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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RO VAN VO et al., Defendants and Appellants.	C034960 (Super. Ct. No. 98F03454)

APPEAL from a judgment of the Superior Court of Sacramento County, Peter Mering, J. Affirmed as modified.

Janice M. Lagerlof, under appointment by the Court of Appeal, for Defendant and Appellant Ro Van Vo.

The Law Office of Lauretta Marie Oravitz-Komlos and Lauretta Marie Oravitz-Komlos, for Defendant and Appellant Quyen Tran.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Stan Cross, Supervising Deputy Attorney General, Janet E. Neeley, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, II, III, IV, V, VI, VIIE, VIIIB, C, D, E, and IX.

Defendants Ro Van Vo and Quyen Tran were found guilty by a jury of first degree murder and assault with a firearm in a gang-related, drive-by shooting. On appeal, defendants claim evidentiary error, ineffective assistance of counsel, insufficiency of the evidence, instructional error, prosecutorial misconduct, and sentencing error.

We conclude the trial court erred in instructing the jury on the "predicate offense" element of a criminal street gang enhancement (Pen. Code,[1] § 186.22, subd. (b)(1)), but the error was harmless. In addition, we conclude the trial court erred in sentencing defendants on their convictions for assault with a firearm and erred in imposing consecutive determinate terms of imprisonment for the gang enhancements on the murder convictions. We will modify defendants' sentences to correct the sentencing errors and, as modified, will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in the light most favorable to the judgments, the evidence showed that on the evening of April 10, 1998, defendants and two or three companions were shooting pool at Hot Shots Billiards on Arden Way in Sacramento. Defendants were

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

both members of Insane Viet Boys (IVB), an Asian street gang. As they were preparing to leave, defendants were involved in a confrontation with members of a rival gang, El Camino Crips (ECC), at the poolhall counter. When someone in defendants' group identified themselves as IVB, someone in the other group said "fuck IVB," which would have been perceived by a gang member as disrespectful and a challenge. An off-duty reserve sheriff's deputy, Don Ralls, who was working security at the poolhall, intervened and escorted defendants' group to their car, which belonged to Tran. As they left the poolhall, a group outside that included ECC members taunted defendants' group. Tran and his group then drove away.

Moments later, Tran returned, pulling into the parking lot. As Tran drove slowly past the poolhall with the headlights of his car off, Vo fired several shots at the people standing outside. Southalay Vongesedon, an ECC gang member known as "Nippy," who was standing by one of the doors to the poolhall, was killed when he was struck in the back of the head by a bullet fragment. Deputy Ralls, who was still outside when the shooting occurred, ran after the car as it left and fired one shot but missed.

Defendants and a third suspect, Tuan Huynh, also an IVB member, were eventually arrested and charged with the first degree murder of Nippy (§ 187, subd. (a)) and assault with a

firearm on Deputy Ralls (§ 245, subd. (d)(1)). For penalty enhancements on the murder, the amended information alleged: (1) defendants were armed with a firearm within the meaning of section 12022, subdivision (a)(1); (2) defendants intentionally and personally discharged a firearm causing great bodily injury to the victim within the meaning of section 12022.53, subdivisions (b) through (l); and (3) defendants acted "for the benefit of, at the direction of, and in association with a criminal street gang, to wit, INSANE VIET BOYS, with the specific intent to promote, further and assist in criminal conduct by gang members." The amended information also alleged the "drive-by murder" special circumstance was intentional and "perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person . . . outside the vehicle with the intent to inflict death." (§ 190.2, subd. (a)(21).) As penalty enhancements on the assault, the amended information alleged the same arming enhancement and gang enhancement as alleged for the murder. The amended information also alleged the personal use of a firearm by Vo and Huynh (but not by Tran) within the meaning of section 12022.5, subdivision (a).

The jury found Vo and Tran guilty of both crimes and found all applicable enhancement allegations true as to both defendants.[2] The jury could not reach a verdict as to Huynh, and the court declared a mistrial.

The trial court sentenced Vo to a term of life in prison without the possibility of parole for the murder, with a consecutive term of 25 years to life for the section 12022.53 firearm use enhancement and a further consecutive term of 18 years. The latter term was composed of a three-year term for the gang enhancement on the murder, an upper term of eight years for the assault, a four-year term for the section 12022.5 firearm use enhancement on the assault, and a three-year term for the gang enhancement on the assault. The court also imposed but stayed two one-year terms for the section 12022 arming enhancements on the murder and the assault.

The trial court sentenced Tran to a term of life in prison without the possibility of parole for the murder, with a consecutive term of 25 years to life for the section 12022.53 firearm use enhancement and a further consecutive term of nine years four months. The latter term was composed of a middle term of six years for the assault, a two-year term for the gang enhancement on the assault, and a one-year four-month term for an earlier burglary for which Tran was on probation at the time

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[2] The assault charge had been reduced to assault with a firearm on a person (§ 245, subd. (a)(1)) before the case went to the jury.

of the shooting. The court also imposed but stayed two one-year terms for the section 12022 arming enhancements on the murder and the assault and a two-year term for the gang enhancement on the murder.

DISCUSSION

I

Evidentiary Issues

A

The trial court did not abuse its discretion in admitting expert testimony on gang mentality or in admitting, in connection with that testimony, portions of letters written by defendants.

1. *Factual background.*

Before trial, the prosecution filed a motion to introduce into evidence portions of letters written by defendants while in custody. Although the written motion is not part of the record on appeal, the discussion of the motion reveals that the prosecution's purpose in seeking to introduce the letters was not only to prove the gang enhancement allegations, but also to prove "what was going through a gang member's mind as to why they got in an argument at the counter of a pool hall, as to why they would come back and do something like this." The prosecution also expressed its intent to call a gang expert to testify, based in part on the letters, about "what the gang mentality is and how gangs operate and how gang members think" and "why this crime occurred."

Although he said he had "no problem with [the expert], at least at the present time," Vo's counsel did object to introduction of the letters on several grounds, including that they were improper character evidence and were more prejudicial than probative. Tran's counsel said his "position [wa]s the same as" that of Vo's counsel. Both attorneys suggested, however, that the expert's testimony would be unnecessary if they stipulated to the elements of the gang enhancement.

Subsequently, Tran's counsel filed a written opposition to the prosecution's "application for use of its 'gang expert' to testify before the jury." Tran argued "it is not necessary to have an expert testify in a simple case where the defense offers to stipulate to what the expert could permissibly testify to under Evid. Code Section 801: that the defendants were members of IVB, a criminal street gang . . . ."

The trial court stated it was "unpersuaded" by Tran's argument "that a gang expert . . . should not be permitted in this case" and concluded "juries at the minimum need explanations about gang mentality and gang activities and gang methods and morale" "that isn't common knowledge." Accordingly, the trial court denied Tran's "motion to exclude a gang expert or prevent the People from calling a gang expert." With respect to the prosecution's motion to introduce the letters, the trial court stated it was "going to permit . . . the expert to refer to" the letters. The court explained that "most of this has some value and is probative. And I don't think its prejudicial

effect is so great as to significantly outweigh the probative value, which I find to be considerable."

It was subsequently agreed that the parties would stipulate before the jury that at the time of the crime, defendants were members of IVB.

In her testimony, the gang expert testified about a "gang mentality," which involves elements of reputation, respect, rivalry, revenge, loyalty, and camaraderie. Among other things, she testified that "failure to get respect requires them to act on it, which allows them to work as a group" and that "when they are shown disrespect they are then required to go out and fix it." She read excerpts from letters written by defendants and explained how those excerpts demonstrated elements of gang mentality. For example, she explained how an excerpt from a letter written by Tran demonstrated "the need to exact revenge. That when you're disrespected and somebody shows you disrespect, you've got to react to that." The prosecution also posed a hypothetical question to the expert based on the evidence of the confrontation at Hot Shots and the subsequent shooting and elicited her opinion that the shooting "occurred for the benefit of, the association of, or the direction of IVB members with the specific intent to promote the criminal activity of IVB."

2. *The gang expert's testimony was relevant.*

On appeal, Tran argues the trial court erred in allowing the gang expert to testify. Tran first contends the gang expert's testimony "could not be admitted under the relevancy standards of Evidence Code § 210 . . . ." We disagree.

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210) Here, the gang expert's testimony was relevant to prove elements of the gang enhancement allegation, e.g., whether the crimes with which defendants were charged were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) The gang expert's testimony was also relevant to prove defendants had a motive for committing the drive-by shooting at Hot Shots. Proof of motive, in turn, was relevant to prove both identity and intent. As the gang expert explained in response to the hypothetical question based on the facts of the shooting: "IVB is confronted by ECC and they are shown that disrespect by being cussed at and said you're not anybody, we don't -- we don't even want to acknowledge who you are because you're so insignificant, that act of disrespect with IVB coming back saying okay, we'll show you who's nobody. We're gonna shoot you. We're gonna come back and do that."

3. *The gang expert's testimony was not inadmissible under Evidence Code section 801, subdivision (a).*

Tran contends the trial court erred in allowing the gang expert to testify because none of the gang expert's testimony "met the standard of 'beyond common experience' standard [*sic*] required for expert witnesses." According to Tran, "[t]he

concept of 'gang mentality' is as old as human history" and is "commonly understood in our culture." Again, we find no error.

Expert opinion testimony is admissible if it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused." (*People v. Page* (1991) 2 Cal.App.4th 161, 187.)

We find no clear abuse of discretion in the trial court's determination that "gang mentality and gang activities and gang methods and morale" are not "common knowledge." "[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole* (1956) 47 Cal.2d 99, 103.) Here, the trial court reasonably concluded that the way gang members tend to think and act is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. That gang violence is "repeatedly portrayed" in the media does not mean a gang expert could not be of assistance to the jury in understanding gang culture. Indeed, our Supreme Court has held that expert opinion testimony is admissible on "[t]he subject

matter of the culture and habits of criminal street gangs." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

4. *The gang expert's testimony was not inadmissible ultimate mental state testimony.*

Tran next contends the gang expert's testimony was inadmissible because it "impermissibly went to [Tran's] ultimate mental state." Specifically, Tran complains of the expert's expression of her opinion that the shooting was committed "for the benefit of, the association of, or the direction of IVB members with the specific intent to promote the criminal activity of IVB." Tran contends this testimony was prohibited by section 29, which he claims prohibits an expert from testifying that a defendant had or did not have a particular mental state. That statute is irrelevant, however, because by its plain terms it applies only to an expert "testifying about a defendant's mental illness, mental disorder, or mental defect." (§ 29.) The gang expert here was not testifying about defendants' mental illness, disorder, or defect; she was testifying about defendants' motive for committing the drive-by shooting. Thus, section 29 does not apply.

5. *The gang expert's testimony was not inadmissible under Evidence Code section 352.*

Tran next contends the trial court abused its discretion in not excluding the gang expert's testimony under Evidence Code section 352. We disagree.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is

substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) A court's exercise of its discretion under Evidence Code section 352 is not a ground for reversal unless the court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

"California courts have long recognized the potential prejudicial effect of gang membership evidence. However, they have admitted such evidence when the very reason for the crime is gang related. (See, e.g., *People v. Manson* (1976) 61 Cal.App.3d 102 [132 Cal.Rptr. 265] [motive for murders]; *In re Darrell T.* (1979) 90 Cal.App.3d 325, 328-334 [153 Cal.Rptr. 261] [motive]; *People v. Beyea* (1974) 38 Cal.App.3d 176, 194 [113 Cal.Rptr. 254] [motive]; *People v. Frausto* (1982) 135 Cal.App.3d 129 [185 Cal.Rptr. 314] [motive and intent].)" (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 239-240.)

