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# IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ERIC HUNG LE, et al.,

Defendants and Appellants.

**No.**

Court of Appeal No. D057392

Superior Court No. SCD212126

**PETITION FOR REVIEW**

**[From People's Cross-Appeal Regarding Co-defendant Down George Yang]**

## 2nd PETITION FOR REVIEW

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## IN THE SUPREME COURT OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>v.<br>ERIC HUNG LE, et al.,<br>Defendants and Appellants. | **No.**<br>Court of Appeal No. D057392<br>Superior Court No. SCD212126<br>**PETITION FOR REVIEW**<br>**[From People's Cross-Appeal Regarding Co-defendant Down George Yang]** |

### ISSUES PRESENTED

Does Penal Code section 1170.1, subdivision (f), as interpreted by this Court in *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), preclude a sentencing judge from imposing both a firearm enhancement under Penal Code section 12022.5, subdivision (a)(1), and a gang enhancement for a "serious felony" under Penal Code section 186.22, subdivision (b)(1)(B), when the underlying felony involves use of a gun?

## INTRODUCTION

The People's appeal in this case was intended to settle a recurring sentencing issue of importance to gang prosecutors statewide. The People sought to clarify the available sentencing options in situations where this Court's holding in *Rodriguez*, interpreting Penal Code section 1170.1, subdivision (f), precludes imposing additional punishment for both a gun use enhancement under Penal Code section 12022.5, subdivision (a)(1), and a gang enhancement elevated to the "violent felony" under Penal Code section 186.22, subdivision (b)(1)(C), because each enhancement involved the identical gun use conduct.[1]

Unfortunately the published opinion from Division One of the Fourth Appellate District Court of Appeal, *People v. Le* (2012) 205 Cal.App.4th 739, as modified on May 24, 2012,did not, in our estimation, correctly analyze the question or come to the right result. Instead of discussing available sentencing options in a *Rodriguez* scenario, the Court of Appeal expanded the holding of *Rodriguez* beyond its limits or rationale. The appellate court opinion interprets *Rodriguez* as precludes imposing additional punishment for personal use of a firearm under section 12022.5, subdivision (a)(1), when the gang enhancement has been elevated only to a "serious felony" under subdivision (b)(1)(B) of section 186.22. The punishment for the gang enhancement in this case could be elevated to the "serious felony" level, not by the gun use enhancement as in *Rodriguez*, but because the underlying crime, here assault with a semi-automatic gun in violation of section 245, subdivision (b), involved use of a gun. The Court of Appeal relying on *Rodriguez*, nevertheless, ruled imposition of both enhancements would violate section 1170.1, subdivision (f). This was an

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

unwarranted expansion of the *Rodriguez* decision.

The People filed a Petition for Rehearing in the Court of Appeal. In denying the petition the appellate court modified its opinion helping to clarify the rationale for its ruling, but otherwise made no change in the judgment.[2]

The issue presented is worthy of a grant of review by the Court to clarify the nature and scope of your decision in *People v. Rodriguez*, *supra*, 47 Cal.4th 501. This Court grants review "where necessary ... to settle an important question of law in matters of statewide impact." (*People v. Garcia* (2002) 97 Cal.App.4th 847, 854.) In the alternative, we have also submitted a letter requesting depublication of the Court of Appeal opinion.

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[2] Per Cal. Rules of Ct., rule 8.504(b)(4), copies of the slip opinion and the subsequent modification are attached.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Trial Court

Defendant Yang was charged in count 4 of the Information with committing the crime of assault with a semi-automatic firearm under section 245, subdivision (b), as well as a criminal street gang allegation under section 186.22, subdivision (b)(1), and a personal use of a firearm enhancement allegation under section 12022.5, subdivision (a)(1). (1 Clerk's Transcript on Appeal [C.T.] pp. 14-18.) The jury convicted defendant Yang of the charged crime in count 4 and both allegations. (2 C.T. p. 307; 3 C.T. pp. 583-584, 588.) As charged and as found true by the jury, the gang allegation under section 186.22, subdivision (b)(1), made no mention of the use of a firearm.

The offense charged in count 4 occurred in 2002. Then, as now, the crime of assault with a semi-automatic firearm under section 245, subdivision (b), has a triad of sentencing choices of three, six, or nine years. Then, as now, the sentencing enhancement for personal use of firearm under section 12022.5, subdivision (a)(1), also has a triad of sentencing choices consisting of three, four, or ten years, which must be imposed consecutive to the punishment for the underlying felony. Finally, then, as now, upon a finding that the defendant committed the underlying felony for the benefit of a criminal street gang under section 186.22, subdivision (b)(1), an additional term is added to the sentence. For most felonies there is a triad of sentencing options of two, three or four years. This additional term is increased to five years if the crime is a "serious felony" as defined by section 1192.7, subdivision (c) (§ 186.22, subd. (b)(1)(B)), and to ten years if the crime is a "violent felony" as defined by section 667.5, subdivision (c) (§ 186.22, subd. (b)(1)(C)).

Count 4 Sentencing Options for Defendant Yang [In Years]

| | |
|---|---|
| Section 245(b) | 3 – 6 – 9 |
| Section 12022.5(a)(1) | 3 – 4 – 10 |
| Section 186.22(b)(1) | 2 – 3 – 4 |
| or | |
| (B) As "Serious Felony" | 5 |
| or | |
| (C) As "Violent Felony" | 10 |

At sentencing, the prosecutor asked the trial judge to consider a sentence as to count 4 for defendant Yang consisting of three components: (1) The principle term for the crime of assault with a semi-automatic firearm under section 245, subdivision (b); (2) the personal use of a firearm enhancement under section 12022.5, subdivision (a)(1); and (3) the criminal street gang allegation related to a "serious felony" under section 182.22, subdivision (b)(1)(B). (18 Reporter's Transcripts on Appeal [R.T.] pp. 3442-3452.) In effect, the prosecutor was arguing that the maximum prison sentence that could be imposed on count 4 was 24 years consisting of the upper term of nine years for the crime, the upper term of ten years for the gun use enhancement, and five years for the gang allegation treated as a "serious felony" rather than a "violent felony."

Count 4 Sentence Requested by the People

| | |
|---|---|
| Section 245(b) | 9 |
| Section 12022.5(a)(1) | 10 |
| Section 186.22(b)(1)(B) | 5 |
| TOTAL | 24 |

The trial judge found that, in his reading of *Rodriguez*, he did not have the legal authority to even consider imposing this sentence.

> So that the reviewing court can have the benefit of my alleged wrong, to the extent that can be discerned from this record, I'm concluding as a matter of law that this [section 1170.1, subd. (f) as interpreted by *Rodriguez*] precludes the application of the term … under 12022.5. I specifically do not embrace the notion that I could use the firearm and choose a term under the firearm enhancement and then just take the base gang allegation and impose a term with respect to that.

(18 R.T. p. 3458, lines 10-18.)

As a result, the judge imposed what he believed to be the maximum sentencing on count 4 (19 years in prison). (2 C.T. p. 410; 18 R.T. p. 3458, lines 19-24.) The judge felt he "should" impose the ten year "violent felony" term for the gang allegation under section 186.22, subdivision (b)(1) (18 R.T. p. 3458, lines 7-9) and, thus, he stayed sentencing for the firearm use allegation under section 12022.5, subdivision (a)(1) (18 R.T. p. 3458, lines 21-22).

| Count 4 Sentence Imposed by the Court | |
|---|---|
| Section 245(b) | 9 |
| Section 12022.5(a)(1) | Stayed |
| Section 186.22(b)(1)(C) | 10 |
| TOTAL | 19 |

The judge's sentence was five years less than what he could have imposed while still complying with the requirements of section 1170.1, subdivision (f), as interpreted by the *Rodriguez* decision. As the prosecutor pointed out: "And if we read *Rodriguez* or 1170.1 as saying we can only get one or the other, then they are both 10-year allegations. And, in fact, we would be losing 5 years under the gang allegation." (18 R.T. p. 3451, lines 23-27.)

The judge indicated that were he able to impose sentence on just the gun enhancement under section 12022.5, he would have chosen the upper term of ten years.

> And there was indication at least one or both of the defendants claimed or bragged to have emptied the clip. There were other people cowering down. There were multiple bullet strikes. There was injury inflicted, and I think that all of these factors warrant the upper term. If the court were to impose or to be called upon to impose a term under the 12022.5 allegation, the court would and hereby does find that the upper term would be appropriate.

(18 R.T. p. 3464, lines 10-18.) But, as indicated, the judge felt he could not legally impose this additional sentence under the compulsion of the *Rodriguez* decision. The People disagreed and appealed (we were designated cross-appellant in the defendants' consolidated appeal).

**B. Court of Appeal**

The thrust of the People's argument in Division One of the Fourth Appellate District Court of Appeal was that the trial court erred during defendant Yang's sentencing as to count 4 by misinterpreting subdivision (f) of section 1170.1 and the holding in *Rodriguez*, and thus not considering the sentence requested by the prosecution. Specifically, we argued that the sentencing judge had the power to impose additional punishment on the charge of assault with a firearm in count 4 for both the gang and firearm use enhancements found true by the jury. As the Court of Appeal paraphrased our position:

> Thus, according to the People, if the trial court had merely imposed the 10-year sentence under [Pen. Code] section 12022.5 and the five-year sentence under 186.22, subdivision (b)(1), the two enhancements would not have conflicted with the dual use prohibition of section 1170.1, subdivision (f) as discussed in *People v. Rodriguez*, *supra*, 47 Cal.4th at page 509. Yang therefore would have been sentenced to 24 years in prison under count 4 as opposed to the 19 years he received.

(*People v. Le*, *supra*, 205 Cal.App.4th at p. 747; see attached slip opinion, p. 66.) This was not an academic discussion because, as discussed above, the sentencing judge appeared inclined to impose the upper term of ten years for the section 12022.5, subdivision (a)(1), enhancement in addition to the gang enhancement, but felt he did not have the discretion to do so. (18 R.T. pp. 3462-3464.)

As to the issue of remedy, the People asked the Court of Appeal to remand the matter for resentencing on count 4 so the sentencing judge could consider the option of imposing the aggravated upper term sentence of ten years under section 12022.5, subdivision (a)(1), and reducing the ten year sentence for the gang enhancement from a "violent felony" under section 186.22, subdivision (b)(1)(C), to a five-year sentence for a "serious felony" under subdivision (b)(1)(C). Appellant Yang conceded that "[if] this Court agrees with the People's position, ... appellant would agree that remand for resentencing, as requested by the People, is the proper remedy." (Appellant Yang's Reply Brief, pp. 16-17.)

Division One of the Fourth Appellate District Court of Appeal, nevertheless, affirmed the judgment of the trial court as to defendant Yang's sentence in count 4. In rejecting the People's appeal the appellate court wrote:

> Although the People attempt to distinguish *People v. Rodriguez* on the basis that the gang enhancement in the instant case was generically pled and there was no gun use allegation or finding made by the jury in connection with that enhancement, we conclude this is a distinction without a difference. That the trial court may have exercised its discretion and treated the gang enhancement as a mere "serious felony" and not as a "violent felony" for purposes of section 186.22, subdivision (b)(1), as the People contend, does not change the fact that under either scenario the gang enhancement involved Yang's use of a firearm, which we conclude makes *People v. Rodriguez* applicable.

> We therefore conclude the trial court did not err when it found it lacked the discretion under the facts of this case to impose both the personal gun use enhancement under section 12022.5, subdivision (a) and the gang enhancement under section 186.22, subdivision (b)(1)(B) or (b)(1)(C).

(*People v. Le*, *supra*, 205 Cal.App.4th at p. 747; see attached slip opinion, pp. 66-67, footnote and original italics omitted.)

Disagreeing with the holding and confused as to the rationale behind it—specifically the basis for the conclusion that "the gang enhancement involved Yang's use of a firearm"—the People asked for rehearing. In response the Court of Appeal modified its opinion to add the following lengthy footnote:

> In their petition for rehearing, the People argue that this court erred in affirming the trial court's decision in count 4 to stay additional punishment for personal gun use under section 12022.5, subdivision (a) (personal gun use enhancement) and to impose the 10-year enhancement for the commission of a "violent felony"—in this case a violation of section 245, subdivision (b) for assault with a semiautomatic weapon—under the criminal gang provision set forth in section 186.22, subdivision (b)(1)(C) (criminal gang enhancement). The People argue that "the prosecutor in this case never asked the trial court to elevate the punishment for the gang enhancement to the 'violent felony' level under subdivision (b)(1)(C) of section 186.22 with the same conduct, personal gun use, that supported the section 12022.5 enhancement. Instead, ... the prosecutor here pled and proved a 'bare' gang enhancement under section 186.22 without reference to (1) gun use, (2) it being a 'serious' or 'violent' felony, or (3) either subdivision (b)(1)(B) or (b)(1)(C) [of section 186.22]. By doing so, the prosecutor exposed the defendant to the maximum possible sentence while not violating the holding of [*People v.*] *Rodriguez*. It was only by setting the level of punishment for the gang enhancement for a "violent felony" that the sentencing judge created a conflict with the [*People v.*] *Rodriguez* case." (Fn. omitted.)
>
> We reject the People's form-over-substance argument. In focusing on the nature of the offense and the circumstances

> surrounding its commission (see *People v. Rodriguez, supra*, 47 Cal.4th at p. 507), we conclude the trial court did not err in (tacitly) finding, and substantial evidence in the record supports that finding, that the personal gun-use and gang enhancements in this case were both based on firearm use involving the same offense, viz. commission of assault with a semiautomatic weapon (§ 245, subd. (b)). As such, we conclude the instant case falls squarely within the holding of *People v. Rodriguez* and its prohibition against imposing multiple punishments for firearm use in the commission of a single offense. (See § 1170.1, subd. (f).)

(*People v. Le, supra*, 205 Cal.App.4th at p. 747, fn. 17; see attached modification order dated May 24, 2012.)

## ARGUMENT

## I

## THE COURT OF APPEAL OPINION PRESENTS AN IMPORTANT ISSUE MEETING THE STANDARD FOR GRANTING REVIEW

Section 1170.1, subdivision (f), controls the sentencing parameters when an individual is convicted of multiple enhancements, including those involving the use of a firearm in the commission of the underlying felony offense. In 2002, as now, section 1170.1, subdivision (f), reads:

> When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.

In *Rodriguez*, *supra*, 47 Cal.4th 501, this Court held that under section 1170.1, subdivision (f), a defendant's single act of personally using a gun during the commission of a felony could not be used both to support a sentence enhancement for personal use of a firearm under section 12022.5, subdivision (a)(1), and to elevate the punishment for a criminal street gang allegation to a "violent felony" under section 186.22, subdivision (b)(1)(C). (*Id.* at p. 504.) The rationale of this holding was based on the language of subdivision (f) of section 1170.1 prohibiting imposing sentence on two enhancements when both enhancements are "for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense."

