritt acknowledges she did not rely on a mistake of fact defense at trial. On the contrary, her counsel argued to the jury that Merritt was not even present at the time of the offenses. Counsel relied on the testimony by Tyler that he left Merritt behind at his motel room and evidence that Merritt had a cast on her hand at the time but Doe made no mention of anyone in the group having a cast. In other words, Merritt's counsel took an all or nothing approach to the case.

Any argument that Merritt mistakenly thought the others had abandoned their plan to murder Doe would have presupposed that Merritt was present at the time. In other words, a mistake defense would have been inconsistent with Merritt's theory of the case. Hence, a mistake instruction would have been improper.

At any rate, as support for her mistake defense, Merritt cites Doe's testimony that she asked Tyler and Griffin to take her to the home of a friend and they said they would and Doe's further testimony that Merritt and others were coming in and out of the room and arguing about whether they should let Doe go. Merritt also relies on Doe's testimony that when they left

A.S.'s home, Doe thought she was going home, and B.K.'s testimony that when the others left the residence she heard someone say they were taking Doe home. Merritt argues this evidence demonstrates she believed any agreement to kill Doe had been abandoned by the others.

However, regardless of whether there was substantial evidence from which Merritt could have surmised the others had abandoned their intent to murder Doe, there is no evidence whatsoever that Merritt herself had done so. Merritt argues that, because she mistakenly believed the others abandoned their intent to kill Doe, Merritt had no occasion to announce to the group her own withdrawal from the conspiracy. However, this argument presupposes Merritt did in fact change her mind about killing Doe. But the evidence is to the contrary. While the others may have spoken about taking Doe to the home of her friend, Merritt insisted instead that Doe could not be trusted and should be killed. Hence, any mistaken belief about what the others may have been thinking is irrelevant. Merritt was not entitled to a mistake of fact instruction.

B

Conspiracy Instructions

The jury was given the following instruction on conspiracy pursuant to CALCRIM No. 416: "In addition to the conspiracy charged in Count Seven [conspiracy to commit murder], the people have presented evidence of an uncharged conspiracy to commit residential robbery. [¶] . . . A member of a conspiracy . . .

is criminally responsible for the acts or statements of other members of the conspiracy done to help accomplish the goal of the conspiracy. [¶] . . . [¶] The people must prove that the members of the alleged conspiracy had an agreement and intent to commit Count One, residential robbery."

The court did not also instruct on natural and probable consequences pursuant to CALCRIM No. 417. That instruction reads in relevant part: "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime. [¶] A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. . . . [¶] A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan. . . ."

Merritt contends the trial court erred in giving CALCRIM No. 416 without also giving CALCRIM No. 417. Merritt argues giving CALCRIM No. 416, standing alone, allowed the jury to convict her on "an invalid legal theory." According to Merritt,

the instruction "presented the uncharged conspiracy as an alternative theory of liability, one which erroneously allowed the jury to convict [her] for charged crimes committed by co-conspirators in the uncharged residential robbery conspiracy, as long as such crimes were 'done to help accomplish the goal of' that conspiracy, even if such crimes were not a foreseeable, or natural and probable, result of the 'common design or plan.'" For example, Merritt argues, the jury could have concluded the kidnapping and attempted murder were committed in order to eliminate a witness to the robbery and, therefore, were done to help accomplish the goal of the conspiracy, despite the fact those crimes may not have been a natural and probable consequence of the robbery.

Merritt's argument is self-contradicting. On the one hand, she argues that, because the jury could have concluded the kidnapping and attempted murder were done in furtherance of the conspiracy to commit robbery, the jury should have been instructed on natural and probable consequences. Nevertheless, she argues, it would have been improper for the jury to conclude the kidnapping and attempted murder were in furtherance of the robbery conspiracy because they were not natural and probable consequences of the robbery.

At any rate, on the evidence presented in this matter, no reasonable jury would have convicted Merritt of kidnapping or attempted murder based on a theory that those offenses were committed to assist in the robbery. On the kidnapping, Merritt was not simply an absent co-conspirator. She actively

participated in forcing Doe to accompany them from Nate's residence to that of A.S. As for the attempted murder, there was actually a charged conspiracy to commit murder. Thus, there is no reason whatsoever why the jury would have relied on an uncharged conspiracy to commit robbery as the basis for convicting Merritt of attempted murder. Hence, the trial court was not required to instruct with CALCRIM No. 417.

C

Aggravated Kidnapping Instructions

Merritt was convicted of aggravated kidnapping under section 209, subdivision (b)(1). That subdivision reads: "Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or any violation of Section 264.1, 288, or 289, shall be punished by imprisonment in the state prison for life with the possibility of parole." The defendants were charged with having kidnapped Doe "to commit robbery and/or forcible sexual assault." The court likewise instructed the jury that the people must prove, among other things, the defendants "intended to commit robbery or forced sexual assault." The court later instructed: "[T]o decide whether the defendant intended to commit robbery or forced sexual assault, refer to the separate instructions I will give you on those crimes."

The court instructed the jury that forcible oral copulation is a general intent crime, requiring proof only that the person acted with wrongful intent. The court further instructed: "A

person acts with wrongful intent when he or she intentionally does an act on purpose. However, it is not required that he or she intend to break the law."

Merritt contends the foregoing instructions were inadequate, as they failed to define "forcible sexual assault" and failed to inform the jury of the mental state necessary for such offense. Merritt argues there are offenses that could qualify as forcible sexual offenses, such as misdemeanor sexual assault (§ 243.4), that do not qualify for aggravated kidnapping under section 209, subdivision (b)(1). Hence, one or more of the jurors could have found Merritt guilty of aggravated kidnapping based on a finding that she intended to commit a forcible sexual assault that is not covered by section 209, subdivision (b)(1).

The People counter that the term "forcible sexual assault" was merely a shorthand way of referring to the various sex crimes delineated in section 209, subdivision (b)(1), and the only such crime charged in this matter was forcible oral copulation. However, that does not resolve the issue. The only sex crime actually committed was forcible oral copulation. However, that does not mean it was the only crime *intended* at the time of the kidnapping. In other words, the defendants may have intended to commit one sex offense but ended up committing another. And the intended sex offense may not have been one covered by section 209, subdivision (b)(1).

Nevertheless, instructions should be considered as a whole (*People v. Doyell* (1874) 48 Cal. 85, 93), and the overall

instructions here did not mislead the jury. The only sex offense defined to the jury was forcible oral copulation. In the midst of this definition, the court indicated "[c]onviction of a sexual assault crime may be based on the testimony of a complaining witness alone." There was no mention of any other sex crime, whether or not included in section 209, subdivision (b)(1). Thus, there is no reason to conclude the jury may have considered another sex offense in deciding whether Merritt had the requisite intent at the time of the kidnapping.

At any rate, "we will not set aside a judgment on the basis of instructional error unless, after examination of the entire record, we conclude the error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) A miscarriage of justice occurs only when it is reasonably probable that the jury would have reached a result more favorable to the [defendant] absent the error. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277-278.) In this instance, it is not reasonably probable the jury would have reached a different result had the court provided an express definition of "forcible sexual assault."

D

Stay of Burglary Sentence

Merritt contends she cannot be sentenced both for robbery and burglary, because those offenses were part of an indivisible course of conduct with a single objective. That objective, Merritt argues, was to steal property from Nate's residence.

Thus, the sentence for burglary must be stayed. The People counter that Merritt had multiple objectives in entering the residence, including killing and robbing both Nate and anyone else who might be present. We agree with the People.

Section 654 reads: "(a) 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. . . ." Although section 654 speaks in terms of "[a]n act or omission," it has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) The key inquiry is whether the objective and intent attending more than one crime committed during a continuous course of conduct was the same. (*People v. Brown* (1991) 234 Cal.App.3d 918, 933.) "[I]f all of the offenses were merely incident to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The question whether a defendant entertained multiple criminal objectives is one of fact for the trial court. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Based on the evidence presented in this matter, the trial court could reasonably have concluded the defendants harbored multiple objectives in entering the residence, including assault or murder of Nate. Knorr announced at the home of A.S. that Nate had disrespected the gang and Tyler said, "fuck that nigga, let's go smoke him." He also said they should rob Nate. After the defendants entered the residence, they pointed guns at Doe and told her not to say anything while they searched the residence for Nate. They then proceeded to assemble things from the house to steal, including various clothing items and a stereo from Doe's bedroom. Thus, Merritt could lawfully be sentenced both for the robbery of Doe and for the burglary of the residence for the purpose of assaulting or robbing Nate.

E

Sentence on Burglary Gang Enhancement

Section 186.22, subdivision (b), provides for an enhancement on any offense committed for the benefit of a criminal street gang. If the offense was a "serious felony" within the meaning of section 1192.7, subdivision (c), the

enhancement is five years. (§ 186.22, subd. (b)(1)(B).) If the offense was a "violent felony" within the meaning of section 667.5, subdivision (c), the enhancement is 10 years. (§ 186.22, subd. (b)(1)(C).) Included within the list of serious felonies in section 1192.7, subdivision (c), is any burglary of the first degree. (§ 1192.7, subd. (c)(18).) Included in the list of violent felonies in section 667.5, subdivision (c), is first degree burglary "wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." (§ 667.5, subd. (c)(21).)

Merritt contends the term of 10 years imposed for the gang enhancement on the burglary count must be reduced to five because the offense was charged as a serious felony rather than a violent felony and the jury returned a verdict on the enhancement as charged. The People disagree, arguing the information charged burglary of an inhabited dwelling *occupied* by Nate E. Count two of the information read, in relevant part: "On or about January 22, 2007, at and in the County of Sacramento, State of California, defendants . . . did commit a felony namely: a violation of Section 459 of the Penal Code of the State of California, First Degree Residential Burglary, in that said defendants did unlawfully enter an inhabited dwelling house and trailer coach and inhabited portion of a building *occupied by [Nate E.]*, with the intent to commit larceny and any felony." (Italics added.)

