Filed 9/18/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JUVENAL VALENCIA,<br><br>Defendant and Appellant. | B199951<br><br>(Los Angeles County<br>Super. Ct. No. BA293794) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Judge. Reversed in part, affirmed in part with modifications.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, parts I, III(E)(4), and IV of the opinion are certified for publication.

## I. INTRODUCTION

Defendant, Juvenal Valencia, appeals from his convictions for: first degree murder (Pen. Code,[1] § 187, subd. (a)); five counts of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664); and one count of shooting at an occupied automobile. (§ 246). The jurors also found: the murder was intentional and perpetrated by means of discharging a firearm from an automobile with the intent to inflict death (§ 190.2, subd. (a)(21)); a principal personally discharged a firearm which caused the death of Roberto Morales (§ 12022.53, subds. (c), (d), (e)(1)); a principal personally used a firearm in the murder, the attempted murders, and the shooting at an occupied automobile; (§ 12022.53, subds. (b) and (e)(1)); and all of the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) In the published portion of this opinion, we hold that the Government Code sections 76104.6 deoxyribonucleic acid penalty and 76104.7 deoxyribonucleic acid state-only penalties do not apply to the Penal Code section 1465.8 court security fee. We reverse the $20 Government Code section 76104.7 deoxyribonucleic acid state-only penalties as well as the 15-year minimum parole eligibility dates imposed as to counts 2 through 6. Additionally, we modify the presentence credit award and impose six additional section 1465.8, subdivision (a)(1) court security fees. We affirm the judgment in all other respects.

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

[Parts II, III (A)-(E)(3) are deleted from publication. See *post* at page 27 where publication is to resume.]

## II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On October 17, 2005, Roberto Morales drove his red Honda in Los Angeles. Mr. Morales's friends, Mariano Ramirez and Edgar Salazar, were also in the car. Mr. Morales stopped his car to offer Olga Mora a ride. Mr. Morales asked Ms. Mora if she wanted to "hang out." Mr. Morales drove Ms. Mora to the home of Vivian Flores. Ms. Mora and Ms. Flores were friends. Ms. Flores also got into the Honda. Thereafter, Ms. Mora and Ms. Flores agreed to go with Mr. Morales to buy marijuana. One of the male passengers said he had a friend that would give them the marijuana. Before entering the freeway, Mr. Morales stopped to pick up Roxana Ortiz. Ms. Ortiz got into the seat behind Mr. Morales. One of the male passengers was in the front passenger seat. The remaining three passengers were in the back seat. Mr. Morales drove on the freeway to "South Central." After driving to the friend's home, the group went to a liquor store to purchase beer. Ms. Flores was concerned about the area where they were driving. Ms. Flores asked if the male passengers were in a gang. The men denied being in a gang. During a later conversation, the men indicated they were from a local gang. Ms. Flores asked if they should be in that area. Mr. Morales told her, "It's all right." Ms. Flores was concerned and had a bad feeling because of the way the men were looking around on the street.

After Mr. Morales made a right turn from 41st Place on to Main Street, a parked car blocked his path. When Mr. Morales attempted to pull back into the traffic lane, a truck blocked his way. Ms. Mora heard someone scream. Mr. Morales said, "Oh, shit, you all duck." Ms. Flores saw an individual in the passenger seat of the truck with a gun.

Ms. Mora heard screaming, but did not know what was said. Ms. Mora saw something that she believed was a gun protruding out of the truck window. Thereafter, several shots were fired from the truck. Mr. Morales was struck by one of the first shots. The Honda crashed into the parked car and then a wall. Ms. Ortiz's back and hand were grazed by a bullet. Ms. Mora's finger was blistered by a passing bullet. After the shooting stopped and the truck pulled away, everyone got out of the Honda except Mr. Morales and one of the male passengers. The passenger door was blocked by the wall where the car had crashed. Mr. Morales did not move. Ms. Mora believed Mr. Morales was dead. Ms. Mora ran but returned immediately to get her purse from the car. The girls ran the opposite way than the two male passengers. Ms. Mora was afraid of gangs because of what had occurred. Ms. Mora believed the shooting was gang related. Mr. Morales died of a gunshot wound to his back. One medium caliber bullet was removed from Mr. Morales's body.

Police officers later showed Ms. Flores a photographic lineup. Ms. Flores selected one individual and wrote, "The picture of the guy in photo number 6 is by far the one that most looks like the shooter similarities by eyebrows, I can make out facial expression, I'm not quite sure." Ms. Flores signed and dated the photographic lineup. Ms. Flores also identified a photo of a truck as being the same as the one from which the shots were fired except for the color. When Ms. Flores initially told the police what occurred on the night of the shooting, she told them she thought the truck was a big blue truck like a Ford F-150 or F-250.

Los Angeles Police Officer Julio Cortez and a partner, identified only as Officer Quintanar, responded to a radio call regarding the shooting at 9:30 p.m. No one was in the Honda at the time they arrived at the scene. Officers Cortez and Quintanar were then directed to the front porch of a residence one block east of Main Street. The officers then spoke to Mr. Salazar and Mr. Ramirez.

Detective James Fanning investigated this case. When Detective Fanning arrived at the scene of the shooting, he saw a burgundy Honda Accord on the sidewalk. The car

had crashed into the wall and security gate of a business. Detective Fanning recovered 15 nine-millimeter casings on the street and in the gutter. There was bloody clothing on the sidewalk. The Honda had "a bunch" of bullet holes. The ignition was still on as were the front headlights. The driver's side window was shot out. The rear window was shattered. The scene had been secured by officers who responded initially. When the pile of clothing was moved by the officers, a copper jacket from one of the bullets was discovered. The black sweater had a hole in it. A nearby street sign identifying 41st Street was crossed out. The letters of the rival gang were written over it.