Here, the evidence of "gang mentality" was highly relevant to prove not only the elements of the gang enhancement, but also defendants' motive for the shooting, which in turn was relevant

to prove both their identity as the perpetrators and the intent with which they acted. Contrary to defendants' contentions, the expert's testimony was not used simply "to criminalize any activity that members or associates of gangs may engage in or to supply elements of mental state simply based upon gang membership." Instead, the gang expert's testimony was used to help the jury understand why, based on a minor altercation inside Hot Shots, defendants would have returned to the poolhall only moments later and fire a gun at the people standing outside with the intent to kill someone standing there.

Given its significant probative value, we cannot find the trial court acted in an arbitrary, capricious, or patently absurd manner in concluding the gang expert's testimony should be admitted despite its potential prejudicial effect. Moreover, the fact that defendants admitted their membership in IVB did not make the expert's testimony so cumulative as to outweigh its probative value. While that admission lightened the prosecution's burden in some respects, it did not cover all aspects of the gang enhancement, nor was it coextensive with the gang expert's testimony about the "gang mentality," which, as we have noted, was highly probative evidence of defendants' motive for the shooting.

6. *The gang expert's testimony was not the only evidence of intent or aider and abettor liability.*

Relying on cases from the Ninth Circuit, Vo contends "that an expert may not constitute the entire prosecution's proof of intent by explaining to the jury what typical gang members think

or intend." In a similar vein, Tran contends it was "improper to establish 'aider and abettor' liability through gang expert testimony."

Neither of the cases on which defendants rely -- *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337 and *U.S. v. Garcia* (9th Cir. 1998) 151 F.3d 1243 -- dealt with the admissibility of gang expert evidence. Rather, they dealt with the *sufficiency* of gang *membership* evidence to prove either aiding and abetting or conspiracy. In *Mitchell*, the court found there was "a massive failure of proof that [the defendant] aided and abetted [the victim's] killing" and that failure could not be remedied by the argument that the defendant "aided and abetted the killing by fanning the fires of gang warfare that culminated in [the victim's] death." (*Mitchell v. Prunty*, *supra*, 107 F.3d at p. 1342.) According to the court, "[m]embership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting." (*Ibid.*) Following *Mitchell*, the court in *Garcia* held that "evidence of gang membership cannot itself prove that an individual has entered a criminal agreement to attack members of rival gangs." (*U.S. v. Garcia*, *supra*, 151 F.3d at p. 1246.)

Neither *Mitchell* nor *Garcia* is of assistance to defendants here because evidence of their membership in IVB was far from the only evidence of intent or aiding and abetting liability. Likewise, the gang expert's testimony about "gang mentality" was not the only evidence that defendants committed a drive-by

shooting at Hot Shots with the intent to kill someone. As the People point out, "[i]t is patent that [Vo] was not convicted on generic evidence about gang membership." The same is true of Tran. Accordingly, *Mitchell* and *Garcia* are inapplicable.

To the extent Tran suggests it was improper for the gang expert to express the opinion "that gang members do not act independent of one another," he offers no authority other than *Mitchell* to support that suggestion, and *Mitchell* does not, in fact, support it.

7. *The excerpts from defendants' letters were relevant.*

Defendants contend the trial court erred in admitting the excerpts from defendants' letters in connection with the gang expert's testimony because "the contents of the letters themselves were irrelevant to any material issue in the trial" in that "[n]ot one word of the letters had anything to do with the charged crime and the defendants had already stipulated to their gang membership." They are mistaken. As we have already explained, the evidence of "gang mentality" was highly relevant to prove not only the elements of the gang enhancement, but also motive, which in turn was relevant to prove both identity and intent. The excerpts from the letters were a vital part of the prosecution's showing because they allowed the gang expert to demonstrate how defendants in particular exhibited elements of the "gang mentality," which tended to explain why they would have committed the drive-by shooting with the intent to kill someone.

For example, the prosecution asked the gang expert about an excerpt from a letter in which Vo had written: "So who do you fight with? I know there's hella enemies in J-1. I'd be fighting all day if I was over there. I can't wait to see one of the enemies." The gang expert then testified that this letter reflected upon the gang mentality by showing "[r]ivalry. Again, establishing who his enemies are. They have enemies. Gangsters have enemies. They want respect. If somebody disrespects them, they're going to confront. They want notoriety. If they want notoriety they'll just pick the fight because they want notoriety. They want people to know who they are and how bad they are. They're bullies."

The specific excerpts from defendants' letters allowed the gang expert to tie her general testimony about gang mentality to these defendants in particular by showing that these individuals exhibited elements of gang mentality, which in turn bolstered the inferential showing that the confrontation at Hot Shots gave defendants a motive to commit the drive-by shooting with the intent to kill, as well as the purpose required to prove the gang enhancement allegation. Thus, the excerpts from defendants' letters were relevant.

8. *The excerpts from defendants' letters were not inadmissible propensity evidence.*

Defendants next contend the excerpts from the letters constituted inadmissible character evidence showing only their "propensity to commit a violent act." Again, we disagree. While it is true that, generally, evidence of specific instances

of a defendant's conduct "is inadmissible when offered to prove his or her conduct on a specified occasion" (Evid. Code, § 1101, subd. (a)), this bar on specific acts evidence does not apply when the evidence is "relevant to prove some fact (such as motive, . . . intent, [or] identity, . . .) other than his or her disposition to commit such an act" (Evid. Code, § 1101, subd. (b)). As we have explained already, the excerpts from the letters were a vital part of the gang expert's testimony in this case, which tended to show that defendants, as gang members, exhibited elements of the "gang mentality" and thus had motive to commit the drive-by shooting at Hot Shots, which in turn tended to prove both identity and intent. Thus, the excerpts from the letters did far more than prove defendants had a propensity for violence. They were admissible under Evidence Code section 1101.

9. *The excerpts from defendants' letters were admissible because the expert relied on them in forming her opinions and they were not more prejudicial than probative.*

In *People v. Coleman* (1985) 38 Cal.3d 69, the California Supreme Court explained that "'[w]hile an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. [Citations.] The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of

reasons bring before the jury incompetent hearsay evidence.'" (*Id.* at p. 92.)

Defendants rely on *Coleman* to argue that the trial court erred in this case by allowing the gang expert "to put before the jury incompetent hearsay evidence." Defendants are mistaken. Unlike the evidence in *Coleman*, which consisted of letters written by the victim, the evidence here consisted of letters written by *defendants themselves*. Accordingly, at least to the extent defendants' letters were used against the author, this evidence was not "incompetent hearsay evidence." (See Evid. Code, § 1220 ["Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party"].)

To the extent one defendant's statements might have been used against the other defendant, i.e., excerpts of Vo's letter used against Tran, the excerpts from the letters might have been hearsay.[3] Even if they were, however, this does not mean the trial court erred in admitting them. "[B]ecause Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on . . . inadmissible matter can, when testifying, describe the material that forms the basis of the opinion."

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[3] We consider this unlikely, since the letters were offered to show how defendants' writings exhibited elements of "gang mentality." Used for this purpose, each letter would tend to be useful only against its author.

(*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) Thus, a "gang expert [can] recite the hearsay on which he ha[s] relied in forming his expert opinion." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 510.) "Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved, . . ." (*People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

Here, during the gang expert's testimony, the court instructed the jury that the letters were "not offered to prove something specific happened," but for the "limited purpose" of "lay[ing] some foundation for the expert's view or the expert's opinion on the state of mind or the attitude towards gangs that may be displayed in a given portion of a letter." This limiting instruction was sufficient to cure any hearsay problem in use of the letters' excerpts.

As the Supreme Court observed in *Coleman*, however, when otherwise inadmissible evidence is offered as a basis for an expert's opinion, "the trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses. The exercise of this discretion may require exclusion of portions of inadmissible hearsay which were not related to the expert opinion. [Citation.] Or it may be necessary to sever portions of the testimony in order to protect the rights of the defendant without totally destroying the value of the expert witness' testimony. [Citation.] In

still other cases where the risk of improper use of the hearsay outweighs its probative value as a basis for the expert opinion it may be necessary to exclude the evidence altogether." (*People v. Coleman*, *supra*, 38 Cal.3d at pp. 92-93.)

"Because an expert's need to consider extrajudicial matters and a jury's need for information sufficient to evaluate an expert opinion may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*People v. Valdez*, *supra*, 58 Cal.App.4th at p. 510.) We find no abuse of discretion. As we have explained, the excerpts from defendants' letters were highly relevant because they allowed the gang expert to tie her general testimony about gang mentality to these defendants in particular and thus show, inferentially, that the confrontation at Hot Shots gave defendants a motive to commit the drive-by shooting and that they committed the shooting with the intent to kill, as well as show they acted with the purpose required to prove the gang enhancement allegation. Furthermore, to the extent the excerpts were used only against their particular authors -- the use most likely under the circumstances -- they were not hearsay at all. Under these circumstances, we cannot say the trial court acted in an arbitrary, capricious, or patently absurd manner by allowing into evidence the excerpts of defendants' letters on which the gang expert based her opinions.

B

The trial court did not abuse its discretion in limiting the impeachment of two prosecution witnesses.

Tran contends the trial court abused its discretion in limiting the impeachment of two key witnesses -- Martha Jackson and Eli Orta -- both of whom testified they saw Tran driving the car from which the shots were fired. We find no error.

1. *The trial court did not improperly limit the impeachment of Martha Jackson.*

In his cross-examination of Jackson, counsel for defendant Huynh asked Jackson if she remembered telling him on an earlier occasion that she "had heard that the shooters had left to go to the Am-Pm to take their license plate off." Jackson responded, "Yeah. That's what I had heard later on." When counsel then asked Jackson if she remembered telling him that she had heard "they were on videotape at the Am-Pm," the prosecution objected on relevance grounds. When the court asked, "[w]hat is the relevance of what she heard," Huynh's counsel responded, "This goes to the witness's state of mind. It goes specifically to her testimony." The court sustained the objection, observing: "If it's some information she received at the very beginning in this process, if it might have been on her mind when she gave her detailed statement to McClatchy, that might be different. But it doesn't seem to be relevant."[4]

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[4] The "statement to McClatchy" to which the court referred was a statement Jackson gave to a law enforcement officer five

Tran contends the trial court abused its discretion in sustaining the prosecution's relevancy objection, thereby depriving him of his constitutional right to cross-examine witnesses against him, because Huynh's counsel was "attempt[ing] to elicit what . . . Jackson had learned from other people regarding the shooting." We find no abuse of discretion.

A judgment cannot be reversed based on the erroneous exclusion of evidence unless it appears from the record that "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a).) "An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.)

Here, the relevance of the question Huynh's counsel asked Jackson was not made known to the trial court either by the question itself, an offer of proof, or any other means. The question apparently sought to elicit an admission that Jackson

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days after the shooting. A videotape of that statement was played for the jury, and a transcript of the tape was admitted into evidence. In that statement, Jackson gave a detailed description of the shooting, including identifying Tran (known to Jackson by his gang moniker "Baby Q") as the driver.

had heard that the shooters had been recorded on videotape after the shooting changing the license plate on their car. The relevance of the information sought was not self-evident. Moreover, when the trial court effectively asked for an offer of proof by asking counsel, "[w]hat is the relevance of what she heard," Huynh's counsel merely suggested without further explanation that it was relevant to her "state of mind." This "offer of proof" was far from sufficient to "give the trial court an opportunity to change or clarify its ruling" and likewise does not provide us "with the means of determining error and assessing prejudice." (*People v. Schmies*, *supra*, 44 Cal.App.4th at p. 53.)