The Court remanded the *Rodriguez* case to the trial court without giving any guidance as to the available options on resentencing. (*Id.* 47 Cal.4th at p. 510.) The lower court was simply directed to impose a

sentence that did not violate section 1170.1, subdivision (f). (*Ibid.*) One treatise describes the nature of the uncertainty left from this portion of the *Rodriguez* decision:

> If the felony is a "violent" felony, for these purposes, solely because a Penal Code Section 12022.5(a) enhancement also attaches to the felony, Penal Code Section 1170.1(f) will preclude the trial court from imposing both the Penal Code Section 186.22(b)(1)(C) enhancement and the Penal Code Section 12022.5(a) enhancement, as that statute allows the court to impose only the greater of the two enhancements. However, in so holding, *the California Supreme Court has left open the question of whether a lesser punishment may be imposed under a different subdivision of Penal Code Section 186.22(b)(1) in addition to the Penal Code Section 12022.5(a) enhancement.*

(6 Millman, Sevilla & Tarlow, Cal. Criminal Defense Practice (Matthew Bender, 2011) Crimes Against Order, ch. 144, § 144.03[4], p. 144-69, fn. omitted, italics added.)

This issue was debated extensively in the trial court during sentencing as to count 4 regarding defendant Yang. (See 18 R.T. pp. 3438-3459.) The prosecutor argued that such lesser punishment could be imposed under subdivision (b)(1)(B) of section 186.22. As described above, the trial judge disagreed and stayed the punishment for the personal use of a firearm allegation under section 12022.5, subdivision (a)(1).

The People appealed to Division One of the Fourth Appellate District. Our argument was based on the fact that the gang allegation could be punished as a "serious felony" under subdivision (b)(1)(B) of section 186.22 without reliance on the personal use of a gun allegation under section 12022, subdivision (a)(1). This avoided violating the holding of *Rodriguez*, which was premised on a reading of section 1170.1, subdivision (f), which precluded punishing two different sentence enhancements "each pertaining to firearm use."

> Here, defendant became eligible for this 10-year punishment only because he "use[d] a firearm which use [was] charged and proved as provided in … Section 12022.5." (§ 667.5, subd. (c)(8).) Thus, defendant's firearm use resulted in additional punishment not only under section 12022.5's subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22's subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of firearm) to benefit a criminal street gang. *Because the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1's subdivision (f) requires imposition of "only the greatest of those enhancements" with respect to each offense.*

(*Rodriguez*, *supra*, 47 Cal.4th at p. 509, original italics omitted, new italics added.)

The Court of Appeal rejected our arguments. According to the appellate court, *Rodriguez* prohibits "imposing multiple punishments for firearm use in the commission of a single offense" even when the firearm use component of one of the sentence enhancements is derived from the nature of the underlying felony offense, here assault with a semi-automatic handgun under section 245, subdivision (b). (*People v. Le*, *supra*, 205 Cal.App.4th at p. 747, fn. 17; see attached modification order dated May 24, 2012.)

This Petition for Review followed because the People believe, as discussed further in Argument II, below) that the Court of Appeal misinterpreted this Court's reasoning in *Rodriguez* resulting in an unwarranted expansion of the *Rodriguez* holding. The question, as presented above, seeks to clarify the nature and scope of *Rodriguez*, and, thus, is worthy of a grant of review by the Court.

## II

## THE LOWER COURTS DID NOT ACCURATELY INTERPRET AND APPLY THE *RODRIGUEZ* DECISION

The defendant in *Rodriguez* was convicted of three counts of assault with a firearm in violation of section 245, subdivision (a)(2). As to each count the jury found true two sentencing enhancements: (1) that the defendant personally used a firearm (§ 12022.5, subd. (a)(1)) and (2) that the offense was a "violent felony" committed for the benefit of a street gang (§ 186.22, subd. (b)(1)(C)). The defendant's use of a firearm qualified each felony assault as a "violent felony" under section 667.5, subdivision (c)(8), thus raising the punishment for the gang-related crime allegation to ten years under section 186.22, subdivision (b)(1). The trial court imposed sentence on both enhancements. This Court held it was error to impose a sentence for the personal use of a firearm enhancement under section 12022.5, subdivision (a)(1), and to increase the sentence for an additional ten years as a "violent felony" under section 186.22, subdivision (b)(1)(C)). The Court reasoned that to impose two enhancements both based upon one act of firearm use violated the dual use prohibition of section 1170.1, subdivision (f). (*Rodriguez*, *supra*, 47 Cal.4th at pp. 508-509.)

In this case, as distinguished from *Rodriguez*, the only gun use allegation alleged and found true by the jury against defendant Yang in count 4 was pursuant to section 12022.5, subdivision (a)(1). Unlike *Rodriguez*, the gang enhancement in the instant case was generically plead and proved under section 186.22, subdivision (b)(1), without a gun use allegation and without such a finding made by the jury. (1 C.T. p. 17; 2 C.T. pp. 288-290; 3 C.T. pp. 588, 601.) The trial and appellate court each erred, albeit in different ways, by rejecting the prosecutor's argument that *Rodriguez* did not prohibit imposing two enhancements, namely subdivision

(b)(1)(B) of section 186.22 and subdivision (a)(1) of section 12022.5, on the felony offense of assault with a semi-automatic handgun as charged in count 4.

**A. Trial Court**

The sentencing judge chose to treat the gang enhancement as being under section 186.22, subdivision (b)(1)(C), because defendant Yang's personal use of a firearm could have been used to define the underlying felony (§ 245, subd. (b)) as a "violent felony" under section 667.5, subdivision (c)(8), instead of as only a "serious offense" pursuant to § 1192.7, subdivision (c)(31).[3] By stepping up the punishment for the gang allegation from five years to ten years under section 186.22, subdivision (b)(1)(C), the judge unnecessarily overlapped the gun use allegation under section 12022.5, subdivision (a)(1), thus bringing the gang enhancements in conflict with the dual use prohibition of section 1170.1, subdivision (f). (*Rodriguez, supra*, 47 Cal.App.4th at p. 509.) Also by doing so, and then staying the punishment for the section 12022.5, subdivision (a)(1) allegation, the trial court violated the mandate of section 1170.1, subdivision (f), that the "greatest" punishment for the gun use be imposed.

The first analytical step is determining which enhancement, the gang allegation or the personal use of a firearm allegation, attached to count 4 qualifies as the "greatest" under section 1170.1, subdivision (f). The threshold question here is which term the sentencing judge was likely to impose for the gun use allegation under subdivision (a)(1) of section 12022.5 – three, four, or ten years. If only a three or four year term was contemplated, then the additional five year bump up of the gang

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[3] A violation of section 245, subdivision (b), is a "serious offense" pursuant to section 1192.7, subdivision (c)(31).

enhancement from a "serious felony" to a "violent felony" under section 186.22, subdivision (b)(1), would be the greatest term under section 1170.1, subdivision (f). In this case, however, the judge indicated that if he had the power to sentence on the section 12022.5, subdivision (a)(1), enhancement, he would have imposed the upper term of ten years. (18 R.T. pp. 3462-3464.) A ten year gun use enhancement under subdivision (a)(1) of section 12022.5 would net five more years in prison than the five year bump-up in the gang allegation from a "serious felony" to a "violent felony." By the terms of section 1170.1, subdivision (f), therefore, the "greatest" enhancement which should have been imposed in this case was the ten year term for the section 12022.5, subdivision (a)(1) allegation.

The next step in the analysis is whether the rules of statutory construction required the judge to impose sentence for the gun use allegation under the "violent felony" portion of section 186.22, subdivision (b)(1)(C), rather than section 12022.5, subdivision (a)(1). The judge felt compelled by section 1170.1, subdivision (f), to transfer the jury's gun use finding under section 12022.5, subdivision (a)(1), to the sentencing analysis for the gang allegation under section 186.22, subdivision (b)(1), and then stay imposition of sentence under section 12022.5, subdivision (a)(1). (18 R.T. p. 3458, lines 7-24.) There was no statutory requirement that he do so. Nor did the *Rodriguez* decision mandate this action.

In rejecting the prosecutor's request to enhance the sentence for count 4 with both the section 12022.5, subdivision (a)(1), and section 186.22, subdivision (b)(1)(B), allegations, the trial court cited familiar principles of statutory interpretation. These included the rule that courts should not attempt to rewrite a statute that is not ambiguous and that the Legislature is presumed to know the rest of statutory scheme when they enact a new provision. (18 R.T. p. 3457, lines 5-16.) The judge reasoned

that the Legislature must have known and, thus, intended by enacting the ten year term for a "violent felony" under section 186.22, subdivision (b)(1)(C) , that this would eviscerate the ability of the sentencing court to impose a section 12022.5, subdivision (a)(1), enhancement when both were based on the same personal use of a firearm by a defendant. (18 R.T. p. 3457, lines 16-21.) This analysis is flawed for a number of reasons.

First, there is no statutory prohibition against imposing sentence on both a gun use enhancement and a gang allegation as requested by the prosecutor. (§§ 1170.1, subds. (a) & (d); 1170.11.) This is especially true here because, unlike the situation in *Rodriguez*, the gang allegation as plead in the Information and found true by the jury was based on conduct unrelated to the use of a firearm. Instead, as noted above, the firearm use allegation was separately plead and proved only under section 12022.5, subdivision (a)(1). It was only by essentially rewriting the Information and the jury verdict as to count 4 that the trial judge created a *Rodriguez* "problem" that otherwise did not exist.

Second, no legislative history has been found indicating what the Legislature intended in the instant scenario.[4] Division One of the Fourth Appellate District itself recently and aptly described section 186.22 as "a

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[4] Indeed, the Legislature was not involved in adding the additional levels of punishment for "serious" and "violent" felonies in section 186.22, subdivision (b)(1). These were enacted as one part of the numerous changes made by an initiative measure commonly referred to as Proposition 21. (Prop. 21, "the Gang Violence and Juvenile Crime Prevention Act of 1998", as approved by voters, Primary Elec. (Mar. 7, 2000), § 4.) In 2001, as part of a large "technical clean up" bill, the Legislative added the subpart designations (A), (B) and (C) to the sentencing options in section 186.22, subdivision (b)(1). (Stats. 2001, chap. 854, § 22.) For simplicity, however, the term "Legislature" will be used through this Argument to refer to all those involved in the drafting and enactment of the various statutory provisions discussed.

complex statute." (*People v. Morgan* (2011) 194 Cal.App.4th 79, 84.) It is unreasonable to attribute such omnipotence to the Legislature that it can be assumed they recognized the *Rodriguez* issue and intended the result found by the trial judge in this case. This is especially true when one enhancement (§ 12022.5, subd. (a)(1)) is only "greater" than the other (§ 186.22, subd. (b)(1)(C)) within the meaning of section 1170.1, subdivision (f), when the upper term among three sentencing options is chosen as to one (§ 12022.5, subd. (a)(1)). Common sense and experience mandates finding the Legislature simply never contemplated the issue presented here. Such a problem is best put into the category a "legislative oversight" requiring judicial construction. (*People v. Glass* (2004) 114 Cal.App.4th 1032, 1037.)

The fundamental rule of statutory construction, nevertheless, remains that "[i]n construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) The clearest and purest expression of Legislative intent applicable to this case is contained in section 1170.1, subdivision (f): "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense … ." In this case the "greatest" sentence for the defendant Yang's firearm use was the ten year sentence under section 12022.5, subdivision (a)(1). As described previously, there was only a five year bump-up in punishment for the firearm use (from a "serious felony" to a violent felony) under section 186.22, subdivision (b)(1)(C). Clearly the judge's decision to use section 186.22, subdivision (b)(1)(C), instead of section 12022.5, subdivision (a)(1), did not result in the imposition of the "greatest" sentence in this case

as mandated by the Legislature pursuant to section 1170.1, subdivision (f).

Legislative history is a strong indicator of legislative intent. The "legislative" history related to the higher punishments for "serious" and "violent" felonies added to section 186.22, subdivision (b)(1), indicates they were added to increase the overall sentences available for gang-related crimes, not limit them as occurred in this case. The "Findings and Declarations" in Proposition 21, for example, states "[g]ang-related felonies should result in severe penalties." (Prop. 21, *supra*, § 2, subd. (h).) Proponents of Proposition 21 indicated: "Although we strongly support preventative mentoring and education, the law must be strengthened to require serious consequences, protecting you from the most violent juvenile criminals and gangs offenders." (Ballot Pamp., Primary Elec. (Mar. 7, 2000), Argument in Favor of Proposition 21, p. 48, italics omitted.) More importantly, Proposition 21 has uncodified "Intent" language stating:

> It is the intent of the people of the State of California in enacting this measure that *if any provision of this act conflicts with another section of law which provides for a greater penalty or longer period of imprisonment that the latter provision shall apply*, pursuant to Section 654 of the Penal Code.

(Prop. 21, *supra*, § 37, italics added.)

"[I]t is a general principle of statutory construction that a specific statute relating to a particular subject will govern and take priority over a general statute in matters concerning that subject, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. [Citations.]" (*People v. Valdez* (1982) 137 Cal.App.3d 21, 27.) "The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply." (*People v. Jenkins* (1980) 28 Cal.3d 494, 505.) The gun

use enhancement under section 12022.5, subdivision (a)(1), is much narrower in scope and focus than the gang enhancement provisions of section 186.22. The five year bump-up in punishment under section 186.22, subdivision (b)(1), from a "serious felony" to a "violent felony" applies to many different fact patterns. The designation of a crime as a "violent felony" is controlled by section 667.5, subdivision (c). Section 667.5, subdivision (c), has 22 subparts listing numerous qualifying crimes, of which "any felony in which the defendant uses a firearm" is contained in only part of one subpart. (§ 667.5, subd. (c)(8).) Absent the requirement in section 1170.1, subdivision (f), that the sentencing court impose the "greatest" available punishment, section 12022.5, subdivision (a)(1), is clearly a more specific enhancement statute than section 186.22, subdivision (b)(1)(C), when a firearm is used during the commission of a felony.

Similarly, the Legislature has given preferential status to section 12022.5, subdivision (a)(1), gun use enhancements beyond that given to gang allegations under section 186.22. Specifically, the Legislature has absolutely prohibited sentencing courts from striking gun use allegations under section 1385. (*People v. Thomas* (1992) 4 Cal.4th 206; *People v. Herrera* (1998) 67 Cal.App.4th 987.) In contrast, section 186.22, subdivision (g), enacted as part of Proposition 21, states:

> Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

The courts do not "construe statutes in isolation, but rather read

every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 899.) The trial court's construction of section 186.22, subdivision (b)(1), eviscerated the gun use enhancement under section 12022.5, subdivision (a)(1). In contrast, the prosecutor's requested sentencing on count 4 harmonized and gave effect to both statutes.