Detectives Tommy Thompson and Fanning interviewed defendant on November 22, 2005, at the Newton Street police station. Detective Fanning had determined that defendant lived in a nearby apartment complex. An audiotape of that interview was played for the jury at trial and a transcript of the interview was provided to the jurors. Defendant said that he returned home from dropping off his girlfriend in Montebello at approximately 9:25 p.m. on October 17, 2005. Three of defendant's "homies" from his gang approached him and said, "'Hey fool, hey fool, they just banged on us, they just banged on us woo-woo-woo.'" The three told defendant, "'They're right there, right there.'" Defendant believed they were enemies: "[T]hey either shot at these fools or something right now or they just said something. So I'm like all right come on." The three men got into defendant's grey Silverado truck. An individual, identified originally only by an alias, was in the front passenger seat. Later, defendant admitted the person in the front passenger seat was David Cruz. Defendant saw the Honda in his rearview mirror. Defendant made a U-turn. Defendant saw Mr. Cruz pull a gun. Defendant pulled alongside the Honda. Mr. Cruz began shooting out of the window. Defendant believed the gun was similar to a Glock. Defendant believed that Mr. Cruz fired 15 or 16 shots. After the first few shots, the Honda tried to "hit the corner" in defendant's words. Defendant followed the Honda. Thereafter, the Honda hit the wall and defendant fled. Defendant drove to the area of the University of Southern California, where he parked his truck. Defendant called a member of his gang who picked them up. Defendant got rid of

his Silverado truck immediately thereafter. Defendant's mother traded the Silverado truck in for an Avalanche.

Defendant knew one of the males in the Accord. Defendant had a prior encounter with that individual. Defendant told the detectives: "I think I had seen them because he came into Tams before. Right there on Broadway and Forty-First. And we are about to leave . . . they were just like two people, they were just like looking at the tables, you know like writing though." Defendant believed the individual was "crossing out" the rival gang writing. Defendant hit the individual. After the boy ran outside, defendant was confronted by the youngster's father and uncle. According to the defendant, there had been a long-standing "beef" between the two gangs. Defendant was shown several books of photographs depicting fellow gang members. Defendant identified one of the three individuals in the Silverado truck at the time of the shooting.

Officer Paul Miller was assigned to the Newton area gang enforcement detail for three years. In that capacity, he gathered intelligence regarding gang crimes, trends, rivals, cultures, and habits. Officer Miller explained that respect is very important to gang members. Gang members gain respect by: selling narcotics; robbing others; shooting people; and by committing murders and other violent crimes. Gangs have a turf or territory which they claim as their own. Gangs use graffiti to mark their territory. If a gang's graffiti is crossed out, it is a sign of disrespect and may indicate an effort of another gang to take over the area. Gangs identify themselves through names, signs, tattoos, and symbols. Gangs have a hierarchy that includes those that have been in the gang for some time. These members have committed numerous crimes, including shootings. These members have gained the respect of other gang members and now tell them what to do.

Officer Miller had hundreds of contacts with the members of defendant's gang. Officer Miller knew most of the members by their nickname. The members of defendant's gang sell narcotics, shoot, rob, and terrorize the community. Officer Miller had numerous consensual encounters with defendant. On approximately 20 occasions,

defendant admitted his gang membership. Defendant lived in the heart of the gang territory. Officer Miller was familiar with those individuals defendant identified during his police interviews. One of those individuals, Eric Zuniga, had been killed in October 2005. Mr. Zuniga's funeral was held on the day of the shootings in this case. Officer Miller knew that the local gang had been the main rival of defendant's gang for approximately 10 years. The 41st Street sign that had been crossed out and painted over with defendant's gang acronym represented a sign of disrespect for the local gang. Defendant's gang claimed the Tam's restaurant as their territory.

Officer Miller was familiar with a member of defendant's gang named Jaime Correa. Mr. Correa was arrested for attempted murder and pled guilty to assault with a deadly weapon on October 19, 2005. Mr. Correa's co-defendant, Juan Farias, was also a member of defendant's gang. Mr. Farias was also arrested for attempted murder and pled guilty to possession of a concealed weapon on October 19, 2005. When posed with a hypothetical set of facts which included a scenario similar to those in this case, Officer Miller believed that the posited offenses were committed for the furtherance of defendant's gang reputation. Officer Miller based his opinion on the facts that a rival gang came into another gang's territory. The fact that those involved said "they banged on us" could mean "shot at us, hit us up, where you from, they threatened us in some manner" in Officer Miller's words. Also, the gang members chased the car down and shot at them for disrespecting them. Such violence would further the gang reputation.

