Filed 8/22/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FELIX LOPEZ, Defendant and Appellant.	F062740 (Super. Ct. Nos. 1076152, 1091955) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Scott T. Steffen, Judge.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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* Under California Rules of Court, rules 8.1105(b) and 8.1110, only the Factual and Procedural Summary, part III.A. of the Discussion, including the two introductory paragraphs under part III., and the Disposition are certified for publication.

A jury convicted Felix Lopez (Lopez) of the murder of Michael Valles. The jury also found numerous enhancements true, resulting in a determinate sentence of eight years four months and an indeterminate sentence of 50 years to life.

Lopez contends his convictions must be reversed because the evidence was insufficient to support the verdict in several respects, and the trial court erroneously instructed the jury in two respects. We reject these contentions and affirm each of the convictions.

Lopez also argues the trial court erred when it sentenced him to an indeterminate term of 14 years to life for attempting to dissuade a witness from testifying, count 5. The trial court relied on Penal Code section 186.22, subdivision (b)(4)(C) to impose this sentence. (All further statutory references are to the Penal Code unless otherwise specified). As we shall explain, because the jury did not find the act committed by Lopez was accompanied by an express or implied threat of force, section 186.22, subdivision (b)(4)(C) is not applicable to this conviction. We thus will vacate the sentence on this count and remand the matter to the trial court for resentencing.

Finally, while this appeal was pending, the Supreme Court issued its opinion in *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*), which holds the sentence for a violation of section 186.22, subdivision (a) must be stayed pursuant to section 654 when the acts establishing the defendant willfully promoted, furthered, or assisted in any felonious criminal conduct by gang members is the same criminal conduct the defendant was convicted of and punished for in the trial. One part of the determinate sentence the trial court imposed on Lopez was a consecutive 16 months for violating section 186.22, subdivision (a), count 4. Because the only evidence presented at trial to support the necessary acts element was the other crimes of which Lopez was convicted and punished, the sentence on count 4 must be stayed. We will thus vacate the sentence on this count as well and remand the matter to the trial court for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

Prosecution Evidence

Alonzo Gonzalez[1] (Gonzalez)

Alonzo Gonzalez was the owner of Pushing Ink Tattoo Studio (the tattoo shop) in January 2004. In his younger days, Gonzalez was involved in gangs but dropped out about 16 years ago when his son was born. He understood that when a gang labeled someone "no good," it meant someone was bad and could be beaten up or even killed. Similarly, when a gang put a "green light" on someone, it meant the person was "no good" and a gang member could attack this person.

Gonzalez met Paul Bargas when Bargas brought his girlfriend in for a tattoo. He also tattooed Bargas. Bargas became a friend and often would come to the tattoo shop. Gonzalez met Henry Wernicke when Wernicke came into the tattoo shop with Bargas.

In January 2004, Gonzalez went to the apartment of Daniel Lopez hoping to resolve a dispute between Daniel Lopez's girlfriend and Gonzalez's brother's girlfriend. Bargas, who was at the tattoo shop, followed Gonzalez to the apartment. As Gonzalez was talking with a woman in the doorway, Daniel Lopez said, "that's Paul Bargas. He's no good. Green light on Paul Bargas." Gonzalez told Bargas to leave. Daniel Lopez and two other men followed Bargas when he left.

The next day Daniel Lopez came into the tattoo shop with Lopez. Gonzalez told the two he did not want his brother to have any problems with them. Lopez told Gonzalez that Bargas was "no good" and, if Gonzalez continued to be friends with Bargas, he also would be "no good." Lopez wrote his phone number on a piece of paper and told Gonzalez to call him if Bargas showed up at the tattoo shop.

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[1]In the clerk's transcript, Alonzo's last name is spelled "Gonzalez"; in the reporter's transcript it is spelled "Gonzales." We will use the spelling taken from the information, which is "Gonzalez." We also will use this spelling for Gonzalez's mother's surname.

The following day Gonzalez was in the tattoo shop with Mario Sanchez when Bargas and Wernicke arrived. A few minutes later Lopez and Valles entered the shop. Valles took off his gloves and probably shook hands with Gonzalez. Valles then put out his hand to shake with Bargas. Bargas backed up, refusing to shake hands.

Lopez said, "That's Paul Bargas. He's no good." Gonzalez felt that something was going to happen, so he said they had to take it "somewhere else." Gonzalez saw Lopez make a movement with his hands towards the waistband of his pants. Gonzalez then heard a gunshot from behind him. Gonzalez ran out of the tattoo shop. As he was leaving, he heard numerous gunshots.

Gonzalez returned to the tattoo shop a few minutes after the gunshots stopped. The only person in the shop was Valles, who was lying on the floor. Gonzalez did not see any weapons on Valles at any time that day. Valles asked Gonzalez to help him up. Gonzalez told him to stay on the floor and he would call for an ambulance. Linda Gonzalez, Gonzalez's mother, appeared at the shop at that time.

In May 2005, Gonzalez was called to testify in this matter. He went to the courthouse with his mother and Sanchez. He saw Lopez in the hallway, out of custody. When Lopez walked by Gonzalez, he heard Lopez and Lopez's sister say, "Fucking snitches." In the gang world, a snitch is the same thing as an informant, which is a bad thing.

Linda Gonzalez

Gonzalez is Linda Gonzalez's son. She lived across the street from the tattoo shop. She was in her kitchen when she heard shots being fired from in front of the tattoo shop. She left her apartment and saw Lopez coming from the direction of the tattoo shop. Lopez said he had been shot and was holding his abdomen. Linda Gonzalez ran across the street to the tattoo shop. Gonzalez was upset and crying.

Linda Gonzalez also heard the comments made by Lopez in the courthouse in May 2005. She heard Lopez and a female voice say, "Snitches, you shouldn't be here."

Mario Sanchez

Sanchez went to Gonzalez's tattoo shop about 5:00 p.m. on the day of the shooting. He was visiting with Gonzalez when Bargas and Wernicke arrived.

Sanchez went into the bathroom to clean some of the tattooing equipment. While he was doing so, he heard the front door open. Sanchez heard Valles say, "What's the matter? You don't shake hands?" Bargas responded, "I'm not going to shake your hand." Sanchez heard a voice ask, "Are you Paul Bargas?" Bargas denied that he was and then Lopez said, "That's Paul Bargas." A voice also said, "You're Paul Bargas. You're no good." Right after that Sanchez heard gunfire and he ran out the back door. As he was running out, he saw Bargas with two guns in his hands shooting downward. Police officers had arrived by the time Sanchez returned to the tattoo shop.

Sanchez also confirmed the comments that were made in the courthouse in May 2005. He heard Lopez say "snitches" as he, Gonzalez, and Linda Gonzalez walked by.

Paul Bargas

Bargas reviewed his criminal history, which began when he was about 15, and his gang involvement, which began shortly thereafter. He admitted he was a member of the Nortenos criminal street gang and associated with other gang members. Bargas explained that someone who informed on a fellow gang member to the police would be labeled "no good" and subject to consequences.

In 1998 Bargas was driving a vehicle and Jose Ochoa was the passenger. Ochoa shot a gun from the vehicle and injured a rival gang member. Bargas was arrested and identified Ochoa as a passenger in the vehicle at the time of the shooting. Bargas spent about nine months in the county jail, where he learned how to survive as a gang member.

In 2000, Bargas was arrested for false imprisonment. While in jail, he saw Lopez. Bargas was jumped by four or five Nortenos while he was sleeping in his cell. While the attackers were beating him, they were telling Bargas he was "no good" and he was a "rat" because he told on "Jose."

Bargas met Gonzalez in 1999 but became friends with him in 2003. Bargas would spend time at the tattoo shop, and Gonzalez told him he would teach him how to tattoo. Wernicke also was Bargas's friend, but he used drugs so he was not always around.

About two days before the shooting, Bargas was at the tattoo shop with Gonzalez and Sanchez. Gonzalez and Bargas went to an apartment complex across the street. As they walked up the stairs to an apartment, Bargas saw Daniel Lopez and two other men he did not know. Daniel Lopez said, "There's Paul Bargas. He's no good." Daniel Lopez also said there was a "green light" on Bargas, which means the same thing as "no good." Bargas understood the term "no good" to mean that he could be attacked, and even murdered, by other Nortenos.