The People argue the foregoing adequately alleges a nonaccomplice was present in the residence at the time of the unlawful entry. They assert that in *Doe v. Saenz* (2006) 140 Cal.App.4th 960, at page 987, the Court of Appeal equated "occupied" with the presence of a nonaccomplice during the burglary. However, in that case, the court merely used the term "[o]ccupied burglary" as a shorthand reference to the type of burglary defined in section 667.5, subdivision (c)(21). The court was not asked to decide if an allegation that the residence was "occupied" at the time of the burglary was sufficient to satisfy the charging requirement of section 667.5, subdivision (c)(21). Cases are not authority for propositions not considered therein. (*McKeon v. Mercy Healthcare Sacramento* (1998) 19 Cal.4th 321, 328.)

In this instance, the information, as worded, alleged that the defendants unlawfully entered "an inhabited dwelling house and trailer coach and inhabited portion of a building occupied by [Nate E.] . . . ." Rather than allege the defendants unlawfully entered an inhabited dwelling while Nate was present, this appears more reasonably to be a reference to the identity of the inhabitant of the dwelling. This interpretation is reinforced by the next paragraph of the information, which gives notice that the offense alleged in count two "'is a serious felony within the meaning of Penal Code Section 1192.7(c).'" There is no mention of a violent felony or section 667.5, subdivision (c).

In order to qualify as a violent felony, section 667.5, subdivision (c)(21), requires that it be "charged and proved" that another person was present in the residence at the time of the burglary. It is undisputed that at least Doe was present in the residence at the time of the burglary. Nevertheless, the People made no effort to charge this matter as a violent felony. Therefore, the sentence on the enhancement must be reduced to five years. This applies to all defendants.

F

Section 667.6 Fine

Merritt contends the trial court improperly imposed a $1,000 fine on the oral copulation conviction pursuant to section 667.6, subdivision (f), which authorizes a fine of up to $20,000 for anyone sentenced under section 667.6, subdivisions (a) or (b). Those subdivisions deal with recidivist sex offenders. Merritt was not sentenced under either of these subdivisions, but under section 667.6, subdivision (c). The People concede error. We shall direct that the $1,000 fine be stricken. In addition, we shall direct that the two $1,000 fines imposed on Tyler for his two oral copulation convictions be stricken for the same reason. Tyler was not sentenced under either subdivision (a) or (b) of section 667.6.

G

Cruel and Unusual Punishment

Merritt contends the sentence imposed on her, 30 years plus 65 years to life, is equivalent to a sentence of life without

the possibility of parole, inasmuch as she will not be eligible for parole for 90.5 years (65 years plus 85 percent of 30 years), at which time she would be well over 100 years old. And, Merritt argues, because she was only 15 years old at the time of the offenses, such a sentence constitutes cruel and unusual punishment.

The Eighth Amendment to the United States Constitution "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.) A punishment also may violate the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) In *Lynch*, the California Supreme Court suggested three areas of focus: (1) the nature of the offense and the offender; (2) a comparison with the punishment imposed for more serious crimes in the same jurisdiction; and (3) a comparison with the punishment imposed for the same offense in different jurisdictions. (*Id.* at pp. 425-427.) Disproportionality need not be established in all three areas. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38.)

The United States Supreme Court has identified two classes of cases that violate the proportionality standard. "The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the

proportionality standard by certain categorical restrictions . . . ." (*Graham v. Florida* (2010) ___ U.S. ___ [176 L.Ed.2d 825, 836] (*Graham*).) This second classification, in turn, "consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." (*Id.* at p. ___ [176 L.Ed.2d at p. 836].) Under the first subset, the high court has barred capital punishment for nonhomicide offenses. (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 411 [171 L.Ed.2d 525, 534].) Under the second, the court has barred capital punishment for minors, even if they commit murder. (*Roper v. Simmons* (2005) 543 U.S. 551, 578 [161 L.Ed.2d 1, 28].)

In *Graham*, the high court identified a hybrid category of juvenile offenders who commit nonhomicide offenses and concluded such offenders cannot be sentenced to life without the possibility of parole. (*Graham*, *supra*, ___ U.S. at p. ___ [176 L.Ed.2d at p. 845].) The court explained: "As compared to adults, juveniles have a '"lack of maturity and an underdeveloped sense of responsibility"'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' [Citation.] These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citation.] Accordingly, 'juvenile offenders

cannot with reliability be classified among the worst offenders.' [Citation.] A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" (*Id.* at p. ___ [176 L.Ed.2d at p. 841].)

This does not mean a juvenile offender can never be kept in prison for life. "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [nonhomicide juvenile offenders] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Graham*, *supra*, ___ U.S. at p. ___ [176 L.Ed.2d at pp. 845-846].)

In *People v. Mendez* (2010) 188 Cal.App.4th 47 (*Mendez*), the Court of Appeal considered a sentence of 84 years to life for a

defendant who was 16 years old at the time of his offenses, which included carjacking, assault with a firearm, and seven counts of robbery, all for the benefit of a criminal street gang. (*Id.* at p. 50.) After first noting that the life expectancy for an 18-year-old male at the time was 76 years and the defendant would not be eligible for parole until he reached the age of 88, the court concluded the defendant's sentence "and an LWOP sentence are 'materially indistinguishable.'" (*Id.* at p. 63.) Nevertheless, the court concluded the matter was not controlled by *Graham* because that case was limited to defendants "actually sentenced to LWOP." (*Ibid.*) Nevertheless, applying the underlying principles of *Graham*, the court concluded the sentence imposed did not give the defendant a meaningful opportunity for release. (*Id.* at pp. 63-64.) The court further concluded the sentence also failed the proportionality test. (*Id.* at p. 64.)

In a series of more recent cases, the Court of Appeal has issued conflicting decisions on whether a term-of-years sentence, where the juvenile offender will not be eligible for parole until after he or she would normally be expected to die, constitutes cruel and unusual punishment. However, the California Supreme Court has granted review in these cases. (See *People v. Caballero* (2011) 191 Cal.App.4th 1248, 1257, review granted Apr. 13, 2011, S190647 [sentence of 110 years to life for a juvenile offender did not violate *Graham* because, technically, it was not an LWOP sentence]; *People v. Ramirez* (2011) 193 Cal.App.4th 613, 626, review granted June 22, 2011,

S192558 [sentence of 120 years to life for juvenile offender convicted of three attempted homicides does not violate *Graham*, citing *Caballero*]; *People v. Nunez* (2011) 195 Cal.App.4th 414, 425, review granted July 20, 2011, S194643 [juvenile offender's original LWOP sentence modified to 175 years to life; the court found a violation of *Graham* because there was no distinction between this sentence and an LWOP]; *People v. J.I.A.* (2011) 196 Cal.App.4th 393, 404, review granted Sept. 14, 2011, S194841 [sentence making juvenile offender ineligible for parole until he reaches 70 violates *Graham*].)

We agree with the approach taken by the court in *Mendez*. Although, technically, *Graham* applies only to LWOP sentences imposed on juvenile offenders, the sentence imposed on Merritt in this matter is effectively indistinguishable from an LWOP sentence. Merritt will not be eligible for parole until she is over 100 years old, which is well beyond her normal life expectancy. In rejecting a case-by-case approach to juvenile offenders who receive an LWOP sentence, the high court in *Graham* noted: "[A] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. In [*Roper v. Simmons*, *supra*, 543 U.S. 551 [161 L.Ed.2d 1]], that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls,

no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. . . ." (*Graham*, *supra*, __ U.S. at p. ___ [176 L.Ed.2d at p. 848].) The court continued: "Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit." (*Ibid.*)

The foregoing applies equally to Merritt. The sentence imposed upon her for this one night of crimes committed in concert with her older gang compatriots when she was only 15 years old guarantees she will die in prison without any meaningful opportunity for release, regardless of what she might do over the rest of her life to demonstrate she is fit to rejoin society. Such a sentence is prohibited by the Eighth Amendment.

H

Firearm Enhancement

Merritt received an enhancement of 25 years to life for firearm use in connection with the conspiracy to commit murder charge. The abstract of judgment indicates this enhancement was pursuant to section 12022.53, subdivisions (b)(c)(d). Merritt contends the abstract should be corrected to reflect the enhancement was pursuant to section 12022.53, subdivision (e), because she did not personally use a firearm. The People counter that the jury verdicts reflect a true finding on the firearm use enhancement pursuant to subdivisions (b), (c), (d) and (e)(1). Thus, they argue, the abstract should be amended to add subdivision (e)(1).

We disagree with both parties. Subdivision (b) of section 12022.53 requires that anyone who personally uses a firearm in the commission of certain identified offenses be punished by an additional term of 10 years. Subdivision (c) imposes an enhancement of 20 years on anyone who personally discharges the firearm, and subdivision (d) imposes an enhancement of 25 years to life for anyone who personally discharges the firearm and causes great bodily injury. Finally, subdivision (e)(1) reads: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in

subdivision (b), (c), or (d)." Thus, subdivision (e)(1) makes subdivisions (b), (c) and (d) applicable whenever any principal in a gang-related offense is the person who uses the firearm.

As noted earlier, the evidence presented at trial was contradictory as to whether Merritt accompanied the others when they took Doe to the field where she was fired upon. And since Doe did not know which of the occupants shot at her, the jury could have concluded Merritt was one of the shooters. In the alternative, the jury could have found the firearm enhancement true as to Merritt based on the fact that another principal used the firearm. Thus, both subdivision (d) and subdivision (e)(1) apply. Both should be listed on the abstract. This applies to all defendants convicted of conspiracy to commit murder.

III

David Griffin

Griffin raises the following contentions on appeal: (1) the prosecutor committed misconduct during rebuttal argument; (2) the prosecutor argued a legally incorrect theory of aider and abettor liability; (3) there was insufficient evidence of a conspiracy to murder Doe; (4) the trial court improperly imposed a court facilities fee of $180; and (5) a clerical error in the abstract of judgment must be corrected. We agree with the last contention only.

A

Prosecutorial Misconduct--Criticism of Defense

During her rebuttal argument, the prosecutor made the following statements:

"[T]here is this old saying that when the facts--if you're a defense lawyer, if the facts aren't on your side, argue the law. If the facts aren't on your side, argue the law [*sic*].