Finally, although not dispositive, this Court's language in the *Rodriguez* decision seems to point to the trial court here erring by staying the punishment for the section 12022.5, subdivision (a)(1), allegation. The Court of Appeal in *Rodriguez* used section 654 as the basis for ordering the trial court to strike the section 12022.5, subdivision (a)(1), allegation. (*Rodriguez*, *supra*, 47 Cal.4th at p. 509.) This Court rejected such as the proper remedy:

> The proper remedy, however, was *not* to strike the punishment under section 12022.5 but to reverse the trial court's judgment and remand the matter for resentencing. (See *People v. Navarro* (2007) 40 Cal.4th 668, 681.) Remand will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f).

(*Ibid.*, italics in original.) A remand for resentencing would have been unnecessary in *Rodriguez* if the Court believed its ruling legally precluded the trial court from imposing the section 12022.5, subdivision (a)(1), enhancement in lieu of the section 186.22, subdivision (b)(1)(C), allegation. Instead, the above-cited language from *Rodriguez* suggests that the trial court was free "to restructure its sentencing choices" in any manner that did violate section 1170.1, subdivision (f), including sentencing under section 12022.5, subdivision (a)(1), and some provision of section 186.22, subdivision (b)(1), other than subpart (C).

## B. Court of Appeal

Although the Court of Appeal affirmed the trial court's ruling, it used a completely different analysis. The main premise of the Court of Appeal's holding was that "the gang enhancement involved Yang's use of a gun." (*People v. Le*, *supra*, 205 Cal.App.4th at p. 747; see attached slip opinion, p. 66.) The People disagree. That the underlying felony in count 4, assault with a semi-automatic handgun, involved use of a gun, did not infuse the gang enhancement with a firearm use component. Stated alternatively, although count 4 involved firearm use and, thus, rendered the section 186.22's gang enhancement subject to punishment under the "serious felony" provision in subdivision (b)(1)(B), did not mean the gang enhancement itself "pertain[ed] to firearm use." (*Rodriguez*, *supra*, 47 Cal.4th at p. 509.)

The gang enhancement under section 186.22, subdivision (b)(1), applies when the defendant committed the charged felony "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." The additional prison term for this enhancement comes with one of three levels:

- 2, 3 or 4 years for a normal felony (§ 186.22, subd. (b)(1)(A)) [inapplicable here as § 245, subd. (b) is a statutory "serious felony"]
- 5 years for a "serious felony" (§ 186.22, subd. (b)(1)(B)) [the base gang allegation term for a § 245, subd. (b) per § 1192.7, subd. (c)(31)]
- 10 years for a "violent felony" (§ 186.22, subd. (b)(1)(C)) [which here rests upon the jury's finding that Yang personally used a gun in violation of § 12022.5, subd. (a)]

The generic gang enhancement language from subdivision (b)(1) of section 186.22 was used in the Information as to count 4 without reference

to subsection (A), (B) or (C). (1 C.T. p. 17.) The jury was instructed in this generic language (2 C.T. pp. 288-290) and the jury so found as to defendant Yang (2 C.T. p. 307). Thus, looking just at the charging document, contrary to the appellate court's main premise, the gang enhancement in this case did not involve defendant Yang's use of a gun.

Unlike *Rodriguez*, the prosecutor in this case never asked the trial court to elevate the punishment for the gang enhancement to the "violent felony" level under subdivision (b)(1)(C) of section 186.22 with the same conduct, personal gun use, that supported the section 12022.5, subdivision (a)(1), enhancement.[5] Instead, as noted above, the prosecutor here pled and proved a "bare" gang enhancement under section 186.22 without reference to (1) gun use, (2) it being a "serious" or "violent" felony, or (3) either subdivision (b)(1)(B) or (b)(1)(C). By doing so, the prosecutor exposed the defendant to the maximum possible sentence while not violating the holding of *Rodriguez*. As described previously, it was only by setting the level of punishment for the gang enhancement for a "violent felony" that the sentencing judge created a conflict with the *Rodriguez* case.

Section 1170.1, subdivision (f) reads in pertinent part: "When *two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense*, only the greatest of those enhancements shall be imposed for that

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[5] In *Rodriguez* the prosecutor specifically charged and proved the gang allegation as a "violent felony" under subdivision (b)(1)(C). The "jury found defendant guilty of three counts of assault with a firearm (§ 245, subd. (a)(2)), and as to each count made findings under two different sentencing enhancement statutes: (1) that defendant personally used a firearm (§ 12022.5, subd. (a)); and (2) that he committed a 'violent felony' to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C))." (*Id.* 47 Cal.4th at p. 505.)

offense." (Italics added.) Thus, the two prerequisites to the sentence restriction under subdivision (f) of section 1170.1 are (1) that each overlapping charging allegation be an "enhancement" and (2) that each of these "enhancements" involve being armed with or using of a deadly weapon or firearm. " 'Enhancement' means an additional term of imprisonment added to the base term." (Cal. Rules of Ct., rule 4.405(3).)

The Court of Appeal reasoned that the gang enhancement punishment levels in both subparts (B) or (C) of subdivision (b)(1) of section 186.22, each "involved Yang's use of a firearm" because the underlying felony in count 4 (§ 245, subd. (b)) necessarily involved use of a semi-automatic firearm. But this charge alone, or in conjunction with section 186.22, subdivision (b)(1), does not include or require defendant Yang's *personal* use of the firearm. Thus, per the plain language of section 1170.1, subdivision (f), there is no improper dual use of the firearm use enhancement under section 12022.5, subdivision (a)(1), and the gang enhancement.

That the substantive crime of violating section 245, subdivision (b), involved use of a firearm does not implicate section 1170.1, subdivision (f) and, thus, does not produce a violation of the holding in *Rodriguez*. As noted, section 1170.1, subdivision (f), only applies to "two or more *enhancements*" for being armed with or using a firearm. It does not apply to prevent imposing a personal firearm use enhancement upon conviction of violating section 245, subdivision (b), even though this offense necessarily involves a firearm. (§ 1170.1, subd. (d); *People v. Harper* (2000) 82 Cal.App.4th 1413, 1416-1419.)

This Court in *Rodriguez* did not base its holding upon the fact that the underlying felony involved assault with a firearm under section 245. Instead, its holding was grounded solely on its construction of section

1170.1, subdivision (f). The Court reasoned that imposing the additional five years on the gang enhancement in the form of the ten year "violent felony" punishment for the gang enhancement, the crime being made "violent" by the same proof supporting the section 12022.5, subdivision (a)(1), allegation, and imposing additional punishment for this firearm use enhancement under section 12022.5, subdivision (a)(1), constituted imposing two enhancements each based upon the defendant using the same firearm in the commission of the offense.

> As mentioned earlier ..., the standard additional punishment for committing a felony to benefit a criminal street gang is two, three, or four years' imprisonment. (§ 186.22, subd. (b)(1)(A).) But when the crime is a "violent felony, as defined in subdivision (c) of Section 667.5," section 186.22's subdivision (b)(1)(C) calls for additional punishment of 10 years. *Here, defendant became eligible for this 10-year punishment only because he "use[d] a firearm which use [was] charged and proved as provided in ... Section 12022.5."* (§ 667.5, subd. (c)(8).) Thus, defendant's firearm use resulted in additional punishment not only under section 12022.5's subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22's subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of firearm) to benefit a criminal street gang. *Because the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1's subdivision (f) requires imposition of "only the greatest of those enhancements" with respect to each offense.*

(*Rodriguez*, *supra*, 47 Cal.4th at p. 509, italics added.)

In the instant case there would be no violation of *Rodriguez* in sentencing Yang under subdivision (b)(1)(B) of section 186.22 because, unlike subdivision (b)(1)(C), the former punishment level ("serious felony") does not rely upon or pertain to Yang's personal use of a firearm as charged and proved under section 12022.5, subdivision (a)(1). Thus, there would be no prohibited "dual use" within the meaning of 1170.1, subdivision (f).

In sum, the Court of Appeal was mistaken in holding that under "either scenario"— subpart (b)(1)(B) *or* (b)(1)(C) of section 186.22—"the gang enhancement involved Yang's use of a gun." (*People v. Le*, *supra*, 205 Cal.App.4th at p. 747; see attached slip opinion, p. 66.) Under subdivision (b)(1)(B) the gang enhancement simply involved Yang's conviction for an assault with a deadly weapon as defined by section 1192.7, subdivision (c)(31), whereas under subdivision (b)(1)(C) the gang enhancement involved Yang's personal use of a firearm charged and proved as provided in section 12022.5, subdivision (a)(1), as defined by section 667.5, subdivision (c)(8).

Review should be granted so the Court can clarify which interpretation of *Rodriguez*, that purposed by the People or that found by the Court of Appeal, is correct.

## CONCLUSION

The issue raised by the People in this case and decided by the Court of Appeal opinion presents proper grounds for review. Review is necessary to settle important questions of law. For these reasons, the People of the State of California, respectfully requests that the Court grant review.

Dated: June 4, 2012

Respectfully submitted,

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## Certificate of Word Count

I certify that this **Petition for Review**, including footnotes, and excluding tables and this certificate, contains 7,196 words according to the computer program used to prepare it.

CRAIG E. FISHER, SBN 95337
Deputy District Attorney

# Attachments

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal Fourth District
FILED
APR 27 2012
Stephen M. Kelly, Clerk
DEPUTY

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|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ERIC HUNG LE et al.,<br>Defendants and Appellants. | D057392<br><br>(Super. Ct. No. SCD212126) |

APPEALS and CROSS-APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Down George Yang.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant Eric Hung Le.

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1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of DISCUSSION I and II.

Kamala D. Harris, Attorney General of California, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Erik Hung Le and Down George Yang of murder (Pen. Code,[2] § 187, subd. (a), count 1); attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a), count 2); discharging a firearm from a motor vehicle (§ 12034, subd. (d), count 3); and assault with a semi-automatic firearm (§ 245, subd. (b), counts 4 & 5). The jury also found true that all counts were committed for the benefit of a street gang (§ 186.22, subd. (b)); that as to counts 1, 2 and 3, Le and Yang were principals in the offenses and that during their commission, at least one principal used a firearm (§ 12022.53, subds. (d) & (e)); and finally, as to counts 3 and 4, that Yang personally used a firearm (§ 12022.5, subd. (a)(1)). Le was sentenced to a term of 96 years to life and Yang to a term of 101 years to life.

Le and Yang raise myriad challenges to their convictions. We consider them seriatim. As we explain, we reject their challenges and affirm their judgments of convictions.

The People cross-appeal, contending the trial court erred in staying the sentence under court 4 for the firearm use enhancement under section 12022.5, subdivision (a) and

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2 Unless otherwise noted, all statutory references are to the Penal Code.

imposing under that count the 10-year "violent felony" term for the gang enhancement under section 186.22, subdivision (b)(1)(C). As we explain, we conclude the trial court properly stayed the firearm use enhancement under section 12022.5.

## FACTUAL AND PROCEDURAL BACKGROUND[3]

In 2002 Le and Yang were members of the Tiny Oriental Crips (TOC), a criminal street gang that claimed as its territory Linda Vista and parts of Mira Mesa, communities within the City of San Diego. TOC territory included the Han Kuk Pool Hall (pool hall) located on Convoy Street then owned by Don Su (Don) and his wife Kyung Su (Kyung) (together, the Sus). The Sus had owned the pool hall for about three months at the time of shooting. Rivals of TOC included Asian Crips (AC) and the Tiny Rascal Gang (TRG). The pool hall was managed by the Sus' nephew, Min Su (Min).

On the night of June 14, 2002, TOC member Kane Bo Pathammavong[4] and his friends Gerry Ian Sulit, Phouthasanoe Volvo Syrattanakoun, Sherri Pak and Rei Morikawa were drinking in a grassy area near the pool hall. During the evening, Le

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3 We view the evidence in the light most favorable to the judgment of convictions. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to appellants' claims are discussed *post*, in connection with those issues.

4 Pathammavong testified pursuant to an agreement with the district attorney's office in which he pleaded guilty to being an accessory after the fact with a gang allegation, with an agreed-upon sentence of no more than seven years and use immunity, in return for his truthful testimony.

joined the group. At some later point, Le spotted AC members near the pool hall and yelled out a gang challenge.

Le left to make a phone call to Yang. When Le returned, he told Pathammavong and Syrattanakoun to leave with their friends. Pathammavong and his group left and went to a tea house located in the same shopping center as the pool hall.

Octavius Soulivong[5] (Octavius) was at the house of his twin brother Orlando, along with Yang and several other TOC members. Around midnight, Orlando received a telephone call. Orlando claimed the caller was Le. After talking to Le, Orlando handed the phone to Yang, who walked outside to talk. When Yang returned, he told the group that he and Le were going to the pool hall. About 15 minutes later, Le arrived at the house. Le told the group there were some AC members at the pool hall and asked whether anyone had a "strap" (e.g., slang for gun). Le left the house shortly thereafter with Yang and John Vue.

Pathammavong and his friends were at the tea house when Le returned. Le said he needed to take care of something and told Pathammavong and his group to stay put. Another car pulled up and parked next to Le's car. Le spoke to a passenger in that car,

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5 Octavius was arrested and charged as one of the shooters in an unrelated crime that took place on Comstock Street in Linda Vista (Comstock shooting). The evidence ultimately showed Octavius's brother was the shooter in the Comstock shooting. In return for testifying in connection with the Comstock shooting and the shooting in the instant case, Octavius was granted use immunity. He ultimately was placed into the witness protection program after receiving threats.

returned to Pathammavong and his group and told them not to follow. Both cars then left the parking lot.

Pathammavong did not take Le's advice. Thinking there might be a fight or shooting because of the "tension," Pathammavong and Sulit began driving to the pool hall in Pathammavong's car. On the way they heard gunshots and decided to return to the tea house.

At the time of the shooting, Don and his friend Jinwon Lee were outside the pool hall. TRG members Michael Lieng and Nikhom Somsamout arrived in the parking lot near the pool hall. A car with two people inside pulled into the alley near the pool hall. Shots were fired from the car and then the car sped away. One of the bullets struck Don in the neck area. Another struck Lieng in the right elbow and a third bullet struck Somsamout in the right foot. Don died three days later from the gunshot wound.