The three men started spitting at Bargas, so he walked away. Bargas could tell the three wanted to fight. The three men followed Bargas into the parking lot in front of the tattoo shop. Bargas grabbed a screwdriver from his car to defend himself. One of the men hit Bargas on the head; Bargas stabbed Daniel Lopez in the arm with the screwdriver. Daniel Lopez told his friends that Bargas had a knife, so the three left.

Over the next two days Bargas heard many comments that the Nortenos were going to kill him because he was "no good" and because he had stabbed Daniel Lopez. Bargas decided to arm himself for protection; he obtained a .38-caliber handgun from a friend. He also had a .22-caliber handgun. He kept the guns in his pocket and attempted to "[lay] low" to avoid a confrontation.

Two days later Bargas had someone drop him off at the tattoo shop. Gonzalez and Sanchez were at the shop. Wernicke came in shortly after Bargas arrived. Bargas had the two guns with him.

About two minutes later, Valles and Lopez entered the tattoo shop. Bargas immediately thought the two were going to attack him. The two men split up in the shop. Valles said something to Gonzalez that Bargas did not hear. Lopez was pacing. Bargas was concerned about being attacked, but was waiting to see if anything would happen.

Valles approached Bargas and asked if he was Paul Bargas while extending his hand as if to shake hands. Bargas backed up because he knew that shaking hands was a trick that Nortenos used to distract the target of an attack. When Bargas did not answer, Lopez identified Bargas and said he was "no good." Bargas saw Lopez pull a gun from under his sweatshirt. Valles moved to grab his gun. Bargas thought his life was in danger so he began shooting. He shot Valles maybe four times. Bargas also shot at Lopez. Lopez aimed his gun at Bargas but then ran out the door. Valles said he was going to kill Bargas, so Bargas shot him again as he was lying on the floor.

Bargas ran out the front door to escape. He saw Lopez a short distance away. Lopez was running away and shooting at Bargas as he was running. Bargas hid behind a truck and returned fire. Bargas was shot in the foot, but he managed to run away from the scene.

Bargas received treatment in San Diego because he did not want to be discovered in the area with a bullet wound. Bargas did not call the police, even though he believed he was defending himself.

Approximately seven months later, parole agents searched Bargas's home and discovered the two guns used in the shooting. Bargas pled guilty to being a felon in possession of a firearm and was sentenced to four years in prison. While in prison he was placed in protective custody at his request.

Henry Wernicke

Wernicke was in custody at the time he testified. In exchange for his testimony, the prosecutor agreed to seek a reduced sentence and period of parole. Wernicke also was provided immunity for his testimony.

Wernicke grew up in the same neighborhood as Bargas, and the two were friends. He met Gonzalez at the tattoo shop about a month before the shooting.

Wernicke had a long criminal history, as well as many periods of confinement for offenses and parole violations. He admitted membership in the prison gang Nuestra Raza, which is affiliated with the Nuestra Familia prison gang.

One of the fundamental rules of gang membership is that no one can attack another gang member unless they have the permission of someone with status. Wernicke knew the gang had determined Bargas was "no good" and Bargas could be attacked at any time. He also knew that Daniel Lopez did not have the authority within the gang to order an attack on Bargas.

Wernicke met Valles while in jail. Valles appeared to be in a position of power in jail. Wernicke had not done any jail time with Lopez.

On the day of the shooting, Wernicke and Bargas were dropped off at the tattoo shop. Gonzalez and Sanchez were present when they entered. Three or four minutes later Lopez and Valles entered the shop and walked to separate locations. Wernicke was scared because he knew both Lopez and Valles had "status" in the gang, and they were after Bargas.

Wernicke tried to neutralize the situation by introducing himself to Lopez and Valles. Lopez and Valles were "staring" or "mad-dogging" Bargas. Valles attempted to shake Bargas's hand, but Bargas backed away. Wernicke knew that Valles was attempting to neutralize Bargas by grabbing his hand so he could not defend himself. Valles appeared hostile and aggressive. Lopez was watching Bargas closely. Lopez then pulled a handgun from his waistband. Bargas pulled out his gun and the shooting started. Wernicke ran out the back of the tattoo shop.

Wernicke did not see Valles with a gun.

Patricia and Lawrence Corona

At the time of the shooting, Patricia and Lawrence Corona were stopped at a traffic signal. They observed a man shooting a gun towards the tattoo shop. The man

wore a hooded black sweatshirt and was moving away from the tattoo shop while firing his weapon. He appeared to hop in the air each time he shot the gun.

Thomas Blake

Thomas Blake was a detective with the Modesto Police Department in January 2004 and was assigned to investigate the shooting. He located a blood trail that ran from the tattoo shop towards the apartments across the street. The blood trail ended at the apartment of Daniel Lopez. A search of the apartment located evidence of someone seriously wounded, as well as a .38-caliber semiautomatic gun magazine.

Blake visited Lopez in the hospital the day after the shooting. Lopez said he and Valles had gone into the tattoo shop to look at patterns. They were immediately engaged by a heavyset Hispanic male. This man said he knew Lopez and Valles. When Valles went to shake the man's hand, the man pulled a gun and started shooting at them. Lopez was shot as he tried to leave the shop. He collapsed on the sidewalk outside of the shop. Lopez denied possessing a firearm or shooting a firearm.

Blake testified that Bargas was medium build, not heavyset, while Gonzalez would be considered heavyset.

John Habermehl

Officer John Habermehl spoke with Lopez at the hospital shortly after Lopez was shot. Lopez stated that he was shot at the tattoo shop by an unknown male. He also asked about the condition of his friend, Valles.

Forensic Evidence

Investigators recovered a .45-caliber handgun and eight .45-caliber shell casings in the street near the blood trail leading to Daniel Lopez's apartment. Lopez's thumbprint was found on the magazine from the handgun. The eight recovered shell casings were fired from the handgun.

The bullets recovered revealed that at least two .38-caliber handguns were used during the firefight.

No evidence was recovered that would suggest a gun was fired from the front of the tattoo shop towards the area where Bargas was standing.

Valles was shot five times and died of blood loss due to those injuries. Wounds to the chest and abdomen were both fatal shots.

Gang Evidence

The prosecution's theory of the case was that Valles and Lopez went to the tattoo shop to murder Bargas because Bargas was "no good." The prosecution's gang expert, Richard Delgado, testified that individuals who held leadership positions in the gang had an obligation to make an example out of gang members who had done something that resulted in a "green light" being put on them. By attacking the disfavored gang member, the leaders instill fear and intimidation on other gang members and the public in general, thereby benefitting the gang.

Delgado further opined that Lopez was an active member of the Nortenos criminal street gang, as was Daniel Lopez. Daniel Lopez, however, was not in a position of leadership within the gang.

Defense Evidence

Lawrence Brookter

Lawrence Brookter testified as a gang expert on behalf of Lopez. It appears the primary purpose of his testimony was to suggest that Delgado's testimony was incorrect in several respects. He, however, did not suggest that Lopez was not a member of the Nortenos, nor did he testify this crime was not committed for the benefit of the Nortenos.

Felix Lopez

Lopez testified that when he was released from prison in about 1998, he attempted to avoid the gang lifestyle. He no longer associated with gang members and was staying out of jail.

When Lopez learned that Daniel Lopez had been stabbed by Bargas, he met with Gonzalez at the tattoo shop in an attempt to avoid further violence. Lopez thought they

had resolved the dispute, but he wanted to bring by a friend that Gonzalez knew (Valles) to make sure the issue was resolved.

Lopez had spoken with Valles on the phone before, so he called him because he thought Valles knew Gonzalez. The two went to the tattoo shop to make sure there would not be any further problems. Lopez did not have a weapon, but he did not know if Valles was armed.

There were three men near the counter when Lopez and Valles entered the tattoo shop. Lopez and Valles shook hands with Gonzalez and Wernicke. Lopez admitted he knew Bargas, but did not recognize him in the tattoo shop. Lopez denied knowing there was a "green light" on Bargas or if the gang had labeled Bargas "no good."

Bargas shook his head and backed up when Valles offered to shake his hand. Wernicke asked Lopez if he was Diablo's brother. Lopez heard gunshots and saw Bargas had a gun in each hand and was shooting Valles. Valles fell to the ground with a gun in his hand. The gun fell out of Valles's hand and landed near Lopez's foot. Lopez grabbed the gun and tried to shoot at Bargas, but the gun was jammed.