"If you haven't got either one on your side, attack the cops, attack the D.A. I'm not evidence. I'm one person here who has a job to do, which is to bring this evidence in before you for your consideration.

"Just because we have assembled for a trial, does not mean that there is a valid defense. And at the same time, we are very fortunate that in our country, nobody has to go through a trial charged with a crime alone. Everybody is entitled to an attorney.

"I believe in that. You believe in that. We're fortunate to live in a country where we have that type of freedom and that type of privilege and constitutional rights.

"But these lawyers, each of these lawyers are private attorneys. They're obviously very well experienced and--but the problem, nobody can come in here and say, gosh, looks like the evidence has shown that they're guilty. They can't say that."

At this point, defense counsel objected, but the trial court overruled the objection. The prosecutor continued:

"They can't do that, but they have to say something.

"But the lawyers, don't forget the lawyers, they're no more responsible for what happened on January 22nd than I am.

"You've heard--you've heard from the witnesses and you've heard and you've seen the evidence that tells you and talks to you about what happened on January 22nd, on January 23rd of 2007. That's our focus. That's our focus.

"And when you've heard the words about what the group did to her, what they did to her, things of this nature, it's appropriate for you to consider the experience and the testimony of Destiny Doe when she describes, yes, what they did to her, yes, what this group of people did to her.

"And you'll notice we talked in great specificity, also, too, about each person's individual role and in multiple defendant cases involved where people choose to aid and abet one another to commit these types of crimes, especially in a gang context and with this gang mentality, you have to consider all of that in conjunction with the rest of the evidence in finding each person's responsibility.

"Mr. Mahle [counsel for Griffin] commented several times, he kept saying something about [Doe] being interviewed 17 times and told--there's 17 versions of what she told you has happened. Well, that's simply not true. That is simply not true.

"Or Miss Huey [counsel for Merritt] saying that her story changes every time she's interviewed. The evidence does not support that. That is not true.

"Or attacking Sergeant Nutley and the integrity of his work as a professional. This is a man who does his job--basically

what we learned here is this is a law enforcement professional who will go out there and do his job, and it doesn't matter whether you're the Governor or whether you're a homeless guy or whether you're a prostitute."

At this point, defense counsel again objected and the court again overruled the objection. The prosecutor continued:

"Or whether you're somebody's grandmother next door, he's got a job to go out and do because the focus is the protection of the community and to enforce the laws against parties who break them.

"So he treats her in a dignified and professional manner that she doesn't get in here."

Defense counsel again objected, and the court once again overruled the objection. The prosecutor continued:

"And is then slammed, you know, slammed by these belittling--."

Defense counsel once again objected and asked for a finding of misconduct. The court denied the request but sustained the objection to the phrasing of the prosecutor's argument. The prosecutor then resumed her argument:

"Like allowing [Doe] to meet him at Starbuck's, if a witness or a victim wants to meet an officer at a location rather than at their house, it's their prerogative. [¶] . . . [¶]

"There is a lot of talk about Miss Doe's credibility, and of course you're going to evaluate the credibility of every witness. [¶] . . . [¶]

"And it's not--it's interesting, Miss Huey said that we need to think about how--that [Doe] has a motive to lie or fabricate this whole event because she has a personal interest in how this case is resolved.

"Well, what exactly is that? . . .

"What does she gain? The ability to have to look over your shoulder for the rest of your life.

"Miss Huey described Miss Doe as a wild cat on the witness stand during her cross-examination but crying her way through direct.

"Gosh, it's impossible to understand how anyone who's been a victim of a crime can come into court and even--."

Defense counsel again objected, but the court again overruled the objection.

Following the lunch break, the defendants moved for a mistrial based on prosecutorial misconduct. The court denied the motion.

Griffin contends the foregoing argument was improper for several reasons. First, Griffin argues the prosecutor accused defense counsel of fabricating a defense. Next, Griffin argues the prosecutor shifted the burden of proof to the defendants. Finally, according to Griffin, the prosecutor appealed to the passions of the jurors. Griffin further argues the foregoing misconduct affected the fundamental fairness of the trial and resulted in prejudice.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's

. . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

The prosecution has a solemn obligation to protect a criminal defendant's constitutional right to a fair trial. (*Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321].) "Improper remarks by a prosecutor can '"so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."'" (*People v. Frye* (1998) 18 Cal.4th 894, 969, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Nevertheless, a prosecutor has wide latitude in closing argument and may argue vigorously that the evidence shows the defendant is guilty of the crimes charged. (*People v. Mincey* (1992) 2 Cal.4th 408, 447-448; *People v. Wharton* (1991) 53 Cal.3d 522, 567.)

"[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on

what the prosecution believes is the relevant evidence is not improper." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47.)

Griffin cites three cases in support of his misconduct claim. In *People v. Bain* (1971) 5 Cal.3d 839 (*Bain*), the defendant, a black man, was charged with various sex offenses committed against the victim and the defendant claimed the victim was a "pick-up" who accompanied him willingly. (*Id.* at pp. 843-844.) The prosecutor, also a black man, "asserted before the jury that the defendant and his counsel had fabricated the 'pick-up' story; he stated that he, as a black man, would not be prosecuting a black defendant unless he personally believed the man to be guilty; he attacked the integrity of the defense attorney and the office of the public defender; and he referred repeatedly to racial matters." (*Id.* at p. 845.)

The Supreme Court found misconduct both as to the assertion that the defendant and counsel had fabricated a defense during the three-month period prior to trial and as to the prosecutor's assertion of a personal belief in the defendant's guilt without any disclaimer that this was based solely on the evidence presented at trial. (*Bain*, *supra*, 5 Cal.3d at pp. 847-848.) As to the latter, "a prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.] It is misconduct, however, to suggest to the jury in arguing the veracity of a witness that

the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jury will believe that inculpatory evidence, known only to the prosecution, has been withheld from them." (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, overruled on other grounds in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.) In *Bain*, the prosecutor did not just express his belief in the defendant's guilt but asserted he would not have pressed charges against the defendant if he did not believe he was guilty. Thus, even before the evidence was presented to the jury, the prosecutor believed the defendant was guilty, which belief obviously could not have been based on the evidence presented at trial. (*Bain*, *supra*, 5 Cal.3d at p. 848.)

In *People v. Charlie* (1917) 34 Cal.App. 411 (*Charlie*), the defendant was charged with assault and the prosecutor questioned the defendant about why he had not given testimony supporting his claim of self-defense at the preliminary hearing, where he testified without the aid of counsel. (*Id.* at p. 414.) In commenting to the jury on this disparity in the defendant's testimony, the prosecutor said: "'That was defendant's testimony down before the magistrate, and if it was not the truth it came pretty near being. That was before he had any attorneys to tell him it was not true. When he got attorneys, they said to him, "We can make a fine self-defense case out of this, so you say that you saw the knife; you must tell that all the time, and we will put Oakley . . . on the stand to corroborate you, and we have got a good case."'" (*Id.* at

pp. 414-415.) The Court of Appeal concluded these remarks were not warranted by anything in the record and were improper. (*Id.* at p. 415.)

In *People v. McCracken* (1952) 39 Cal.2d 336 (*McCracken*), the defendant was prosecuted for child stealing, kidnapping and murder of a 10-year-old and claimed the victim died as a result of an accident, which he described at trial in some detail. However, when first asked about the matter, the defendant denied having seen the victim at all. (*Id.* at pp. 338-341.) During argument to the jury, the prosecutor asserted the accident defense did not originate from the mind of the defendant himself, thereby suggesting it had been fabricated by defense counsel. (*Id.* at p. 348.) The high court found this argument to be "highly improper" (*id.* at p. 349), but ultimately concluded it was not prejudicial in light of the evidence against the defendant, defense counsel's objections, and admonitions given by the court (*ibid.*).

Griffin contends the prosecutor in this matter committed the same misconduct illustrated by the foregoing cases, thereby shifting the burden of proof to the defense and appealing to the passions of the jurors. Griffin points out that the prosecutor asserted the defense presented was not "valid" and that defense counsel was unable to say their clients were not guilty. According to Griffin, the prosecutor implied defense counsel was lying and appealed to the jury's passions by asserting defense counsel treated Doe in an undignified manner.

We find no misconduct. The first objection by the defense came after the prosecutor said that simply because there is a trial does not mean the defendants have a valid defense and defense counsel cannot come into court and admit that their clients are guilty. There is nothing improper in the prosecution asserting the defendants have no defense to the charges. This is simply another way of saying they are guilty. There is no shifting of the burden of proof. As for asserting that defense counsel cannot admit their clients are guilty, this is a true statement, in light of the defendants' not guilty pleas. This does not imply, as Griffin apparently assumes, that defense counsel believed their clients are guilty.

The next objection came after the prosecutor denied that Doe had changed her version of the events each time she was interviewed and asserted that Sergeant Nutley, the lead investigator who interviewed Doe a number of times, treated her the same as he would have the Governor, notwithstanding the fact Doe was a prostitute. The basis of the defense objection is not stated on the record. However, to the extent Griffin contends this was improper vouching for a witness, it was not.

The next objection came after the prosecutor said Sergeant Nutley treated Doe in a dignified and professional manner "that she doesn't get in here." Again, the basis for the objection is not stated. However, to the extent the prosecutor was implying that defense counsel did not treat Doe in a dignified manner, there is nothing improper in this. Despite having repeatedly admitted that she was working as a prostitute at the time and

still does, Doe was questioned over and over again by defense counsel about these matters. At one point, one of the defense attorneys inadvertently referred to Doe as Ms. Smith and was corrected by the prosecutor. Defense counsel then spelled the name out as "D-o-u-g-h", to which Doe responded, "That's not funny." The court admonished defense counsel about use of the fictitious "Doe" designation. Doe was also belittled about her claim that she worked as a preschool teacher, since she did not in fact have a teaching credential and was no more than a teacher's aide. She was further questioned about the change in her hairstyle for trial and her use of the word "relevant" in response to a question during direct examination, in light of her lack of legal training. Doe responded, "I'm not stupid, thank you." Thus, the prosecutor was merely responding to the treatment given the victim by defense counsel.