After the shooting, Le and Yang returned to Orlando's house where, according to Octavius, they spoke about the shooting. Le claimed he was the driver and Yang the shooter. Le also claimed Yang "shot the whole clip" from the rear left seat of the car driven by Le; Yang shot at people in front of the pool hall and kept shooting without aiming. Le referred to AC members as "ass crack," and bragged that he and Yang shot at them. During Le's recounting of the shooting, Yang interjected and corrected some of Le's statements about the shooting.

TOC members subsequently learned that the shots fired on the night of June 14 had struck and killed Don and not AC members. TOC members, including Yang, agreed not to discuss the shooting any more.

Police investigators recovered a beer bottle in the alley on the south side of the pool hall; a fingerprint matched to Le was found on the neck of the bottle. Police also found several cartridge casings consistent with a 9 millimeter Luger semi-automatic. Because police did not have a murder weapon, a casing was placed into a computer database matching bullets to weapons.

During a search warrant executed at Yang's home, police found under a bed an empty box of 9 millimeter casings along with a gun-cleaning kit. Yang's fingerprints were on the gun box and an instruction manual for the gun.

In early 2005, Deputy Richard Sanchez of the San Diego County Sheriff's Department stopped a car for speeding. The driver was Daniel Manalo, a member of the "B-Down" criminal street gang. During a search of the vehicle, Deputy Sanchez found a 9 millimeter Jennings Bryco semi-automatic handgun with an illegible serial number. Manalo claimed he bought the gun a short time earlier from an individual in Del Mar.

Criminalist Mary Jane Flowers of the San Diego Police Department found the gun had a serial number "1452_66" with the "_" being either a 3 or a 5. Flowers test-fired the gun and placed the results in the computer database. A match came back to the pool hall shooting and four other shootings.

Investigators traced the gun to Yang's older brother, Meng. Meng told police he purchased the gun for Yang from a federally-licensed firearms dealer at a gun show in October 2001. Although Meng filled out the paperwork to acquire the gun, Yang paid for the weapon and accompanied Meng to pick up the gun after the waiting period. Meng told police he gave Yang the gun that day and never saw it again.

Meng identified the box of ammunition recovered during the search warrant as the box that came with the gun. When a detective asked Meng about the gun, Meng said he bought it for Yang and did not know its whereabouts. Meng then blurted out, "Was it used in a murder or something?"

In August 2007 police obtained authorization to wiretap Yang's phone. The record includes myriad incriminating statements involving Yang and the shooting, including as follows:

<u>August 14, 2007 (call between Yang and Meng)</u>

Yang: "[E]ver since last Wednesday, they started asking about that thing. [¶] . . . [¶] Yea, they about to back off but they don't have anything, like the same thing. But the gun, said I sold it that guy 'Slipper.'[6] The gun, they found it at Slipper's." Meng: "Oh really?" Yang: "Yeah. Say you sold it to the Slipper guy and you don't know his name that's it. If they make it hard for you just say, 'You talk to my lawyer. He will answer my questions because you don't know what they're talking about. That's it'."

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6 The term "Slipper" is slang for a person of Cambodian descent.

Meng: "All right." Yang: "But if you are afraid—they make you afraid. Don't be. Don't worry about it. Say you sold it to Slipper, that is all."

August 14, 2007 (Yang, Meng)

Yang: "Hey, did they say you bought the gun for yourself or you bought it for me?" Meng: "Yea, I said bought it for me in particular." Yeng: "All right."

August 14, 2007 (Yang, unidentified male (UM))

Yang: "I told Meng to say he sold it to 'Slipper' already. Said that Meng bought it and when he didn't want it, he . . . sold it to 'Slipper.' "

August 14, 2007 (Yang, Meng)

Meng: "Where did you put the gun?" Yang: "Sold it already. [¶] . . . [¶] Sold it to slipper . . . already, I told you. [¶] . . . [¶] Fuck! You told them that you gave me the gun. You just got me involved!"

August 15, 2007 (Yang, Meng)

Yang: "[D]id they say, they don't have the gun?" Meng: "They found the box." Yang: "I think they got the gun. They found a gun but yours they don't get it. The serial numbers on yours, I removed it already. I made sure. Just the box. [¶] . . . [¶] [I]f they don't have the gun, there is nothing they can do. [¶] . . . [¶] It seems like they don't have good evidence. . . . Let them take the box. The box and the paper. [¶] . . . [¶] They found a gun . . . but the one I gave you I removed the serial number already. There is no way they—I removed the serial number before I sold it."

August 15, 2007 (Yang, UM)

Yang: "My brother fuckin' told them [police] that he gave me the strap. [¶] . . . [¶] That was used for the case. [¶] . . . [¶] [T]hey gonna come tomorrow morning and take my ass in for that shit. [¶] . . . [¶] I want to run[.] [¶] . . . [¶] I'm just thinking about running out on this."

August 16, 2007 (Yang, U.M.)

Yang: "[T]hey [police] took Meng yesterday. [¶] . . . [¶] [T]hey lookin' for the strap . . . . [¶] . . . [¶] Meng said . . . he bought me, he got me a strap, he gave me a strap, but they're not sure it's the same one. [¶] . . . [¶] [H]e just kinda slipped. Not bad, there's still nothing."

August 16, 2007 (Yang, Octavius)

Yang: "Hey man—remember back when you first came out, you told me that—that you got that Shirocko?" Octavius: "The what?" Yang: "They [police] got the . . . heater." Octavius: "The what?" Yang: "The thing, you know—" Octavius: "What thing?" Yang: "Fabosha—" Octavius: "Oh yeah—yeah. What about it?" Yang: "How do you know they have it?" Octavius: "Because they told me. They told me that they got it from some big—got it from some fool from B-Down." Yang: "Did they show it to you or what?" Octavius: "No, they just told me. They told me this when I was in jail." [¶] . . . [¶] Yang: "[W]hen they hit [searched] my house, last time, they found the—they found the box. That he [Meng] bought the strap in. Cause he bought it brand new. [¶] . . . [¶] So it's under his name but . . . I sold that motherfucker a long time ago.

You know what I'm saying?" [¶] . . . [¶] Octavius: "[T]hey didn't give me the name of the person who they picked it up from and shit, but he was like—'Yeah, cause—uh—it don't make sense, cause we got the gun from the fool from B-Down and shit.' You know what I mean? . . . I was all, 'I don't know man, whatever.' And then you tell me that the cops went up to Meng and shit and asked MENG about the strap and giving it up and shit, but—I don't know. Either that, though, or they fuckin made some fuckin big ass fuckin story about it or some shit." Yang: "So you knew they were going to go—go talk to Meng already?" [¶] . . . [¶] Octavius: "I didn't know. How the hell was I to know? I don't know what strap you guys talking about." [¶] . . . [¶] Yang: "Whoa, whoa, whoa." Octavius: "What I'm talking about is the one that Bo [Pathammavong] had—that Bo used to kill that one fool?" Yang: "Yeah." Octavius: "OK? That fuckin—uh—the nine." Yang: "Yeah." Octavius: "That's the one that Cuz was talking about. He talking about that nine w-w-was stripped off to fucking—uh—to B-Down. That's the one I'm talking about. I don't know what—what fuckin strap you talking—talking about Meng— [¶] . . . [¶] Yang: "[T]hey [police] didn't say that was the gun used. Cause—if it—I think if it was, they would say, 'Your gun was used for so and so.' You know?"

San Diego Police Department Detective Daniel Hatfield testified as the prosecution's gang expert. In 2002 TOC had between 50 and 60 members, including Le and Yang. The primary activities of the TOC gang in 2002 included murder, robbery, assault with a deadly weapon, drive-by shootings at occupied residences, shootings at occupied vehicles, auto thefts and burglaries.

## DISCUSSION

## I

### *Le's Appeal*[7]

A. *Sufficiency of Evidence to Prove Intent to Kill*

Le contends the evidence was insufficient he acted with the intent to kill, requiring his conviction in count 1 for murder be reduced to second degree murder and his conviction in count 2 for attempted murder be reversed.

1. *Standard of Review and Governing Law*

On appeal, "we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard applies when assessing a federal constitutional due process claim: "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318, fn. omitted [99 S.Ct. 2781].)

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7 Yang joined in all issues and arguments raised by Le that would inure to Yang's benefit.

"The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The conviction shall stand "unless it appears 'that upon no hypothesis whatsoever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

"[A]ny 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, italics added.) Thus, proof of a specific intent to kill (express malice) is required to prove first degree murder on this theory. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386; see also § 188 [Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."].) Premeditation and deliberation need not be proven for first degree murder by a drive-by shooting. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849, 851, fn. 10, 853, fn. 11.) Rather, the murder "could be the product of sudden and spontaneous rage, occurring without premeditation and not occurring in connection with the

commission (or attempt to commit) any felony." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 165, fn. omitted.)

Because there rarely is direct evidence of a defendant's intent, it must usually be determined by looking at all of the circumstances surrounding the defendant's actions. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Whether a defendant had the intent to kill is a question of fact for the jury. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

2. *Analysis*

Based on the evidence presented at trial, we conclude a reasonable jury could have found that Le harbored the requisite intent to kill on the night of the shooting.

Indeed, the record shows that on the night Su was killed, Le and other TOC members were hanging out on a grassy area near the pool hall; that at one point Le saw cars pulling into the parking lot and yelled out a gang challenge because Le believed members of the rival gang AC, whom Le referred to as "ass cracks," were in TOC territory; that Le told the group he was going to call Yang, left and returned about five minutes later and told Pathammavong, "Get your people out of here"; that Pathammavong and Sulit gathered their friends and went to a tea house in the same shopping center as the pool hall; that while Octavius was at his brother's house along with several TOC members, including Yang, Le called and spoke to Orlando and then to Yang, who confirmed that he was going with Le to the pool hall; that about 15 minutes later, Le arrived at Orlando's house, said there were AC members at the pool hall and

asked if anybody wanted to return with him to the pool hall; that before leaving Le asked if anybody had a "strap" and then spoke to Yang, who was known by other TOC members to own a 9 millimeter gun; that Le, Yang and Vue left in Le's car and returned to the pool hall; that Le next drove to the tea house where he met Pathammavong and his group and instructed them to stay at the tea house; that Le approached another car that had parked near Le's car, spoke to a passenger of the other car and then returned to Pathammavong's group and said not to follow; that both cars pulled out of the parking lot at the same time and gunfire erupted shortly thereafter; that after the shooting Le and Yang returned to Orlando's house, where Le spoke about the shooting; that Le confirmed he was the driver and Yang the shooter, and Yang had "shot the whole clip" at some "ass cracks"; and that AC's presence at the pool hall was an act of disrespect to the TOC because TOC considered the pool hall its territory.

We conclude this evidence is sufficient to support the jury's finding that Le harbored the requisite intent to kill on the night of the shooting.

Le contends that any evidence proffered by Octavius is inherently unreliable and cannot be considered to support the intent to kill finding because on the day of the shooting Octavius had consumed 320 ounces of malt liquor between the hours of 2:00 p.m. and midnight and because Octavius was known to be a compulsive liar. However, it was for the jury to decide whether to believe Octavius's testimony and the weight, if any, to afford it. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162 [assessing witness credibility is exclusively the jury's function].) In addition, Le does not dispute that the

trial court properly instructed the jury in this case regarding its role as fact finder and as sole judge of the "believeability of the witnesses."

In addition, even without the testimony of Octavius, there was sufficient, credible evidence to support the jury's finding that Le harbored the requisite intent to kill on the night of the shooting.[8]

We also reject Le's contention that the statement by the People's gang expert that shooting at rivals *without* hitting them shows a lack of intent to kill in this case. However, the jury decides whether there is an intent to kill and not an expert. In any event, the record shows the expert was testifying about the "benefits" a gang derives when shots are fired by one of its members at a rival gang and misses the intended target, or, as in the instant case, hits an unintended target, among other subject matters. This testimony in no way supports Le's argument.

B. *Motion for Severance*

Le next contends the trial court abused its discretion when it refused under section 1098[9] to sever the trials of the two appellants.

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8 For the same reason, we reject Le's argument there was insufficient evidence of intent to kill to support his conviction in count 2 for attempted murder.

1. *Additional Background*

At the time Le filed his motion to sever, there were three defendants in the case: Le, Yang and Pathammavong. Le mainly argued in his motion that severance was necessary because the People intended to introduce "highly prejudicial" statements by Pathammavong that implicated Le in the crime by placing Le "at or very close" to the proximity of the crime scene and by insinuating that Le knew a shooting was about to take place. Le also argued that severance was necessary because his association with Yang and Pathammavong was prejudicial, inasmuch as he claimed both individuals were much more involved in TOC than he; that there was a likelihood of jury confusion resulting from evidence involving multiple counts against three individuals; that Yang might give testimony exonerating Le if Yang was separately prosecuted; and that the case against him was weak while the case against Yang and Pathammavong was strong.

At the hearing on the motion, the trial court noted Pathammavong was no longer a defendant in the case after pleading guilty and agreeing to testify against Yang and Le. Le's counsel acknowledged that with Pathammavong out of the case, "70 to 80 percent of the argument [on the motion to sever] appears to be moot." Nonetheless, Le's counsel

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9 Section 1098 provides: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

argued severance was still required because the case against Le allegedly was much weaker than the case against Yang.

The trial court denied the motion to sever, reasoning as follows:

"There is, of course, a general preference in the law for joint trials. In part, this is for judicial economy, and in part it's to minimize the emotional and other costs to witnesses. Certainly that preference, however, must not be allowed to infringe on the right of a defendant to receive a fair trial and due process.

"The cases say that this is something of a discretionary call for the court to make. There are a number of cases that have talked about the various grounds that would either authorize a severance or require one or that should be considered by the court. I don't really see any of those grounds present here. [¶] . . . [¶]

"I understand that there is some circumstantial evidence as to Mr. Yang that doesn't exist with respect to Mr. Le, and there may be some intercepted phone calls of Mr. Yang that don't involve Mr. Le, but, frankly, looking at it as a whole, it seems to me that the evidence is [relatively] comparable as to both of these gentlemen.

"There was a reference in the papers, I think, to the possibility that if severed, Mr. Yang would give exonerating testimony. That representation seems to me to be pretty watery. I certainly don't have anything other than that that might demonstrate a due process o[r] Sixth Amendment violation.

"Bottom line is I believe that in this case it's not a good basis to sever, and I'm going to deny the motion for severance."

2. *Governing Law*

" ' "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Our Legislature has thus "expressed a preference for joint trials." [Citation.] But, the court may, in its discretion, order separate trials . . . .' " (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 149-150.)