Lopez was shot at least twice but ran out of the tattoo shop. He checked the clip in the gun to see if it had bullets and then put the clip back in the gun and kept running. He heard more gunshots, so he pulled the slide back on the gun and started shooting at Bargas, who was near the door of the tattoo shop. Lopez dropped the gun when the ammunition was exhausted. He ran to Daniel Lopez's apartment and was taken to the hospital.

Regarding the incident with Gonzalez at the courthouse, Lopez said he was at the courthouse because of the possession of a firearm charge. The hearing was moved from one department to another. He was upset because he did not want to be there and he was required to move from one department to the next. He said to his sister something like "This is a bitch." He was not attempting to intimidate anyone, nor did he realize that Gonzalez was nearby.

The Charges

An amended information charged Lopez with five counts: (1) the murder of Michael Valles (§ 187) (count 1), (2) discharge of a firearm at an occupied building (§ 246) (count 2), (3) being a felon in possession of a firearm (former § 12021.1) (count 3), (4) active participation in a criminal street gang (§ 186.22, subd. (a)) (count 4), and (5) attempting to dissuade a witness from testifying (§ 136.1, subd. (a)(2)) (count 5). The information also alleged as enhancements that Lopez (1) committed the offense for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1) (counts 1, 2, 3, and 5), (2) suffered a prior conviction of a serious felony within the meaning of section 667, subdivisions (b) through (i) (all counts), (3) suffered a prior conviction of a serious felony within the meaning of section 667, subdivision (a) (all counts), (4) served two prior terms of imprisonment within the meaning of section 667.5, subdivision (b) (all counts), and (5) committed the crime while on bail for another offense within the meaning of section 12022.1 (count 5).

Verdict and Sentence

The jury deliberated for three days before finding Lopez guilty of all charges and finding all enhancements true. Lopez admitted the prior conviction allegations. He was sentenced to a determinate term of eight years four months and a consecutive indeterminate term of 50 years to life.

DISCUSSION

The prosecutor did not suggest that Lopez killed Valles, acknowledging that it was Bargas who shot Valles. Instead, the prosecutor argued Lopez was guilty of murder under the provocative act murder doctrine. This doctrine applies where a defendant's actions are a substantial concurrent cause of the death of the victim, even though the victim was killed by a third person. (*People v. Concha* (2009) 47 Cal.4th 653, 662 (*Concha*).)

"'When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life. Thus, the victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.' [Citation.] We later stated that, '[i]n the classic provocative act murder prosecution, *malice is implied* from the provocative act, and the resulting crime is murder in the second degree.' [Citations.]

"This statement regarding a classic provocative act murder prosecution is often, but not always, true. Provocative act murder is not an independent crime with a fixed level of liability. [Citation.] It is simply a type of murder. The words 'provocative act murder' are merely shorthand used 'for that category of intervening-act causation cases in which, during commission of a crime, the intermediary (i.e., a police officer or crime victim) is provoked by the defendant's conduct into [a response that results] in someone's death.' [Citation.]" (*Concha, supra,* 47 Cal.4th at pp. 665-666.)

The prosecutor argued that Lopez was a substantial concurrent cause of Valles's death because Lopez went into the tattoo shop to kill Bargas. Since Bargas killed Valles after he was provoked by Lopez's conduct, the prosecutor argued Lopez was guilty of Valles's murder. In other words, the prosecutor argued that Bargas's act of killing Valles in self-defense was a dependent intervening act that did not relieve Lopez of criminal liability for the natural and probable consequences of his actions.

We now turn to Lopez's arguments.

I. Sufficiency of the Evidence of Murder

Lopez contends his murder conviction must be overturned because it was not supported by sufficient evidence in three respects.

Standard of review

To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. (*People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*).) The record must disclose substantial evidence to support the verdict—i.e., 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. (*Id.* at p. 396.) In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury reasonably could have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" (*Maury*, at p. 403.) A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. (*Maury, supra*, 30 Cal.4th at p. 396.) We "must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*Ibid.*) "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.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054 (*Kraft*).) Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion that the circumstances also reasonably

might be reconciled with a contrary finding does not warrant the reversal of the judgment. (*Ibid*.)

Sufficiency of the evidence that Lopez was attempting to murder Bargas

Lopez begins by arguing the prosecution was required to prove that he went into the tattoo shop to kill Bargas. While acknowledging there was evidence that Lopez pulled out a gun when he was confronting Bargas, Lopez claims that his intent in doing so was never established. According to Lopez, he could have intended to intimidate Bargas, threaten Bargas, assault Bargas, or shoot Bargas. Since the prosecutor failed to establish his specific intent, Lopez asserts the conviction must be reversed.

The prosecution argued that Lopez intended to kill Bargas, and the trial court instructed the jury accordingly. The evidence to support the prosecution's argument was supplied by those with knowledge of the gang lifestyle.

There was no serious dispute that Bargas had been labeled by the Nortenos as "no good," and gang members had a "green light" to act on this label. Lopez points out that a gang member labeled "no good" was subject to various types of attack, including being assaulted or killed. He also points out that while in jail Bargas was not killed, but merely attacked by other Nortenos.

This was evidence the jury could have considered, but it hardly was all of the relevant evidence. The jury also knew that Valles was an admitted enforcer for the Nortenos and had killed before. Bargas testified that both Valles and Lopez were armed with handguns when they entered the tattoo shop, and both pulled out their weapons. Forensic evidence established that four weapons were fired during the shooting -- the gun Lopez admitted possessing, the .38- and .22-caliber weapons Bargas admitted possessing, and a second .38-caliber weapon.

In addition, two days before the shooting Bargas was assaulted by three Norteno gang members, including Daniel Lopez. Bargas successfully fought them off by stabbing

Daniel Lopez in the forearm with a screwdriver. In the two days following that fight, Bargas heard numerous comments that the Nortenos were going to kill him.

The jury logically and reasonably could have concluded from these facts that when Lopez and Valles entered the tattoo shop, they intended to kill Bargas. Additional facts also support this inference.

First, Lopez and Valles did not enter the shop with knives, but with handguns. The use of handguns often results in death.

Second, since Valles was an admitted hit man for the Nortenos, the jury could have inferred that his presence was unnecessary if the intent was to assault Bargas.

Third, the jury could have inferred that since only two men went into the tattoo shop, the intent was to kill, not assault, Bargas. Bargas already had successfully fought off an assault by three gang members. If three could not complete the assault, then it is logical that more than three would be sent to assault Bargas. Since only two went to the tattoo shop, and they were armed with guns, it is unlikely that the intent was to commit an assault.

Fourth, the confrontation occurring inside the tattoo shop suggests an intent to kill Bargas. An assault is more easily accomplished in an open area where the victim can be surrounded. If the intent was to assault Bargas, the gang could have waited for Bargas to leave the tattoo shop.

These facts all support the inference that Lopez and Valles intended to murder Bargas when they went to the tattoo shop. Moreover, there is seldom direct evidence of a defendant's intent. (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) Instead, the jury must infer a defendant's intent from the circumstances surrounding the crime. (*Ibid*.) Here, there was more than adequate circumstantial evidence to support the jury's conclusions that Lopez intended to kill Bargas when he entered the tattoo shop. Simply because the jury could have reached a different conclusion from these circumstances is irrelevant. (*Kraft, supra*, 23 Cal.4th at pp. 1034-1035.)

The only case cited by Lopez to support his argument, *People v. Miller* (1935) 2 Cal.2d 527 (*Miller*), is of no assistance. Earlier in the day in question, Charles Miller threatened to murder Albert Jeans because, according to Miller, Jeans was harassing Miller's wife. Later that day Miller, apparently under the influence of alcohol, approached Jeans in a field in which he and several other people, including the local constable, were working. Miller carried a rifle. At one point Miller stopped, apparently for the purpose of loading the rifle. Jeans fled when he saw Miller approaching. The constable approached Miller and confiscated the loaded rifle without resistance. Miller never raised the gun into a shooting position.

Miller was convicted of the attempted murder of Jeans. The Supreme Court observed the prosecution was required to prove that Miller intended to murder Jeans and had taken a direct but ineffectual act toward the commission of the murder. (*Miller, supra,* 2 Cal.2d at p. 530.) Preparation alone would not be sufficient. (*Ibid*.) The Supreme Court concluded that under the facts presented "no one could say with certainty whether the defendant had come into the field to carry out his threat to kill Jeans or merely to demand his arrest by the constable. Under the authorities, therefore, the acts of the defendant do not constitute an attempt to commit murder." (*Id*. at p. 532.)