The next objection came after the prosecutor asserted that Doe was "slammed" and belittled. Although the court denied the request for a finding of misconduct, it did sustain the objection to the phrasing of the comment.

The final objection came after the prosecutor stated: "Gosh, it's impossible to understand how anyone who's been a victim of a crime can come into court and even--." Defense counsel objected that this "misstates the burden" and the court overruled the objection. We see no basis for concluding this comment somehow shifted the burden to the defendants.

In *Bain*, the prosecutor asserted the defendant and his counsel had fabricated their defense and further assured the

jury he would not have prosecuted the defendant if he did not believe he was guilty, without explaining the basis for that belief. In *Charlie*, the prosecutor asserted the defendant changed his story between the preliminary hearing, when he was unrepresented, and trial, when he was represented by counsel. The prosecutor asserted defense counsel instructed his client to assert he had seen the victim with a knife. In *McCracken*, the prosecutor asserted that the defendant's accident defense did not originate in his own mind, thereby inferring it had been fabricated by defense counsel.

The present matter does not involve anything even remotely approaching what occurred in those three cases. The prosecutor did no more than assert the defendants had no valid defense and chided defense counsel for having treated the victim roughly. This is not misconduct.

B

Prosecutorial Misconduct--Aiding and Abetting Theory

Griffin contends the prosecutor's arguments incorrectly led the jury to believe it could convict an individual defendant on the basis of group liability rather than individual liability. Griffin points out that an individual aider and abettor can be held liable for a crime only if he or she had the requisite intent and, therefore, an aider and abettor can have a lesser level of culpability than the person who commits the crime. According to Griffin, the prosecutor improperly led the jury to

believe all parties share guilt equally. Griffin misreads the prosecutor's arguments.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.] To be guilty of a crime as an aider and abettor, a person must 'aid[] the [direct] perpetrator by acts or encourage[] him [or her] by words or gestures.' [Citations.] In addition, except under the natural-and-probable-consequences doctrine [citations], which is not implicated on the facts presented here, the person must give such aid or encouragement 'with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,' the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must "know[] the full extent of the [direct] perpetrator's criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime." [Citation.] Thus, to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing--which means that the person guilty of attempted murder as an aider and

abettor must intend to kill. [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

Because an aider and abettor must himself or herself have the requisite mental state to commit the attempted crime, his or her liability may be different from that of the actual perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114.) Of course, the line between an actual perpetrator and an aider and abettor is often blurred. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 402.) One acting in concert with another to commit a crime may be both perpetrator and aider and abettor at the same time.

Griffin contends the prosecutor's arguments were inconsistent with the foregoing principles. The prosecutor began her argument to the jury as follows: "Long before this was ever our case, this was already a gang case. These defendants, independent of one another and together, had made conscious decisions to become 29th Street Crip gangsters or commit crimes with them. If we've learned anything from Detective Bell and Zachary Tyler's testimony as well, we know that the 29th Street Crip--Crip gang members are committed to a lifestyle of crime. They're committed to backing each other's play, whatever it may be. Long before they ever went over to the residence on Belleau Wood Lane, they had already contemplated crimes like these and a host of other crimes that they were willing to commit in the name of the 29th Street Crips."

At this point, the defense objected, but the objection was overruled. The prosecutor continued: "When this home invasion started leading to kidnapping and almost murder, it doesn't matter whose idea it was or whether they discussed it each step of the way. When they car caravanned over to that home intent on robbing and smoking another human being, they acted as one. They acted on intentions that they have harbored on a daily basis for a long time. That's not to say that gang members can't have other lives as well. But when they're out there with their homeboys in the street, they're not Mr. Tyler or Ms. Merritt in a dress shirt and tie or lace and a pretty sweater, they're Smash and Lady Smash with guns and blue bandanas concealing their faces."

Griffin contends the foregoing is an improper argument regarding propensity to commit crimes based solely on gang status. He further contends the argument implies that each defendant harbored the same intent simply because they were gang members.

We find no misconduct in the prosecutor's argument. The jury was properly instructed that aider and abettor liability requires a finding of knowledge of the perpetrator's intent to commit the crime and specific intent to aid and abet the perpetrator in committing the crime. The prosecutor's argument did not say the jury need not find the aider and abettor specifically intended that the perpetrator commit the crime. Rather, the prosecutor argued the jury could infer such intent based in part on gang status. In other words, the fact that

each defendant was a member of a criminal street gang, coupled with the fact they accompanied each other to the crime scene, may be used to infer the requisite intent. Since there is rarely ever direct evidence of intent, this was a proper comment on the evidence, especially in light of the expert testimony presented by the prosecution on gang culture.

Much later, the prosecutor argued: "Everybody aided and abetted in this offense [attempted murder]. It is--the law recognizes under circumstances like ours it's--it's as if everybody is the shooter, 'cause everyone shares responsibility for the attempted murder."

Griffin contends this argument contradicts the principle that each party's culpability must be judged individually. Again, we disagree. The prosecutor was merely asserting that the evidence showed each of the defendants was an aider and abettor in the crime of attempted murder. This is no more problematic than if the prosecutor had said the evidence showed Griffin fired at Doe with the intent to kill her. The prosecutor's statement that it is as if each defendant was the shooter is not a misstatement of the law. Once it is established that a particular defendant was an aider and abettor in the crime of attempted murder, the law treats that person as if he or she was the perpetrator. However, it must first be established that the person was an aider and abettor.

Griffin next challenges the following argument: "[The] State of California's also gonna ask that you find that this attempted murder was done with premeditation and deliberation.

Premeditation and deliberation. You're gonna hear the word used--what's called a principal, that a principal--it's just a legal word. A principal is someone who's responsible for a crime. So it's either a person who's directly responsible like the shooter, or it's a person who aids and abets the attempted murder. Both people are principals in the crime, both people share responsibility for it. [¶] So you're going to hear the word, a principal, that's what it means. *And you have to find premeditation and deliberation for everybody*." (Italics added.)

Griffin contends the prosecutor was wrong to say the jury had to find premeditation and deliberation for everybody. According to Griffin, such finding may be different as to each defendant.

Griffin misreads the quoted statement. The prosecutor was not saying the jury was required to make a finding that all defendants premeditated and deliberated the attempted murder. In other words, the prosecutor did not say that if one premeditated and deliberated, they all did. Rather, the prosecutor was saying the jury must make a finding on the issue of premeditation and deliberation as to each defendant. Those findings may be different.

Finally, Griffin takes issue with the following statement by the prosecutor during rebuttal: "And you'll notice we talked in great specificity, also, too, about each person's individual role and in multiple defendant cases involved where people choose to aid and abet one another to commit these types of crimes, especially in a gang context and with this gang

mentality, you have to consider all of that in conjunction with the rest of the evidence in finding each person's responsibility."

Griffin again asserts the prosecutor was referring here to "'group guilt'" for gang members. We disagree. The cited passage says nothing more than that gang status may be taken into consideration in deciding whether any one defendant is responsible for a particular crime. This is not contrary to the law.

C

Sufficiency of the Evidence of Conspiracy

Griffin contends there is insufficient evidence he entered into a conspiracy to murder Doe. Griffin acknowledges there was an agreement among the defendants to commit a robbery but "the co-defendants were not of a single mind about the rest of the evening." Doe testified that Griffin, unlike the others, was quieter and more polite to her. Thus, he argues, "one cannot infer from his behavior after the robbery that he necessarily was in agreement with the other co-defendants for the rest of the evening." In fact, Doe testified that when they left the home of A.S., Tyler and Griffin told her they were taking her home. She also told Detective Nutley that Tyler and Griffin were opposed to hurting or killing her. Griffin further points out that Doe's testimony was uncertain as to who actually shot at her. According to Griffin, while the jury could have found he joined at the last minute in the attempt to murder Doe, "the

evidence does not support the inference beyond a reasonable doubt that he joined in an agreement to kill beforehand."

"A conspiracy is an agreement between two or more people to commit a public offense." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464.) It requires not only a specific intent to agree to commit a public offense but a further specific intent to commit the offense itself. (*People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 20.) It also requires proof of an overt act committed by one or more of the conspirators in furtherance of the object of the agreement. (*Ibid.*)

"The agreement or the unlawful design of [the] conspiracy may be proved by circumstantial evidence without the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy." (*People v. Superior Court (Quinteros)*, *supra*, 13 Cal.App.4th at p. 20.) "While mere association does not prove a criminal conspiracy [citation], common gang membership may be part of circumstantial evidence supporting the inference of a conspiracy. [Citation.] The circumstances from which a conspiratorial agreement may be inferred include 'the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties [and] the interests of the alleged conspirators . . . .' [Citation.]" (*Id.* at pp. 20-21.)

Here, in addition to a common gang membership among the alleged conspirators, the evidence showed defendants got

together to discuss what was to be done with Doe. Although there may have been disagreement among them, eventually they embarked on a course of action that involved taking Doe to a field, releasing her and then taking shots at her as she attempted to flee. From this evidence alone, a reasonable jury could infer defendants agreed to kill Doe before they ever left the home of A.S. Hence, substantial evidence supports Griffin's conviction for conspiracy to commit murder.

D

Court Facilities Fee

Government Code section 70373 provides in relevant part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony . . . ." (*Id.* subd. (a)(1).) This provision did not go into effect until January 1, 2009 (Stats. 2008, ch. 311, § 6.5), after the crimes in this matter were committed.

Griffin contends imposition of the foregoing fee under the circumstances of this case is not authorized. However, in *People v. Castillo* (2010) 182 Cal.App.4th 1410, we concluded Government Code section 70373 is not punitive and therefore does not fall within the scope of ex post facto principles. (*Id.* at p. 1413.) We further concluded that while the provision should be applied prospectively, the operative event is the conviction, not the crime. Hence, the provision is applicable to any

conviction occurring after the effective date of the legislation. (*Id.* at pp. 1414-1415.) Griffin was convicted after the effective date of Government Code section 70373. Therefore, the trial court properly imposed the court facilities assessment.