In his reply brief, Tran contends for the first time that "[t]he clear intent of this line of questioning by the defense was to establish that Jackson learned enough from others to piece together her fabricated story that she was a witness to the shooting." He also contends the line of questioning "would have established that [Jackson] had heard a great deal of gossip regarding the shooting and that she had discussed the shooting with many people prior to her trial testimony."

This explanation is too little, too late. Huynh's trial counsel made no effort to suggest to the trial court he wanted to engage in a "line of questioning" that would have established Jackson fabricated her story of the shooting based on gossip. Rather, he simply attempted to ask Jackson one question concerning what she had heard about something the shooters may have done *after* the shooting. Even then, when asked to explain

the relevance of the information he sought, counsel gave the insufficient explanation that it went to Jackson's "state of mind."

Furthermore, as the trial court recognized, Jackson gave a detailed statement about the shooting five days after it occurred. To establish the relevance of the testimony he sought to elicit, it was incumbent upon counsel to show Jackson heard the alleged gossip *before* she gave her statement, thus supporting the inference she had fabricated her story based on that gossip. Despite the trial court's invitation to make such a showing, Huynh's counsel did not do so. Even now, on appeal, Tran does not contend it could be shown that Jackson "heard a great deal of gossip regarding the shooting and . . . discussed the shooting with many people" *before* she gave her statement. Instead, he merely contends she did so "prior to her trial testimony."

Under these circumstances, we cannot conclude the trial court abused its discretion in sustaining the prosecution's relevancy objection.

2. *The trial court did not improperly limit the impeachment of Eli Orta.*

In his cross-examination of Orta, counsel for defendant Huynh asked Orta about a shooting at a market in Elder Creek two

days before the Hot Shots shooting, in which "Doggie" was shot.[5] The prosecutor intervened, asking to approach, and an off-the-record discussion in chambers followed. When Huynh's counsel resumed his cross-examination of Orta, Tran contends "[d]efense counsel did not continue in his questioning" on the Elder Creek shooting.

Tran contends his "constitutional right to cross-examination and impeachment of witnesses against him was infringed when the trial court refused to permit testimony regarding the Elder Creek shooting of SBB member Doggie." That argument fails because the record discloses the trial court did *not* refuse to permit further cross-examination of Orta on the Elder Creek shooting. On the contrary, the trial court actually *prompted* counsel to finish his cross-examination on that subject. When Huynh's counsel informed the court he had "[n]o further questions" of Orta, the court responded: "You don't intend to ask the questions we discussed back in chambers for more than a few moments?" Counsel replied, "I will, your Honor," and proceeded to elicit from Orta that he believed IVB or VPG (Viet Pride Gangsters) were responsible for Doggie's shooting.

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[5] "Doggie" was a nickname for Nanu Saechao, an individual who was a member of Sacramento Bad Boys (SBB), the same gang to which Orta belonged.

Tran fails to show any ruling or other action by the trial court that limited the cross-examination of Orta on the Elder Creek shooting. Accordingly, we find no error.

C

Vo's attorney was not ineffective for withdrawing an objection to the admission of Tran's jail conversation.

While Tran was in jail pending trial, a conversation between him and two visitors was recorded. A redacted version of that conversation was read to the jury during the prosecution's case-in-chief. During the conversation, Tran referred to someone as "that fool" who "put us at the crime scene."

Before trial, the court and counsel discussed the redacting of the conversation. Once the prosecution and Tran's attorney had agreed on what redactions should be made, the court asked if any other party objected. Vo's attorney complained about the portion of the conversation that referred to someone who "placed [them] at the crime scene," contending the unidentified person would be identifiable as his client "when other evidence is brought in," thus raising a "*Bruton*"[6] issue. The court pointed out that in his statement to police, which was going to be admitted into evidence against him, Vo "placed himself at the

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[6] "*Bruton*" refers to the United States Supreme Court's decision in *Bruton v. United States* (1968) 391 U.S. 123, [20 L.Ed.2d 476], which addressed whether the admission, at a joint trial, of a nontestifying defendant's confession implicating a codefendant violates the codefendant's confrontation rights. (See generally *People v. Fletcher* (1996) 13 Cal.4th 451, 455.)

crime scene."[7] In light of that fact, the court asked Vo's attorney how the jury identifying Vo as the unnamed person in Tran's conversation who "placed [them] at the crime scene" would hurt Vo. Vo's attorney responded, "Point well taken" and withdrew his objection.

Tran's conversation with the two visitors was read to the jury at trial. The following morning, the court instructed the jury that it could consider what Tran said only against Tran and not against the other two defendants.

Vo now contends on appeal that notwithstanding the court's limiting instruction, the admission of Tran's conversation with readily identifiable references to him violated his constitutional rights and that his attorney's withdrawal of his objection constituted ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, a defendant must show "that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant." (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) Here, Vo has failed to show both elements.

In *Richardson v. Marsh* (1987) 481 U.S. 200, 206-207 [95 L.Ed.2d 176], the United States Supreme Court explained its

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[7] In his statement, Vo admitted being at Hot Shots on the night of the shooting, admitted being involved in an argument with ECC members inside the poolhall, and admitted being escorted out by a cop; however, he repeatedly denied returning to the poolhall or being involved in the shooting.

ruling in *Bruton* as follows: "The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.' The right of confrontation includes the right to cross-examine witnesses. [Citation.] Therefore, where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand. [¶] Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions, [citation], which we have applied in many varying contexts. . . . In *Bruton,* however, we recognized a narrow exception to this principle: We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant."

The court went on to draw a distinction between the confession in *Bruton*, which the court characterized as "'powerfully incriminating'" because the codefendant "'expressly implicat[ed]'" the defendant as his accomplice, and the confession in *Richardson*, which "was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." (*Richardson v.*

Marsh, *supra*, 481 U.S. at p. 208.) The court refused to extend *Bruton* further and instead held "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Id.* at p. 211.)

In *People v. Fletcher*, *supra*, the California Supreme Court addressed an issue the United States Supreme Court did not reach in *Richardson*: "whether redacting a nontestifying codefendant's confession to replace references to the defendant's name with a 'symbol or neutral pronoun' avoids violation of a defendant's rights under the confrontation clause." (13 Cal.4th at pp. 464-465.) The California Supreme Court held that "redaction that replaces the nondeclarant's name with a pronoun or similar neutral and nonidentifying term will adequately safeguard the nondeclarant's confrontation rights unless the average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the nondeclarant is the person so designated in the confession and the confession is 'powerfully incriminating' on the issue of the nondeclarant's guilt." (*Id.* at p. 467.)

Here, Vo's name did not appear in Tran's conversation with the two visitors, but Tran did refer to an unnamed person who "placed us at the scene." Vo contends this unnamed person was "clearly" him, especially because "Tran's statement was read to the jury right after [Vo's] statement which had placed him and

some friends at the scene." Vo further contends Tran's conversation with the visitors was "particularly damaging" because "[t]he clear import of Tran's statement is that [Vo] was lying in his statement to [police] *and* that he had something to lie about."

We conclude that Vo has failed to demonstrate ineffective assistance of counsel because a continued request for further redacting of Tran's conversation would have been without merit. Because Tran's conversation did not facially incriminate Vo, and because the jury was instructed not to consider Tran's words against Vo, Vo's confrontation rights were adequately safeguarded "unless the average juror, viewing [Tran's conversation] in light of the other evidence introduced at trial, could not avoid drawing the inference that [Vo was] the person so designated in the confession *and the confession [was] 'powerfully incriminating' on the issue of [Vo's] guilt*." (*People v. Fletcher*, *supra*, 13 Cal.4th at p. 467, italics added.)

Even assuming the average juror could not have avoided drawing the inference that Vo was the person mentioned by Tran who "placed [them] at the scene," we conclude Vo's confrontation rights were adequately safeguarded because Tran's reference to Vo was not "'powerfully incriminating'" on the issue of Vo's guilt. As the trial court and counsel recognized, Vo's own statement put him and his friends "at the scene," i.e., at Hot Shots on the night of the shooting. Tran's reference to the "fool" who "placed us at the scene" did not incriminate Vo any

more than Vo's own statement to police. Vo's denial that he and his friends returned and committed the shooting was hardly less believable just because Tran complained someone had "placed us at the scene."

For similar reasons, Vo's ineffective assistance of counsel claim fails because his attorney's decision to drop his request for further redaction of Tran's conversation did not prejudice Vo. As noted, Vo's own statement put him at the scene of the crime, albeit, before the shooting occurred. In addition, at least one witness identified Vo as being at the crime scene at the time of the shooting. Under these circumstances, even if Vo's counsel could have successfully maintained his request for further redaction, it is not reasonably probable exclusion of Tran's complaint that a "fool" had "put [them] at the crime scene" would have led to a different result. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697-698 [80 L.Ed.2d 674].)

II

Sufficiency Of The Evidence

A

The evidence of first degree murder was sufficient as to both defendants.

Defendants contend there was insufficient evidence to support a finding that the murder of Nippy was committed with an intent to kill and therefore their convictions for first degree murder must be reversed. We disagree.

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, "'[t]he test on appeal is

whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment (order) to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the [defendant] guilty beyond a reasonable doubt. In making such a determination we must view the evidence in a light most favorable to respondent and presume in support of the judgment (order) the existence of every fact the trier could reasonably deduce from the evidence.'" (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52, quoting *In re Oscar R.* (1984) 161 Cal.App.3d 770, 773.)

"Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the jury." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "All murder which is perpetrated . . . by any . . . kind of willful, deliberate, and premeditated killing, . . . or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree." (§ 189.) "Murder of the first degree necessitates a finding of express malice on the part of the perpetrator" -- that is, "a

specific intent to kill." (*In re Sergio R.* (1991) 228 Cal.App.3d 588, 595.)

Defendants contend the evidence was insufficient to prove they had the intent to kill Nippy because Nippy was killed by a ricochet bullet. According to Vo, "the mere fact of shooting a gun from a car . . . where the only person hit was hit by a ricochet, does not in itself prove intent to kill. Neither does the fact that the alleged shooters were gang members change that equation."

"Intent is a state of mind. A defendant's state of mind must, in the absence of the defendant's own statements, be established by the circumstances surrounding the commission of the offense." (*People v. Mincey* (1992) 2 Cal.4th 408, 433.) A defendant's intent to kill may be established by evidence of the defendant's actions before the killing (planning evidence), evidence of the defendant's prior relationship or conduct with the victim (motive evidence), or evidence of the nature of the killing (manner evidence). (*People v. Orabuena* (1976) 56 Cal.App.3d 540, 545-546, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Here, there was evidence of all three types sufficient to support a finding of intent to kill. There was evidence that defendants, both members of the IVB gang, had a confrontation with rival gang members in a poolhall in which the rival gang showed them disrespect and challenged them. Defendants were escorted from the poolhall by a sheriff's deputy while the rival gang members taunted them. A few minutes after driving away,

defendants returned to the poolhall. As Tran drove the car slowly through the parking lot adjacent to the poolhall with the headlights off, Vo pointed a gun toward the crowd standing outside, which included members of the rival gang that had disrespected them, and fired it several times. Based on this evidence, the jury could have reasonably found that defendants acted with an intent to kill.