Lopez's acts were not nearly as equivocal as those of Miller. In the past, Lopez had ordered other gang members to assault Bargas. He came into the tattoo shop with another man, both armed with firearms. Both men displayed open hostility towards Bargas. Both men attempted to withdraw their weapons when Bargas "beat them to the draw." This evidence established much more than mere preparation -- it showed several direct acts towards accomplishing the murder of Bargas.

Sufficiency of the evidence that Lopez's act caused Bargas to act

Lopez also contends there was insufficient evidence that it was Lopez's act of pulling a gun from his waistband that caused Bargas to begin shooting. He points out

that Bargas also observed Valles simultaneously pull out a gun from his waistband. According to Lopez, Valles's actions could have caused Bargas to begin shooting.

Once again, Lopez is asking us to draw a different logical conclusion than the one drawn by the jury. This we will not do. Our task is to determine whether the circumstances reasonably justify the inferences drawn by the jury. (*Kraft, supra,* 23 Cal.4th at pp. 1034-1035.) Once again, we conclude the inferences drawn by the jury were reasonably supported by the evidence.

The evidence supporting the verdict indicates that Bargas observed both Valles and Lopez enter the tattoo shop. Bargas immediately became concerned for his safety because he had been labeled "no good" by the Nortenos; he had been attacked while in jail because he was "no good"; and he had had a fight two days earlier because he was "no good." In that fight he had stabbed Daniel Lopez, who was related to Lopez. Bargas recognized Lopez, who once again called him "no good." Bargas observed Lopez reach for his gun and then he reached for his to defend himself.

The jury reasonably and rationally could have inferred from this evidence that Lopez's act of pulling his gun out of his waistband was a substantial factor in bringing about Valles's death. The prosecution was not required to prove the actions of Lopez were the only cause of Bargas's decision to defend himself.

> "A prosecution for murder requires a finding of malice. [Citations.] The malice necessary for provocative act murder is implied malice. [Citations.] Malice may be implied if the defendant commits an act with a high probability that it will result in death and does so with a base antisocial motive or a wanton disregard for human life. [Citations.] Unless the defendant's *conduct* is sufficiently provocative of a lethal response, it cannot support the finding of implied malice necessary for a verdict of guilt on a charge of murder. [Citations.] Thus, a central inquiry in determining a defendant's criminal liability for a killing committed by a resisting victim is whether the defendant's conduct was sufficiently provocative of lethal resistance to support a finding of implied malice. [Citations.]

> "The prosecutor must also establish that the defendant's conduct proximately caused the killing. Courts use traditional notions of concurrent and proximate cause in order to determine whether the killing was the result of the defendant's conduct. [Citations.] To be considered the proximate cause of the victim's death, the defendant's act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical. [Citations.] A defendant's provocative acts must actually provoke a victim response resulting in an accomplice's death. [Citation.]" (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 583-584, fn. omitted (*Briscoe*).)

Arguably, the actions of both Valles and Lopez caused Valles's death. As the Supreme Court recently explained in *People v. Gonzalez* (2012) 54 Cal.4th 643, 659 (*Gonzalez*), however, "when the conduct of two felons acting in concert provides a deadly response, the question is only whether the defendant's acts were a *substantial* factor contributing to the resulting death. If so, that defendant is guilty. Accompanying provocative acts of the accomplice do not dissipate culpability."

Bargas testified that he saw both men reach for guns. While Valles's act of reaching for a gun may have been a provocative act, it was the jury's role to determine whether *Lopez's actions* were a substantial factor contributing to Bargas's decision to defend himself. (*Briscoe, supra*, 92 Cal.App.4th at p. 584.) Since Lopez and Valles withdrew their guns at the same time, the jury reasonably and logically could have inferred the actions of each was a substantial factor in Bargas's decision. That Valles's actions may have contributed to his death does not absolve Lopez of responsibility under the provocative act murder doctrine because the jury could have concluded that Lopez's actions were a substantial factor causing Bargas to shoot Valles.

Lopez also argues that since Bargas shot Valles before shooting at Lopez, Valles's actions must have caused his death. Although the record is far from clear, we read it somewhat differently. We understand Bargas's testimony to be that when he pulled out his guns, he pointed one at Valles and the other at Lopez. If we read the record correctly, then this argument fails.

Even if our understanding of the record is incorrect, we would still reject the argument because the decision to shoot Valles first may have been based on his proximity and not because Bargas was reacting to Valles's actions. This was an issue for the jury to decide, and the decision was supported by substantial evidence.

The Supreme Court's decision in *Gonzalez*, as well as the opinion in another recent case, *People v. Baker-Riley* (2012) 207 Cal.App.4th 631 (*Baker-Riley*), supports our conclusion. In *Gonzalez*, the defendant's brother had a confrontation with the victim; the defendant decided to seek revenge. She obtained a rifle and then recruited Fernando Morales to confront the victim. She drove to the area where the victim normally picked up his daughter and waited for him to arrive. When the victim arrived, Morales assaulted the victim with a knife. When the victim disarmed Morales, the defendant retrieved the rifle from the car, cocked it, and handed it to Morales. The victim was shot several times but managed to disarm Morales and then used the rifle to kill him. (*Gonzalez, supra,* 54 Cal.4th at pp. 650-651.)

The defendant was convicted of first degree murder based on the provocative act murder doctrine. On appeal, the defendant argued there was insufficient evidence that she committed an act that provoked the victim to shoot her accomplice. The Supreme Court disagreed.

> "This record contains ample evidence to support a conclusion that [the defendant] committed a provocative act that caused [the victim] to kill Morales. The evening before the killing, [the defendant] plotted with [her brother] and other members of the family to 'kick [the victim's] ass.' That night, [the defendant] went with Morales and [a second man] to meet [the victim], anticipating a violent confrontation. Morales brought a BB gun and shot it out the car window several times while waiting for [the victim]. As noted, [the victim] did not appear. The next morning, [the defendant] set events in motion. She roused first [the second man] and then Morales for another attack on [the victim]. It was [the defendant's] idea to ambush [the victim] at the corner where he routinely picked up his young daughter. They stopped at [her brother's] house to make sure he had not yet done so. She then drove to the corner with a loaded rifle in her car, and she tried to

> induce [a bystander] to leave the scene before their target arrived. While Morales attacked [the victim] and stabbed him, [the defendant] stayed near the car containing the rifle she had brought. When [the victim] appeared to get the upper hand in the fight, Morales ran to [the defendant]. [The defendant] got the rifle from her car, cocked it, and turned toward [the victim]. Having made clear to Morales what she intended him to do, she handed him the rifle. A struggle ensued during which [the victim] was shot three times. He then managed to seize the gun and shoot his attacker.
>
> "By bringing a loaded rifle to the scene, preparing it for firing, then handing it to her accomplice, [the defendant] dramatically escalated the level of violence in the encounter. Introducing a loaded firearm into the fight went beyond the acts necessary to 'kick [the victim's] ass.' In producing the rifle, turning it toward [the victim], and putting it in the hands of Morales, who had just stabbed [the victim] in the face, [the defendant] performed acts '"fraught with grave and inherent danger to human life."' [Citation.]" (*Gonzalez, supra,* 54 Cal.4th at p. 656.)

The Supreme Court also rejected the defendant's argument that her actions were "not sufficiently violent to support the conviction." (*Gonzalez, supra,* 54 Cal.4th at p. 656.) "A provocative act is conduct that is dangerous to human life, not necessarily in and of itself, but because, in the circumstances, it is likely to elicit a deadly response. The danger addressed by the provocative act doctrine is not measured by the violence of the defendant's conduct alone, but also by the likelihood of a violent response. Thus, our cases have not required any particular level of violence to support provocative act murder liability." (*Id.* at p. 657.)