E

Abstract of Judgment

Griffin contends the abstract of judgment incorrectly identifies the count in box 6.a. for which he received an unstayed, indeterminate term of 15 years to life, as count eight rather than count three. The People concede the abstract should be corrected to reflect count three rather than count eight. We shall direct that the abstract be corrected.

IV

Zachary Tyler

Tyler raises the following contentions on appeal: (1) the gang enhancements on counts four and five must be stricken because there is insufficient evidence the sex crimes were gang-related; (2) section 12022.53 violates equal protection and due process; (3) the trial court improperly instructed that motive is irrelevant to the gang offense and gang enhancements; and (4) the gang enhancement on the burglary count must be reduced because the burglary was not a violent felony. We have previously concluded the gang enhancement on the burglary count must be reduced to five years. We reject Tyler's remaining contentions.

A

Gang Enhancements on Sex Offenses

Tyler contends there is insufficient evidence to support the gang enhancements on the two sex offenses. He argues there is no evidence those offenses, as distinct from the others, were committed for the benefit of the gang or that he had the specific intent to benefit the gang. We disagree.

Section 186.22, subdivision (b)(1), provides: "[A]ny person who is convicted of a felony 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished" by a term of two, five or 10 years, depending on the nature of the offense. Application of this enhancement requires proof that (1) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, and (2) with the specific intent to promote, further, or assist any criminal conduct by members of the gang. (*People v. Ramon* (2009) 175 Cal.App.4th 843, 849.)

Regarding the first element, Tyler argues the lone fact that the participants were gang members or associates is not enough to establish that the offenses were committed for the benefit of the gang. Nor is it sufficient that two or more gang

members acted in concert to commit the crimes, inasmuch as acting in concert was an element of the offense. Furthermore, Tyler argues, the fact he and Merritt acted together to commit the sex offenses is more a consequence of their family-like relationship than their gang membership.

Tyler further contends there is insufficient evidence on the second element of the gang enhancement--that he acted with the specific intent to benefit the gang when he committed the sex offenses. Tyler asserts his only motivations for committing those crimes were personal pleasure and his business interest as a pimp.

In *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*), the California Supreme Court considered the sufficiency of the evidence to support street gang enhancements for multiple sex offenses committed in concert. In *Albillar*, three members of the Southside Chiques gang took turns raping the victim while the others either assisted in holding her down or stood nearby. (*Id.* at pp. 52-53.) They were subsequently convicted of forcible rape in concert, forcible sexual penetration in concert, and active participation in a criminal street gang. They were also found to have committed the sex offenses for the benefit of a criminal street gang. (*Id.* at p. 50.) On appeal, the defendants challenged the sufficiency of the evidence to support the substantive gang crime and the enhancements. (*Id.* at p. 51.)

On the defendants' challenge to gang enhancements, the high court acknowledged that the offenses must be gang-related, and

not all crimes committed by gang members are related to the gang. However, in this instance, the court found the offenses were gang-related both because they were committed in association with the gang and because they were committed for the benefit of the gang. (*Albillar*, *supra*, 51 Cal.4th at p. 60.) According to the court: "The record supported a finding that [the] defendants relied on their common gang membership and the apparatus of the gang in committing the sex offenses against [the victim]." (*Ibid.*) In particular, the court cited expert testimony about how gang members earn respect and status by committing crimes with other members and gang members choose to commit crimes together in order to increase their chances of success and to provide training for younger members. (*Id.* at pp. 60-61.) The court concluded the conduct of the defendants, where each participant assisted the others without a word being spoken, and each could count on the silence of the others and group intimidation of the victim, "exceeded that which was necessary to establish that the offenses were committed in concert." (*Id.* at p. 61.) The court elaborated: "Defendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together. They relied on the gang's internal code to ensure that none of them would cooperate with the police and on the gang's reputation to ensure that the victim did not contact the police." (*Id.* at pp. 61-62.)

Regarding the defendants' argument that they were related to each other and lived together and "'it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang,'" the court noted the record contained no evidence of the significance of the family ties to the criminal activity. (*Albillar*, *supra*, 51 Cal.4th at p. 62.) The court further noted that the defendants' relationships to the gang were more than superficial. They all had gang tattoos and the apartment they shared was saturated with gang paraphernalia. (*Ibid.*)

The high court also found sufficient evidence that the crimes were committed to benefit the gang. (*Albillar*, *supra*, 51 Cal.4th at p. 63.) According to the gang expert: "'When three gang members go out and commit a violent brutal attack on a victim, that's elevating their individual status, and they're receiving a benefit. They're putting notches in their reputation. When these members are doing that, the overall entity benefits and strengthens as a result of it.' Reports of such conduct 'rais[e] the[] level of fear and intimidation in the community.'" (*Ibid.*) The court explained: "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 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*Ibid.*)

On the second prong of the section 186.22, subdivision (b), analysis, the high court concluded the scienter required is "the

specific intent to promote, further, or assist in *any* criminal conduct by gang members--including the current offenses--and not merely *other* criminal conduct by gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 65.) The court further concluded the criminal conduct the defendant sought to promote, further or assist, if other than the current offenses, need not necessarily be gang-related. (*Id.* at p. 67.) Finally, the court indicated that "if substantial evidence establishes that 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; see also *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199.) In other words, if the defendant intentionally committed the offense, and did so with known gang members, the jury may infer the requisite specific intent for the gang enhancement.

In the present matter, Detective Brian Bell testified as the prosecution's gang expert. Bell testified about certain photographs depicting Tyler and Merritt together flashing signs for the 29th Street Crips and explained that Merritt's gang name "Lady Smash" can signal a dating or mentoring relationship with Tyler, whose gang name is "Smash." Bell testified about the concept of respect in gang culture, that all gang members strive for respect and respect can be gained by possessing guns, committing violent crimes and intimidating members of the community. Such activities heighten the level of the member in

the gang and benefit the gang itself. According to Bell: "If a gang member commits a crime, the more violent the crime is, the more respect they gain by other rival gang members or members of the community fear them more. [¶] And by committing more violent crimes, it makes people less likely to want to--pretty much let's them get away with whatever they want to do by knowing how violent they can be. [¶] And in that way, it gains respect for them."

Detective Bell also explained the concept of disrespect in gang culture. According to Bell, one way to disrespect a gang is to say something derogatory about the gang, its members or the clothing they wear. In the event of such disrespect, the gang members are required to "act upon it, to retaliate, whether it be to fight or to shoot or to stab the rival gang or whoever disrespected them to let them know that that is inappropriate and not going to be tolerated." Bell explained that it is important for gang members to show their willingness to commit violent crimes in front of other gang members in order to demonstrate what they are willing to do for the gang. Bell further explained that a comment like that made to the group by Knorr, where she told them Nate had said, "'Fuck Smash and them. They're no fucking 29th Street Garden Blocc Crips," is like calling them out and requires them to prove "they're these bad, violent 29th Street Crip gang members."

Bell described the 29th Street Crips as small in numbers and without a hierarchical structure. He listed the crimes they commit as assault with a deadly weapon, robbery, murder,

attempted murder, drug trafficking, shootings, witness intimidation, kidnapping, forced sex crimes, and illegal firearm possession.

Detective Bell further opined that the actions of the defendants in going over to Nate's residence in response to what Knorr told them Nate had said, carrying guns, wearing bandanas, entering through a window, ransacking the home, and stealing property benefited the gang and was done in association with the gang. Bell also opined the kidnapping of Doe was for the benefit of, at the direction of or in association with the gang. Bell explained that holding a gun to Doe's head, threatening to kill and sexually assault her, telling her this is the gang life, and using gang lingo benefited the gang in making people fear them and raising their stature in the community.

Bell further testified that the actions of the defendants in moving Doe to the home of A.S., putting her in a room, openly discussing sexually assaulting her, and forcing her to orally copulate Tyler and L.M. were done at the direction of or in association with the gang. Bell explained: "Well, again, the association factor, you have these gang members who are together committing these crimes. [¶] In the direction of, I would consider Lashea Merritt directing [L.M.] and the victim to engage in that act, would be at the direction of her being a gang member." Finally, Bell opined that the shooting of Doe was at the direction of or in association with the gang.

As in *Albillar*, the foregoing expert testimony, coupled with the evidence regarding the commission of the crimes

themselves, was sufficient to establish the two oral copulation offenses were committed for the benefit of the 29th Street Crips. Those crimes were part of the crime spree that started with the burglary of Nate's residence in retaliation for his alleged disrespect of the gang and continued through the robbery and kidnapping of Doe, the sexual assaults and finally the attempted murder. The sex offenses did not occur in isolation. Doe was told this was the gang life and she was with the gang now. She was threatened with forced sex and death. Tyler told her he would take care of her and she could work for him. At the home of A.S., Doe was taken to a bedroom and put on a bed and told they were going to "run a train" on her and force her to give them oral sex. She was eventually forced to perform oral sex on L.M. and then Tyler. In our view, this was more than what was necessary to establish that the crimes were committed in concert.

As in *Albillar*, there is no evidence to suggest Tyler and Merritt acted together to commit the sex offenses because of their purported family-like relationship rather than gang membership. The evidence showed they were both heavily invested in the gang and had more of a mentoring relationship than a family relationship.

Tyler argues the gang expert's opinion that the sex offenses were gang-related is belied by the fact the other defendants were not charged with these crimes despite their presence at the time. However, the fact that other defendants could have been, but were not, charged with the same offenses

does not detract from Tyler's culpability. Tyler further argues the gang expert failed to explain how committing the sex offenses benefitted the gang. However, this overlooks the expert's recitation of the crimes 29th Street Crips commit, which included forced sex offenses, and his explanation that committing crimes in general benefits the gang.

As for Tyler's argument that there is insufficient evidence he had the specific intent to benefit the gang, *Albillar* instructs that such intent may be inferred from the fact the defendant intentionally committed the offenses and did so with known members of a gang. (*Albillar*, *supra*, 51 Cal.4th at p. 68.) We find substantial evidence to support the gang enhancements on the two oral copulation counts.