## III. DISCUSSION

### A. Evidence of Defendant's Gang Membership to Infer Intent and Motive

#### 1. Factual and procedural background

Defendant argues the trial court improperly allowed the prosecutor to argue that the jury could use gang evidence as proof of intent or motive. Defendant further argues the trial court abused its discretion in denying his new trial motion based upon the same argument. Defendant concludes that the ruling resulted in a violation of his constitutional rights to: freedom of association; a fair and impartial jury trial; and "due process rights to a fair trial, a jury trial and proof of guilt of every element of the charged crimes beyond a reasonable doubt. . . ." Prior to trial, defense counsel filed a motion to exclude or limit expert testimony regarding the behavior of and membership in street gangs. At the motion hearing, after considering the arguments, the trial court ruled: "I do not intend to allow this to run wild, but the bottom line is People are I believe permitted to introduce evidence that again backs up their theory of the case. And I'm fully aware of what you are speaking of. At anytime you believe we are going into an area, you can ask to approach. And that's all I can say at this point. [¶] You are right, gang evidence is prejudicial, but we have to walk this balance. I have this weighing. I believe, at this point, based upon what [the prosecutor] said in her response papers, clearly, in my opinion, the probative value of this intended evidence clearly exceeds prejudicial at this point." Defense counsel acknowledged the relevancy of evidence that: defendant was a member of the gang as were three of his friends; there was a rival gang; the crime took place between the territory of the two gangs; as well as the predicate acts. Ultimately, the trial court asked the prosecutor, Arisa Mattson, to speak to Officer Miller and advise him "not to be as expansive" as he might want to be. Defense counsel made various

objections to Officer Miller's testimony, which were overruled. Defense counsel then made a standing objection. The trial court instructed the jury with CALJIC No. 17.24.3.[2]

In her closing argument, the prosecutor quoted defendant's statement to the police Ms. Mattson argued: "He says naw, you can't just say it is just a gangster life, but he, meaning Robert Morales, he's chosen to fuck around, you know. He made that choice to get into that car. He knew who he was rolling with. He knew the people they were from, and he knew that when they passed through the streets. He knew that we don't like them, not just specifically me, but so far all the other homies too." The prosecutor, Ms. Mattson, drew the analogy: "The defendant knew. Counsel is trying to say this isn't gang-related, he is not a gang member, he didn't say anything. [¶] But, members of the jury, the defendant knew who he was rolling with. Those are his homeboys from [the local gang]. [Defendant] made that choice to get into that car, knowing that his homeboys had just said they just banged on us, they just banged on us. And seeing a gun, he still made that choice. The defendant knew who he was rolling with, three other members of the [local gang] in his neighborhood. And he knew that when they passed through the street. He knew that we don't like them. Yes, he said in his taped statement that he knew Robert Morales was an enemy, was a rival from [the rival gang] because two years ago he had beat him up for crossing out graffiti from Tam's." Defendant's new trial motion based upon the same issues raised herein was denied.

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**2** CALJIC No. 17.24.3 was given as follows: "Evidence has been introduced for the purpose of showing criminal street gang activities and of criminal acts by gang members, other than the crime for which the defendant is on trial. This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. [¶] It may be considered by you only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed at the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further or assist any criminal conduct by gang members. [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case."

2. The trial court did not abuse its discretion

Defendant's argument involves multiple claims: "The trial court erred by permitting the prosecutor to argue that evidence pertaining to [defendant's] gang membership proved his knowledge and intent to aid the shooting. Since the combination of such argument, the aiding and abetting instructions and the contradictory limiting instruction on gang evidence created a likelihood of jury confusion, misapplication of the instructions and misuse of the gang evidence, the court also abused its discretion by denying the new trial motion." The California Supreme Court has held: "[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 178 [element of fear]; *People v. Williams* (1997) 16 Cal.4th 153, 193 [motive and identity]; *People v. Champion* (1995) 9 Cal.4th 879, 922-923 [identity].)

In *People v. Frye* (1998) 18 Cal.4th 894, 957, the California Supreme Court held, "[W]e are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."'" (*People v. Frye*, *supra*, 18 Cal.4th at p. 957, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; see also *People v. Burgener* (1986) 41 Cal.3d 505, 538, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) Here, in addition to the instruction limiting the jurors' use of gang evidence, the jury was instructed on aiding and abetting as well as an aider and abettor's liability for the natural and probable consequences of crimes committed by principals. (CALJIC Nos. 3.01, 3.01A, 3.02.) The California Supreme Court has discussed the mental state necessary for liability as an aider and abettor: "To prove that a defendant is an accomplice . . . the prosecution must show that the defendant

acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.] Thus, we held, an aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, original italics, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560-561; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123 ["The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' [Citations.]"]; *People v. Leon* (2008) 161 Cal.App.4th 149, 157.)

Our Supreme Court also held: "Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. [Citation.]" (*People v. Mendoza, supra,* 18 Cal.4th at p. 1123; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 729; *People v. Leon, supra,* 161 Cal.App.4th at p. 158.) The Supreme Court has explained the application of the natural and probable consequences rule thusly in the context applicable here: "It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 260.) Thus, for example, if a person aids and abets

only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. (*Id.* at p. 267.)" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Moreover, the Court of Appeal has held: "The issue 'is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable.' [Citation.]" (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161, original italics, citing *People v. Mendoza, supra,* 18 Cal.4th at p. 1133; see also *People v. Culuko* (2000) 78 Cal.App.4th 307, 327.) Our colleagues in the Court of Appeal for the Fourth Appellate District held: "The question whether an offense is a natural and probable consequence of a target offense is to be determined 'in light of all of the circumstances surrounding the incident.' (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)" (*People v. Leon, supra,* 161 Cal.App.4th at p. 158.)