As in *Gonzalez,* Lopez engaged in a course of conduct that resulted in Valles's death and committed acts *fraught with grave and inherent danger to human life*. The jury could have concluded that Lopez ordered a group of Nortenos to assault Bargas while he was in prison. Lopez warned Alonzo Gonzalez the day before the assault not to associate with Bargas and instructed him to call should Bargas appear at the tattoo shop. Lopez and Valles appeared at the tattoo shop a few minutes after Bargas arrived, armed and ready to assault Bargas. Lopez then withdrew his weapon and attempted to shoot Bargas,

only failing because the weapon jammed. These acts were much more inherently dangerous than those cited by the Supreme Court in *Gonzalez.*

Lopez's acts are similar to the facts in *Baker-Riley*. The defendant and an accomplice knocked on the victim's door. When the victim opened the door, the defendant "pulled out a gun from under his shirt, 'put it in [the victim's] face,' and said, 'You're fucked.'" (*Baker-Riley, supra,* 207 Cal.App.4th at pp. 633-634.) The defendant and his accomplice entered the house and demanded cash and marijuana. The defendant also threatened the victim and his friend who was at the house at the time. He laughed at the victim and ate his food while pointing the gun at the victim's head. The defendant repeatedly clicked the gun's safety on and off. He then ordered the victim to a bedroom and told him to sit on the bed. The victim thought he was going to die, so he "grabbed his own handgun, which was 'tucked in between the bed and the mattress.' [The victim] stood up and fired four or five times at [the defendant]. He missed [the defendant] but one of the bullets penetrated the lungs of [the accomplice]. He died from the wound." (*Id*. at 634.)

The defendant argued that his actions could not support the conviction because he did nothing more than participate in a robbery, and the provocative act murder doctrine requires something more than participation in the underlying crime. The appellate court concluded the defendant "did far more than participate actively in an armed robbery. When [the victim] opened the front door, [the defendant] 'put [his gun] in [the victim's] face' and said, 'You're fucked.' From a distance of less than three or four feet, [the defendant] pointed the gun at [the guest's] head. [The defendant] was 'waving his gun around' and was repeatedly 'clicking the safety on and off.' He threatened to shoot [the guest] in the kneecaps and 'make [him] paralyzed for the rest of [his] life.' [The defendant] further threatened: 'I'll fucking kill. I'll fucking shoot you right now.' [¶] Far beyond committing a simple armed robbery, [the defendant] taunted, terrorized, and toyed with the victims for an extended period of time. While pointing his gun at [the

victim and the guest, the defendant] laughed and ate their food. He ordered [the victim] to open a fortune cookie and read it. He asked [the victim] if he had seen the movie Pulp Fiction and laughed when [the victim] replied that he had not seen it." (*Baker-Riley* at p. 637.) The appellate court concluded that the defendant's conduct was "egregiously provocative" and "easily falls within the purview of the provocative act murder doctrine." (*Id*. at p. 638.)

Similarly, we conclude Lopez's actions were egregiously provocative and easily fell within the purview of the doctrine.

Sufficiency of the evidence that Lopez fired at an occupied building

Lopez was convicted in count 2 of discharging a firearm at an occupied building, in violation of section 246. Lopez claims the evidence established he was shooting at Bargas and not at the tattoo shop.

The testimony on this issue is relatively straightforward. Lopez testified that when the shooting inside the tattoo shop started, he picked up Valles's gun and tried to defend himself. The gun did not fire, apparently because it was jammed. Lopez then ran out of the tattoo shop. As he was running away, he checked the magazine and was able to make the firearm operational. He then turned and fired at Bargas, who was near the door of the tattoo shop. Lopez kept firing until the gun ran out of ammunition.

The forensic evidence agreed that Lopez fired from the street. The gun Lopez was using was a semiautomatic weapon, and all of the ejected shell casings were found in the street.

Bargas testified that when he exited the front door of the tattoo shop, Lopez started firing at him. Bargas hid behind a truck and returned fire.

The evidence was undisputed that Lopez fired at Bargas while Bargas was near the front door of the tattoo shop. The issue is whether this evidence was sufficient to establish that Lopez was firing at the tattoo shop within the meaning of the statute.

The only relevant case cited by both parties is *People v. Overman* (2005) 126 Cal.App.4th 1344, which explains that "section 246 is not limited to the act of shooting directly 'at' an inhabited or occupied target. Rather, the act of shooting 'at' a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant's conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act." (*Id*. at pp. 1356-1357, fn. omitted.)

Overman cited *People v. Chavira* (1970) 3 Cal.App.3d 988, a case remarkably similar to the facts in this appeal. Chavira was charged with several crimes, including violating section 246. The relevant testimony established that Chavira fired several shots from a shotgun at a group of men standing in the driveway of a residence. Some of the shotgun pellets hit the house. Chavira argued the conviction for violating section 246 had to be overturned because he fired at the group of men, not the residence. The appellate court disagreed. "An act done with a reckless disregard of probable consequences is an act done with 'intent' to cause such result within the meaning of the words used in the instruction. Defendant and his associates engaged in a fusillade of shots directed primarily at persons standing close to a dwelling. The jury was entitled to conclude that they were aware of the probability that some shots would hit the building and that they were consciously indifferent to that result. That is a sufficient 'intent' to satisfy the statutory requirement." (*Chavira*, at p. 993, fn. omitted.)

Bargas testified that Lopez began shooting at him when he (Bargas) exited the tattoo shop. Bargas then hid behind a vehicle. The jury rationally and logically could have concluded from this evidence that there was a probability some of the shots would hit the building, and Lopez was consciously indifferent to that result.

Sufficiency of the evidence that Lopez's remark was intended to dissuade Gonzalez from testifying

The information charged Lopez with attempting to dissuade a witness from testifying, in violation of section 136.1, subdivision (a)(2). Lopez argues this conviction must be reversed because there was no evidence the comment he made was intended to dissuade Gonzalez from testifying.

Gonzalez testified that on the day in question he, his mother, and Sanchez were at the courthouse to testify against Lopez. The three were walking down a hallway when he passed in front of Lopez and Lopez's sister. As he walked by, he heard Lopez say, "Fucking snitches." Sanchez also heard Lopez say, "snitches." Linda Gonzalez heard Lopez say, "Snitches, you shouldn't be here."[2]

The prosecution argued the comment was made in an attempt to dissuade Gonzalez from testifying. Gonzalez explained that he understood the term "snitches" to be a reference to an informant, and in the world of criminal street gangs it was "all bad to be a snitch or an informant." Gonzalez did not want to testify after Lopez made the comment because he was upset. Gonzalez also testified that he understood that in the gang world if you were labeled "no good" you were going to be killed or severely beaten up.

While Gonzalez did not testify that being a snitch made you "no good," Bargas explained to the jury he was deemed "no good" by the Nortenos because he had provided information that was used against Ochoa.

Taking all of these facts into consideration, the jury reasonably and logically could have concluded that Lopez assumed Gonzalez knew how the Nortenos responded to

[2]Lopez testified he said something about it being a "bitch" because he had to travel to two or three different courtrooms that day. The jury obviously disbelieved his testimony.

informants and that when Lopez called Gonzalez a snitch, he intended to convey to Gonzalez that he would suffer the consequences inflicted by Nortenos on informants. This was substantial evidence to support the conviction.

Lopez also maintains Gonzalez was equivocal about what Lopez had said because Gonzalez testified on cross-examination that it was possible Lopez said, "this is a fucking bitch." But Gonzalez's concession that it was *possible* Lopez said "bitch" instead of "snitch" is inconsistent with Gonzalez's reaction to the comment. Gonzalez testified he did not want to testify after he heard the comment because he was upset. Furthermore, Gonzalez testified on redirect that Lopez said "snitches," not "bitches." Accordingly, this argument fails.

II. Jury Instructions

Lopez contends the trial court erroneously instructed the jury in two respects. We begin by noting no objection was raised to any of the instructions, and therefore any potential issue has been forfeited. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) On the merits, the argument fails as well.

Failure to instruct on attempted murder

Lopez asserts that since the prosecution theorized that he and Valles were attempting to murder Bargas, the trial court was required to instruct the jury with the elements of attempted murder. According to Lopez, the jury was required to find that he attempted to murder Bargas before it could convict him of provocative act murder. Lopez cites *People v. Cervantes* (2001) 26 Cal.4th 860 (*Cervantes*) as authority for this proposition.

The issue in *Cervantes* was causation, not jury instructions. Cervantes, a gang member, was at a party with other members from his gang, as well as individuals who were members of another gang. The two gangs generally coexisted peacefully. Cervantes approached a young woman who rebuffed his advances. Cervantes called the woman a foul name, which caused a member of the other gang to challenge Cervantes. A

third man, also a member of the other gang, intervened in an attempt to prevent a conflict. Guns were drawn and Cervantes shot the third man.

Cervantes and his fellow gang members fled. The rival gang shot and killed a member of Cervantes's gang as the victim drove away from the party.