"The court should separate the trial of codefendants 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.' " (*People v. Turner* (1984) 37 Cal.3d 302, 312, overruled on other grounds as stated in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150, superseded by statute as stated in *People v Letner and Tobin, supra,* 50 Cal.4th at p. 163, fn. 20.) "Whether denial of a motion to sever the trial of a defendant from that of a codefendant constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion rather than on what subsequently develops." (*People v. Isenor* (1971) 17 Cal.App.3d 324, 334.)

3. *Analysis*

Le argues that the evidence against him was much weaker than the evidence against Yang, and as such, Le was prejudiced by his "mere association"' with Yang. To support this argument, Le claims there was "scant" evidence establishing his "presence and participation" in the shooting, as compared to the "large amount" of evidence against

Yang, which he claims was substantial and included wiretap and other evidence positively linking Yang to the murder weapon.

We disagree with Le that the evidence against him was "scant," as demonstrated *ante* in connection with the summary of evidence on the issue of intent to kill. In fact, the record shows that at the time the trial court denied the motion to sever there was substantial evidence of Le's involvement in the shooting.[10]

Moreover, we note that Le and Yang were charged with having committed " 'common crimes involving common events and victims.' [Citation.] The court accordingly was presented with a ' " 'classic case' " ' for a joint trial. [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 452-453.)

Thus, on this record we conclude there was neither an abuse of discretion nor gross unfairness when the trial court denied Le's motion to sever. (See *People v. Letner & Tobin, supra*, 50 Cal.4th at pp. 149-150 ["a reviewing court may reverse a judgment only on a showing that joinder ' "resulted in 'gross unfairness' amounting to a denial of due process." ' [Citation.].]")

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10 This evidence includes, among other things, placing Le at the crime scene immediately before the shooting, when Le yelled out a gang challenge to members of the AC arriving at the pool hall; Le instructing other members of his group to leave the area, which they in fact did when they went to the tea house; Le leaving and returning a short time later with Yang and others; Le instructing the group at the tea house not to follow as he left in his car along with another car; and shots ringing out within a few minutes after he left. This evidence is in addition to the testimony of Octavius, who testified Le bragged about the shooting after the fact, when Le and Yang returned to Orlando's house, including how Le was the driver and Yang the shooter.

C. *Request for Foundational Hearing Regarding Testimony by Octavius*

Le next contends the trial court erred both when it refused to hold a hearing pursuant to Evidence Code section 402 before allowing the jury to hear the testimony of Octavius and when it ultimately admitted that testimony. Le contends this testimony was inadmissible hearsay and opinion testimony, and more prejudicial than probative.

1. *Additional Background*

At a pretrial hearing, the trial court summarized what it described as the "interrelated" motions of Le and the People regarding the admission of testimony by Octavius. The People moved to admit Octavius's testimony regarding statements made by Le and, to a lesser extent, by Yang after the shooting, as adoptive admissions. Le moved to exclude those statements as well as any testimony by Octavius regarding a telephone call Le allegedly made before the shooting when Le spoke to Orlando and then Yang.

After hearing argument, the court noted Octavius had provided inconsistent accounts of the events and conversations regarding the shooting in interview transcripts, police reports and the preliminary hearing transcripts. The court found these inconsistencies provided "fertile ground for examination, cross-examination, impeachment, and even impeachment of the impeachment."

The record shows the trial court thoughtfully explained its reasoning to admit the testimony of Octavius, however, noting that the issues raised by the defense went to weight rather than admissibility:

"If we step back from the trees here and look at the forest, though, what are we dealing with? We're dealing with a long-time gang member [Octavius] and friend of the two defendants, or at least one of them; probably intoxicated at the time that he made these observations; talking about things that happened seven or eight years ago. Some of the statements were maybe made when they had only happened about five or six years ago.

"Now the question is, that I'm dealing with, do I not allow his testimony on certain issues? It seems to me that we have to consider what the Evidence Code contemplates. The Evidence Code, of course, contemplates that clearly inadmissible evidence will not be put before the jury.

"But our law also contemplates that the jury will decide the credibility of the witnesses and they will find the facts from the testimony that is there.

"It seems to me that the People have a basis to put this man on the stand, referring to Octavius, and seek from him testimony that he heard the conservation when Mr. Le and Mr. Yang returned.

"By casting it that way, I realize I'm assuming that something happened. But we know that they left and we know [that] they came back, and at some point when they came back, there was a conversation among a group of people. And it is clear that at least at some point in the past, Octavius has said that Mr. Le described what happened and Mr. Yang was joining in.

"Now he's also repudiated that, and counsel get to impeach him with that. But the threshold question is whether that kind of testimony, absent the repudiation, would be admissible. And it is. There is a doctrine of adoptive admissions.

"We use the term 'admission' in this sense as a statement of a party opponent. It doesn't really need to even be against anybody's interest. That's a separate doctrine. But the law is clear that if A and B are standing there, and A is talking about what we did and B is nodding or agreeing or adding details or even standing there equivocally silent, that is evidence from which a trier of fact may conclude that B was saying, 'Me too,' and adopting those statements. That's what the adoptive admission exception deals with. [¶] . . . [¶]

"I remember reading the testimony of Mr. Octavius Soulivong. I didn't do the prelim. You all have read far more, because you have his discovery statements. [¶] But certainly on page 67, he does confirm that a conversation occurred that consisted of Down Yang and Erik Le describing what happened at the pool hall. And it was made to a group of people, of which he was a part.

"And I think that there's enough here for the district attorney to be able to call him and ask him these questions. I'll rule on objections as they might be made, but it sure seems to me that the district attorney will be able to obtain from this gentleman statements that will be admissible as actual statements of the speaker, an actual admission of the speaker, and one that's adopted by the person that wasn't speaking. [¶] . . . [¶]

"I am going to, so that the record is reasonably clear, allow the People to admit the testimony of Octavius, subject to all objections that may be made."

2. *Governing Law*

Evidence Code section 402 authorizes a trial court to hold a hearing outside the presence of the jury for the purpose of determining the admissibility of evidence. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 897 ["Evidence Code section 400 et seq., sets forth the rules for determining the existence or nonexistence of a preliminary fact when the parties dispute its existence"], overruled on another ground as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 640-641.) "But subdivision (b) of Evidence Code section 402 does not mandate . . . that a court must hold an evidentiary hearing on request." (*Ibid.*) Where "no 'preliminary fact' concerning . . . admissibility" is presented, "challenges to the reliability" of proffered testimony go "to the weight of [the] testimony rather than its admissibility (Evid. Code, § 351) . . . ." (*Ibid.*) In such cases, an evidentiary hearing is not warranted. (*Ibid.*)

Moreover, a ruling on a motion under Evidence Code section 402 is not binding if the subject evidence is proffered later in the trial. (*People v. Williams* (1997) 16 Cal.4th 153, 196.) "[T]he court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial." (Evid. Code, § 403, subd. (b).)

"On appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed only

for abuse of discretion." (*People v. Williams, supra,* 16 Cal.4th at p. 197 [trial court "was within its discretion in failing to conduct additional proceedings outside the jury's presence on the question of gang evidence."].)

3. *Analysis*

It appears that the "preliminary fact" on which Le argues the trial court was required to conduct such a hearing was the alleged inherent unreliability of Octavius's testimony, given the inconsistent statements he had made over the years regarding the events and conversations of and about the shooting, and given he had been drinking on the day of the shooting.

Le acknowledges in his brief that portions of Octavius's testimony were likely admissible. However, he argues that an Evidence Code section 402 hearing was the "only viable solution" for the trial court to "parse through the various statements" made by Octavius, which he claims "consisted of an amalgam of potentially admissible and inadmissible statements." We disagree.

By Le's own admission, his challenge to Octavius's statements went to weight and not admissibility; as such, the trial court was *not* required under Evidence Code section 402 to conduct a hearing to determine admissibility based on the alleged "preliminary fact" of unreliability. (See Evid. Code, § 351.) We decline Le's invitation to adopt a rule *mandating* that a trial court conduct an Evidence Code section 402 hearing merely because a witness *may* testify to subject matter that is inadmissible, as such a broad and expansive rule would effectively require a hearing every time a witness took the stand.

In addition, we note that in denying Le's request for a hearing under Evidence Code section 402 the trial court did make a preliminary finding that despite Octavius's inconsistency regarding the events and conversations after the shooting, including who said what, "at least at some point in the past[] Octavius has said that Mr. Le described what happened and Mr. Yang was joining in."

Moreover, even if we concluded the trial court erred by not holding such a hearing, we would further conclude that error does not require reversal. (See *People v. Stoll* (1989) 49 Cal.3d 1136, 1163 [errors involving exclusion of evidence are generally governed by the *Watson* standard, based on *People v. Watson* (1956) 46 Cal.2d 818, 836, namely whether it is reasonably probably that a result more favorable to defendant would have been achieved absent the error].)

Here, the record shows the trial court was keenly aware that portions of Octavius's statements *may* have been inadmissible and the trial court was prepared to exclude them on proper objection. Le also does not argue that the trial court erred by overruling any of his objections and/or by admitting any one statement of Octavius, as opposed to challenging the *procedure* the court used to rule on the admissibility of those statements. Thus, even if the trial court was required to conduct a hearing under Evidence Code section 402, it is not reasonably probable the result at trial would have been any different.

D. *Pathammavong's Testimony He Was Targeted for Being a "Snitch"*

Le next contends the trial court erred when it overruled his objection to Pathammavong's testimony that while in local custody somebody had "dropped a kite on

[him]." Pathammavong explained this meant he was considered a "snitch" and people were out to get him. Pathammavong testified he had no information that defendants were responsible for this conduct. Le nonetheless contends the trial court abused its discretion when it refused to exclude such evidence because it was not relevant and because it was extremely prejudicial.

1. *Additional Background*

While on the witness stand, Pathammavong testified he was concerned for his safety because he would be "green lighted." When asked what that meant, Pathammavong responded he could be shot, attacked or hurt by a gang member. Pathammavong then made the "kite" statement when discussing a problem he experienced while incarcerated. Defense counsel objected, but the court overruled the objection and allowed Pathammavong to testify about being beaten up by five or six people.

At a sidebar after the jury had been excused, defense counsel complained that Pathammavong's testimony was inadmissible hearsay and prejudicial because Pathammavong's testimony would lead the jury to believe appellants "are deadly, dangerous people who can cause others to be beat up in jail at any given moment on a whim, and I think that prejudices Mr. Yang and Mr. Le tremendously."

The trial court disagreed, noting in the gang culture there is a custom and practice to retaliate against witnesses who testify against the gang and its members. The court noted that the jury would be instructed to consider the demeanor and attitude of each

witness, and that Pathammavong's testimony went to that issue. The court also noted that the probative value of that evidence outweighed any prejudice to Le and Yang, particularly because the court had instructed the jury that any statements by Pathammavong regarding his safety was not to be attributed to either Le or Yang, and because Pathammavong's testimony made it clear that the attack was not connected to appellants.

The following day, members of the jury submitted a note to the court requesting a meeting. One of the jurors explained during the meeting attended by counsel that they were generally concerned for their own safety due to the nature of the case and because their names were mentioned at the beginning of trial.

After conferring with counsel on and off the record outside the presence of the jury, the court, with the assistance of all counsel, discussed how to handle the safety issue raised by jury members. The court noted it had a "dual duty" in this instance: "Let me reason this through. If I thought there were a security concern, and there are cases that have those, then it would be incumbent upon me to take steps to do two things: number one, alleviate that concern for the protection and security of the jurors; and, number two, alleviate it or take measures so that it wouldn't prejudice the defendants." The court also noted it had no information that anybody was in danger, including jury members.

In the presence of the jury and the defendants, the court addressed the note by the juror and communicated that it was satisfied no notes or lists of potential jurors had been removed from the courtroom during voir dire; that after making an inquiry, there was no

information of any threat against any juror, court personnel and counsel; and that the instant case did not raise any real concerns beyond the "theoretical concern that would exist because of what you've heard some of the witnesses testify to."

The court next asked the jurors whether any safety concern would influence in any way their ability to be fair and impartial. All jurors gave appropriate responses that they could remain fair and impartial. The court also asked any juror to raise his or her hand if he or she could no longer follow this admonition. The court noted on the record no hands were raised. The court added that Le and Yang were "entitled to the independent, conscientious decision of each juror. And that means a decision that is made without regard to concerns about your or anybody else's safety as a result of your service in this case."

2. *Governing Law and Analysis*

Evidence Code section 780 provides in relevant part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] . . . [¶] (j) His [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony."

" 'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An

explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court. [Citations.]' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084; see also *People v. Valencia* (2008) 43 Cal.4th 268, 302 ["Evidence of fear is relevant to the witness's credibility."].)

"Moreover, evidence of a 'third party' threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant." (*People v. Mendoza, supra*, 52 Cal.4th at p. 1084; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1142 [for evidence that a witness is afraid to testify or fears retaliation for testifying, "there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant."].)

Our Supreme Court in *People v. Mendoza, supra*, 52 Cal.4th at pages 1084-1085 discussed *People v. Olguin* (1994) 31 Cal.App.4th 1355, among other authorities, which is instructive on the issue at hand. Briefly, in *People v. Olguin* "an eyewitness to a gang-related shooting testified he left the crime scene and did not voluntarily provide information to the police because ' "I didn't want anything to happen to my house or to my family." ' [Citation.] Over the defendants' objection, the witness testified that someone telephoned him a few days after the shooting, that the caller said they knew where the witness lived and that he had better watch his back, and that the caller also mentioned the name of the defendants' gang. The witness further testified that someone subsequently 'spray-painted the word "Rata" (Spanish for "rat") on his driveway.' [Citation.] In holding the challenged evidence was properly admitted, [the court in

People v.] *Olguin* explained: 'Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim. . . . [¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear. A witness who expresses fear of testifying because he [or she] is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into [his or] her home the night before the trial.' [Citation.]" (*People v. Mendoza*, *supra*, 52 Cal.4th at pp. 1084-1085.)

"Likewise, in *People v. Avalos* (1984) 37 Cal.3d 216 . . . , an eyewitness to a crime hesitated before responding affirmatively when asked by the prosecutor whether the person she previously identified in a lineup (i.e., the defendant) was in the courtroom. [Citation.] At an in camera hearing, the trial court ruled the prosecution might ask whether the witness was reluctant to testify out of fear, because 'the fact she felt fear, whether or not caused by specific acts of any persons connected with the trial, was relevant to her credibility and . . . the probative value outweighed any potential prejudice

to defendant.' [Citation.] Upon resuming the stand, the witness testified she was afraid to testify. Defense counsel then clarified during cross-examination that the witness's fear was due only to the importance of the event. [Citation.] On appeal, we concluded [in *People v. Avalos*] the evidence was properly admitted: 'The determination that an explanation of [the witness's] hesitation would be relevant to the jury's assessment of her credibility was well within the discretion of the trial court.' [Citation.] Moreover, the evidence had no prejudicial impact given counsel's clarification that the witness's fear did not reflect on the defendant. [Citation.]