In this case, the trial court could reasonably rule the gang evidence was relevant as to defendant's intent and motive. We presume the jurors, as instructed, limited their consideration of the gang evidence to the determination of whether it tended to show that the crime or crimes charged were committed for the benefit of a street gang for the specified purposes. (*People v. Carey* (2007) 41 Cal.4th 109, 130; *People v. Lewis* (2001) 26 Cal.4th 334, 390; *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.) Moreover, the prosecutor could reasonably argue that based upon defendant's own statements, he knew that a shooting was a natural and probable consequence of his decision to drive his fellow gang members in pursuit of rival gang members. The jury was properly instructed and the prosecutor's argument was a proper comment on the state of the evidence. As a result, the trial court properly allowed the argument and denied the new trial motion.

B. Instructions

1. Aiding and abetting instructions

Defendant argues the trial court improperly instructed the jury on aiding and abetting,[3] thereby permitting the jury to find him guilty of first degree murder even if the

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[3] The trial court instructed the jurors as follows: "3.00. Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. [¶] Principals include, number 1, those who directly and actively commit the act constituting the crime, or number 2, those who aid and abet the commission of the crime. [¶] 3.01. A person aids and abets the commission of a crime when he, number 1, with knowledge of the unlawful purpose of the perpetrator, [¶] and 2, with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] number 3, by act or advice, aids, promotes encourages or instigates the commission of the crime. [¶] 3.01(a). Those who aid and abet a crime and those who directly perpetrate a crime are principals and are equally guilty of the commission of that crime. [¶] In order to find the defendant guilty of a crime, you need not unanimously agree nor individually determine whether the defendant is an aider and abettor or a direct perpetrator so long as each of you is convinced beyond a reasonable doubt that the defendant is either an aider and abettor or direct perpetrator of the charged crime. [¶] 3.02 One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crimes of murder and attempted murder, as charged in counts 1, 2, 3, 4, 5 and 6, you must be satisfied beyond a reasonable doubt that, number 1, the crime of shooting at an occupied vehicle, in violation of Penal Code section 246 or assault with a deadly weapon, in violation of Penal Code section 245 (a)(2), was committed. [¶] Number 2, that the defendant aided and abetted that crime. [¶] Number 3, that a co-principal in that crime committed the crime of shooting at an occupied vehicle, in violation of Penal Code section 246 or assault with a deadly weapon, in violation of Penal Code section 245 (a)(2), and Number 4, crimes of murder and attempted murder as charged in counts 1, 2, 3, 4, 5 and 6, were a natural and probable consequence of the commission of the crime of shooting at an occupied vehicle, in violation of 246, or assault with a deadly weapon, in violation of Penal Code Section 245(A)(2). [¶] In determining whether a consequence is natural and probable, you must apply an objective test based not only on what the defendant actually intended, but what a person of reasonable and ordinary prudence

jury concluded "the only natural and probable consequence of the offense he aided and abetted" was a second-degree murder. Defendant correctly notes that an aider and abettor may be convicted of a lesser included offense even if the perpetrator is convicted of first degree murder. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 683.) Conversely, the California Supreme Court has also held that an aider and abettor may be found guilty of an offense greater than that of the perpetrator. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120; see 1 Witkin, Cal. Criminal Law (2008 Supp.) Introduction to Crimes, § 78, pp. 39-40.)

In *Woods*, the trial court, in response to a question posed by the jury, specifically instructed that the aider and abettor could not be found guilty of second degree murder if the perpetrator was found guilty of first degree murder. (*People v. Woods, supra*, 8 Cal.App.4th at p. 1579.) In *McCoy*, one of the two aiders and abettors relied upon an unreasonable self-defense theory. Our Supreme Court held that a jury could have reasonably found that the other aider and abettor did not act under unreasonable self-defense. As a result the defendant's conviction could stand and on retrial the other aider and abettor might be convicted of a lesser crime or even acquitted. (*People v. McCoy, supra,* 25 Cal.4th at p. 1122.)

Neither of those scenarios was present here. The jury was instructed regarding both first and second degree murder as well as manslaughter. Defendant argues that the aiding and abetting instruction did not specify what degree of murder had to be the natural and probable consequence of the shooting. Defendant reasons, "Consequently, it

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would have expected likely to occur. The issue is to be decided in light of all the circumstances surrounding the incident. [¶] The natural consequence is one which is within a normal range of outcomes that may be reasonably expected to occur, if nothing unusual has intervened. Probable means likely to happen. [¶] You are not required to unanimously agree as to which of the contemplated crime[] the defendant contemplated and abetted so long as you are satisfied beyond a reasonable doubt, and unanimously agree that the defendant aided and abetted the commission of an identified target crime and that the crime of murder and attempted murder as charged in counts 1, 2, 3, 4, 5 and 6 was a natural and probable consequence of the commission of that target crime."

permitted the jury to convict [defendant] of first-degree murder if it concluded that [Mr.] Cruz premeditated and thereby committed that crime, even if it merely concluded that 'the crime of murder', and thus merely second-degree murder, was the natural and probable consequence of the shooting." Defendant acknowledges that the jury was instructed on two degrees of murder. Defendant does not speak to the fact that the jury was also instructed with CALJIC No. 8.75, which allowed the jurors to convict him of "any" lesser offense. Rather, defendant argues, "[T]he 'natural and probable consequences' instruction would have subjected [him] to conviction for the higher degree of murder solely based upon the jury finding that [Mr.] Cruz had premeditated and thereby committed first degree murder [] because such a finding would have caused the jury to conclude that first-degree murder was 'any other crime committed by a principal . . . .'" Defendant misconstrues the instruction. As set forth in footnote 3, *supra,* CALJIC No. 3.02 sets forth a step-by-step process that must be satisfied before defendant could be found guilty of murder and attempted murder beginning with his aiding and abetting an identified target crime. Nor does the term "equally guilty" as used in CALJIC No. 3.00 "reinforce [the] conclusion" that defendant must be convicted of the same offense as the perpetrator as defendant suggests. CALJIC No. 3.00 refers to the commission of a specific crime, including the target offense. It does not suggest that the aider and abettor is presumed guilty of any offense beyond that anticipated.