Cervantes was found guilty of murder based on the provocative act murder doctrine. The Supreme Court concluded the evidence was insufficient as a matter of law to support the conviction because the murder of the victim "by other parties was itself felonious, intentional, perpetrated with malice aforethought, and directed at a victim who was not involved in the original altercation between [Cervantes and the third man]." (*Cervantes, supra,* 26 Cal.4th at p. 874.)

Nowhere in the opinion does the Supreme Court state, or even suggest, the trial court was required to instruct the jury with the elements of the crime Cervantes allegedly was attempting to commit before it could find him guilty of murder. Instead, the jury in *Cervantes* was instructed in terms essentially equivalent to the instructions provided to the jury in this case.[3] (Compare *Cervantes, supra,* 26 Cal.4th at p. 864, fn. 6 with CALCRIM No. 560.)

We also reject Lopez's attempt to analogize burglary and aider and abettor liability. Burglary consists of the entry into a structure with the intent to commit a grand or petit larceny or any felony. (§ 459.) A burglary occurs regardless of whether the felony is committed. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.) The trial court is required to instruct the jury with the "target offense" and instruct on the elements of the crimes. (*People v. Hughes* (2002) 27 Cal.4th 287, 348-349.) The reason for this is that if the defendant did not have any felonious criminal intent, then a burglary did not

[3]The *Cervantes* jury was instructed with the elements of the crime of attempted murder because Cervantes was charged with the attempted murder of the third man. This fact does not change our analysis.

occur. For example, a defendant may enter into a building with the intent to commit an offense that is classified as a misdemeanor or acts not punishable as crimes. If there is evidence of multiple objectives, then the failure to instruct the jury which crimes are felonies, and the elements of those crimes, would permit the jury to "indulge in unguided speculation as to what kinds of criminal conduct are serious enough to warrant punishment as felonies and incorporation into the burglary statute." (*People v. Failla* (1966) 64 Cal.2d 560, 564.)

Lopez was charged with the crime of murder even though he did not shoot Valles. Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice may be either express or implied. (§ 188.) Malice is implied where "no considerable provocation appears, or when the circumstance attending the killing show an abandoned and malignant heart." (*Ibid*.) "The provocative act murder doctrine was originally conceived as a form of implied malice murder," and applies where the defendant causes a third party to kill in response to the defendant's life-threatening provocative acts. (*Cervantes, supra,* 26 Cal.4th at p. 867.) The doctrine also implicates the concept of causation, since the death is caused by an intervening act, e.g., the third person killing the victim. As explained in *Cervantes*, however, when the doctrine applies, the third party's act is a dependent intervening cause that does not break the chain of causation. (*Id*. at pp. 868-872.)

These concepts are incompatible with the burglary analysis. Burglary requires the defendant to harbor the specific intent to commit larceny or a felony, and the prosecution must prove the defendant harbored that intent when he entered the structure. Murder does not require the intent to commit a felony, but does require the defendant possess malice. When the provocative act murder doctrine is at issue, the prosecution seeks to prove malice and at the same time establish a dependent intervening cause by proving the defendant provoked the deadly response by a third party by intentionally committing an act with conscious disregard for life. (*Concha, supra,* 47 Cal.4th at pp. 665-666.)

Therefore, the underlying felony is not an element of the crime, and the jury need not be instructed on the elements of that crime.

The same analysis holds true when considering aider and abettor liability. Section 31 includes those who aid and abet a crime in the definition of principals of the crime, and the same liability attaches whether one is the perpetrator or aids and abets the crime. (*Montoya, supra,* 7 Cal.4th at pp. 1038-1039.) To establish a defendant is liable as one who aided and abetted a crime, the People must prove (1) a perpetrator committed the crime, (2) the defendant knew the perpetrator intended to commit the crime, (3) the defendant intended to aid and abet the crime, and (4) the defendant's words or acts aided and abetted the crime. (CALCRIM No. 401.) Common to every element of a defendant's liability is the concept that the perpetrator committed a crime. The jury must be instructed with the elements of the underlying offense to determine if a crime was committed. Therefore, the underlying felony is an element of the defendant's liability, which, as explained above, is not the case in this prosecution.

Even if we were to assume, arguendo, that the jury should have been instructed with the elements of attempted murder, reversal would not be required because Lopez cannot establish that a miscarriage of justice occurred. (Cal. Const., art. VI, § 13.) A miscarriage of justice occurs where, after examination of the entire cause, we conclude it is reasonably probable that a result more favorable to the appealing party would have been reached if the error had not occurred. (*People v. Watson* (1956) 46 Cal.2d 808, 836.)

Here, the evidence was overwhelming that Lopez and Valles entered the tattoo shop to murder Bargas. Numerous witnesses testified the Nortenos decided Bargas was "no good" and the consequences to a person who has that label. Bargas described the prior beating he received because of the label. Several witnesses described the confrontation two days before the shooting and that Bargas wounded Daniel Lopez, who was related to Lopez. Bargas and Wernicke described Lopez's conduct in the tattoo shop

on the day of the shooting that caused Bargas's response, including Lopez's withdrawing a firearm from his waistband. The only logical inference that could be made from this evidence is that Lopez and Valles went to the tattoo shop to murder Bargas and were unsuccessful only because Bargas was armed and defended himself.

The only evidence offered that differed from the above was the testimony of Lopez himself. According to Lopez, he went to the tattoo shop to attempt to ensure there would not be any future violence between Bargas and Daniel Lopez. He was unarmed, and Valles drew his weapon only after Bargas started the gunfire. Lopez testified he fired at Bargas in self-defense. If the jury believed Lopez's testimony, it would have found him not guilty of the charged crime. Because the jury found him guilty of the murder of Valles, the jury necessarily rejected Lopez's testimony.

Since the only testimony believed by the jury established that Lopez entered the tattoo shop armed and with the intent to injure or kill Bargas, there is no possibility that had the jury been instructed with the elements of attempted murder, Lopez would have obtained a better outcome. Accordingly, reversal is not required under any standard of review.

Failure to instruct that chain of causation must not be broken by an independent intervening cause

The jury was instructed that to convict Lopez it must find beyond a reasonable doubt that Valles's death was the natural and probable consequence of Lopez's provocative act. The instruction then defined a provocative act as one "Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response." Next, the jury was informed that Valles's death was the natural and probable consequence of Lopez's provocative act if the People proved (1) a reasonable person in Lopez's position would have foreseen there was a high probability his act could begin a chain of events resulting in someone's death, (2) Lopez's act was a direct and substantial factor in causing Valles's death, and (3)

Valles would not have died if Lopez had not committed the provocative act. Finally, the jury was instructed that a substantial factor is more than a remote or trivial factor, but it did not need to be the only factor that caused Valles's death.[4]

Lopez argues there was evidence of an independent intervening cause that broke the chain of causation. Specifically, the jury could have found that it was Valles's act of withdrawing his firearm from his waistband that caused Bargas to defend himself. According to Lopez, the jury was misinstructed because the trial court did not inform the jury that an independent intervening cause would break the chain of causation and absolve Lopez of guilt.

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[4]The complete instruction as read to the jury stated: "The defendant is charged in Court 1 with murder. A person can be guilty of murder under the Provocative Act Doctrine even if someone else did the killing. To prove that the defendant is guilty of murder under the Provocative Act Doctrine, the People must prove that, one, in attempting to commit the murder of Paul Bargas, the defendant intentionally did a provocative act. Two, the defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life. Three, in response to the defendant's provocative act, Paul Bargas killed Michael Valles. And, four, Michael Valles' death was the natural and probable [consequence] of the defendant's provocative act. [¶] A provocative act is an act whose natural and probable consequences are dangerous to human life because there is a high probability that the act will provoke a deadly response. [¶] In order to prove that Michael Valles' death was the natural and probable [consequence] of the defendant's provocative act, the People must prove that, one, a reasonable person in the defendant's position would have foreseen that there was a high probability that his or her act could begin a chain of events resulting in someone's death. Two, the defendant's act was a direct and substantial factor in causing Michael Valles' death. And, three, Michael Valles' death would not have happened if the defendant had not committed the provocative act. [¶] A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death. [¶] The People alleged that the defendant committed the following provocative act: He entered the Pushing Ink Tattoo Parlor armed with a loaded .45 caliber pistol, declared to his companion, Michael Valles, 'This is Paul Bargas. He is no good' and drew his .45 caliber pistol inside the tattoo parlor. You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed the provocative act."

This was the issue addressed by the Supreme Court in *Cervantes*. We already have discussed the facts of that case and the Supreme Court's holding that an independent criminal act is an independent intervening cause absolving the defendant of liability. In reaching this conclusion, the Supreme Court explained the causation aspect in murder prosecutions where criminal liability is predicated on the provocative act murder doctrine.