That Nippy may have been hit by a ricochet bullet does not compel a different conclusion. The pathologist who testified that the bullet which hit Nippy was "flying sideways" offered several possible explanations for that fact, only one of which was that the bullet ricocheted. The pathologist also said the sideways flight of the bullet could have been caused by "a weapon in very poor condition with a rifling in the barrel [that] has either rusted away or worn away" or "putting an improper caliber ammunition in a weapon and firing it." Even if the bullet did ricochet, that does not, as a matter of law, preclude a finding of intent to kill. While a ricochet might have been indicative of the fact that Vo was not firing at the crowd, that is not the only possible explanation. As Vo's attorney conceded in his argument to the jury, a ricochet might just as well have resulted from the fact that "[w]hoever pulled in to [*sic*] that parking lot . . . couldn't hit the broad side of a barn." That a person is a bad shot does not negate the existence of an intent to kill.

For his part, Tran contends "there was no evidence that he knew of Vo's intention to discharge a weapon" and therefore "no

evidence that [Tran] shared the requisite 'intent to kill.'" We reject this argument also.

"All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (§ 31) "Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Generally, in the case of murder, "the aider and abettor must know and share the murderous intent of the actual perpetrator" to be guilty of the murder.[8] (*Id.* at p. 1118.)

The question here is whether there was sufficient evidence to support a finding that Tran shared Vo's intent to kill when Tran drove his car back through the Hot Shots parking lot. Tran contends there was no evidence he was involved in the confrontation inside Hot Shots and "no evidence as to what happened and what was discussed or decided inside the shooter's car prior to the shooting." While it is true no one testified specifically that Tran was involved in the confrontation inside the poolhall, there was evidence that the group of IVB gang members escorted from the poolhall got into Tran's car, and Tran was driving the car when it returned to the poolhall a few minutes later. Thus, there was sufficient circumstantial

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[8] There is an exception when the charged offense and the intended offense are not the same, but that exception is irrelevant here.

evidence to find Tran *was* one of the IVB gang members involved in the confrontation that led to the shooting. Additionally, while there was no direct evidence of what happened inside the car between the time it left the parking lot and the time it returned a few moments later, that absence of direct evidence does not preclude a finding that Tran shared Vo's murderous intent. There was evidence that only minutes after being escorted from the poolhall to avoid a gang fight, Tran drove back to the poolhall and drove his car slowly through the parking lot adjacent to the poolhall with the headlights off while Vo pointed a gun out the window and fired at the crowd that included members of the rival gang that had disrespected and challenged them. The jury reasonably could have inferred from this evidence that Tran drove slowly past the crowd to facilitate Vo's ability to take aim at a rival gang member and that he drove with the headlights off to draw less attention to the car.

Under these circumstances, we conclude a reasonable trier of fact could find beyond a reasonable doubt that Tran shared Vo's intent to kill. Therefore, the evidence was sufficient to support both defendants' convictions for first degree murder.

B

The evidence of an assault on Deputy Ralls was sufficient.

Defendants contend there was insufficient evidence of an assault on Deputy Ralls because "there was no evidence that any of the defendants specifically pointed a gun or fired at Ralls during the entire encounter." We conclude the evidence was

sufficient to support defendants' convictions for assault with a firearm.

"[A]n intent to do an act which will injure any reasonably foreseeable person is a sufficient intent for an assault charge." (*People v. Tran* (1996) 47 Cal.App.4th 253, 262.) Thus, a defendant who fires a gun at a group of people does not have to intend to hit a specific person within the group to be found guilty of assault with a firearm; it is sufficient if the defendant "was simply firing at the group, hoping to kill someone." (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1736.) "[T]he naming of the particular victim is not an element of assault with a deadly weapon." (*People v. Griggs* (1989) 216 Cal.App.3d 734, 742.) However, where the assault charge does name a particular victim, a defendant cannot be convicted of assaulting a different person. (*People v. Christian* (1894) 101 Cal. 471, 473-477.)

Under the foregoing principles, for the assault convictions to stand in this case, there must be substantial evidence that Ralls was among those persons whom it was reasonably foreseeable could have been injured by the shots Vo fired from Tran's car. Defendants contend "the evidence does not establish that Ralls was in the group of people toward whom the shots were being fired." The People, on the other hand, contend "the evidence showed Ralls was near enough to the group which was fired upon to be within range of being hit, so the evidence was sufficient to support the verdict."

The evidence showed there were two doors along the west side of the poolhall where the shooting occurred. Nippy was standing with a group near the southernmost door when he was shot, and there was testimony that shots were fired toward that group. In addition, a bullet fragment was found inside the poolhall near that door.

There was other evidence, however, that the shooting was not limited to the vicinity of the southernmost door. One witness testified the shooter was pointing his gun toward the northernmost door. Furthermore, the only possible impact mark found on the west side of the poolhall was on the wall at a spot much closer to the northernmost door than the southernmost door.

In two statements he gave shortly after the shooting,[9] Deputy Ralls said he was standing on the sidewalk along the west side of the poolhall, near the northernmost door, talking with 10 or so members of the group that had confronted defendants, when he heard the sound of gunshots. He turned and saw the car that had left moments before down near the southernmost door. Deputy Ralls started running south along the sidewalk as the car moved north. As he drew even with the car, then turned and began running parallel to the car down the sidewalk, he

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[9] One statement was made at the crime scene to an investigating detective who testified at trial to the substance of his conversation with Deputy Ralls. The second statement, which was tape-recorded, was made to another detective several hours after the shooting. The tape was played for the jury at trial. These statements were offered into evidence because Deputy Ralls died before trial.

continued to hear gunshots. Deputy Ralls specifically stated in his tape-recorded statement that shots were fired as he was running "parallel to the car."

In a footnote in his brief, Tran purports to "re-affirm" a hearsay objection that was allegedly made to Deputy Ralls's statement in the trial court. (Tran does not distinguish between Ralls's initial statement at the crime scene and his subsequent tape-recorded statement.) No such objection was ever made. Before trial, the prosecution moved to introduce a tape recording of the 911 call in which Deputy Ralls spoke to the dispatcher. Vo's counsel filed a response indicating no objection but requesting that the jury also hear the tape-recorded statement Ralls gave to police several hours after the shooting. During the discussion of these statements, the prosecution asked to introduce the statement Deputy Ralls gave to the investigating detective at the scene, after the 911 call but before the tape-recorded statement. Vo's counsel argued admitting this third statement "would be inappropriate both under [Evidence Code section] 352 and under the sections allowing for the admissibility of prior consistent statements." As discussion of the statements continued, Vo's counsel acknowledged the later, tape-recorded statement was admissible over a hearsay objection (which he was not making) because it was a spontaneous statement, and he clarified that his opposition to the admission of the earlier, nontape-recorded statement was that it might be cumulative. The court ultimately decided all three statements would be admitted. Because a

proper hearsay objection was never made to *any* of Deputy Ralls's statements -- in particular, the tape-recorded statement that was offered into evidence at the behest of Vo's counsel -- Tran's attempt to "re-affirm" such an objection on appeal necessarily fails.

Given the evidence of shots fired in the direction of both doors on the west side of the poolhall, the evidence that the shots were fired from a car moving south to north, and the evidence that Deputy Ralls himself was moving parallel to the car as shots were fired, we cannot say under any hypothesis whatever that there is insufficient substantial evidence to support the jury's implicit determination that Deputy Ralls was among those persons whom it was reasonably foreseeable could have been injured by the shots Vo fired from Tran's car.

For his own part, Tran renews the argument he made in connection with the murder charge that there was insufficient evidence that he "had knowledge of co-defendant Vo's criminal purpose prior to or during the commission of the crime." We disagree. Because assault is not a specific intent crime (*People v. Williams* (2001) 26 Cal.4th 779, 784), Tran did not have to share a specific intent to assault Deputy Ralls to be held liable for assault as an aider and abettor. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118.) Instead, Tran simply must have acted with knowledge of Vo's criminal purpose and with the purpose of committing or of encouraging or facilitating commission of the offense. (*Ibid.*)

Here, the evidence showed that following an altercation with rival gang members in which his gang was shown disrespect, Tran drove back to Hot Shots moments later and cruised slowly through the parking lot with the headlights of his car off while Vo fired several shots out the window toward the people outside the poolhall, including Deputy Ralls. This evidence was sufficient to support a finding by the jury that Tran knew Vo intended to shoot at the people outside Hot Shots and by driving the vehicle acted with the purpose of facilitating the shooting. Accordingly, there was sufficient evidence to support both defendants' convictions for assault with a firearm.

III

Aider And Abettor Instruction

Tran acknowledges that the trial court "gave the standard Jury Instructions on aiding and abetting," but nevertheless contends the trial court should have instructed the jury sua sponte "that an 'after the fact' development of the mental state or 'after the fact' act of assistance is insufficient to show aider and abettor liability." We find no error.

The trial court properly instructed the jury that "[a] person aids and abets the commission of a crime when he personally, with knowledge of the unlawful purpose of the perpetrator . . . with the intent or purpose of committing or encouraging or facilitating the commission of the crime . . . by act or advice aids, promotes, encourages, or instigates the commission of the crime."

Tran contends "[o]n the evidence presented at the trial, the jury might have found that [Tran] only became involved in the incident after co-defendant Vo drew a weapon and discharged his weapon." Even assuming this is true, Tran fails to explain how, under the standard aiding and abetting instruction given here, the jury reasonably could have convicted him despite concluding he did not know what was going on until after the shooting occurred. The instruction informed the jury that Tran must have, by act or advice, aided, promoted, encouraged, or instigated the shooting, and that he must have had the requisite mental state *at the time he did so*. This instruction was sufficient to apprise the jury that Tran must have aided and abetted the commission of the crime before it occurred or while it was occurring, not after it was already complete. Thus, no further instruction was required.

Furthermore, even assuming the evidence in this case could have been interpreted to lead the jury to the conclusion that Tran formed his intent to assist Vo only after Vo had finished shooting, "neither the prosecution nor the defense relied on such a theory, nor was that theory conspicuously implied from the evidence presented." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1056 (conc. & dis. opn. of Mosk, J.).) Accordingly, in the absence of a defense request for such an instruction, the trial court had no sua sponte duty to give the instruction Tran contends should have been given. (*See ibid.*)

IV

Prosecutorial Misconduct

At the very end of rebuttal argument, the prosecutor addressed the burden of proof beyond a reasonable doubt. After rereading the instruction defining reasonable doubt, the prosecutor stated as follows: "So what does this mean? What's reasonable doubt? Reasonable doubt is no more than common sense. That's all it is. That's all reasonable doubt is. [¶] I'll break this instruction down for you a bit further. It basically says if you have any doubt based on reason, any doubt based on reason after the comparison and consideration of all the evidence -- any doubt based on reason after the entire comparison and consideration of all the evidence, the defendants are not guilty. Any doubt based on reason. That's all. After comparing the evidence, all the evidence, the defendants are not guilty. Reason. Common sense. That's all it is. [¶] I'm going to break it down to you even further. After hearing all the evidence, reviewing whatever it is you choose to review, you think to yourself they did it, you know they did it, that's it. Reasonable doubt. You knew they did it, standard is met. You know they did it."