Defendant's further argument that the trial court should have sua sponte instructed the jury regarding the fact that he could be found guilty of a lesser offense than the perpetrator is meritless. A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Ledesma* (2006) 39 Cal.4th 641, 715; *People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Flannel* (1979) 25 Cal.3d 668, 680-681.) As set forth above, the aiding and abetting instructions adequately informed the jury that defendant could be found guilty of anything ranging from the target offenses to the first degree murder. No further instruction was necessary.

2. CALJIC No. 1.22

Defendant argues the trial court's instruction with CALJIC No. 1.22, which defines the term "malice" and "maliciously" as "a wish to vex, annoy or injure another person, or intend to do a wrongful act" served to confuse the jurors regarding the definition of "malice aforethought" as defined in CALJIC No. 8.11. We review the instructions as a whole to determine whether it is reasonably likely that the jury misconstrued the instructions given. (*People v. Roybal* (1998) 19 Cal.4th 481, 526-527; *People v. Mendoza, supra,* 18 Cal.4th at p. 1134; *People v. Frye, supra,* 18 Cal.4th at p. 957; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248, *People v. Castillo* (1997) 16 Cal.4th 1009, 1014-1016.) In *People v. Frye, supra,* 18 Cal.4th at page 957, quoting *Boyde v. California* (1990) 494 U.S. 370, 378, our Supreme Court held: "In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."'" (See also *People v. Burgener, supra*, 41 Cal.3d at p. 538.) The trial court instructed the jurors with CALJIC No. 8.11 as follows: "Malice may be either express or implied. Malice is expressed when there is manifested an intention unlawfully to kill a human being. Malice is implied when, number 1, the killing resulted from an intentional act, number 2, the natural consequences of the act are dangerous to human life, and number 3, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life. [¶] When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. Mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. The word aforethought does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

The trial court also instructed the jurors with CALJIC No. 9.03.1, shooting at an occupied motor vehicle, as to count 7: "Defendant is accused in count 7 of having

committed the crime of shooting at an occupied motor vehicle . . . . [¶] Every person who willfully and maliciously discharges a firearm at an occupied motor vehicle is guilty of the crime of shooting at an occupied motor vehicle . . . ." Immediately thereafter, the trial court gave CALJIC Nos. 1.20, defining "willfully," and 1.22, which defined "maliciously" as, "The words malice and maliciously mean a wish to vex, annoy or injure another person or intend to do a wrongful act." The Use Note for CALJIC 9.03.1 specifically requires that CALJIC No. 1.22 be used to define "maliciously." (Use Note to CALJIC No. 9.03 (Spring 2008 ed.) p. 531.) As noted, the challenged instructions specifically adverted to the different counts.

Here, the definition of malice aforethought was explicitly contained within the murder instruction. Moreover, the term "maliciously" was defined immediately after the instruction for shooting at an occupied motor vehicle, thereby clarifying the terms of that instruction. The jurors could reasonably understand the difference between the two terms as they specifically related to separate instructions. The trial court instructed the jurors regarding specific intent with CALJIC No. 3.31, as it related to the murder and attempted murders, in pertinent part as follows: "In the crime charged in count 1, namely murder, or the crimes charged in counts 2, 3, 4, 5 and 6, namely, attempted murder, and the allegation that the murder, attempted murders were committed for the benefit of, at the direction of, and in association with a criminal street gang, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. [¶] Unless the specific intent exists, the crime or allegation to which it relates is not committed or is not true. [¶] The specific intent required is included in the definitions of the crimes or allegations set forth elsewhere in these instructions." Further, the jurors were ordered consistent with CALJIC No. 17.31[4] to disregard inapposite instructions. There is no reasonable possibility the jurors were misled.

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**4** CALJIC No. 17.31 was given as follows: "The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts.

Even if the trial court should have further instructed the jurors on the distinction between "malice aforethought" and "maliciously," any error in failing to do so was harmless. The California Supreme Court held: "An instruction that omits a required definition of or misdescribes an element of an offense is harmless only if 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' [Citation.] 'To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 774, quoting *People v. Harris* (1994) 9 Cal.4th 407, 424, and *Yates v. Evatt* (1991) 500 U.S. 391, 403, overruled on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn.4; see also *People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1128-1129.)

Here, the prosecutor's argument defined "malice aforethought" at length. The prosecutor clarified the difference between express and implied malice. The prosecutor used the facts in evidence to explain how defendant's Silverado drove close to the victims' Honda while Mr. Cruz fired 15 rounds through the doors and windows of the car amounted to express malice aforethought: "Here we have express malice. We have implied malice. We have express malice. How do you determine that? You look at the facts surrounding the crime. [¶] You have the defendant driving his car up close to the victim's car. They are so close, as you saw in the previous photos. The shooter is able to unload 15 rounds. We know that at least I think 8 of them get into the car through the driver's side as well as through the back. Express malice. [¶] How do we know that? Why else? We have the defendant's previous statement. We know what he said about the fact that his homeboy, Shotgun, had been killed. And you if these guys just banged on us, we know from Officer Miller, this is what gang members do. They kill each other,