"These authorities make clear that a trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness." (*People v. Mendoza, supra*, 52 Cal.4th at p. 1085.)

In light of the above authorities, we conclude the trial court properly exercised its discretion when it allowed Pathammavong to testify he was concerned for his safety because while in local custody somebody had "dropped a kite on [him]." Pathammavong explained this meant he was considered a "snitch" and people were out to get him. (See *People v. Mendoza, supra*, 52 Cal.4th at pp. 1084-1085; *People v. Olguin, supra*, 31 Cal.App.4th at pp. 1368-1369.)

E. *Discovery Violations*

Le next contends he was denied a fair trial because of the allegedly late disclosure by the prosecution of fingerprint evidence on a beer bottle found near the pool hall linking Le to the crime scene and of an e-mail/letter written by a defense witness that portrayed Octavius as a habitual liar. Specifically, he contends the trial court erred by refusing to read a special jury instruction advising the jury that the prosecution did not provide this evidence at least 30 days before trial commenced and that the jury therefore could consider such failure in determining the weight to be given this evidence.[11]

1. *Additional Background—Fingerprint Evidence*

During trial, the prosecutor informed the court and the defense that the People's expert had found an additional set of prints from a beer bottle recovered from the back alley of the pool hall which, when analyzed, matched Le's fingerprints. The prosecutor represented he turned this information over to the defense as soon as he acquired it.

Le's counsel in response argued the fingerprint evidence should be excluded because the prosecutor had violated section 1054 by not providing the information 30 days before trial.

The court found there was no discovery violation because the prosecutor did not willfully suppress evidence as the People did not learn that Le's print was on the beer

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11 Le in his brief confusingly argues the trial court also erred when it refused to give this special jury instruction with regard to the e-mail/letter evidence, even though the proposed instruction itself addressed *only* the fingerprint evidence.

bottle until that morning. Although the court refused to suppress the evidence, it agreed to a five-day delay of the testimony of the People's expert who discovered the fingerprint evidence in order to give that expert additional time to complete a written report and give the defense time to hire its own expert, if necessary, to investigate the prints after it received the report.

Le's counsel subsequently requested a special jury instruction be given addressing the prosecution's alleged failure to comply with the discovery requirements. In rejecting the proposed instruction, the trial court ruled as follows:

"Here it doesn't seem to me, frankly, that there was a discovery violation. The evidence of the print on the [beer] bottle I find was disclosed as soon as it was known to exist.

"Now, arguably, one could argue that the police were negligent in not tracking down that second envelope of fingerprints earlier and processing it earlier. But that's the worst that can be said. I don't find even a shred of evidence that they willfully waited until the eleventh hour to do this comparison.

"I don't think it was a discovery violation. There was an inadvertent failure to recognize significant evidence. But as soon as that was recognized, it was called to everybody's attention. And I think I acknowledged before, and I certainly acknowledge again, that it's no fun to be surprised by that kind of evidence. But I don't see this as, particularly in a case where the investigation went as long as it did and involved different investigative units, that this was willful or a discovery violation.

"On the issue of prejudice, . . . I don't really think that the cross-examination would likely to have been too much different. It seems to me that since the evidence of the fingerprint on the bottle is somewhat damning, it would be certainly appropriate to establish from the witnesses who were there at the pool hall that nobody saw him that night, because that then supports the inference that the bottle was there for some other reason, had been in the car perhaps and kicked out by the actual people in the car. Who knows?

"Moreover, of course, we did recess and give the defense a chance to get its own expert and to call any expert witnesses that the defense felt might have been fruitful. And that chance was afforded.

"Bottom line is I don't see any impairment of Mr. [Le's] right to a fair trial." Although the court denied the request for a special instruction, the court ruled the defense could address the matter during closing argument.

2. *Additional background—E-mail by Defense Witness*

During trial, defense counsel informed the court that in August 2008 a defense witness sent an e-mail to the district attorney investigator stating that the witness had known Octavius for at least 10 years, that for a time the witness had dated Octavius and that the witness believed Octavius was a habitual liar and lied for no reason at all. Defense counsel explained that in speaking with the investigator, defense counsel had learned the investigator received the e-mail and had shown it to the prosecutor, who looked at the e-mail, put it in a box and forgot about it. Defense counsel argued that the

prosecutor should have turned the e-mail over to the defense and that the failure to do so was a violation of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] (*Brady*) and asked the court to conduct a hearing on whether the prosecutor should be sanctioned.

The prosecutor responded he had learned about the e-mailed letter from an ex-girlfriend that was recovered during a search of her house; he did not have a copy of the e-mail and when he received it, the e-mail appeared to be duplicative of the information already provided to the defense and the defense had the e-mail and it could be used at trial. The prosecutor also noted he took seriously his obligation to turn over information to the defense as it became available.

At a subsequent hearing outside the presence of the jury, the trial court found the prosecutor had failed to comply with his obligation to disclose the e-mailed letter but that no sanctions were warranted because the prosecutor had not willfully suppressed the information:

"I conclude . . . that there is no *Brady* violation in this case. I make that conclusion for the following reasons.

"I think that the question isn't answered simply by looking at whether the content of the document brings it within the *Brady* doctrine. I think you have to look at the circumstances and the effect in this case. I find, as a matter of fact, that the nondisclosure of this document was inadvertent and that the document was not willfully suppressed.

"I note in making that finding that the discovery is some four to 5,000 pages of documents. There are numerous photographs. This was a complex investigation of a

cold case. We have just heard testimony today about how this investigation was reactivated and began to heat up again in 2007, some five years after the actual killing. The case involved gang detectives, homicide detectives, peace officers from other agencies recovering guns and cars, involved district attorney investigators, involved items impounded as physical evidence under one tag number or one description number by the gang detectives, then being transferred and renumbered by homicide detectives.

"In my view and it is my finding that the discovery, frankly, has been managed exceptionally well in a case [this complex] by the district attorney and, frankly, by defense counsel. But there is not even a hint or a scintilla of evidence that this nondisclosure was anything other than inadvertent.

"Moreover, I think we have to look at it in light of the other evidence that exists about [Octavius's] credibility. Granted, the bias of a witness and a witness' credibility is never a collateral matter. However, it certainly cannot be said that this letter . . . was the sole piece of impeaching evidence as to [Octavius] or even, frankly, a significant one. It is a letter from an ex-girlfriend who is upset about pregnancy allegations or rumors or statements made by [Octavius], whom she admittedly dated for some period of time. There is no way to even suggest that a marginal benefit of this in terms of evaluating [Octavius's] credibility is anything more than minor.

"I conclude that there is no *Brady* violation in this case. I certainly don't impose any kind of a *Brady*-based sanction. I am declining to impose any sanction under the discovery laws as well, that is, the statutory laws."

3. *Governing Law and Analysis*

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Our Supreme Court has established that " 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order.' " (*Ibid.*) In considering whether the trial court abused its discretion, we examine whether the trial court's response "was inadequate to dispel any prejudice resulting from the prosecution's conduct." (*People v. Robbins* (1988) 45 Cal.3d 867, 884, superseded by statute as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

As to the fingerprint evidence, we conclude the trial court properly found there was no discovery violation under Penal Code section 1054 et seq. Indeed, we note that Le does not challenge the findings of the trial court that the prosecution did *not* willfully suppress the fingerprint evidence, or that once it discovered the information, the prosecutor immediately turned it over to the defense. (See § 1054.7 "[If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made *immediately* . . . ."], italics added.)

Here, the record shows the People's expert uncovered the fingerprint evidence as the expert was preparing to testify at trial. To ensure there was no prejudice, the court granted the defense's request for a five-day continuance to allow the defense to review the forthcoming report of the People's expert and to conduct their own investigation, if necessary.

The record also shows the defense was aware of the existence of fingerprint evidence on the beer bottle and chose not to examine that evidence or conduct its own investigation. (See *People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049 [noting that "[a]lthough the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation," and further noting that "[i]f the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence."].)

Under the circumstances, we conclude the trial court's decision to delay the trial in order to give the defense an opportunity to investigate the fingerprint evidence, but not to give the requested jury instruction, was a proper exercise of the court's discretion. (See *People v. DePriest* (2007) 42 Cal.4th 1, 38-39 [concluding trial court properly allowed shoeprint evidence to be admitted shortly before trial because the prosecutor informed both the court and defense counsel of the existence of such evidence immediately after it was acquired and because there was no evidence the acquisition of such evidence was unreasonably delayed, and concluding the trial court did not abuse its discretion in denying the defense's request for a continuance with respect to such evidence because the "record supports the court's determination that defendant had ample time and resources to [investigate the shoe print evidence] after trial began."]; see also *People v. Panah* (2005) 35 Cal.4th 395, 459-460 [concluding there was no statutory violation when pathologist

prepared on the eve of testimony a new report after reexamining microscopic slides at request of prosecution].)

As to the e-mailed letter sent to the district attorney investigator, Le takes issue with the finding of the trial court that the nondisclosure of this information was inadvertent. However, because this finding is supported by substantial evidence in the record, we may not reweigh the evidence or reappraise the credibility of the witnesses (e.g., the prosecutor and district attorney investigator) and come to a different finding. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

In any event, we conclude the trial court properly found there was no *Brady* violation in connection with the e-mail. " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (See *People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.)

Here, Le cannot satisfy all three elements. Assuming the e-mail was exculpatory, there is no evidence the prosecution suppressed this information as the defense obtained it from another source and merely confirmed the prosecutor had received it at some point during the investigation. "Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him [or her]. [Citation.] If the material evidence is in a

defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence. [Citations.] Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it ' "by the exercise of reasonable diligence." ' [Citations.]" (*People v. Salazar, supra,* 35 Cal.4th at pp. 1048-1049.)

There also is no evidence Le was prejudiced by the prosecutor's failure to produce the e-mailed letter to the defense. "Prejudice, in this context, focuses on the 'materiality of the evidence to the issue of guilt and innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.)

The trial court in the instant case correctly noted the e-mail did not provide any new information regarding Octavius and/or his credibility (or lack thereof). For this separate and independent reason, even if the e-mail was exculpatory and even if the People suppressed it, we conclude the trial court properly found there was no *Brady* violation because Le cannot establish he was prejudiced by its suppression.

F. *Evidence Pathammavong Was Involved in a Shooting in 2003*

Le next contends the prosecutor engaged in misconduct by misrepresenting that the defense had elicited certain details from Pathammavong regarding a 2003 shooting when in fact it was the prosecutor who had obtained the information from this witness. Le further contends the prosecutor's misconduct was "deceptive and reprehensible and infected the trial with such unfairness as to make [his] conviction a denial of due process." He also contends the trial court erred when it gave a curative instruction to the jury regarding this issue.

1. *Additional Background*

During cross-examination, defense counsel asked Pathammavong about a shooting in 2003 that took place on Comstock Street (e.g., the Comstock shooting). Specifically, Yang's counsel asked Pathammavong whether gangs retaliate against other gang members for cooperating with authorities. After Pathammavong responded, "Yes," counsel then asked, "And isn't that—your experience is really based on the fact that you yourself were involved in a shooting on Comstock Street in 2003 for the same reason, correct?" The trial court sustained the prosecution's objection on the grounds the question was improper impeachment.

Outside the presence of the jury, the prosecutor expressed some concern about the questioning of Pathammavong by Yang's counsel that made it appear that Pathammavong had been *convicted* of another shooting, which was not true. The prosecutor reminded

the court that in a motion in limine he had asked that Pathammavong's prior conviction be referred to as "assault with a firearm, and attendant gang allegations."

Counsel for Yang argued that the jury should hear that Pathammavong admitted as part of his plea to being in the car in the Comstock shooting, when two young girls were wounded. The trial court disagreed, finding this argument "border[ed] on specious" because counsel was impermissibly trying to show that if Pathammavong was involved in a previous drive-by shooting, he also may have committed the pool hall shooting.

The next day, the prosecutor asked for a curative instruction based on the fact that, as he remembered it, Pathammavong had been asked by defense counsel whether he shot two little girls in the Comstock shooting and that such questioning was beyond the court's in limine rulings. After a recess, Yang's counsel informed the court that he had reviewed the court reporter's "rough notes" and determined that defense counsel had *not* asked Pathammavong about shooting two girls, as represented by the prosecutor.

The trial court accepted defense counsel's representation, but recalled the issue of the shooting of the two girls on Comstock Street had come up on a few occasions. The trial court therefore ruled to give the proposed curative instruction proffered by the prosecutor, which provided in part:

"A witness's criminal history—this goes for all witnesses—is relevant for you as jurors in assessing the credibility of the testimony of a witness. As I will more fully instruct you at the conclusion of the trial, you may give a witness's criminal history whatever weight you believe it deserves in assessing the credibility.

"There will be an instruction that talks about prior convictions and how that is something that you can consider in determining the believability of a witness, and you decide how much weight you want to give it based on all of the circumstances, including the conviction.

"You are instructed that, by stipulation, the parties have agreed that Mr. Pathammavong was, in fact, convicted in 2004. He was convicted of conspiracy to commit an assault with a firearm, and there was an attendant gang allegation attached to this charge. This charge of which he was convicted in 2004 is a felony.

"Also, of course, he was convicted in 2009 of being an accessory after the fact of murder, along with a gang allegation, and that, as you heard, arose from his participation in the events about which you are hearing testimony in this trial.

"Please, ladies and gentlemen, you are instructed to disregard any other assertions or suggestions that may have been made or arisen yesterday with regard to Mr. Pathammavong's alleged role in the 2004 crime, the crime for which he was convicted in 2004. And you are likewise instructed to disregard any suggestion as to the details of that crime.

"You are, however, of course, entitled to consider the facts that he was convicted of that conspiracy to commit an assault with a firearm, along with a gang allegation.

"Counsel will be allowed to and entitled to comment on this instruction and that conviction to the extent they see fit in their closing arguments.

"If this seems to be coming to you in a vacuum, just make a note of it and give it the weight to which you believe it's entitled during your deliberations after hearing the arguments of counsel and the instructions of the court."

It is this instruction that Le contends violated his due process rights to a fair trial.

2. *Analysis*

We need not determine whether the prosecution engaged in any misconduct or whether the trial court erred in giving the curative instruction because even if we assume the record supported such conclusions, we nonetheless would conclude any conceivable error, misconduct or deficiency was harmless by any standard. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 193-194 [alleged prosecutorial misconduct harmless where there was no reasonably possibility the jury would have reached a more favorable verdict had the misconduct not occurred].)