The Supreme Court began its analysis by noting the cause of a murder is "'an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of [the decedent] and without which the death would not occur.' [Citations.]" (*Cervantes, supra,* 26 Cal.4th at p. 866.) The jury in Cervantes's case was instructed with each of these concepts. The Supreme Court also noted that proximate cause is established when the act is directly connected with the resulting injury, meaning that there is "'no intervening force operating.' [Citation.]" (*Ibid*.)

In this case, as in *Cervantes*, there was an intervening force that acted because neither Lopez nor Cervantes fired the bullets that killed the victim. This fact, standing alone, does not absolve Lopez of liability because he may be criminally liable, even if another cause contributed to the victim's death. (*Cervantes*, *supra,* 26 Cal.4th at pp. 866-867.) Lopez would be absolved of criminal liability if an independent intervening event caused Valles's death, but he would remain criminally liable if the intervening cause was a dependent intervening cause. (*Id*. at pp. 868-869.) The issue is the distinction between an independent intervening cause and a dependent intervening cause, which the Supreme Court also explained:

> "The principles derived from these and related authorities have been summarized as follows. 'In general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be "independent" the intervening cause must be "unforeseeable … an extraordinary and abnormal occurrence, which rises to the level of an

> exonerating, superseding cause." [Citation.] On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' [Citation.]" [Citation.]' [Citations.]" (*Id.* at p. 871.)

Thus, an independent intervening cause is one that is unforeseeable, while a dependent intervening cause is one that is a normal and reasonably foreseeable result of the defendant's provocative act, i.e., one that a defendant should have foreseen as a possible result of his provocative act.

The jury properly was instructed with these concepts, even though the term "independent intervening cause" was not used. The jury was instructed that the People must prove a reasonable person in Lopez's position would have foreseen there was a high probability that the chain of events started by Lopez would result in someone's death, and that Valles's death would not have occurred if Lopez had not committed the provocative act. The requirement that a reasonable person would have foreseen that someone would die eliminates the possibility that Bargas's action was an independent intervening cause because the jury could not also find Bargas's action was unforeseeable.

Even if the argument had merit, we would not reverse the judgment because, as we explained in the preceding section, Lopez cannot establish the hypothetical error resulted in a miscarriage of justice.

III. Sentencing

There are two sentencing issues. The first is raised by Lopez and relates to the sentence imposed for his conviction of attempting to dissuade a witness from testifying. The second arose when the Supreme Court recently issued its decision in *Mesa, supra*, 54

Cal.4th 191 and concerns application of section 654 when the defendant is convicted of active participation in a criminal street gang as well as other substantive offenses.

We begin with the sentence for Lopez's section 136.1 conviction.

A. Sentence for section 136.1

Count 5 of the information charged Lopez with violating section 136.1, subdivision (a)(2), alleging that Lopez did "willfully, unlawfully, knowingly, maliciously, and feloniously attempt to prevent or dissuade ALONZO GONZALEZ, a witness, from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." The information charged as an enhancement that Lopez committed the offense "for the benefit of, at the direction of, or in association with a criminal street gang … with the specific intent to promote, further, or assist in any criminal conduct by gang members."

The verdict stated that the jury found Lopez guilty "of the offense of ATTEMPT TO PREVENT/DISSUADE WITNESS FROM TESTIFYING, violation of Section 136.1[, subdivision] (a)(2) of the California Penal Code, a felony, as charged in Count V of the Information." The jury also found the enhancement true: "We further find the above crime was committed for the benefit of, at the direction of, or in association with a criminal street gang … with specific intent to promote, further, or assist in any criminal conduct by gang members, pursuant to Penal Code Section 186.22[, subdivision] (b)(1)."[5]

The trial court imposed a sentence of 14 years to life for the conviction. The base term was seven years to life, which was doubled because Lopez had suffered a prior "strike" conviction within the meaning of section 667.5, subdivision (d).

[5]For clarity's sake, we refer to this enhancement as "for the benefit of a criminal street gang."

The issue is whether the trial court properly chose the base term of seven years to life. It appears, and the parties agree, that the trial court applied section 186.22, subdivision (b)(4)(C) to reach this result.

Section 186.22, subdivision (b)[6]

Subdivision (b) deals with increased terms of imprisonment when the jury finds that a crime is committed for the benefit of a criminal street gang.

When applicable, subdivision (b)(1) imposes an additional term of imprisonment when a defendant is convicted of a felony and the jury determines the crime was committed for the benefit of a criminal street gang. It begins by stating, "Except as provided in paragraphs (4) and (5), any person convicted of a felony" committed for the benefit of a criminal street gang shall receive the following sentence enhancements: (1) an additional term of two, three, or four years if only the enhancement is found true (subd. (b)(1)(A)), (2) an additional term of five years if the felony is a serious felony as defined in section 1192.7, subdivision (c) (subd. (b)(1)(B)), or (3) an additional term of 10 years if the felony is a violent felony as described in section 667.5, subdivision (c) (subd. (b)(1)(C)).

Subdivision (b)(2) and (3) assists the trial court in determining which term of the sentencing triad should be imposed when the court has discretion to choose the additional term.

On the other hand, subdivision (b)(4) requires the trial court to impose a term of life in prison instead of the sentence otherwise required by law for the following crimes: home invasion (§ 213), carjacking (§ 215), felony shooting at an inhabited building (§ 246), infliction of great bodily injury while discharging a firearm from a vehicle in the

[6]All undesignated subdivisions referred to under this subheading are to section 186.22.

commission of a felony (§ 12022.55), extortion (§ 519), and "threats to victims and witnesses, as defined in Section 136.1." (Subd. (b)(4)(B), (C).)

When imposing the indeterminate term of life in prison, the trial court must choose a minimum sentence that is the greater of two alternatives. The first alternative is the term that would otherwise be imposed pursuant to section 1170 for the underlying conviction, including any enhancements. (Subd. (b)(4)(A).)

The second alternative depends on the crime committed. The minimum term is 15 years if the crime is a home invasion (§ 213), carjacking (§ 215), felony shooting at an inhabited building (§ 246), or if the defendant inflicts great bodily injury while discharging a firearm from a vehicle in the commission of a felony (§ 12022.55). (Subd. (b)(4)(B).) The minimum term is seven years if the crime is felony extortion, or "threats to victims and witnesses, as defined in Section 136.1." (Subd. (b)(4)(C).)

To summarize, when a crime is committed for the benefit of a criminal street gang, subdivision (b) requires the trial court to impose either (1) a term of imprisonment in addition to the term otherwise imposed by law (subd. (b)(1)), or (2) a life term with a minimum term of imprisonment determined as explained in the preceding paragraphs if the crime is specifically identified in subdivision (b)(4).

In this case, the trial court relied on subdivision (b)(4)(C) to impose a term of seven years to life. Imposition of this sentence is permissible only if Lopez was convicted of "threats to victims and witnesses, as defined in Section 136.1." (*Ibid.*)

Lopez argues he was convicted only of attempting to dissuade a witness from testifying, not attempting to dissuade a witness from testifying *with threats*. The People assert that because the phrase "threats to victims and witnesses" refers to section 136.1, any conviction of this offense permits imposition of the indeterminate sentence of life with a minimum term of seven years.

We now turn to section 136.1.

Section 136.1[7]

Subdivision (a) provides that anyone who knowingly and maliciously prevents or dissuades, or attempts to prevent or dissuade, a witness or victim from testifying is guilty of an offense that may be punished as either a misdemeanor or a felony. (Subd. (a)(1), (2).) Subdivision (a) specifically names subdivision (c) as an exception to its provisions.

Subdivision (c) provides that every person who commits an act described in subdivision (a) where the act is accompanied by force or by an express or implied threat of force, committed in furtherance of a conspiracy, committed by one who previously has been convicted of violating this section, or is committed by one acting on behalf of another and is committed for pecuniary or other gain, is guilty of a felony punishable by imprisonment for two, three, or four years. (Subd. (c)(1)-(4).)

Thus, a defendant who attempts to dissuade a witness from testifying is guilty of either a misdemeanor or a felony, but, if the defendant's attempt is accompanied by an express or implied threat of force, he is guilty of a felony with an increased term of imprisonment.