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Disregard any instruction which applies to facts determined by you not to exist. [¶] Do not conclude that because an instruction has been given that I'm expressing an opinion as to the facts."

shoot each other, and they kill each other. . . . When they are driving upon this car, he unloads. Express malice. [¶] . . . [¶] What do you do when you want to kill someone, but you can't use the word? You just aim at them and fire as many times as you can as close as possible. Again who facilitated that distance? The defendant. "

The prosecutor also explained how that express malice aforethought applied equally to attempted murder and second degree murder. Defense counsel argued that defendant had no knowledge about who the victims were or what gang they might have belonged to. Defense counsel argued: "But it's one thing to hop in a car. It is another thing to commit murder. [The prosecutor] used the phrase about forming the intent. Well you are in the left-hand turn lane, and the light turns yellow and you run the light. That's premeditated. [¶] The degree it takes of premeditation to run a red light is not the same as murder. They are just not the same, not the same crimes. [¶] The degree it takes of premeditation to run a red light is not the same as murder. . . . [¶] And they shouldn't, there should not be an analogy trying to be made between them. [¶] . . . [¶] Not guilty because [defendant], when he and his three buddies got in the car, they didn't know [Mr. Cruz] had a gun, didn't know [Mr. Cruz] was going to start shooting, and he is not an aider and abettor in murder."

Moreover, the fact that the jurors found the attempted murder was willful, deliberate, and premeditated suggests that they found defendant intended to kill with malice aforethought. Instructional error may be rendered harmless when the jury's findings on special allegations indicate a disputed issue was resolved adversely under other unchallenged instructions. (*People v. Wright* (2006) 40 Cal.4th 81, 98-99; *People v. Garrison* (1989) 47 Cal.3d 746, 778-779.) In light of the state of the evidence, other instructions given, both defense counsel's and the prosecutor's closing argument, and the jury's findings, any error is failing to give a clarifying instruction was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Prieto* (2003) 30 Cal.4th 226, 257-258 [erroneous special-circumstance instruction harmless beyond a reasonable doubt]; *People v. Ervin* (2000) 22 Cal.4th 48, 91; see also *People v.*

*Jeter, supra,* 125 Cal.App.4th at p. 1217; *People v. Chavez* (2004) 118 Cal.App.4th 379, 387-390; *People v. Williams* (1994) 30 Cal.App.4th 1758, 1763.)

C. Defense Counsel Provided Effective Assistance

Defendant argues that defense counsel's argument incorrectly explained the concept of implied malice. As a result, defendant argues he was denied effective assistance of counsel. During the course of deliberations, the jurors sent a note to the trial court. The trial court noted: "The court has received a jury request form which asks 'Clarification on the following terms: one, deliberation; two, premeditation,' and as to those two, it indicates 'as they relate to number 3.' [¶] Number 3 says 'express versus implied malice. And why is express malice different than implied malice?'" The trial court asked the foreperson to explain their inquiry. The foreperson responded: "The question of, the jury is having trouble deciphering between express malice and implied malice. And the instructions seem a little vague in determining I believe under the section of malice, it says something about the act being deliberate and premeditated. And some Jurors are having some difficulty deciphering exactly the definition of premeditation." Thereafter, the trial court told counsel that it appeared the jurors were relating to CALJIC Nos. 8.11 concerning malice aforethought and 8.20 which defines deliberate and premeditated murder. The trial court then reread those instructions in an attempt to address the jurors' concerns. The trial court asked the foreperson if that assisted the jury in any way. The foreperson indicated that they had read the instructions several times without resolution of the questions. Thereafter, the trial court gave the prosecutor and defense counsel 10 minutes each for rebuttal argument on the questioned portions of the instructions.

Our standard of review in determining whether defendant was denied effective assistance of counsel was specified by the Supreme Court as follows: '"In order to demonstrate ineffective assistance, a defendant must first show counsel's performance

was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Second, he must show prejudice flowing from counsel's performance or lack thereof. 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 Avena* (1996) 12 Cal.4th 694, 721.)' (*People v. Williams* (1997) 16 Cal.4th 153, 215.) [¶] . . . ' . . . "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." (*People v. Ray* (1996) 13 Cal.4th 313, 349.)' (*People v. Williams, supra,* 16 Cal.4th at p. 215.)" (*People v. Majors* (1998) 18 Cal.4th 385, 403.) The Supreme Court has also held: "Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 206, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; *People v. Anderson* (2001) 25 Cal.4th 543, 569.) Our Supreme Court has held that in ruling on the effectiveness of counsel, the reviewing court must also consider the record of what the attorney *did* do at trial. (*In re Ross* (1995) 10 Cal.4th 184, 209; *People v. Miranda* (1987) 44 Cal.3d 57, 121.)