Indeed, as noted by Yang's counsel during trial and the trial court, the curative instruction at issue here covered the *same* general subject matter that was covered by the instructions given at the conclusion of testimony. In addition, Le does not contend that the trial court's curative instruction was incorrect under the facts or the law. Rather, the instruction merely cautioned the jurors that the facts underlying Pathammavong's conviction in 2004 were not to be considered.

Finally, although Le contends the instruction cast the defense in a "negative light," our review of the instruction shows it was content neutral. The record also shows the trial court incorporated changes to the proposed instruction suggested by the defense to

ensure it was "more passive." If anything, the instruction may have assisted the defense more than the People because it reminded the jury that Pathammavong had been convicted in 2004 of conspiracy to commit assault with a firearm and a gang allegation, *and* that the jury could consider that conviction in assessing his credibility (or lack thereof). Le's speculation that the curative instruction prejudiced him is insufficient to establish prejudice. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 [a defendant's proof of prejudice must be a "demonstrable reality" and not simply speculation].)

G. *Third Party Culpability Defense and Ineffective Assistance of Counsel*

Le next contends there was sufficient evidence of a third party culpability defense such that the trial court had a sua sponte duty to instruct the jury on that defense or, alternatively, his counsel should have requested such an instruction.

Regarding his contention the trial court had a sua sponte duty to instruct the jury on this defense, as Le recognizes our high court rejected this same argument in *People v. Abilez* (2007) 41 Cal.4th 472. There, defendant was convicted of several offenses, including murdering and sodomizing his mother. At trial, defendant's defense was that his cousin committed the crimes. On appeal, defendant contended his rights to a jury trial and to due process were violated when the trial court failed to instruct the jury that he did not need to prove his innocence or that his cousin was guilty, but merely raise a reasonable doubt as to his own guilt. (*Id.* at p. 517.) Because defendant did not request such an instruction at trial, his contention was that the trial court had a sua sponte duty "to instruct the jury how the burden of proof applies to third party culpability." (*Ibid.*)

In rejecting this contention, our Supreme Court in *People v. Abilez*, *supra*, 41 Cal.4th at page 517 ruled that although a criminal defendant may use a third party culpability defense to raise a reasonable doubt as to his or her guilt, and the trial court "has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court[,]' " there is "no special instruction on third party culpability . . . necessary to apprise the jury of the pertinent legal principles" where the jury was properly instructed on the defendant's presumed innocence and the requirement that the jury find him guilty beyond a reasonable doubt. The court reasoned that "[h]ad the jury entertained a reasonable doubt that defendant sodomized and killed the victim and instead believed [his cousin] committed those crimes, presumably it would have acquitted defendant." (*Ibid.*; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 823-824 [concluding trial court did not err by failing to instruct the jury, sua sponte, regarding third party culpability].)

Similar to the jury in *People v. Abilez*, here the jury was properly instructed on the presumption of innocence, the People's burden of proof, and the concept of reasonable doubt. If the jury believed Pathammavong or another individual committed the shooting at the pool house, presumably it would have acquitted Le. We thus conclude the jury instructions did not undermine the presumption of innocence or ease the prosecution's burden of proof.

Without legal support, Le nonetheless contends that because the trial court also instructed the jury with CALCRIM No. 373,[12] the trial court erred by failing to instruct sua sponte on third party culpability. We disagree.

A third party culpability instruction focuses on the significance of a third party's alleged past acts offered as exculpatory evidence during a criminal prosecution of the defendant. In contrast, CALCRIM No. 373 focuses on the significance of the facts that (1) the third party may not be currently participating in the criminal prosecution of the defendant, and/or (2) may not have been, or might not be, criminally prosecuted. (See *People v. Farmer* (1989) 47 Cal.3d 888, 918 [like its predecessor, CALCRIM No. 373 "does not tell the jury it cannot consider evidence that someone else *committed* the crime," but rather it "merely says the jury is not to speculate on whether someone else might or might not be *prosecuted*."], disapproved on other grounds as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6, italics omitted.)

We thus conclude the fact that CALCRIM No. 373 instructed on an issue irrelevant to third party culpability did not impose upon the trial court an otherwise

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12 CALCRIM NO. 373, as given, provides: "[T]he evidence shows that another person may have been involved in the commission of the crimes charged against these defendants. There may be many reasons why someone who appears to have been involved might not be a co-defendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendants here on trial committed the crimes charged with which they are charged. [¶] This instruction does not apply to the testimony of Mr. Pathammavong."

nonexistent duty to instruct sua sponte on such culpability. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 517.)[13]

Alternatively, Le contends he received ineffective assistance of counsel because defense counsel failed to ask for a third party culpability defense instruction. The burden of proving a claim of ineffective assistance of counsel is on the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, [the defendant] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*In re Harris*

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13 We also reject Le's unsupported argument that because the trial court instructed the jury with CALCRIM No. 334, the court was required to give sua sponte an instruction on third party culpability. CALCRIM No. 334 states the rule provided in Penal Code section 1111 that a defendant cannot be convicted by the testimony of an accomplice unless it is corroborated by other evidence. The rule exists because the testimony of an accomplice is viewed with a certain amount of caution. (See *People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.) In any event, it also is clear from the record that any error in failing to instruct on third party culpability was harmless because the jury was properly instructed that the People had to prove Le's guilt beyond a reasonable doubt and the jury knew the defense believed another person (e.g., Pathammavong, who bragged about being involved in the shooting after the fact) committed the drive-by shooting. (See *People v. Earp* (1999) 20 Cal.4th 826, 887.)

(1993) 5 Cal.4th 813, 832-833; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

We need not determine whether the defense's decision not to ask for a third party culpability instruction fell below an objective standard of reasonableness because we find no prejudice. As already mentioned, the jury was properly instructed on the presumption of innocence, the People's burden of proof and the concept of reasonable doubt. In addition, the record clearly shows that the jury knew the defense believed individuals other than Le and Yang (e.g., Pathammavong) committed the drive-by shooting. If the jury believed a third party and not appellants committed the crime, presumably it would have acquitted one or both of appellants of the crime.

II

*Yang's Appeal*[14]

A. *Other Crimes Evidence*

Yang contends the trial court abused its discretion when it admitted the testimony of Octavius that Yang participated in at least one uncharged shooting by TOC at AC targets in order to prove motive and the gang allegation.

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14 This court in September 2010 granted Yang's unopposed motion to augment the record to include two rulings made by the judge in connection with motions in limine: a transcript of a tape recording (e.g., People's exhibit 84) played to the jury, and the reporter's transcript of opening statements to the jury.

1. *Additional Background*

During pretrial proceedings, the trial court ruled to admit two or perhaps three incidents, and exclude one incident, regarding uncharged shootings involving TOC, as testified to by Octavius. In an incident described by Octavius in 1998, members of TOC had gathered at the pool hall and in the back alley area of the pool hall for a party. At some point, some AC gang members appeared and Le confronted them and asked them to leave. The AC members left, but returned and fired shots at TOC gang members that hit nobody.

Octavius described another incident in 2002 when Yang, Le and other TOC gang members were shot at by what they believed were AC members at Crown Point in San Diego. In the weeks that followed, TOC responded by shooting at some AC gang members' houses in Mira Mesa. Nobody was injured in either shooting. Octavius said Yang was with him when they shot at the houses.

Finally, another incident took place in 2005 regarding a gang fight and shooting in which Le was convicted.

In admitting the incidents in 1998 and 2002 but excluding the 2005 incident, the trial court ruled as follows:

"It seems to me that these questions need to be addressed under principles of relevance and [Evidence Code] section 352 and [Evidence Code] section 1101(a) and (b), if applicable. I'll do that in reverse order.

"[Evidence Code section] 1101 is the rule that says that evidence of a person's character is normally not admissible to prove his conduct on a specific occasion. 1101(b) is sometimes referred to as an exception to that rule. It's really not, if you read it. It's an elaboration of the rule.

"It says, in effect, if you're using evidence that might be considered otherwise character evidence to prove some other relevant issue, then it's not going to be kept out by subdivision a.

"The very first one on the list that we all learned in law school was motive, of course. Motive, intent, identity, common plan or scheme, absence of mistake, those things.

"It seems to me that to the extent any of this might be 1101(b) evidence, it comes under the motive exception. I think there's necessarily an overlapping of the pools between character evidence, which is inadmissible under [subdivision] a, and motive evidence, which is such evidence offered for a different reason other than to prove conduct on a specified occasion.

"I had not focused on the point until [the prosecutor] made it, too, that when it's a bad act of the Asian Crips, it's really not 1101(b) evidence as to these gentlemen. But I think that point is well taken. I don't think that section 1101(a) or (b) precludes the admission of any of this evidence if it's otherwise relevant and passes muster under [Evidence Code] section 352.

"Let's step back from the trees again and look at the forest. This is clearly a gang case. It's steeped in the gang culture. I think the evidence is going to be that the Tiny Oriental Crips [TOC] and the Asian Crips [AC] were both around for a long time, certainly before 1998. I think it's the gang culture, just as it is with the Capulets and the Montagues [in *Romeo and Juliet* by William Shakespeare], that these grudges are nursed and kept alive for many years. And I think that a four-year gap doesn't preclude it from being relevant for motive today.

"It seems to me that the question of motive answers the question of relevance. There's actually a jury instruction that says having a motive may tend to show that the crime was committed or that somebody did it. Not having a motive tends to show the reverse. So it's clearly relevant.

"Given the fact that this case will be steeped in the gang culture and the relevance that attends to proof of the gang allegation, I think that [Evidence Code] section 352 is not a bar either.

"My ruling is going to be that incident 3, that is, the facts of an earlier shooting by the Asian Crips at the pool hall, is admissible. I'm told that's a Tiny Oriental Crip/Asian Crip dispute that was believed to be behind that.

"[Incidents] 4 and 1, as we have been calling them, are likewise admissible. If they're the same thing, so be it. And if they're different, they still each involve one gang committing an act of violence towards the other and then the other committing an act towards the one, and I think that those are relevant given the fact that my reading of the

preliminary hearing transcript was consistent with what the prosecutor has said; that is, that I think that if a jury accepts the People's evidence, they would be finding that Mr. Le and Mr. Yang went over there [to Mira Mesa] to go after Asian Crips, and the fact that it was [another gang] that got hit doesn't alter the relevance of that motive.

"The facts of the 2005 event leading to Mr. Le's conviction for Penal Code section 245 are not going to be admissible . . . ."

2. *Governing Law and Analysis*

As the trial court recognized, evidence of a defendant's prior crime or bad act is generally inadmissible to prove a defendant's bad character or propensity to commit the charged offense. (Evid. Code, § 1101, subd. (a).[15]) However, such evidence may be admissible when relevant to prove some relevant fact other than criminal propensity, such as intent, motive, identity or the absence of mistake or accident. (Evid. Code, § 1101, subd. (b).)

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15 Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

When reviewing the admission of evidence of other offenses, a court considers: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crimes evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) A court's decision to admit other crimes evidence is reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

In the instant case, the record shows the trial court carefully considered whether to admit the "other crimes" evidence. We conclude the trial court properly exercised its discretion when it ruled to admit two (or three, if two of them were not identical) of the incidents and exclude one of them. The two incidents admitted into evidence clearly went to the issue of motive for the pool hall shooting, given that both of the prior incidents involved TOC gang members shooting at other gangs including AC members. In addition, both of these incidents were relevant to the gang allegations charged in this case, as also found by the trial court.

We further conclude the trial court did not err and abuse its discretion when it found the probative value of this other crimes evidence involving TOC and AC gang members was not "substantially outweighed" by the probability that its admission would "create substantial danger of undue prejudice" to Le and Yang, particularly given the significance of the role the gangs played in this case and given the gang allegations the People were required to prove. (See Evid. Code, § 352; see also *People v. Zapien* (1993)

4 Cal.4th 929, 958 [" 'The prejudice [that Evidence Code section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' "]; *People v. Wilson* (1992) 3 Cal.4th 926, 938 [a trial court is vested with broad discretion in determining the admissibility of evidence and its exercise of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse]; *People v. Butler* (2005) 127 Cal.App.4th 49, 60 [concluding trial court did not err when it admitted into evidence an altercation between defendant and a group of people a week before defendant's unprovoked attack and killing of a member of that *same* group]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212 [concluding trial court did not err when it admitted evidence of defendant's involvement in a prior gang-related incident that led to a shooting to prove intent and malice when defendant killed a rival gang member for gang-related purposes]; compare, *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [evidence is prejudicial if it uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues].)

Finally, the record shows the jury was properly instructed that it could consider the other crimes evidence only for limited purposes and not to show Yang or Le were persons of bad character, and that it could not consider this evidence at all unless the prior acts were shown by a preponderance of the evidence (discussed in more detail *post*). The jury is presumed to have followed this instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) For this separate and independent reason, we conclude Yang did not

suffer "undue prejudice" for purposes of Evidence Code section 352 in connection with the admissibility of this other crimes evidence.

B. *Gang Allegation and CALCRIM No. 375*

Yang next contends CALCRIM No. 375, as given by the trial court, allowed the jury impermissibly to find the gang allegation true based on the preponderance of the evidence standard.

1. *Additional Background*

Without objection by any party,[16] the trial court instructed the jury pursuant to CALCRIM No. 375 as follows:

"The People presented evidence that a defendant committed another offense that was not charged in this case.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] . . . [¶]

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16 Because Yang failed to raise this issue at trial it is forfeited on appeal. (See *People v. Moore* (2011) 51 Cal.4th 1104, 1139-1140; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' "].) Nonetheless, we reach the merits of the issue to avert any claim of ineffective assistance of counsel.

"If the People have not met this burden of preponderance of the evidence with respect to this evidence about which I am speaking, you must disregard the evidence entirely.

"If you decide that the defendant committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant had a motive to commit the offenses alleged in this case.

"*Do not consider this evidence for any other purpose except for the limited purpose of determining the gang allegation under Penal Code section 186.22.*

"Do not conclude from this evidence that the defendant or either of them had a bad character or is simply disposed to commit crime.

"If you conclude that a defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the crimes or allegations charged. The People must still prove each charge and allegation beyond a reasonable doubt." (Italics added.)

Yang claims the italicized portion of the above instruction directed the jury to use the preponderance of the evidence standard to find true the gang enhancement under section 186.22.

2. *Governing Law and Analysis*

" '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular

instruction.' [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) "In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

CALCRIM No. 375, as instructed by the trial court, itself addresses and eliminates Yang's argument when it states that *if* the jury concludes the defendant committed the uncharged offense, that conclusion "is not sufficient by itself to prove that the defendant is guilty of any of the crimes *or allegations charged*" and that the People "must still prove each charge *and allegation beyond a reasonable doubt*." (Italics added.)