At that point, Vo's counsel objected: "That is not reasonable doubt. That is not just if you have a gut feeling somebody did it. There has to be evidence. It has to be proof beyond a reasonable doubt." The court responded: "All right. I think we've discussed reasonable doubt enough and the jurors have the wording in front of them. Each side interprets it or

paraphrases it in different fashions. The jurors are to follow the legal definition of reasonable doubt."

Defendants contend the prosecutor's characterization of reasonable doubt amounted to misconduct and that the trial court erred in failing to give a curative instruction. "[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) It follows that it is misconduct for the prosecutor to misstate the reasonable doubt standard. Even assuming, however, that the prosecutor's equation of the reasonable doubt standard with "common sense" and "think[ing] to yourself they did it, you know they did it" amounted to a misstatement of the law, any potential harm from the misstatement was cured by the trial court's immediate admonition to the jurors that they were "to follow the legal definition of reasonable doubt," the wording of which they had "in front of them," and which, we hasten add, the prosecutor had just read to them. "The court's instructions, not the prosecution's argument, are determinative, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*People v. Mayfield* (1993) 5 Cal.4th 142, 179, quoting *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) Under the circumstances of this case, no further curative instruction or admonition was necessary.

V

The Drive-by Murder Special Circumstance

Having found both defendants guilty of first degree murder, the jury went on to find as to both defendants that the murder of Nippy "was intentional and was perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person . . . outside the vehicle, with the intent to inflict death." The finding of this special circumstance mandated a sentence of life without the possibility of parole for the murder, which the court imposed on both defendants.[10] (§ 190.2, subd. (a)(21).)

Defendants challenge the constitutionality of the special-circumstance statute and the sufficiency of the evidence to support the jury's finding of the special circumstance. We find these challenges to be without merit.

A

The drive-by murder special circumstance is constitutional.

The same facts that suffice to prove first degree murder by drive-by shooting -- an intentional murder by shooting out of a vehicle with intent to kill -- will also support a true finding of the drive-by murder special circumstance. (Compare § 189 with § 190.2, subd. (a)(21).) In *People v. Rodriguez* (1998) 66

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10 When a special circumstance is found true in connection with a first degree murder conviction, "[t]he penalty . . . is death or imprisonment in the state prison for life without the possibility of parole." (§ 190.2, subd. (a).) Here, the penalty was life in prison because the prosecution did not seek the death penalty.

Cal.App.4th 157, the defendant suggested that the identity of the drive-by shooting theory of first degree murder and the drive-by murder special circumstance created a "constitutional infirmity" in the special circumstance statute. (*Id.* at p. 164.) The appellate court rejected that suggestion out of hand, writing: "This suggestion . . . has already been decided to have no merit, and we therefore need not consider it further. (*Lowenfield v. Phelps* (1987) 484 U.S. 231 [108 S.Ct. 546, 98 L.Ed.2d 568], rehg. den. 485 U.S. 944 [108 S.Ct. 1126, 99 L.Ed.2d 286] [special circumstance of multiple murder may duplicate elements defining defendant's crime as first degree murder]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, fn. 12 [254 Cal.Rptr. 586, 766 P.2d 1] [rejecting suggestion of similar argument regarding 'lying-in-wait' special circumstance].)" (*People v. Rodriguez*, *supra*, 66 Cal.App.4th at p. 164.)

Defendants contend *Rodriguez* was wrongly decided because "the court relied upon misinterpretations of" *Lowenfield* and *Edelbacher*. Defendants urge us "to distinguish the cases relied upon by the court in *Rodriguez*, and to hold the drive-by murder special circumstance to be a violation of the protections afforded by the Eighth and Fourteenth Amendments to the United States Constitutions [*sic*]."

Our Supreme Court has long held that "first degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth Amendment." (*People v. Catlin* (2001) 26 Cal.4th 81, 158.) Indeed, in *People v. Marshall* (1990) 50 Cal.3d 907, the court held that even "the

'triple use' of the same facts--i.e., to support (1) the conviction of first degree murder on a theory of felony murder, (2) the finding of the felony-murder special circumstance, and (3) the imposition of the penalty of death" does not violate either the cruel and unusual punishments clause of the Eighth Amendment or the due process clause of the Fourteenth Amendment. (*Id.* at p. 945.)

"As an intermediate state appellate court, we, of course, are bound by decisions of the California Supreme Court." (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 952.) If the same facts may be used to support first degree murder liability, a special circumstance finding, *and* imposition of the death penalty in a capital case, there is no principled reason why the same facts cannot be used to support first degree murder liability and a special circumstance finding in a noncapital case. Accordingly, we reject defendants' constitutional challenge to the special circumstance statute.

B

There was sufficient evidence to support the jury's finding of the drive-by murder special circumstance.

Defendants contend there was insufficient evidence to support the jury's finding of the special circumstance because there was insufficient evidence of an intent to kill. This argument is identical to their challenge to the sufficiency of the evidence of first degree murder, which we have already rejected. There was substantial evidence from which the jury reasonably could have found both defendants had an intent to

kill and therefore sufficient evidence to support the jury's finding of the special circumstance.

VI

Sentence For Assault

Defendants were initially charged in count two with assault with a firearm on a peace officer in violation of subdivision (d)(1) of section 245. The court found there was insufficient evidence that Deputy Ralls qualified as a peace officer for purposes of the assault charge and therefore the charge was amended to assault with a firearm on a person in violation of subdivision (a)(2) of section 245. The jury found both defendants guilty of that charge. At sentencing, however, the trial court sentenced both defendants for assault with a firearm on a peace officer, giving Vo the upper term of eight years and Tran the middle term of six years.

Defendants contend, and the People concede, that the trial court erred in sentencing them for violating subdivision (d)(1) of section 245 rather than subdivision (a)(2) of that statute. Accordingly, we will modify the judgment by striking the sentences on count two for violating subdivision (d)(1) of section 245 and imposing in their place the following sentences for violating subdivision (a)(2) of that statute: the upper term of four years for Vo and the middle term of three years for Tran.[11]

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[11] All parties agree we can either: (1) remand for resentencing on the assault; or (2) modify the sentences

VII

The Section 186.22 Subdivision (b) Gang Enhancements

The jury found that defendants committed the murder of Nippy and the assault on Deputy Ralls "for the benefit of, at the direction of, and in association with a criminal street gang, to wit: INSANE VIET BOYS, within the meaning of Section 186.22(b)(1) of the Penal Code." With respect to Vo, the trial court imposed an additional three-year prison term on each count for the gang enhancements. With respect to Tran, the court imposed an additional two-year prison term on each count, but stayed the additional term on the murder count pursuant to subdivision (e)(2) of section 12022.53.[12]

Defendants raise several arguments regarding the gang enhancements, which we will address in turn.

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ourselves. We think modification is the most efficient solution because the trial court carefully explained its reasons for aggravating Vo's assault sentence and *not* aggravating Tran's assault sentence; thus, the court would very likely reach the same result on remand. With respect to Tran in particular, the court explained: "Mr. Tran's record is nonviolent and is, while not ideal on probation, is not a highly serious criminal record and not a record of prior criminal violence, and considering his age . . . considering his youthfulness, the Court feels that the middle term would be the appropriate term." We think it highly unlikely the court on remand would suddenly decide to aggravate Tran's assault sentence, when he is already subject to life without the possibility of parole *and* 25 years to life before he ever gets to serving his assault sentence.

12 This point is discussed further below.

A

The evidence was sufficient to support the gang enhancements.

Defendants argue there was insufficient evidence to support the "predicate offense" element of the gang enhancements. We disagree.

Subdivision (b) of section 186.22 (hereafter section 186.22(b)) provides enhanced punishment for certain gang-related crimes. "[T]o subject a defendant to the penal consequences of [section 186.22(b)], the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period.

(§ 186.22, subds. (e) and (f).)"[13] (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 616-617.)

We are concerned with the predicate offenses required to show a "pattern of criminal gang activity." To establish the required pattern, the prosecution must prove that the predicate offenses "were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).) "This language allows the prosecution the choice of proving the requisite 'pattern of criminal gang activity' by evidence of 'two or more' predicate offenses committed 'on separate occasions' *or* by evidence of such offenses committed 'by two or more persons' on the same occasion." (*People v. Loeun* (1997) 17 Cal.4th 1, 10.) "[W]hen the prosecution chooses to establish the requisite 'pattern' by evidence of 'two or more' predicate offenses committed on a single occasion by 'two or more persons,' it can . . . rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member." (*Ibid.*) However, proof that one gang member committed a single crime and was aided and abetted in the commission of that crime by another gang member establishes only

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13 To fall within the "statutorily defined period," at least one of the predicate offenses must have occurred "after the effective date" of the gang-enhancement statute, and the last of the predicate offenses must have occurred "within three years after a prior offense." (§ 186.22, subd. (e).) There is no issue in this case whether the predicate offenses fell within the statutorily defined period since, as will be shown, the charged offenses also served as the predicate offenses.

one predicate offense. (*People v. Zermeno* (1999) 21 Cal.4th 927, 931-933.)

Here, the prosecution relied on the charged offenses of murder and assault to serve as the predicate offenses for the gang enhancements.[14] Defendants contend the charged offenses were insufficient to establish the requisite predicate offenses under the Supreme Court's decision in *People v. Zermeno*, *supra*, 21 Cal.4th at page 927. They are mistaken.

In *Zermeno*, a section 186.22(b) gang enhancement was imposed on a defendant who was convicted of assault with a deadly weapon. (*People v. Zermeno*, *supra*, 21 Cal.4th at p. 930.) The finding of the requisite predicate offenses was based on the assault itself and on the aiding and abetting of the assault by the defendant's fellow gang member. (*Ibid.*) The Supreme Court found the evidence insufficient to support the gang enhancement because "[w]hen a defendant commits an aggravated assault and a fellow gang member aids and abets that assault by preventing anyone from stepping in . . . their conduct [does not] amount to 'two or more offenses' committed 'on separate occasions, or by two or more persons' so as to establish a 'pattern of criminal gang activity' under . . . section 186.22." (*Id.* at p. 928, fn. omitted.) Instead, the

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[14] Although there was some testimony regarding prior crimes by IVB members, the People properly acknowledge that testimony could not support imposition of the gang enhancements because there was no evidence placing those crimes within the statutorily defined period.

high court concluded that "under applicable law, the combined activity of defendant and his companion, who facilitated defendant's commission of the assault, was a single offense." (*Id.* at pp. 928-929.)

Relying on *Zermeno*, defendants assert that "for the people to establish that the charged act herein constituted the requisite 'pattern,' the people necessarily had to prove that there were two perpetrators [of the charged offenses] other than . . . Tran," who was only an aider and abettor. Not so. Under *Zermeno*, proof that a perpetrator and an aider and abettor acted together to commit a single crime establishes only one predicate offense for purposes of a section 186.22(b) gang enhancement. (*People v. Zermeno*, *supra*, 21 Cal.4th at p. 933; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458, fn. 4.) Here, however, there was substantial evidence a perpetrator (Vo, the shooter) and an aider and abettor (Tran, the driver) acted together to commit *two* crimes -- the murder of Nippy and the assault on Deputy Ralls. Thus, there was substantial evidence of two predicate offenses committed by two persons on a single occasion. There is nothing in section 186.22(b) or *Zermeno* that requires two predicate offenses committed on a single occasion to have two different perpetrators. All that is required is two or more predicate offenses committed by two or more persons on a single occasion -- whether those persons act as perpetrators or as aiders and abettors.

For the foregoing reasons, we conclude the evidence was sufficient to support the gang enhancements.