Defendant refers to a portion of defense counsel's rebuttal argument that is, with respect, taken out of context. Defense counsel first reviewed CALJIC No. 8.20, explaining the deliberate and premeditated requirements for first degree murder, noting, "Deliberate means formed or arrived at, as a result of careful thought and weighing of consideration for and against the proposed action." Defense counsel then questioned whether defendant could have deliberately taken action or premeditated when the events occurred so quickly. Thereafter, defense counsel argued: "Now in malice, it says you know it's express, and it says it's implied when. There are three things. All three things

have to happen. [¶] If you look after number 2, there is an and there. It says 1 and it ends in a semicolon, 2, it ends in a semicolon and then it says and. So that tells us all three things have to exist. [¶] And number 3 says the act was deliberately performed. *This is for implied malice. To get to this murder in the first degree, you have to come up with malice. If it's not express, it is implied. When it's implied, you have to have these three things for there to be implied malice.* [¶] When it says when the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life, again, you heard the facts. You have got to make the call. [¶] In the event that occurred in this flurry of activity, did [defendant] act, was it deliberately performed with knowledge of the danger to human life, conscious disregard to human life when he got in the - - he is already in the truck, but when he turned it around and went after the other car? [¶] You know the question becomes, and [the prosecutor] said okay, if I take this gun and point it at her, we don't have that situation here. [¶] [Defendant] pointed a gun at nobody. [Defendant] did not fire one round." (Italics added.) Defendant objects to the italicized portion of defense counsel's argument contending, "Since malice is an element of both first and second degree murder, defense counsel's argument unquestionably misstated the law. Moreover, neither the court nor the prosecutor took any steps to correct the misstatement." In fact, defense counsel had questioned defendant's ability to premeditate and deliberate the killing of Mr. Morales. Defense counsel emphasized the "flurry of activity" that took place. Defense counsel specifically referred to CALJIC No. 8.20, which dealt *only* with first degree murder.

In any event, the evidence of defendant's guilt, including his own statements to the police, was overwhelming. Our Supreme Court has held that in cases where the evidence of guilt is overwhelming, no prejudice results from defense counsel's unexplained argument. (*People v. Avena*, *supra*, 13 Cal.4th at p. 423.) Defendant has failed to sustain his prejudice burden. (*Rompilla v. Beard* (2005) 545 U.S. 374, 375; *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) Moreover, as set forth earlier, the jury made a specific finding as to the willful, deliberate, and premeditated nature of the killing. As a

result, any error in defense counsel's argument was of no consequence. (*People v. Wright, supra,* 40 Cal.4th at pp. 98-99; *People v. Garrison, supra,* 47 Cal.3d at pp. 778-779.)

## D. Sufficient Evidence Supported the Primary Activities Element of the Criminal Street Gang Allegation

Defendant argues that Officer Miller's expert testimony was conclusory and lacked foundation regarding the source of his knowledge as to the primary activities of the local gang as required by section 186.22, subdivision (b)(1). In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 104; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71

Cal.2d 745, 755.) The same standard applies to a claim of insufficiency of the evidence to support a gang enhancement. (*People v. Leon, supra*, 161 Cal.App.4th at p. 161; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.)

Section 186.22 provides in relevant part: "(b)(1) [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . . [¶] . . . [¶] (e) As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [¶] . . . [¶] (1) Assault with a deadly weapon . . . . [¶] . . . (23) Possession of a . . . firearm capable of being concealed upon the person . . . ." "[T]he 'criminal street gang' component of a gang enhancement requires proof of three essential elements: (1) that there be an 'ongoing' association involving three or more participants, having a 'common name or common identifying symbol'; (2) that the group as one of its 'primary activities' the commission of one or more specified crimes; and (3) the group's members either separately or as a group 'have engaged in a pattern of criminal gang activity.' [Citation.]" (*People v. Vy, supra*, 122 Cal.App.4th at p. 1222, citing *People v. Gardeley* (1996) 14 Cal.4th at 605, 617; see also § 186.22, subd. (f); *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611; *People v. Ortiz, supra,* 57 Cal.App.4th at p. 483.)

Here, Officer Miller testified regarding his lengthy experience with gangs as well as their activities, graffiti, tattoos, signs and related crimes. Officer Miller explained the hierarchy within gangs. Officer Miller also discussed the method of gaining respect

within the gang and community by committing crimes for the benefit of the gang. Officer Miller had hundreds of contacts with the members of defendant's gang. Officer Miller knew most of the members by their nicknames. Officer Miller was aware that the members of defendant's gang sell narcotics and commit violent crimes. Officer Miller had numerous consensual encounters with defendant. On approximately 20 occasions, defendant admitted his gang membership. Defendant lived in the heart of the gang territory. Officer Miller was familiar with those individuals defendant identified during his police interviews, including Mr. Zuniga, whose funeral was held on the day of the shootings in this case. Officer Miller knew that the local gang had been the main rival of defendant's gang for approximately 10 years. Officer Miller also testified regarding the felony convictions of two of defendant's fellow gang members, Mr. Correa and Mr. Farias, in October 2005. Substantial evidence of the required predicate offenses and primary gang activities was presented. The jurors could reasonably find the evidence sufficient to support the gang enhancement allegation true.

## E. Sentencing

### 1. Imposition of both the section 12022.53, subdivisions (c) and (e) enhancements

Defendant argues and the Attorney General concedes that the trial court improperly imposed firearm enhancements pursuant to section 12022.53, subdivisions (c) and (e)(1) and 15-year minimum parole eligibility terms pursuant to section 186.22, subdivision (b)(5) as to those counts. In *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282, we held: "In a case where section 186.22 has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm used by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the

Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm. In the present case, the jury never found that defendant personally used a firearm." (Original italics.) In this case, the 15-year minimum parole eligibility terms imposed pursuant to section 186.22, subdivision (b)(5) as to counts 2 through 6 should be stricken because the jury did not find defendant personally used a firearm.

2. Court security fees

The Attorney General argues that the trial court should have imposed a $20 court security fee pursuant to section 1465.8, subdivision (a)(1) as to each count. We agree. (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1372-1373; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) The trial court imposed only one section 1465.8, subdivision (a)(1) fee. Therefore, six additional section 1465.8, subdivision (a)(1) fees shall be imposed.