In addition, the jury was properly instructed with CALCRIM No. 1401, regarding the gang enhancement, and told, "The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." The court also gave CALCRIM No. 220, defining reasonable doubt and explaining the People's burden of proof, and CALCRIM No. 224, instructing the jury how to evaluate circumstantial evidence and the conclusions that may be drawn from that evidence, and explaining that before the jury could rely on such evidence it had to conclude that the People proved each fact beyond a reasonable doubt.

In the context of the overall charge to the jury, we conclude there was no error when the trial court instructed the jury with CALCRIM No. 375. (See *People v. Moore*, *supra*, 51 Cal.4th at p. 1140; *People v. Carrington*, *supra*, 47 Cal.4th at p. 192.)

C. *Exclusion of Wiretap Evidence*

Yang also contends the trial court erred and abused its discretion when it refused to admit two wiretapped calls involving Yang.

1. *Additional Background*

During cross-examination of the investigating officer primarily responsible for obtaining the wiretap order, Yang's counsel asked whether the officer was familiar with wiretap call 322, made on August 9, 2007, between Yang and Octavius, in which Yang said, "They hit Vanessa's house about the shit that Bo [Pathammavong] did." When the officer responded in the affirmative, Yang's counsel then asked about call 330 made on that same day between Yang and Octavius. With that question, the prosecutor objected and asked for a sidebar conference.

Outside the presence of the jury, counsel for Yang noted that call 330 involved a search warrant discussion between Yang and Octavius which provided: "He [Yang] says: They gonna try and catch you slipping. They fucking—they try to bring up the shit, you know, about Bo and shit, dog. They will bring up that shit about Bo because I guess --. and then Mr. [Octavius] Soulivong says: You don't have to worry about that or worry about it though. And Down Yang says: Nah, I ain't worrying, dog. No, I believe you, dog. I just, you know—you ain't going to snitch on Bo or anybody. Basically you slipped. But you know they are going to try to catch you slipping."

Yang's counsel argued call 330 was relevant because it showed that Pathammavong was the shooter and explained Yang's state of mind including the reason

he considered running away, namely because Yang believed someone else was the shooter but the gun used in the shooting belonged to his brother.

The trial court ruled the statements were hearsay and not subject to any hearsay exception, including state of mind, and were not an admission by a party opponent or a prior inconsistent statement. The trial court sustained the prosecutor's objection and instructed the jury to disregard the testimony about call 322.

2. *Governing Law and Analysis*

Under Evidence Code section 1200, subdivision (a) " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Except as provided by law, hearsay evidence is inadmissible. (Evid.Code, § 1200, subd. (b).)

Assuming for purposes of argument only the trial court erred by excluding wiretap calls 322 and 330 either as non-hearsay or as an exception to the hearsay rule, we conclude that error was harmless. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 ["the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*," and absent "fundamental unfairness, state law error in admitting evidence is subject to the traditional [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836] test."]; see also *People v. Hall* (1986) 41 Cal.3d 826, 834 ["As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense."].)

First, the record is replete with evidence of the defense's theory that Pathammavong was the shooter, including evidence of Pathammavong bragging about the shooting after the fact. That the defense believed Pathammavong was the shooter was already before the jury without regard to wiretap calls 322 and 330.

Second, the record shows other wiretap calls the jury did hear covered the same general subject matter as calls 322 and 330. In one such call, Yang talked about the "gun that was used for Bo[] [Pathammavong's] shit," and in another Octavius referred to the "[gun] that "Bo used." Thus, we conclude it was not reasonably probable that a result more favorable to Yang would have been reached absent the trial court's alleged error in failing to admit the two wiretap calls. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

D. *Prosecutorial Misconduct*

1. *Additional Background*

During closing, Yang's counsel argued to the jury that the People had failed to proffer any witnesses to corroborate the testimony of Octavius, despite his testimony that there were others present at his brother Orlando's house when Le and Yang discussed the shooting after returning to the house that same night.

In rebuttal, the prosecutor in response argued:

"And much has been made of, well, why only Octavius [came] and testif[ied] about that conversation at that house[.] I think common sense answers that question, if not all the gang evidence you heard. Being in the gang world and indoctrinated as you are now, do you really think all those hard-core TOC guys were going to come to law

enforcement and say, ['Y]eah, I will testify against . . . my gang. Sure. Let me at 'em. Love to do it.['] Is it really what you expected was for the People to bring in this parade of hard-core bangers to testify against these hard-core bangers?

"Or—now the defense has no burden. It is my burden here to prove this case. But, at the same time, they have the ability to call witnesses. They have the ability to test evidence. They have the ability to do all those things. Could they have called in people from Orlando's house? [Yang's] friends? [Le's] friends to come in and, as Octavius told us, you lie for the gang. That's how it works. Could they have brought them in to say, ['H]ey, I was there, and this didn't happen[.'] Sure."

Defense counsel objected to this argument to the "extent it shifts the burden." The court overruled that objection, and the prosecutor continued, "You didn't have anybody coming in and saying, [']I was with these two. They didn't do it.[']"

2. *Governing Law and Analysis*

When, as here, the alleged misconduct " 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. ' "A prosecutor may 'vigorously argue his [or her] case and is not limited to "Chesterfieldian politeness" ' [citation], and he [or she] may 'use appropriate epithets . . . .' " [Citations.]' [Citation.]

'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

" 'It is now well established that although *Griffin* [ *v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229] prohibits reference to a defendant's failure to take the stand in his [or her] own defense, that rule "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]" [Citations.]' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304.)

Here, Yang wisely does not argue that the prosecutor's comments about the witnesses the defense did not call improperly drew attention to Yang's decision not to testify. Instead, Yang argues the above comments by the prosecutor improperly switched the burden of proof to him to establish innocence. Yang relies upon *People v. Gaines* (1997) 54 Cal.App.4th 821 to support his contention.

In *People v. Gaines*, the prosecutor commented not only upon the absence of an alibi to corroborate defendant's version of events, but further asserted that the alibi's testimony would have conflicted with the testimony of defendant because he allegedly "slipped and he told some untruths" while on the witness stand. (*People v. Gaines*, *supra*, 54 Cal.App.4th at p. 824.) According to the prosecutor in *People v. Gaines*, the defense did not call the absent witness, despite the fact that witness had been present at the trial, because the witness would have impeached defendant's story. (*Ibid.*) The court

determined the prosecutor's conduct denied defendant his Sixth Amendment rights to confrontation and cross-examination. (*Id.* at p. 825.)

In the instant case, the prosecutor's comments were made in the context of explaining to the jury how difficult it is in a gang case to convince a gang member to come forward and cooperate with law enforcement and ultimately testify against the gang and/or its members. The prosecutor's remarks were in response to the argument of the defense regarding the People's failure to call additional witnesses to corroborate the testimony of Octavius. Unlike the prosecutor in *People v. Gaines*, the prosecutor in the instant case did *not* argue to the jury what the substance of the absent witnesses' testimony would have been, how that testimony, if given, would have conflicted with the testimony provided by appellants, neither of whom, in any event, testified in the instant case, or how that testimony undermined their case. Thus, we conclude *People v. Gaines* is inapposite and Yang was not denied his Sixth Amendment right to confront and cross-examine witnesses.

III

*The People's Cross-Appeal*

In their cross-appeal, the People contend the trial court erred in staying the 10-year section 12022.5, subdivision (a)(1) enhancement to count 4. They contend that the trial court had discretion to treat the gang enhancement under section 186.22, subdivision (b)(1) as a "serious offense" within the meaning of section 1192.7, subdivision (c)(31), as opposed to a "violent felony" for purposes of section 667.5, subdivision (c)(8). They

further contend that *if* the trial court had properly exercised that discretion, the two enhancements would not have conflicted and been subject to the California Supreme Court decision of *People v. Rodriguez* (2009) 47 Cal.4th 501, as found by the trial court.

Briefly, in *People v. Rodriguez* defendant fired several shots at three rival gang members. The jury convicted defendant of three counts of assault with a firearm and also found true the allegations defendant (i) personally used a firearm (§ 12022.5, subd. (a)) and (ii) committed a violent felony to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). With respect to each offense, the trial court imposed the firearm and gang enhancement. (*People v. Rodriguez*, *supra*, 47 Cal.4th at pp. 504-505.)

Our Supreme Court reversed and remanded the case for resentencing. (*People v. Rodriguez*, *supra*, 47 Cal.4th at p. 509.) In so doing, it held that imposing both enhancements for defendant's use of a firearm in the commission of a single offense violated section 1170.1, subdivision (f), which provides:

"When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, *only* the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (Italics added.)

The People contend that *People v. Rodriguez* does not govern the instant situation because unlike the situation there, in the instant case the gang enhancement in count 4 was "generically [pled] and proved under section 186.22, [subd.] (b)(1) without a gun use

allegation and without such a finding made by the jury." According to the People, under section 1170.1, subdivision (f) the "greatest" of the two enhancements was for gun use under section 12022.5 because that enhancement netted five more years in prison than the difference between the gang use enhancement for a "serious" (e.g., five-year additional term under section 186.22, subdivision (b)(1)(*B*)) as opposed to a "violent" felony (e.g., 10-year term additional term under section 186.22, subdivision (b)(1)(*C*)).

Thus, according to the People, if the trial court had merely imposed the 10-year sentence under section 12022.5 and the five-year sentence under 186.22, subdivision (b)(1), the two enhancements would not have conflicted with the dual use prohibition of section 1170.1, subdivision (f) as discussed in *People v. Rodriguez*, *supra*, 47 Cal.4th at page 509. Yang therefore would have been sentenced to 24 years in prison under count 4 as opposed to the 19 years he received.

Although the People attempt to distinguish *People v. Rodriguez* on the basis that the gang enhancement in the instant case was generically pled and there was no gun use allegation or finding made by the jury in connection with that enhancement, we conclude this is a distinction without a difference. That the trial court may have exercised its discretion and treated the gang enhancement as a mere "serious felony" and not as a "violent felony" for purposes of section 186.22, subdivision (b)(1), as the People contend, does not change the fact that under *either scenario* the gang enhancement involved Yang's use of a firearm, which we conclude makes *People v. Rodriguez* applicable.

We therefore conclude the trial court did not err when it found it lacked the discretion under the facts of this case to impose both the personal gun use enhancement under section 12022.5, subdivision (a) and the gang enhancement under section 186.22, subdivision (b)(1)(*B*) *or* (b)(1)(*C*).[17]

DISPOSITION

The judgment of convictions of Le and Yang is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.

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17 In support of this argument, the People rely on *People v. Robinson* filed on October 28, 2011. However, our Supreme Court granted review of *People v. Robinson* on February 15, 2012, and ordered the matter transferred to the Court of Appeal, First Appellate District, Fifth Division, with directions to vacate its decision and reconsider the cause in light of *United States v. Jones* (2012) 565 U.S. ___ [132 S.Ct. 945]. (See *People v. Robinson* S198522.)

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal Fourth District
FILED
MAY 24 2012
Stephen M. Kelly, Clerk
DEPUTY

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|---|---|
| THE PEOPLE, | D057392 |
| Plaintiff and Respondent, | |
| v. | (Super. Ct. No. SCD212126) |
| ERIC HUNG LE et al., | NO CHANGE IN JUDGMENT |
| Defendants and Appellants. | |

The opinion filed April 27, 2012, is modified as follows:

At DISCUSSION III, seventh paragraph beginning with "Although the People" and ending with "makes *People v. Rodriguez* applicable." (slip opn., p. 66), insert footnote 17 after the last sentence. Footnote 17 text reads: "In their petition for rehearing, the People argue that this court erred in affirming the trial court's decision in count 4 to stay additional punishment for personal gun use under section 12022.5, subdivision (a) (personal gun-use enhancement) and to impose the 10-year enhancement

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1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of DISCUSSION I and II.

for the commission of a 'violent felony' – in this case a violation of section 248, subdivision (b) for assault with a semiautomatic weapon – under the criminal gang provision set forth in section 186.22, subdivision (b)(1)(C) (criminal gang enhancement). The People argue that 'the prosecutor in this case never asked the trial court to elevate the punishment for the gang enhancement to the "violent felony"' level under subdivision (b)(1)(C) of section 186.22 with the same conduct, personal gun use, that supported the section 12022.5 enhancement. Instead, . . . the prosecutor here pled and proved a "bare"' gang enhancement under section 186.22 without reference to (1) gun use, (2) it being a "serious" or "violent" felony, or (3) either subdivision (b)(1)(B) or (b)(1)(C) [of section 186.22]. By doing so, the prosecutor exposed the defendant to the maximum possible sentence while not violating the holding of [*People v.*] *Rodriguez.* It was only by setting the level of punishment for the gang enhancement for a "violent felony" that the sentencing judge created a conflict with the [*People v.*] *Rodriguez* case.' (Fn. omitted.)

"We reject the People's form-over-substance argument. In focusing on the nature of the offense and the circumstances surrounding its commission (see *People v. Rodriguez*, *supra*, 47 Cal.4th at p. 507), we conclude the trial court did not err in (tacitly) finding, and substantial evidence in the record supports that finding, that the personal gun-use and gang enhancements in this case were both based on firearm use involving the same offense, viz. commission of assault with a semiautomatic weapon (§ 245, subd. (b)). As such, we conclude the instant case falls squarely within the holding of *People v.*

*Rodriguez* and its prohibition against imposing multiple punishments for firearm use in the commission of a single offense. (See § 1170.1, subd. (f).)"

Sequentially renumber subsequent footnotes.

As modified, the petitions for rehearing by appellant and cross-appellant are denied.

There is no change in the judgment.

McCONNELL, P. J.

Copies to: All parties

| **Supreme Court No. ________** | **Court of Appeal No. D057392** | **Superior Court No. SCD212126** |
|---|---|---|

## PROOF OF SERVICE

I am a citizen of the United States and a resident of San Diego County. I am over 18 years and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On June 4, 2012, a member of our office caused to be delivered **via Federal Express overnight delivery** the original and 13 copies of the attached **PETITION FOR REVIEW** for filing with the Supreme Court of the State of California at:

California Supreme Court
The State Building
350 McAllister Street, Room 1295
San Francisco, California 94102

and I placed a true and correct copy thereof in the U.S. Mail to:

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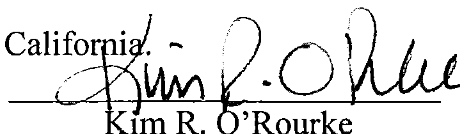
I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 4, 2012, at San Diego, California.



Kim R. O'Rourke