B

The trial court erred in instructing the jury on the "predicate offense" element of the gang enhancements.

Defendants next contend the trial court erred when it misinstructed the jury on the "predicate offense" element of the gang enhancement. On this point, we agree.

The court instructed the jury that a pattern of criminal gang activity "can be established by two or more incidents, each with a single perpetrator or by a single incident with multiple participants committing one or more of the specified offenses listed above. [¶] The current offenses charging the defendants with assault with a firearm and homicide can be used to establish a pattern of criminal gang activity."

Under *Zermeno*, the foregoing instruction was erroneous because it informed the jury that a pattern of criminal gang activity could be established by "a single incident with multiple participants committing *one or more* of the specified offenses . . . ." (Italics added.) As written, the instruction allowed the jury to find a "pattern of criminal gang activity" based on the commission of only one offense by multiple participants. Under *Zermeno*, however, proof of a single crime establishes only one predicate offense, no matter how many aiders and abettors may assist the perpetrator in committing the crime.

C

The error in the gang-enhancement instruction was harmless under both the state and federal standards of harmless error.

Having concluded the gang-enhancement instruction was erroneous, we must determine whether the error was prejudicial. First, however, we must determine which standard of harmless error applies.

Under the Supreme Court's decision in *People v. Sengpadychith* (2001) 26 Cal.4th 316, the standard of harmless error that applies to an error in instructing the jury on a section 186.22(b) gang enhancement depends on whether the offense to which the enhancement applies is punishable by a determinate term of imprisonment or by an indeterminate term of imprisonment for life. If the underlying offense is punishable by a determinate term of imprisonment, then an erroneous instruction on an element of the gang enhancement "is federal constitutional error" which "must be evaluated under the high court's test in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065] (*Chapman*) . . . ." (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 320.) On the other hand, if the underlying offense is punishable by an indeterminate term of imprisonment for life, then the erroneous instruction "does not violate the federal Constitution" and is instead "a matter of state law error, subject to the test . . . articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] (*Watson*) . . . ." (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 320.)

Here, section 186.22(b) gang enhancements were separately imposed on each conviction for each defendant -- that is -- on the murder conviction *and* the assault with a firearm conviction. Because murder is a felony that is punishable by an indeterminate term of imprisonment for life, the *Watson* standard of harmless error applies to the gang enhancement imposed on the murder convictions. However, because assault with a firearm is a felony punishable by a determinate term of imprisonment, the *Chapman* standard of harmless error applies to the gang enhancement imposed on the assault convictions.

Under the *Chapman* standard of harmless error, we must determine "whether the prosecution has 'prove[d] beyond a reasonable doubt that the error . . . did not contribute to' the jury's verdict." (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 320.) Under this standard, we find the instructional error harmless. The jury convicted both Vo and Tran of having committed both the murder of Nippy and the assault with a firearm on Deputy Ralls. Thus, the jury's verdicts on the charged offenses confirm that the jury found the two predicate offenses committed by two persons on a single occasion needed to impose the gang enhancements in this case, despite the error in the court's instruction that would have allowed the jury to find the enhancement allegation true based on a single predicate offense. Under these circumstances, we are convinced beyond a reasonable doubt that the error in the court's gang-enhancement instruction did not contribute to the true finding on the

enhancement allegation on the assault charges and therefore the error was harmless under federal law.

Under the *Watson* standard of harmless error, we must determine "whether without the error it is 'reasonably probable' the trier of fact would have reached a result more favorable to the defendant." (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 321.) Because the state standard under *Watson* is "less demanding" than the federal standard under *Chapman* (*People v. Cahill* (1993) 5 Cal.4th 478, 510), it follows a fortiori from our conclusion of harmless error under federal law that the error in the court's gang-enhancement instruction was harmless under state law also.

D

The trial court erred in imposing consecutive determinate terms of imprisonment as gang enhancements on the murder convictions.

As previously noted, with respect to Vo, the trial court imposed a consecutive three-year prison term for the gang enhancement on the murder conviction. With respect to Tran, the court imposed a two-year prison term for the gang enhancement on the murder conviction, but stayed that term, purportedly pursuant to subdivision (e)(2) of section 12022.53.[15]

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[15] That statute precludes the court from imposing a section 186.22(b) gang enhancement in addition to an enhancement for using or discharging a firearm under subdivision (e) of section 12022.53, "unless the person personally used or personally discharged a firearm in the commission of the offense." (§ 12022.53, subd. (e)(2).) Although we doubt the imposition

Vo contends the trial court erred in imposing the consecutive three-year sentence for the gang enhancement on the murder conviction and instead should have noted a minimum parole eligibility date of 15 years. We agree.

At the time of the crimes in this case,[16] subdivision (b)(1) of section 186.22 provided: "Except as provided in paragraph (4), any 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 an additional term of one, two, or three years at the court's discretion." Former subdivision (b)(4) (now subdivision (b)(5)) provided: "Any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served."

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and stay of a sentence enhancement is consistent with a statute barring imposition of the enhancement in the first place, we need not decide this issue because, as explained below, we are striking the section 186.22(b)(1) gang enhancements altogether for other reasons.

16 Section 186.22 was rewritten in 2000 by Proposition 21. (See Historical and Statutory Notes, 47 West's Ann. Pen. Code (2003 supp.) foll. § 186.22, p. 79.)

The Supreme Court explained the operation of the enhanced penalties of section 186.22(b) in *People v. Sengpadychith*, *supra*. According to the court, subdivision (b)(1), which applies to "felonies punishable by a determinate term of imprisonment," "adds a separate term of imprisonment 'in addition and consecutive to' the punishment otherwise prescribed for the felony." (26 Cal.4th at p. 327, italics omitted.) Former subdivision (b)(4), on the other hand, which applies to felonies "punishable by an indeterminate term of imprisonment for life," "does not alter the indeterminate term of life imprisonment; it merely prescribes the minimum period the defendant must serve before becoming eligible for parole." (*Sengpadychith*, at p. 327, italics omitted.)

Vo contends the trial court's addition of a three-year consecutive term to his sentence for murder was erroneous because murder is "a felony punishable by imprisonment in the state prison for life"; therefore, the applicable "enhancement" was the 15-year minimum parole eligibility date provided for in former subdivision (b)(4) and not the additional determinate term of imprisonment provided for in subdivision (b)(1).[17]

Vo's position finds support in *People v. Ortiz* (1997) 57 Cal.App.4th 480. In *Ortiz*, the appellate court concluded "[t]he statutory language [in subdivision (b)(1) of section 186.22] is

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17 The Supreme Court has explained that the 15-year minimum term in section 186.22(b)(4) is not actually a sentence enhancement at all but is instead "an alternate penalty for the underlying felony itself." (*People v. Jefferson* (1999) 21 Cal.4th 86, 101, italics omitted.)

clear and unambiguous" -- "subdivision (b)(1) specifically excepts prisoners serving a life sentence from the additional [determinate] term." (*Id.* at p. 486; accord, *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465.)

In support of their contrary position that the trial court properly added a three-year consecutive term to Vo's life sentence for murder, the People rely on the majority opinion in *People v. Herrera* (2001) 88 Cal.App.4th 1353. In *Herrera*, the court addressed the application of a section 186.22(b) gang enhancement to a sentence of 25 years to life for murder. The majority concluded "that the 15-year minimum term specified in former section 186.22, subdivision (4), which . . . was the result of a legislative enactment, cannot reduce the 25-year-to-life term specified in section 190, subdivisions (a) and (e), which was the result of an initiative approved by the voters." (*Id.* at p. 1359.) The majority "construe[d] the language in section 186.22, former subdivision (b)(1) '[e]xcept as provided by paragraph (4)' to mean that if paragraph (4) is inapplicable for any reason, then the one of the three determinate terms applies to the defendant." (*Id.* at p. 1364.)

In a concurring and dissenting opinion, Justice Grignon disagreed that the trial court had properly imposed a three-year section 186.22(b) gang enhancement on a 25-year-to-life murder sentence. (*People v. Herrera*, *supra*, 88 Cal.App.4th at p. 1368.) Echoing the *Ortiz* court, Justice Grignon concluded the "language [of section 186.22(b)(1)] is crystal clear. Where a defendant receives a life sentence, the 15-year minimum term

applies instead of the one-, two- or three-year enhancement." (*People v. Herrera*, *supra*, 88 Cal.App.4th at pp. 1368-1369.) Noting the Supreme Court's conclusion that the 15-year minimum term is not a sentence enhancement but an alternate penalty for the underlying murder (*People v. Jefferson*, *supra*, 21 Cal.4th at p. 101), Justice Grignon further observed: "Since the penalty for the underlying felony is greater than the alternate gang minimum term, the gang minimum term has no mandatory effect. However, it is one of the considerations the Board of Prison Terms may take into account when granting or denying parole to a prisoner who is eligible for parole." (*People v. Herrera*, *supra*, 88 Cal.App.4th at p. 1370.)

We agree with *Ortiz* and the dissent in *Herrera* that when a defendant is convicted of a felony, like murder, punishable by imprisonment for life, an additional determinate term of imprisonment cannot be imposed as a gang enhancement under section 186.22(b)(1).[18] By the plain terms of the statute, "subdivision (b)(1) specifically excepts prisoners serving a life sentence from the additional [determinate] term." (*People v. Ortiz*, *supra*, 57 Cal.App.4th at p. 486.) Instead, the defendant is subject to a minimum term of 15 years under former subdivision (b)(4). Although that minimum term may have no

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18 In reaching this conclusion, we join two other recent decisions by our colleagues in the Courts of Appeal, Fourth Appellate District, Division One (*People v. Harper* (2003) 109 Cal.App.4th 520, 523-527) and the Second Appellate Division, Division Six (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236-1239).

effect where, as here, the penalty for the underlying crime is greater,[19] that fact does not allow us to disregard the unambiguous language of the statute. Accordingly, we will strike the section 186.22(b)(1) determinate term gang enhancement for both defendants as to the murder convictions only.

E

Vo is not entitled to have the gang enhancement on his assault conviction stricken under section 654.

Vo contends that because the murder of Nippy and the assault on Deputy Ralls were "part of one continuous course of conduct," "only one criminal street gang enhancement is applicable" and therefore the gang enhancement on the assault conviction must be stricken under section 654. We disagree.

In relevant part, section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "[I]t is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct

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[19] Here, the penalty for the underlying crime is life without the possibility of parole. Obviously, the 15-year minimum parole eligibility specified in former section 186.22, subdivision (4) has no effect where defendant is not eligible for parole in the first place.

which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "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.)

Here, Vo received consecutive, unstayed sentences for both the murder and the assault, and he does not contend those separate sentences were prohibited by section 654. Indeed, separate punishment for the murder of Nippy and the assault on Deputy Ralls was appropriate both because there were multiple shots fired (see *People v. Trotter* (1992) 7 Cal.App.4th 363, 365-368) and because there were multiple victims (see *Neal v. State of California* (1960) 55 Cal.2d 11, 20). Since Vo could be separately punished for the murder and for the assault without violating section 654, there is no reason why he cannot be separately punished for committing each of those crimes "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(b)(1).)