The Sixth and Fourteenth Amendments to the United States Constitution preclude a trial court from imposing a sentence above the statutory maximum based on a fact, other than a prior conviction, not found to be true by a jury. (*Cunningham v. California* (2007) 549 U.S. 270, 274-275; *Blakely v. Washington* (2004) 542 U.S. 296, 303-304; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Whether a defendant used an express or implied threat of force when attempting to dissuade a witness from testifying is a question of fact that subjects the defendant to a greater sentence. Accordingly, *Apprendi* and its progeny require the jury find this fact true beyond a reasonable doubt.

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[7]All undesignated subdivisions referred to under this subparagraph refer to section 136.1.

Analysis

As explained, the information charged Lopez with violating section 136.1, subdivision (b)(2), knowingly and maliciously attempting to dissuade a witness from testifying. The information did not charge Lopez with using an express or implied threat of force. Nor did the instructions inform the jury it must find Lopez used an express or implied threat of force. Nor did the jury make a specific finding that Lopez used an express or implied threat of force.[8]

Section 186.22, subdivision (b)(4)(C) permits imposing a sentence of seven years to life only if the defendant makes "threats to victims and witnesses, as defined in Section 136.1." Only subdivision (c)(1) of section 136.1 refers to the use of an implied or express threat. Therefore, the plain meaning of section 186.22, subdivision (b)(4)(C) is that a seven-year-to-life sentence can be imposed only if the jury convicts the defendant of attempting to dissuade a witness by use of an implied or express threat of force pursuant to section 136.1, subdivision (c)(1).

Lopez was not convicted of violating section 136.1, subdivision (c)(1). Nor did the jury find Lopez used an implied or express threat of force in committing the crime. Therefore, the trial court erred in imposing a sentence of seven years to life pursuant to

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[8]The jury instruction on count 5 was read to the jury as follows: "The defendant is charged in Count 5 with intimidating a witness in violation of Penal Code Section 136.1. To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant maliciously tried to prevent or discourage Alonzo Gonzale[z] from attending or giving testimony at a preliminary hearing. Two, Alonzo Gonzale[z] was a witness. And, three, the defendant knew he was trying to prevent or discourage Alonzo Gonzale[z] from attending or giving testimony at a preliminary hearing and intending to do so. [¶] A person acts maliciously when he or she unlawfully intends to annoy, harm, or [injure] someone else in a way -- in any way or intends to interfere in any way with the [orderly] administration of justice. [¶] As used here, a witness means someone who knows about the existence or nonexistence of facts relating to a crime. It is not a defense that the defendant was not successful in preventing or discouraging the witness. It is not a defense that no one was actually [physically] injured or [otherwise] intimidated."

section 186.22, subdivision (b)(4)(C) because the section did not apply to the crime of which Lopez was convicted and because the sentence was based on a fact not found true by the jury. We will vacate the sentence on count 5 and remand the matter to the trial court for resentencing on that count.

B. People v. Mesa

Lopez was convicted in count 4 of active participation in a criminal street gang. (§ 186.22, subd. (a).) The trial court imposed a consecutive sentence of one year four months for this conviction (one-third the midterm doubled because of the "strike" prior conviction).

While this appeal was pending, the Supreme Court issued its decision in *Mesa* and we requested the parties submit a brief discussing what effect, if any, *Mesa* has on the sentence imposed on Lopez.

Mesa was involved in two separate shootings and was convicted of the same three crimes for each shooting: assault with a firearm (§ 245, subd. (a)(2)), possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)), and active participation in a criminal street gang (§ 186.22, subd. (a)). The trial court imposed consecutive sentences for each count. (*Mesa, supra,* 54 Cal.4th at pp. 194-195.)

The issue presented to the Supreme Court was whether section 654 precluded punishment for the active participation counts when the "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" (§ 186.22, subd. (a)) element of the crime consisted of the same conduct for which Mesa also was convicted, i.e., the assault with a firearm and possession of a firearm by a felon.

The Supreme Court began its analysis by observing that for over a century, section 654 has allowed multiple convictions for a single act or omission, but has precluded multiple punishment "'for a single act or omission, even though the act or omission may violate more than one provision of the Penal Code.… [E]xecution of the sentence for one of the offenses must be stayed.' [Citations.]" (*Mesa, supra,* 54 Cal.4th at p. 195.)

The Supreme Court next turned to section 186.22, subdivision (a) and observed that the Legislature recognized that "mere membership" in a gang was not prohibited, nor was it intended to be punished under the California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.). (*Mesa, supra,* 54 Cal.4th at p. 196.) Instead, the legislation "'imposes sanctions on active participation in the gang only when the defendant knows about and specifically intends to further the criminal activity; or where he knows of the criminal activity and willfully promotes, furthers, or assists it.' [Citation.]" (*Id.* at pp. 196-197.) Accordingly, the active participation in the gang crime "has three elements: (1) '[a]ctive participation in a criminal street gang, in the sense of participation that is more than nominal or passive,' (2) '"knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,"' and (3) 'the person "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." [Citation.]' [Citation.]" (*Id.* at p. 197.)

The jury in *Mesa* was instructed that the People had the burden of proving each of these elements. To prove the third element of the crime, the trial court instructed the jury that "the term '[f]elonious criminal conduct means committing or attempting to commit … assault with a firearm, felon in possession of a firearm.'" (*Mesa, supra,* 54 Cal.4th at p. 197.) The only evidence on these crimes was the same evidence used to convict Mesa for the underlying crimes, which were each punished separately. (*Ibid.*)

The Supreme Court concluded that section 654 precluded imposition of a sentence for the active participation in a criminal street gang because "it punishes defendant a second time either for the assault with a firearm or for possession of a firearm by a felon." (*Mesa, supra,* 54 Cal.4th at p. 197.)

Here, the jury was instructed that to convict Lopez, the People must prove he "willfully assisted, furthered, or promoted feloniously criminal conduct by members of the gang either by, [(a)] directly and actively committing a felony offense or, [(b)], aiding and abetting a felony offense." The jury also was instructed that "Felonious criminal

conduct means committing or attempting to commit any of the following crimes: Attempted murder of Paul Bargas, shooting at an occupied building, an attempt to prevent or dissuade Alonzo Gonzale[z] from testifying."

Lopez was convicted and punished for shooting at an occupied building and attempting to dissuade Gonzalez from testifying. These two crimes, therefore, clearly fall within *Mesa*'s holding. Accordingly, had the trial court related only those two crimes to the jury, section 654 would have precluded punishment for the active participation in a criminal street gang conviction.

The trial court, however, instructed the jury that it could find that Lopez willfully assisted the criminal street gang if Lopez attempted to murder Bargas, a crime with which he was not charged. The People, however, concede that this distinction does not permit a result different than the result in *Mesa*.

Section 654 precludes multiple punishment for a single act. While it is true that Lopez was not punished for the crime of attempted murder, the acts that led to the attempted murder were the same acts that led to the murder conviction. As discussed in detail above, the prosecution theorized that Lopez and Valles went into the tattoo shop to murder Bargas, and, when Lopez removed his weapon from the waistband of his pants, Bargas defended himself by killing Valles. The provocative act Lopez committed that resulted in Valles's death was the attempt to murder Bargas. The prosecutor conceded this in his closing argument. When discussing the willful promotion of the criminal street gang element of this count, the prosecutor stated:

> "Finally, willful promotion, assistance, or furtherance of felonious criminal conduct. That sounds kind of gnarly. What this really means is, conduct amounting to the commission of a felony.
>
> What's occurring in the [tattoo shop] on January 26, 2004? All of the crimes in this case tie together through the gang enhancement and the gang charges, which is why I'm asking you never lose focus on that. The felonious criminal activity [Lopez] is committing is the hit on Paul Bargas,

the botched gang assassination. The movement on Paul Bargas is the felonious criminal activity."

Thus, it is clear that in this case each of the acts the jury was instructed that could establish the *willfully assisting the criminal street gang* element were acts for which Lopez was punished in another count. Therefore, as explained in *Mesa*, section 654 precludes punishment for the active participation in a criminal street gang count. The trial court erred in failing to stay the sentence on count 4.

DISPOSITION

The convictions are affirmed. The sentences on counts 4 (active participation in a criminal street gang, § 186.22, subd. (a)) and 5 (attempting to dissuade a witness from testifying, § 136.1) are vacated and the matter is remanded to the trial court for resentencing on these counts.

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CORNELL, Acting P.J.

WE CONCUR:

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GOMES, J.

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FRANSON, J.