3. Presentence credits

At the time of sentencing, the trial court orally awarded defendant 500 days of actual time served. Defendant was arrested on November 22, 2005. Thus, when he was sentenced on April 6, 2007, he had served 501 days in custody. He is thus entitled to receive 501 days of credit for time served. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn.11 349, fn.15 [the failure to award proper amount of credits is a jurisdictional error that may be raised at anytime]; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765 disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn.1.)

[The balance of the opinion is to be published.]

4. Deoxyribonucleic acid "state-only" penalty

When orally imposing sentence, the trial court stated, "[D]efendant is ordered to pay a . . . security charge pursuant to 1465.8(a)(1), in the amount of $20, and a penal assessment pursuant to 17604.7, in the amount of $20. . . ." In the unpublished portion of the opinion we have held that the trial court should have imposed additional section 1465.8, subdivision (a)(1) court security fees. Defendant argues and the Attorney General agrees that no Government Code section 17604.7 deoxyribonucleic acid state-only penalties can be imposed on any of the court security fees. We agree.

The voters and Legislature have directed the imposition of two deoxyribonucleic acid penalties. First, Government Code section 76104.6, subdivision (a), which was initially adopted as Proposition 69 in the November 2, 2004 General Election, provided for the imposition of a $10 penalty for the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act to be levied on every fine, penalty, or forfeiture imposed in felony and other cases. In 2007, the Legislature amended Government Code section 76104.6, subdivision (a)(1) to state as it does now: "Except as otherwise provided in this section, for the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, there shall be levied an additional penalty of one dollar for every ten dollars ($10), or part of ten dollars ($10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses. . . ." (Stats. 2007, ch. 302, § 7.) Second, in 2006, the Legislature added Government Code section 76104.7 to provide for an additional deoxyribonucleic acid state-only penalty. (Stats. 2006, ch. 69. § 18.) Amended in 2007, Government Code section 76104.7, subdivision (a)(1) now states, "Except as otherwise provided in this section, in addition to the penalty levied pursuant to Section 76104.6, there shall be levied an additional state-only penalty of one dollar ($1) for every ten

dollars ($10), or part of ten dollars ($10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses. . . ." (Stats. 2007, ch. 302, § 8.)

The trial court orally imposed a Government Code section 76104.7, subdivision (a)(1) deoxyribonucleic acid state-only penalty. But, as noted, the Government Code section 76104.7, subdivision (a)(1) deoxyribonucleic acid state-only penalty is imposed in *addition* to the similar penalty imposed pursuant to Government Code section 76104.6, subdivision (a). And no Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid was orally imposed.

In any event, no Government Code section 76104.6, subdivision (a) deoxyribonucleic acid penalty nor a Government Code section 76104.7, subdivision (a) state-only penalty may be imposed on a section 1465.8, subdivision (a)(1) court security fee. As a result of a 2007 amendment, section 1465.8, subdivision (b), the court security fee provision, states in part, "The penalties authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, and the state surcharge authorized by Section 1465.7, do not apply to this fee." (Stats. 2007, ch. 302, § 18.) The Government Code section 76104.6, subdivision (a) deoxyribonucleic acid penalty is in Chapter 12, Title 8, of the Government Code. As a result, no Government Code section 76104.6, subdivision (a) deoxyribonucleic acid penalty can be imposed on a section 1465.8, subdivision (a)(1) court security fee. Since no Government Code section 76104.6, subdivision (a) deoxyribonucleic acid penalty may be imposed, neither may a Government Code section 76104.7, subdivision (a) state-only penalty be levied. The Government Code section 76104.7, subdivision (a) state-only penalty is reversed and stricken. The trial court is to personally insure the abstract of judgment is corrected to fully comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 110, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

## IV. DISPOSITION

The judgment is reversed only insofar as it: imposes a 15-year minimum parole eligibility date pursuant to Penal Code section 186.22, subdivision (b)(5) as to counts 2 through 6; levies the $20 Government Code section 76104.7, subdivision (a) state-only penalty; awards 500 days of presentence credit; and imposes only a single section 1465.8, subdivision (a)(1) court security fee. The judgment is to be modified to reflect that defendant is subject to: a seven-year minimum parole eligibility date pursuant to Penal Code section 3046, subdivision (a)(1) as to counts 2 through 6; and additional six $20 section 1465.8, subdivision (a)(1) court security fees for a total of seven fees. Defendant is to receive 501 days of presentence credit for time actually served and no conduct credits. Upon remittitur issuance, the superior court clerk shall forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P. J.

I concur:

KRIEGLER, J.

**NOT FOR PUBLICATION**

People v. Juvenal Valencia
B199951

MOSK, J., Concurring

I concur.

Defendant contends that the prosecutor argued that defendant's knowledge and intent could be inferred of the gang evidence, but the court's instruction limited the gang evidence to that necessary for a gang enhancement and "not . . . for any other purpose." The trial court probably should not have given an instruction that precluded the gang evidence from being used as evidence of motive and intent. But the defendant may have been the beneficiary of the instruction as given. In short, any error in this regard was not prejudicial.

Other jury instructions did contain some of the ambiguities outlined by defendant. But again, there was no prejudicial error in this case. Similarly, the gang evidence was not pristine from an evidentiary standpoint, but arguably sufficient to support the gang enhancement.

With regard to the claim of ineffective assistance of counsel, that issue should be raised, if at all, in a petition for habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

MOSK, J.