VIII

The Section 12022.53(d) Firearm Enhancement

As applicable here, former subdivision (d) of section 12022.53 (hereafter section 12022.53(d)) provided for an additional and consecutive term of imprisonment in the state prison for 25 years to life for any person convicted of certain felonies -- including murder -- "who in the commission of that felony intentionally and personally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7."[20] The jury found that defendants intentionally and personally discharged a handgun causing great bodily injury in the commission of Nippy's murder within the meaning of section 12022.53(d). Accordingly, the court imposed a consecutive term of 25 years to life in prison on each defendant for the firearm enhancement.

Defendants raise several arguments regarding these enhancements, which we will address in turn.

A

The section 12022.53(d) firearm enhancement can be imposed on a sentence of life without possibility of parole.

While this appeal was pending, Division Seven of the Second Appellate District decided a case -- *People v. Navarro* -- in which the court held that subdivision (j) of section 12022.53 (hereafter section 12022.53(j)) precludes a defendant sentenced

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[20] As it now reads, section 12022.53(d) applies when the firearm use causes "great bodily injury . . . or death." (Stats. 1998, ch. 936, § 19, p. 90.)

to life without possibility of parole under the "drive-by murder" special circumstance statute from being given an additional sentence of 25 years to life under section 12022.53(d). We requested additional briefing from the parties on this question. Not surprisingly, defendants urged us to follow *Navarro*, and the People contended *Navarro* was wrongly decided. Subsequently, the Supreme Court ordered *Navarro* depublished. (*People v. Navarro* (Mar. 17, 2003, mod. Apr. 14, 2003) B148711, review den. and opn. ordered nonpub. June 25, 2003, S115867.) At oral argument, counsel for defendant Vo continued to urge us to follow the reasoning of the *Navarro* court. For the reasons that follow, we decline to do so.

Section 12022.53(d) provides that "[n]otwithstanding any other provision of law, . . . an additional and consecutive term of imprisonment in the state prison for 25 years to life" shall be imposed when a defendant intentionally discharges a firearm and proximately causes great bodily injury during the commission of a murder or other designated felonies. In addition, subdivision (b) of that statute provides an additional 10-year sentence for *use* of a firearm during a qualifying felony, and subdivision (c) provides an additional 20-year sentence for *discharge* of a firearm during a qualifying felony. Under subdivision (f) of the statute, "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment."

Section 12022.53(j) provides: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment."

According to defendant, the 25-years-to-life enhancement does not apply in a case like this because "another provision of law," section 190.2, subdivision (a)(21), "provides for a greater penalty or a longer term of imprisonment," life without possibility of parole. Defendant takes the position that the language of subdivision (j), which was inserted as an amendment to the original bill, was added to the statute to make sure the "notwithstanding any other provision of law" language in subdivisions (b) through (d) did not inadvertently supersede a law which would impose an even greater punishment on a defendant who happened to employ a firearm in committing one of the enumerated crimes and to avoid the risk of ridicule and loss of respect for the criminal justice system in imposing an off-the-wall sentence such as death plus life in prison.

According to defendant's interpretation of subdivision (j), a section 12022.53 enhancement does not apply if "another provision of law" -- including the provision of law proscribing

the basic punishment for the underlying felony -- "provides for a greater penalty or a longer term of imprisonment," in which case only the penalty under the other provision of law is to be applied. Under that construction of the statute, section 12022.53 can *never* be applied to *any* felony that is punished by life in prison without possibility of parole because that punishment will always be greater than any of the section 12022.53 enhancements.

This interpretation of section 12022.53(j) is untenable because it is utterly at odds with subdivision (a) of the statute, which specifies the felonies to which the statute applies. Included in those designated felonies are two that are punishable *only* by a term of life in prison without possibility of parole: (1) aggravated mayhem (§ 205); and (2) kidnapping for ransom in which the victim "suffers death or bodily harm, or is intentionally confined in a manner which exposes [the victim] to a substantial likelihood of death" (§ 209, subd. (a)). (§ 12022.53, subd. (a)(2)-(3).) In addition, section 12022.53 specifically applies to the crime of assault with a deadly weapon by a prisoner serving a life sentence (§ 4500), which is punishable by death or life in prison without possibility of parole if the victim dies within a year and a day after the assault. (§ 12022.53, subd. (a)(14).) Finally, subdivision (a) of section 12022.53 includes a "catch-all" provision that provides for the statute's application to "[a]ny felony punishable by death or imprisonment in the state prison for life." (§ 12022.53, subd. (a)(17).)

Defendant's interpretation of section 12022.53(j) cannot be reconciled with the foregoing provisions. Defendant contends that one of the reasons behind subdivision (j) was to avoid the risk of ridicule and loss of respect for the criminal justice system in imposing an off-the-wall sentence such as death plus life in prison. But subdivision (a)(17) of the statute specifically provides for the application of the statute to "[a]ny felony punishable by death." Thus, the plain terms of the statute demonstrate that the Legislature specifically intended to provide for imposition of the type of sentence the defendant fears.[21]

"The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. . . . An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a

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[21] Indeed, such sentences are possible under other Penal Code provisions also. In *People v. Koontz* (2002) 27 Cal.4th 1041, our Supreme Court affirmed a judgment that imposed "death for [a] murder conviction, imprisonment for life for [a] kidnapping for robbery conviction, and an aggregate determinate term of 21 years' imprisonment" where "both the indeterminate and the determinate terms were to be served consecutively to the sentence for murder." (*Id.* at p. 1054.)

statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Defendant's literal and isolated language approach to interpreting section 12022.53 failed to heed these fundamental rules of statutory construction. As the Supreme Court explained in *People v. Garcia* (2002) 28 Cal.4th 1166: "The legislative intent behind section 12022.53 is clear: 'The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.'" (*Id.* at p. 1172, quoting Stats. 1997, ch. 503, § 1.) To effectuate this intent, section 12022.53 provides for prison terms varying from 10 years to 25 years to life, which, "[n]otwithstanding any other provision of law," are to be imposed as "additional and consecutive" terms -- that is, in addition to and consecutive to the punishment that otherwise attaches to the underlying felony. (§ 12022.53, subds. (b)-(d).) Under defendant's interpretation, however, the mandatory additional and consecutive prison terms provided for by section 12022.53 are *not* to be imposed in certain instances if the penalty for the underlying felony is greater than the applicable section 12022.53 enhancement. This construction of the statute not only "renders related provisions [specifically, parts of subdivision (a) of the statute] nugatory," it also does not "conform [the words of the statute] to the spirit of the act."

As the People note, defendant's construction of section 12022.53(j) would also lead to absurd results. For example, if a defendant were convicted of assault with a machine gun on a peace officer under subdivision (d)(3) of section 245 and given the upper term of 12 years in prison, defendant's construction of section 12022.53(j) would preclude the trial court from imposing a 10-year firearm use enhancement under subdivision (b) of section 12022.53 because section 245 provides for a longer sentence than the enhancement. Thus, the defendant would receive a total term of 12 years. In contrast, if the same defendant received the middle term of nine years for the assault, then the trial court could impose the 10-year gun use enhancement, and the defendant would receive a total term of 19 years. Interpretations of statutes that lead to such absurd results are to be avoided. (*People v. Loeun*, *supra*, 17 Cal.4th at p. 9.)

Even subdivision (j) of the statute reinforces the mandatory nature of the section 12022.53 enhancements by specifying that "[w]hen an enhancement specified in this section has been admitted or found to be true, the court *shall* impose punishment pursuant to this section [that is -- shall impose the applicable 'additional and consecutive term of imprisonment'] rather than imposing punishment authorized under any other provision of law." (Italics added.) The only limitation on this directive is the final part of subdivision (j), which qualifies the directive with the following condition: "unless

another provision of law provides for a greater penalty or a longer term of imprisonment."

It is not readily apparent from the face of the statute what the effect of this condition was intended to be. As we have explained, defendant's interpretation of the condition is untenable because it negates other parts of the statute by rendering the section 12022.53 enhancements inapplicable to certain crimes that, by the plain terms of subdivision (a), the Legislature intended to be subject to the statute. It may be, however, that the condition in subdivision (j) was intended to ensure that section 12022.53 would not be superseded by any later-enacted *enhancement provision*, unless that enhancement provision provided for "a greater penalty of a longer term of imprisonment." Thus, under subdivision (j), the court is required to impose as a sentence enhancement the "additional and consecutive term of imprisonment" provided for in subdivision (b), (c), or (d) of the statute, in lieu of another punishment authorized by law, "unless another provision of law" that provides for a different sentence enhancement "provides for a greater penalty or a longer term of imprisonment."

This interpretation of the statute is reinforced by the fact that at the same time the conditional language of what became subdivision (j) was added to Assembly Bill No. 4, the bill's author also added language to subdivision (f) specifying that "*[a]n enhancement involving a firearm specified in Section 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed in addition to an enhancement imposed pursuant to this*

section." (Assem. Bill No. 4 (1997-1998 Reg. Sess.) § 2, as amended Feb. 19, 1997.) The coincidence of these two additions to the bill suggests the author was addressing the interplay of the new "10-20-life" firearm enhancements with other enhancements, both existing and future, that might also apply. The existing firearm enhancements identified in the addition to subdivision (f) of the proposed statute were all shorter than the new "10-20-life" enhancements, so the legislative purpose of providing longer sentences for gun use could be accomplished by making the new enhancements supersede the existing ones. This goal was achieved by providing that the new firearm enhancements would apply "[n]otwithstanding any other provision of law" and by providing that the existing enhancements could not be imposed in addition to one of the new enhancements. To address other enhancements that might be enacted in the future, or amendments to existing enhancements, the bill's author may have added the conditional language in what became subdivision (j) of the statute to ensure that any future enhancements, too, would be superseded by the section 12022.53 enhancements *unless* the new enhancements were more punitive.

Although this appears to be a plausible construction of the conditional language in section 12022.53(j) which reconciles the language of the statute with its express purpose, we need not decide whether this was, in fact, the intended purpose of that language. For our purposes, it is sufficient to decide what purpose the Legislature did *not* intend. From our review of the statute and its legislative history, we conclude the Legislature

did not intend to take the unprecedented step of requiring courts to impose a sentence enhancement *instead of* the sentence for the underlying crime. Thus, we conclude a section 12022.53(d) enhancement of 25 years to life in prison can and must be added to a sentence of life without possibility of parole.

B

The evidence was sufficient to support imposition of the section 12022.53(d) firearm enhancement on Tran.

Subdivision (e)(1) of section 12022.53 provides that section 12022.53 enhancements "apply to any person who is a principal in the commission of an offense" if that person "violated subdivision (b) of Section 186.22" and "[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d)" of section 12022.53.

"Section 12022.53, subdivision (e)(1) extends potential liability under the firearm enhancement when the accused, in a gang case, does not personally use the weapon. . . . Section 12022.53, subdivision (d) . . . requires the imposition of a 25-year-to-life sentence consecutive to that imposed for the underlying felony when the accused 'personally discharged a firearm and proximally caused great bodily injury . . . or death.' Section 12022.53, subdivision (e)(1) creates an exception to the *personal* use requirement of section 12022.53, subdivisions (b) through (d) in a prosecution where findings have been made pursuant to section 186.22, . . . In a case where section 186.22 has been found to be applicable, in order

for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm." (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282.)

Tran contends that because there was insufficient evidence to support the section 186.22 gang enhancement, there was also insufficient evidence to support the section 12022.53(d) firearm enhancement as to him because he did not personally use the gun. However, we have concluded the evidence *was* sufficient to support the gang enhancement. Therefore, Tran's challenge to the sufficiency of the evidence on the firearm enhancement also fails.