B

Constitutionality of Section 12022.53

Section 12022.53 provides for extra punishment in the event a firearm is used in connection with an offense listed in subdivision (a), which includes attempted murder (§ 12022.53, subd. (a)(1) and (a)(18)). As explained earlier, subdivision (b) requires an additional punishment of 10 years for anyone who personally uses a firearm; subdivision (c) requires an additional punishment of 20 years for anyone who personally discharges a firearm; and subdivision (d) requires an additional punishment of 25 years to life for anyone who personally discharges a firearm and causes great bodily injury. However, under subdivision (e)(1), the requirement of *personal* use of the

firearm is eliminated where the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b). For such crime, it is sufficient if *any* principal in the offense used the firearm.

Tyler contends section 12022.53, subdivision (e)(1), violates equal protection and due process by treating aiders and abettors of gang offenses differently from aiders and abettors of nongang offenses. Therefore, he argues, the gun use enhancements on counts seven and eight must be stricken.

Similar challenges to section 12022.53 were rejected by the Court of Appeal in *People v. Gonzales* (2001) 87 Cal.App.4th 1 (*Gonzales*) and *People v. Hernandez* (2005) 134 Cal.App.4th 474 (*Hernandez*). The first requirement of an equal protection claim "'is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.'" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) In *Gonzales*, the court concluded the defendants failed to make the threshold showing that aiders and abettors of crimes committed for the benefit of a criminal street gang are similarly situated to aiders and abettors of nongang crimes. (*Gonzales*, at p. 13.) In *Hernandez*, the court rejected the defendant's equal protection claim premised on the differing treatment of those who aid and abet gang crimes from those who aid and abet crimes for the benefit of other dangerous groups, such as drug cartels, white supremacists or terrorist organizations. (*Hernandez*, at p. 481.) In doing so, the *Hernandez* court applied the rational basis test to the statute

and concluded the Legislature could rationally choose to address the problem presented by criminal street gangs without also going after all other dangerous groups. (*Id.* at p. 482.)

Defendant contends the rational basis test is not appropriate where his fundamental liberty interests are implicated. However, this same argument was rejected in *Hernandez*. According to the court: "Where as here the question is not whether to deprive Hernandez of his liberty but for how long, we believe rational basis review, not strict scrutiny, is the appropriate test to resolve an equal protection challenge." (*Hernandez*, *supra*, 134 Cal.App.4th at p. 483.) A defendant "does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives." (*People v. Flores* (1986) 178 Cal.App.3d 74, 88.)

We agree with *Gonzales* and *Hernandez* and reject Tyler's equal protection challenge. Those who aid and abet gang crimes are not similarly situated to those who aid and abet other crimes, and there is a rational basis for treating those who aid and abet gang crimes more severely than others.

We also reject Tyler's due process challenge. Tyler argues section 12022.53, subdivision (e), subjects an aider and abettor convicted of first degree murder as a natural and probable consequence of brandishing a firearm in a gang-related case to harsher punishment than a similar defendant in a nongang case. He further argues the statute permits such harsher treatment without a finding that the defendant intended to commit the homicide. However, Tyler posits a hypothetical situation that

does not exist in this matter. Tyler was not convicted based on a natural and probable consequences theory. Thus, he has no standing to raise such a claim. Furthermore, Tyler's argument is more in the nature of an equal protection challenge, which we have already rejected.

Tyler contends he was sentenced under section 12022.53, subdivision (e)(1), "without a jury finding that he shared the shooter's intent" as required by due process. However, as explained earlier, this is not true. In order for Tyler to have been found guilty of attempted murder on an aider and abettor theory, it was necessary for the jury to conclude he had the requisite specific intent to murder. (*People v. Lee*, *supra*, 31 Cal.4th at pp. 623-624.)

C

Motive Instruction

The jury was instructed on the elements of the substantive gang offense and the gang enhancements, including specific intent to promote or assist the gang. The jury was also instructed with CALCRIM No. 370 as follows: "The People are not required to prove that a defendant had a motive to commit any of the crimes charged. [¶] In reaching your verdict, you may, however, consider whether a defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

Tyler contends the trial court erred in failing to inform the jury the foregoing motive instruction did not apply to the gang participation offense or the gang enhancements. Tyler argues that, because motive relates to the reason a defendant commits a crime, it is a necessary part of the gang charges.

Tyler relies on *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*), a case involving charges of child annoyance under section 647.6, where the jury was instructed that the conduct of the defendant must have been "'motivated by an unnatural or abnormal sexual interest in [the victim]'" but further instructed that motive was not an element of the crime and need not be proven. (*Id.* at p. 1125.) This court concluded the trial court erred in providing these conflicting instructions on the mental state element of the offense and reversed the defendant's conviction. (*Ibid.*)

In so concluding, we noted that motive is not generally an element of a criminal offense, but that "section 647.6 is a strange beast." (*Maurer*, *supra*, 32 Cal.App.4th at p. 1126.) We cited prior decisions which determined that, while no specific intent is required for the offense, the acts forbidden are those *motivated* by an unnatural or abnormal sexual interest in children. (See *In re Gladys R.* (1970) 1 Cal.3d 855, 867-869; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901.) Thus, as construed, motive is an element of the offense. Hence, instructing the jury that motive need not be proven was error. (*Maurer*, *supra*, 32 Cal.App.4th at p. 1127.)

Maurer is clearly inapposite to the present matter. Section 186.22, subdivision (a), criminalizes active participation in a criminal street gang with *knowledge* that its members engage in a pattern of criminal gang activity and *willful* promotion of any felonious conduct of the members. Section 186.22, subdivision (b), mandates an enhancement for any conviction of a crime "committed for the benefit of, at the direction of, or in association with a criminal street gang, with the *specific intent* to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1), italics added.)

In *People v. Fuentes* (2009) 171 Cal.App.4th 1133 (*Fuentes*), the defendant was convicted of several offenses stemming from two gang-related drive-by shootings. On appeal, the defendant argued CALCRIM No. 370 conflicted with the instructions on the substantive offense and enhancements relating to participation in a criminal street gang. (*Id.* at p. 1139.) The Court of Appeal disagreed, explaining: "An intent to further criminal gang activity is no more a 'motive' in legal terms than is any other specific intent. We do not call a premeditated murderer's intent to kill a 'motive,' though his action is motivated by a desire to cause the victim's death. Combined, the instructions here told the jury the prosecution must prove that Fuentes intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it. . . ." (*Id.* at pp. 1139-1140.)

The court further explained: "If Fuentes's argument has a superficial attractiveness, it is because of the commonsense concept of a motive. Any reason for doing something can rightly be called a motive in common language, including--but not limited to--reasons that stand behind other reasons. For example, we could say that when A shot B, A was motivated by a wish to kill B, which in turn was motivated by a desire to receive an inheritance, which in turn was motivated by a plan to pay off a debt, which in turn was motivated by a plan to avoid the wrath of a creditor. That is why there is some plausibility in saying the intent to further gang activity is a motive for committing a murder: A wish to kill the victim was a reason for the shooting, and a wish to further gang activity stood behind that reason. The jury instructions given here, however, were well adapted to cope with the situation. By listing the various 'intents' the prosecution was required to prove (the intent to kill, the intent to further gang activity), while also saying the prosecution did not have to prove a motive, the instructions told the jury where to cut off the chain of reasons. . . ." (*Fuentes*, *supra*, 171 Cal.App.4th at p. 1140.)

We agree with *Fuentes*. The jury here was instructed on the intent necessary for the gang participation offense and the gang enhancements. CALCRIM No. 370, informing the jury that motive need not be proven, did not conflict with those instructions. Tyler essentially seeks to equate motive with intent. However, to adopt such a construction would mean that motive is an element of all the crimes charged in this matter, not just the

gang offense and gang enhancements, and CALCRIM No. 370 should not have been given at all. Not even Tyler argues this. We conclude there was no error in giving CALCRIM No. 370 without the restrictive language urged by Tyler.

D

Gang Enhancement for Burglary

Tyler contends the term of 10 years imposed for the gang enhancement on the burglary count must be reduced to five years, because the offense was charged as a serious felony rather than a violent felony and the jury was not asked to determine if there was anyone present in the residence at the time of the burglary, as required for a violent felony.

We have already addressed this issue and agree with Tyler. The 10-year enhancement must be reduced to five.

V

Jordan Kidd

Jordan Kidd raises the following arguments on appeal: (1) there is insufficient evidence to support the substantive gang offense and gang enhancements; (2) the prosecutor committed misconduct during argument; and (3) there was sentencing error regarding the enhancement on count three. We agree with the third contention and shall direct that the abstract of judgment be corrected. We also conclude Kidd was not properly sentenced on the burglary charge and shall remand for resentencing.

A

Sufficiency of the Evidence--Gang Charges

Kidd contends the evidence established that several members of the 29th Street Crips and one member of the Valley Hi Crips committed the various crimes together. However, he argues, it "fails to establish the critical requirement that the charged crimes were committed for the benefit [of], at the direction of, or in association with a criminal street gang." He further argues the evidence fails to establish the requisite specific intent that the crimes were committed to advance criminal conduct by gang members. Thus, he argues, the substantive gang offense and gang enhancements must be reversed.

Kidd's argument is premised on an inaccurate and self-serving reading of the evidence presented at trial. He asserts "[t]here was evidence that Kim Knorr and Tyler may have been motivated to engage in the charged offenses to avenge personal affronts to them." According to Kidd, Knorr was offended by her abrupt eviction by Nate and told Tyler that Nate "had made insulting comments about Tyler." Kidd asserts Tyler responded by saying the group should rob and harm Nate, but there is no evidence any person in a position of authority with the gang ordered that the offenses be committed.

The evidence does not bear this out. B.K. provided testimony as to what occurred when Knorr arrived after being dropped off by Doe. B.K. testified that Knorr was upset with Nate because he told her she had to come and get her things.

B.K. was then asked: "Okay. Did she say anything in front of these--this group about Nate insulting the Crips?" She responded in the affirmative. B.K. then testified that Knorr said: "Um, fuck them--fuck Smash and them. They're not no 29th Street Garden Block Crips." B.K. testified this was said in front of all the defendants. At that point, according to B.K., "[t]hey all jumped up and, like, started talkin' shit to each other about--about it." Tyler said, "fuck that nigga, let's go smoke him." Tyler also said they should rob Nate. At that point, Tyler, Kidd, Griffin, Knorr, Merritt and L.M. departed for Nate's residence.

Contrary to Kidd's assertions, the foregoing evidence shows Knorr told the group that Nate had disrespected *the gang*, not Tyler alone. And it was not just Tyler who reacted to it. When Tyler said they should go rob and kill Nate, he was acting as the spokesman for the group, not acting out of some personal vendetta.

Kidd asserts the evidence indicates Doe did not mention any gang talk by the perpetrators in her early interviews with police. He further asserts that in his own interview with police, he did not mention any gang motivation for the crimes. Finally, Kidd asserts the prosecution's gang expert indicated there was no formal structure to the 29th Street Crips, and the gang never refers to itself as the "mob," as Tyler allegedly did.

None of the foregoing detracts from the other evidence presented at trial that demonstrated the defendants were

motivated in their course of conduct that evening by a perceived affront to the gang. The gang was disrespected and it retaliated. Regardless of what Doe may have said to the investigators shortly after the event, she testified at trial that Tyler and the others made repeated comments about being the mob and that she was with the mob now. The evidence showed the group conferred about their intended course of action during the crime spree. They went to a gang apartment complex during their travels and took Doe to a gang hangout.

Kidd argues "[t]here was no evidence that gang leadership existed, let alone that gang leadership knew of and approved of the charged crimes in advance of their commission." However, this is not a prosecution of the gang as such, but of five individual gang members or associates. Their actions alone can constitute gang activity whether or not gang hierarchy is aware of what they are doing.

Finally, Kidd challenges the expert testimony of Detective Bell as providing only generalizations about gang conduct and nothing with respect to the 29th Street Crips and their gang-related activities. We disagree. As explained in more detail earlier, Detective Bell discussed crimes committed by various members of the 29th Street Crips, the types of crimes committed by this particular gang, and the other gang-related activities of the members. Based on this information and the circumstances surrounding the commission of the offenses in this matter, he opined that those offenses were gang-related. There was nothing more required.

Kidd also contends there is insufficient evidence that the offenses were committed with the specific intent to promote, further or assist in criminal conduct by gang members. Kidd argues there is no evidence he intended to commit the charged offenses in order to further *other* criminal activity by gang members or that the offenses were part of a gang operation rather than "just crimes committed by gang members acting together for their own personal ends."

As explained earlier, the California Supreme Court in *Albillar* concluded section 186.22, subdivision (b), does not require that the charged offenses be committed for the purpose of furthering *other* criminal activity of the gang. It is sufficient if the defendant acted to further the charged gang offenses. (*Albillar*, *supra*, 51 Cal.4th at pp. 64-65.) The court further determined that, "if substantial evidence establishes that 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.) In this instance, it is undisputed Kidd committed the various offenses with known gang members. Hence, the jury may reasonably have inferred he had the specific intent to promote, further or assist the gang.

Substantial evidence supports the substantive gang offense and the gang enhancements.

B

Prosecutorial Misconduct

Kidd challenges a number of comments made by the prosecutor during argument to the jury which, he claims, amounted to misconduct. However, Kidd failed to object to any such comments and therefore failed to give the trial court an opportunity to take any necessary corrective action.

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) However, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."' [Citations.]" (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821.)

Kidd contends the trial court had a sua sponte duty to cure the prosecutor's improper arguments. However, he cites no authority for this proposition. A point raised in an appellate brief without argument or legal support "is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.)

Kidd next contends an objection and admonition could not have cured the situation presented by the prosecutor's arguments. However, beyond merely asserting the alleged misconduct in this instance was "incurable," Kidd again provides no argument or support for this contention.

Kidd contends this court has discretion to review his misconduct claims. He further contends that, at any rate, the failure of his counsel to object amounted to ineffective assistance. According to Kidd, "there can be no plausible rational tactical purpose for trial counsel not to object to the repeated, egregious instances of prosecutorial misconduct discussed in this argument."

Because we cannot determine Kidd's ineffective assistance claim without considering the merits of his misconduct claims, we shall proceed to address those claims.

Kidd first contends the prosecutor improperly argued a theory of vicarious liability based on gang membership alone. He cites the following argument:

"[L]ong before this ever became our case, this was already a gang case. These defendants, independent of one another and together, had made the conscious decision to become 29th Street Crip gangsters or commit crimes with them. [¶] If we learned anything from Detective Bell, as well as from Zachary Tyler's testimony, we know that the 29th Street Crip gang members are committed to a lifestyle of crime and that they're committed to backing each other's play, whatever it may be. [¶] Long before they ever went to that Belleau Wood Lane address, they'd already

contemplated this type of crime and a host of other types of crimes that they were willing to commit in the name of the 29th Street Crips."

"Gang members like Jordan Kidd already know beforehand what they're supposed to do. They don't even need to talk about it."

"There is no passive gang member present when a gang acts together. Each person plays a role and they create strength through their numbers working as a team.

"There's no such thing as a passive rider in a gang case. Each person shared the same motivation in this car as those back home to silence this witness. Each person in this car knows they're not taking [Doe] home. Each person can see that she's put under a blanket when they leave Mama Solo's house. That's not a friendly drive home. Each person knows they took a small diversion to evade the police. Each person knows they got the guns that they need. Each person can see that they're headed to a dark, secluded field. Violence is no secret in this crowd."

"And we know based on our evidence in this case, including the expert testimony, that there is absolutely no way, no way, that a gang member like Mr. Kidd would go into a potentially explosive setting like entering an occupied residence without knowing who is strapped or being strapped yourself. We know from expert testimony, and the photographs, and seeing how guns are passed around in our case that this is part of their pride and part of the tools of the trade in the gang world."

Kidd argues liability cannot be based on gang membership alone. To hold otherwise, he argues, would lead to the absurd

result that any gang member could be held liable for any other gang member's act predicated on the common purpose of fighting the enemy. He further argues the prosecutor's comments contravened due process and rendered the trial fundamentally unfair.

We find nothing inappropriate in the foregoing arguments. Those arguments merely pointed out the backdrop for the alleged crimes. These were not five individuals thrown together by happenstance who acted together on a whim. These were gang members who were presented with an instance of disrespect for their gang and immediately took action in retaliation. The jury here was properly instructed on the elements of the individual crimes, including the scienter requirements. This is not a case where one gang member is being held liable for the actions of another done without the member's assistance. The five defendants acted together throughout the evening. As the California Supreme Court explained in *Albillar*, intent to promote, further or assist criminal conduct of other gang members may be inferred simply from the fact the members intentionally committed the offenses together. (*Albillar*, *supra*, 51 Cal.4th at 68.)

Kidd next contends the prosecutor made arguments based on facts not in the evidence. He cites the following exchange during the testimony of the prosecution's gang expert:

"Q [by prosecutor] And in your opinion, when a group of people who are gang members and/or associates gather together,

gather together for the purpose of committing a crime, is anybody simply a bystander?

"MS. HUEY: Objection.

"MR. DORFMAN: That's--

"MR. MAHLE: Vague.

"THE COURT: All right. Sustained."

Kidd argues that, despite the court's ruling sustaining the objection, the prosecutor argued on the basis of the insinuation contained in her question that all gang members present when the crime is committed are guilty. He cites many of the same statements quoted above in connection with his argument about group liability.

We again find no misconduct. First, Kidd takes the foregoing exchange out of context. The prosecutor's question came right after the witness explained the concept of "backup" in gang culture. Detective Bell testified: "For backup, it would be if one of your gang individuals or friends or buddies get involved in some type of fight or something like that and you were there present, you would be expected to act upon and to join him in assisting with the fight, as opposed to just standing back and watching and being a bystander." The prosecutor was simply trying to get the expert to testify that, where gang crimes are committed, all gang members present are involved.

Furthermore, the prosecutor's argument thereafter was not based on the insinuation in the question but on other evidence presented regarding gang culture, the circumstances surrounding

how these crimes went down, and the reasonable inference that intent to assist the gang follows from the fact the individual members actively participated.

Kidd next contends the prosecutor improperly urged the jury to convict the defendants based on broad social policy considerations rather than the facts of the case. He cites the following arguments:

"These crimes affect us all as a community. They denigrate the community. They have collateral victims, people like Mr. [D.] and Mr. [W.] It doesn't matter whether the victim is a gang member or a grandmother, a pimp or a prostitute. And as it comes down to it, as far as . . . Doe being alone in this case in the evidence, she's not alone."

"Violent crime not only shatters victims and their sense of security, but they shatter our communities. And in the final analysis it doesn't matter whether the victim in this case is a prostitute or somebody's grandmother, this case is about us enforcing the rule of law in our society. We cannot . . . allow lawlessness and tyranny by gang members or any other violent criminals."

The foregoing arguments were part of a larger argument attempting to address one of the problems faced by the prosecution in this case--the fact that the victim was a prostitute, i.e., a person not trustworthy because she herself committed crimes. The prosecutor was merely reminding the jury that a crime against anyone in the community is a crime against the community itself. This was not an appeal to convict based

on a concern for gang violence in general but an appeal to look beyond the avocation of the victim and to treat her just like anyone else, as the law requires. There was nothing improper in this.

Kidd next contends the prosecutor improperly and unfairly denigrated defense counsel. He cites the following arguments:

"We cannot allow these red herrings to divert our attention here. It's kind of infur--concerning when you hear words like Lavish D., thrown out in this trial, or Stick-up Starz thrown out in this trial. These are words from lawyers, and when a lawyer asks a question, it's like saying have you stopped beating your wife. We can't sit here and assume that the other party beats his wife. It's the oldest trick in the book. I can throw a question out there and that throws something out there as if for you it has become evidence. Don't fall for that, don't fall for that. [¶] This whole notion of Lavish D., and Stick-up Starz, and everything else has nothing to do with our case."

"You've also been asked to speculate where's Nate, where's Nate, as if somehow that relates to a failure of proof or something in this case. And I wanted to comment upon that briefly as well, because that's another red herring."