C

The trial court did not err in instructing the jury on the application of the firearm enhancement to aiders and abettors.

In a related argument, Tran contends the jury should have been instructed "that they had to reach a true finding against [Tran] on the § 186.22 enhancement prior to even considering a § 12022.53 allegation against [Tran] as an aider and abettor." We disagree.

For the section 12022.53(d) firearm enhancement to apply to Tran, the jury had to find that: (1) Tran was a principal in the murder; (2) the murder was committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members; and (3) *any* principal in the murder discharged a firearm and proximately caused great bodily injury to Nippy. (See §§ 186.22, subd. (b)(1), 12022.53, subds. (d)-(e).) Here, the jury made all of the necessary findings based on proper instructions. First, as we have determined already, the jury was properly instructed on aider and abettor liability, and pursuant to those instructions the jury found Tran guilty of the murder. Second, the only error in the court's instructions on the gang enhancement was harmless, and the jury found the murder was committed for the requisite gang purpose under those instructions. Third, the jury found Vo, who was also guilty as a principal in the murder, had personally discharged a firearm, proximately causing great bodily injury to Nippy, in the commission of the crime. Accordingly, all of the prerequisites for imposing the section 12022.53(d) enhancement on Tran were found by the jury. All that remained was for the court to impose the enhancement. Under these circumstances, no further jury instruction was necessary.

D

The trial court did not err in instructing the jury on the "great bodily injury" element of the section 12022.53(d) firearm enhancement.

When the crimes in this case were committed, the section 12022.53(d) firearm enhancement required a finding that the use of the firearm "proximately caused great bodily injury, as defined in Section 12022.7." (Former § 12022.53(d).) Section 12022.7 defines "great bodily injury" as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) In instructing the jury on this enhancement, however, the trial court did not provide the jury with the statutory definition of "great bodily injury," but instead informed the jury without objection that "[g]reat bodily injury need not be defined since death obviously qualifies as great bodily injury."

Vo contends the instruction on the section 12022.53(d) enhancement "was improper as it constituted a directed verdict on an element of the enhancement allegation."[22] In essence, Vo contends that because the court instructed the jury that "death obviously qualifies as great bodily injury," the jury did not have to find one of the facts required for imposition of the enhancement, which violated his constitutional rights to due process and a jury trial. We disagree.

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[22] As Vo notes, "[s]ection 1259 authorizes appellate review of an unobjected to instruction." (*People v. Higareda* (1994) 24 Cal.App.4th 1399, 1406, fn. 5.)

In *People v. Figueroa* (1986) 41 Cal.3d 714, a criminal prosecution for the sale of unqualified securities, the Supreme Court held it was error to instruct the jury that the promissory notes involved were "securities" under the Corporate Securities Law because "[t]he court's instruction erroneously removed an element of the . . . charge from the jury's consideration." (*Id.* at p. 741.) In *People v. Brown* (1988) 46 Cal.3d 432, a capital case for the murder of a peace officer, the court reached a different conclusion where, in instructing the jury on the special circumstance for which the defendant was subject to the death penalty, the trial court instructed the jury that "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers." (*Id.* at p. 443, italics omitted.) In distinguishing *Brown* from *Figueroa*, the Supreme Court explained: "We held in *Figueroa* the court erred in instructing that particular promissory notes at issue in that case were securities as a matter of law. As noted, the court here did *not* instruct the jury that *Officer Reed* was a peace officer as a matter of law; it merely instructed pursuant to the unquestionable and clear terms of the relevant statutes that Garden Grove police officers are peace officers." (*People v. Brown*, *supra*, 46 Cal.3d at p. 444, fn. 6.) The Supreme Court concluded that "[a]s instructed, the jury was left to determine all elements of the special circumstance" and "was left to make all essential factual determinations, including whether the victim was a Garden Grove police officer." (*Id.* at pp. 443, 444.)

The People contend this case is akin to *Brown* because "the instruction that death satisfied the element of great bodily injury took no factual determination from the jury." We agree. Like *Brown*, this case is distinguishable from *Figueroa* because the trial court here did not instruct the jury that the gunshot wound to Nippy's head constituted "great bodily injury" as a matter of law. Instead, the trial court simply instructed the jury with the unremarkable proposition that "great bodily injury," by definition, encompasses any injury that is fatal. As a matter of common sense, it is impossible to imagine a more "significant or substantial physical injury" to a person than one that results in the person's death.[23]

By instructing the jury that "death obviously qualifies as great bodily injury," the trial court did not remove any factual issue from the jury's consideration. As instructed, the jury was left to make all the essential factual determinations required for imposition of the section 12022.53(d) enhancement, including whether Vo had murdered Nippy, whether Vo had intentionally and personally discharged a firearm in the

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[23] It is significant to note that in amending section 12022.53(d) in 1998 to specifically include the word "death," the Legislature explained that the amendment was "intended to be declaratory of existing law and to clarify that the enhancement in that subdivision applies to causing great bodily injury or death." (Stats. 1998, ch. 936, § 27, p. 78.) Although "[a] statement by the Legislature construing a prior enactment is not binding on the courts, which have the duty to construe statutes," this statement of the Legislature's intent is nonetheless "entitled to due consideration." (*People v. Valencia* (2000) 82 Cal.App.4th 139, 149.)

commission of that murder, and whether Vo's discharge of the firearm proximately caused Nippy's death.

E

Section 654 did not preclude imposition of the section 12022.53(d) firearm enhancement on sentences for first degree murder by drive-by shooting.

Defendants contend section 654 precludes imposition of the section 12022.53(d) firearm enhancement when the underlying felony is murder perpetrated by discharging a firearm from a motor vehicle. We are not persuaded.

As previously explained, section 654 generally precludes multiple punishment for a single act or omission. Here, defendants contend they were impermissibly punished twice for the murder of Nippy -- once with a sentence of life without parole for the murder itself, and a second time with a consecutive sentence of 25 years to life for the section 12022.53(d) firearm use enhancement.

We need not wade into, or attempt to resolve, the recognized dispute over "whether section 654 applies to enhancements" (*People v. Coronado* (1995) 12 Cal.4th 145, 157) to decide the issue in this case because the language of section 12022.53 provides the answer. As the court explained in *People v. Hutchins* (2001) 90 Cal.App.4th 1308: "The plain language of the statute at issue in this case, section 12022.53, mandates imposition of the additional enhancement sentence. Thus, the statute clearly and unambiguously states that '[*n*]*otwithstanding any other provision of law*, any person who is convicted of a

felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, . . . to any person other than an accomplice, *shall be punished* by a term of imprisonment of 25 years to life in the state prison, *which shall be imposed in addition and consecutive to the punishment prescribed for that felony*.' (§ 12022.53, subd. (d), italics added.) Elsewhere the same statute specifically provides that '[*n*]*otwithstanding any other provision of law*,' a trial court 'shall not' suspend execution or imposition of sentence for any person found to come within the provisions of this enhancement statute, or strike any allegation or finding that brings a person within the provisions of this section. (§ 12022.53, subds. (g), (h), italics added.) [¶] Clearly, in enacting this provision the Legislature intended to *mandate* the imposition of substantially increased penalties where one of a number of crimes, including homicide, was committed by the use of a firearm. In so doing, the express language of the statute indicates the Legislature's intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties." (*Id.* at p. 1313, fns. omitted.)

Vo suggests that *Hutchins* is distinguishable because *Hutchins* involved an underlying conviction for second degree murder, not an underlying conviction for first degree murder committed by a drive-by shooting. According to Vo, this distinction is significant because second degree murder does

not, by definition, involve an element of firearm use, while first degree murder committed by drive-by shooting does. That fact makes no difference for purposes of applying section 654, however. The *Hutchins* analysis set forth above did not depend on the absence of firearm use as an element of second degree murder.[24] What the court in *Hutchins* pointed out was that section 12022.53(d) applies "[n]otwithstanding any other provision of law," and section 654 is just such a provision. In other words, by its plain terms, section 12022.53 trumps section 654. "[W]here imposition of a firearms use enhancement is made *mandatory* notwithstanding other sentencing laws and statutes, it is *error* to apply section 654 to stay imposition of such an enhancement." (*People v. Hutchins*, *supra*, 90 Cal.App.4th at p. 1314.)

Accordingly, the trial court did not err in imposing the enhanced term of 25 years to life under section 12022.53(d).

IX

Cruel And Unusual Punishment

Tran contends the imposition of a term of 25 years to life under section 12022.53(d), consecutive to a term of life without the possibility of parole, constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17 of the California

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[24] Other firearm enhancement statutes specifically preclude their application when use of a firearm is an element of the underlying offense. (E.g., § 12022.5, subd. (a).) No such limitation appears in section 12022.53(d).

Constitution. Pointing out that "[h]is liability resulted from a finding that he was an aider and abettor to the actual shooter" and that he was 20 years old with only one prior conviction at the time of the shooting, Tran contends "the consecutive life sentences offended the proportionality rule" "[i]n light of [his] derivative culpability, his youth, and relatively minor criminal history."

As it appears defendant failed to raise this issue in the trial court, it is waived. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) Nonetheless, to forestall an ineffective assistance of counsel claim, we shall address -- and reject -- this argument on its merits.

A majority of the United States Supreme Court has recently confirmed that "[t]he Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. ___, ___ [155 L.Ed.2d 108, 117]; see also *id.* at p. ___ [155 L.Ed.2d at p. 127], dis. opn. of Breyer, J.) "[T]he precise contours of [this principle] are unclear, [but are] applicable only in the 'exceedingly rare' and 'extreme' case." (*Lockyer v. Andrade* (2003) 538 U.S. ___, ___ [155 L.Ed.2d 144, 156].)

A punishment 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.)

Here, Tran was punished with a term of life without the possibility of parole, and a consecutive term of 25 years to life in prison, for being the driver in an intentional, drive-by shooting murder. That Tran did not personally use a gun in the commission of the offense does not lessen his culpability. As the driver, he brought Vo back to Hot Shots and thereby made the shooting possible. In addition, the evidence showed that in facilitating the drive-by shooting, Tran was acting as part of, and for the benefit of, a criminal street gang. The Legislature has determined that under such circumstances, a person who aids and abets a gang shooting should receive the same penalty enhancement as the one who pulled the trigger.

Given the seriousness of Tran's crime, even his relative youth and limited criminal record does not make his case one of those exceedingly rare cases where the punishment is so grossly disproportionate that is shocks the conscience and offends fundamental notions of human dignity. More offensive to such notions than Tran's sentence are the actions for which he was sentenced, by which a human life was cruelly extinguished.

Viewing the nature of the crime, the nature of the criminal, and the statutory directive regarding the appropriate sentence, we find no constitutional disproportionality in Tran's sentence.

DISPOSITION

The judgment is modified by striking the sentences imposed on count two (assault with a firearm) pursuant to subdivision (d)(1) of section 245 and substituting, pursuant to subdivision (a)(2) of section 245, a sentence of four years in prison for defendant Vo and a sentence of three years in prison for defendant Tran. The judgment is also modified by striking the three-year sentence imposed on Vo for the criminal street gang enhancement on count one (murder) under subdivision (b) of section 186.22 and the two-year sentence imposed on Tran for the same enhancement on that count.

As modified, the judgment is affirmed. The trial court is directed to prepare amended abstracts of judgment for both defendants reflecting the modifications and to forward certified copies of those amended abstracts to the Department of Corrections.

ROBIE, J.

We concur:

SIMS, Acting P.J.

KOLKEY, J.