"Don't fall into that trap to divert you from focusing on the evidence of what we did hear in this case."

The red herrings to which the prosecutor was referring was evidence about Doe's relationship with a different gang and a particular gang member and the absence of any testimony from

Nate, the victim of the burglary. During his argument, Kidd's attorney, Mr. Dorfman, asserted that Doe mentioned Lavish D. in an interview with police. He then said: "Well, now, what do we know about Lavish D.? The gang expert tells us about Lavish D. Lavish D., is a gangster pimp. He is the head of the Stick-up Starz, the Stick-up Starz. . . . Do you remember in the revealing photos of [Doe], she has a tattooed star on her, huh? All of a sudden now she's not just a goody school teacher that goes to work in December for Nate, the pimp. She's switching jobs, switching from one pimp to another. That's where the Lavish D., comes in. She's just job improving."

Regarding Nate, Dorfman argued: "[T]here's a missing link in this case, isn't there? There's a person whose name has been mentioned, whose house has been burglarized, but who we've never seen in this courtroom, have we, and that's Nate. And Nate is the catalyst in this case and I'm going to show it to you, what it's all about.

"You know, you ever watch these animal shows where they show like a--like an eagle with great--he has a nest and then maybe he has two or three eaglets in there and each--each parent is bringing back things to feed them. And apparently it's a usual thing that the toughest of all the eaglets eventually gets rid of other two, and the parents say nothing about it, they just continue to feed the survivor one. They kick them out of the nest. Have you ever seen that before? I've seen it. And what you've got here is you've got a situation where we've got this Nate and, God, I've seen it, you've got to visualize how

Nate is the catalyst. He is the force that brings this all about. I imagine that he has got to be an Adonis. I'm trying to visualize him. Because catch this: In the beginning now we know that there are at least three girls he's got working there. We've got Mia. Remember the story of Mia? Mia's knocking on the door trying to get back in and not allowed in. And then you got Kim who's kicked out and dumped out on the highway leaving only the surviving eaglet."

Dorfman went on to argue that Doe implicated Knorr in this matter in order to get rid of her and also placed Knorr's boyfriend, Kidd, in the car with the others in order to make the story more plausible.

Of course, the problem with this argument is the testimony of B.K., who confirmed Doe's account of the evening and placed Knorr and Kidd in the group of perpetrators.

Nevertheless, in light of the defense strategy, the prosecutor cannot be faulted for explaining to the jury that evidence regarding Lavish D. and the Stick-up Starz and the absence of Nate from the witness stand are not relevant to the issues presented in this matter.

As explained earlier, a prosecutor has wide latitude in describing the deficiencies in defense counsel's tactics. (*People v. Bemore*, *supra*, 22 Cal.4th at p. 846.) An argument that accuses the defense of attempting to confuse the issues and urges the jury to focus on the relevant evidence is not improper. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1302,

fn. 47.) The prosecutor here did no more than that and, hence, there was no misconduct.

Kidd next contends the prosecutor improperly vouched for the veracity of two key witnesses, Doe and Detective Bell. He cites the following arguments:

"We were fortunate in this case to hear from Detective Brian Bell, both for his generalized knowledge about gangs and the culture, but for his specialized knowledge about our community. This is a man who works with violent crime cases on almost a daily basis. He has experience in the Problem-Oriented Policing that focused on high crime areas and neighborhoods where gangs are terrorizing our community. He works with other officers to gather intelligence and information and shares that among law enforcement professionals. He's the type of officer and detective who was selected to work on a Violent Crime Task Force here in our community and presently is working as a gang detective. He's the guy that told you I'm out on the streets daily unless I'm involved in training or in court testifying. He's the expert now who's teaching other officers, including in the academy, about gangs and sharing his knowledge and his experience in weekly and monthly intelligence meetings with other relevant local and even out-of-the-area law enforcement professionals."

"[Tyler's] testimony lacks internal sense. For example, what motivation--what motive does . . . Doe have to set up this group of 29th Street Crips, putting her at great risk to do so while letting the true almost-killers go free?"

Kidd contends the foregoing arguments improperly conveyed to the jury the prosecutor's belief in the veracity of these witnesses. We disagree.

"[A] prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.] It is misconduct, however, to suggest to the jury in arguing the veracity of a witness that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jury will believe that inculpatory evidence, known only to the prosecution, has been withheld from them." (*People v. Padilla*, *supra*, 11 Cal.4th at pp. 945-946.)

In *United States v. Martinez* (6th Cir. 1992) 981 F.2d 867, the prosecutor argued there was nothing particularly significant about the defendant that would have caused a police witness to risk his 18-year career by lying in court about her. The defendant claimed this was improper vouching, because there was no evidence in the record that the witness risked his career by lying. (*Id.* at p. 871.) The Court of Appeals concluded that, while this may have been improper, it was an isolated incident that did not prejudice the defendant. (*Ibid.*)

In the present matter, we have no vouching that could be viewed as being based on evidence withheld from the jury. Regarding Doe, the prosecutor said nothing more than that she had no motive to lie. This is based solely on the circumstances

presented in the evidence. The defense was, of course, free to argue to the contrary, which it did with its discussion of the eaglets.

As for Detective Bell, the prosecutor's comments were merely a recitation of the officer's background and qualifications, as revealed to the jury during testimony. As explained above, the prosecutor may comment on the quality of the evidence, including the credibility of witnesses, as long as there is no suggestion the prosecutor's assessment is based on evidence withheld from the jury. There was no such suggestion here.

Finally, Kidd contends the prosecutor committed misconduct by urging the jury to base his conviction on his gang membership and associations. He cites the following arguments:

"Detective Bell talked with us about the gang culture, their mentality. Gang members are proud of it. Sometimes they even show--you've seen them show themselves off on things like Facebook and My Space. They like to take pictures of themselves looking bad, looking bold. [¶] He told us about how gang members get respect because respect--what respect means to us means something completely different to them. They get respect from committing crimes alone, bragging about it to others, or committing crimes in front of each other so they can prove how bad and how bold you are and what you're willing to do in the name of a gang like the 29th Street Crips."

"There are limitations, and the Judge is going to instruct you on the limitations, for how you can consider gang evidence.

And I want to tell you this up front, that gang evidence in no way, shape, or form, can be used to say that Jordan Kidd or these other defendants are bad guys or people with such bad characters who have dispositions to commit crimes that, therefore, they must have done it this time. You can't do that. But gang evidence is very powerful evidence and compelling evidence that you can and you should consider when determining things like their motivations, Mr. Kidd's intentions, his knowledge, his purpose as well as all of the others, to view how everything fits together. You can consider how gangsters use their status and use violence to inject fear into their victims, into this community, and how they aid and abet each other in committing these crimes as a group."

"And isn't it somewhat ironic--it's not ironic, they stop at the place where this all begins, the 29th Street Crip gang territory, 29th Street Crip gang territory, this apartment complex off of 29th Street. Does that mean--when I say that does that mean that every citizen who lives in that apartment complex is a 29th Street gang member? No, no. I can't imagine what life is like for the people that live there that aren't. Walking on eggshells."

Kidd also points out that the prosecutor engaged in an in-depth discussion of Merritt's tattoos and gang photos and made a point of mentioning that Griffin was in possession of a cell phone with a screen displaying "29th Street Crip Mafia." The prosecutor further argued: "This is a world of power, violence and dominence [*sic*]. They can't let the slightest of slights go

unchallenged, and respect demands retaliation. [¶] Mr. Tyler then incited the group to go over there and to rob and smoke that guy, and that's what they did."

Kidd argues that urging the jury to convict him based on bad character and unsavory associations violates due process. However, none of the foregoing involved urging the jury to convict based solely on Kidd's status as a gang member or associate. As discussed earlier, all of the foregoing merely provided the backdrop for the crimes alleged in this matter. It explained what motivated the defendants to act as a group and retaliate for the slight of being verbally disrespected. There was no misconduct.

C

Sentencing on Enhancement

Kidd contends the trial court imposed a determinate enhancement on count three, the aggravated kidnapping, of 10 years, but the abstract of judgment reflects an indeterminate term of 10 years to life. The People concede error.

The Reporter's Transcript indicates the court imposed a determinate term of 10 years on the firearm use enhancement for the kidnapping charge. This is the term prescribed under section 186.22, subdivisions (b) and (e)(1), where a firearm is used in connection with an offense but not fired. However, the abstract of judgment lists a term of "10 to life" for the enhancement. We shall direct that the abstract be corrected.

D

Determinate Sentencing

The abstract contains another error not initially identified by the parties. On the burglary charge, Kidd received a one-third middle term of one year four months and a one-third enhancement. On the firearm possession charge, he received a consecutive, one-third middle term of eight months. On the gang charge and possession of ammunition charge, he received stayed, one-third middle terms of eight months. On all other charges, Kidd received indeterminate terms.

Section 1170.1, subdivision (a), reads: "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed . . . , the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements . . . . The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed . . . ."

The trial court did not impose a principal term on Kidd. We requested supplemental briefing on the question of whether

this was error. Both Kidd and the People submitted briefs acknowledging the error and requesting a remand for resentencing. We shall do so.

DISPOSITION

Knorr's conviction on count one is reversed. The gang enhancement on count two is reduced from 10 years to five for all defendants. The $1,000 fines imposed on counts four and five pursuant to section 667.6 are stricken as to both Merritt and Tyler. The determinate terms on Kidd's sentence for counts two, six, eleven and twelve are reversed, and Merritt's entire sentence is reversed. In all other respects, the judgments and sentences are affirmed.

The matter is remanded to the trial court with directions to resentence Kidd on counts two, six, eleven and twelve and to resentence Merritt to an overall term of imprisonment that provides her a meaningful opportunity for parole during her lifetime. The trial court is further directed to prepare corrected abstracts of judgment to reflect the foregoing and to reflect that the section 12022.53 enhancement on count seven is for subdivisions (d) and (e)(1) and to forward copies of the amended abstracts to the Department of Corrections and Rehabilitation.

HULL, Acting P. J.

We concur:

ROBIE, J.

MAURO, J.