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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK ALBERT FLOREZ, Defendant and Appellant.	A105204 (Alameda County Super. Ct. No. H33067)

Frank Albert Florez was charged with the murder of Melissa Torre and the felony offense of discharging a firearm at an inhabited dwelling in violation of Penal Code[1]section 246 committed for the benefit of a criminal street gang under section 186.22, subdivision (b), paragraph (4) (§ 186.22(b)(4)). He was also charged with possessing a firearm as an ex-felon in violation of section 12021, subdivision (a)(1), with a criminal street gang enhancement under section 186.22, subdivision (b), paragraph (1), subparagraph (A) (§ 186.22(b)(1)(A)). After a jury trial, Florez was convicted of discharging a firearm at an inhabited dwelling committed for the benefit of a criminal street gang, and possessing a firearm as an ex-felon. The jury also found true the gang enhancement allegation relating to the latter offense. The jury did not reach a verdict on the murder count, and the court dismissed that count on the prosecutor's motion.

* This opinion is certified for partial publication. (Cal. Rules of Court, rules 976(b) and 976.1.) The portions to be published are the introduction, Part V. A. of the Discussion, and the Disposition.

[1] All further unspecified statutory references are to the Penal Code.

In the published portion of the opinion, we conclude that Florez's conviction for the felony offense of discharging a firearm at an inhabited dwelling in violation of section 246 committed for the benefit of a criminal street gang under section 186.22(b)(4), qualifies as a "felony offense listed in subdivision (c) of Section 667.5," thereby limiting Florez's presentence conduct credit to 15 percent under section 2933.1. In the unpublished portion of the opinion, we conclude that Florez's various challenges to his convictions do not warrant reversal. However, we agree with the parties that the sentence imposed upon the conviction for discharging a firearm at an inhabited dwelling committed for the benefit of a criminal street gang should be modified to reflect that the sentence was imposed under section 186.22(b)(4) and is not subject to the 15-year minimum parole eligibility period under section 186.22(b)(5), and that the amended abstracts of judgments issued on remittitur should reflect case number H33067, the total credit for presentence time served of 552 days, and that the court used section 2933.1 in computing presentence conduct credit. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Florez was a member of the "Don't Give A Fuck" (D.G.F.), a criminal street gang. He had an ongoing rivalry with David Ruiz, a member of the Campo Ramos Locos (C.R.L.), another criminal street gang. Five months before the April 21, 2001, incident that was the basis of the current charges against Florez, someone set fire to the Ruiz house. A week later, someone set fire to the Florez house. Eight days later, someone firebombed the Ruiz house.

In the early morning of April 21, 2001, according to Florez, Ruiz fired several gunshots at Florez's car, breaking the rear windshield. Shortly after the event, Florez called several of his fellow D.G.F. gang members on his cellular telephone. At about the same time, James "Jimbo" Wooldridge, known as a D.G.F. gang member, received a telephone call from Melly (Melissa) Torre. Wooldridge asked Torre to meet him on Ruus Road, and she agreed. Wooldridge had met Torre one or two days earlier when April Witt, a D.G.F. gang affiliate, introduced them. Together with April

Witt and another friend, Gabriela Gonzalez, also a D.G.F. gang affiliate, Torre drove her two-door car to Ruus Road. According to Witt, Torre had been living in the area for a few months and she was not a gang member.

Arriving at Ruus Road, Torre, Witt, and Gonzalez met several men, including Florez, Wooldridge, and other members of the D.G.F. gang. Witt and Gonzalez saw that the windows of Florez's car had been shot out. Florez was pacing and angry. He told Gonzalez that while he was driving somebody shot at his car. It appeared to Witt that everyone, not just Florez, wanted to retaliate because of what happened to Florez.

Florez asked Witt and then Gonzalez to drive him home in Torre's car, but they refused. When Florez asked Torre, she agreed to take him home. Witt told Torre she should not drive Florez home because of what had happened to Florez's car, but Torre indicated she had no problem with driving Florez. Witt and Gonzalez drove away in an SUV, leaving Florez and Torre at Ruus Road.[2]

At 4:25 a.m., the police received several telephone calls reporting gunfire at the Ruiz house. At that time, Ruiz was not at home; his parents and younger brother were in the house. Neighbors heard several rapid gunshots, followed by a pause, and then more gunshots. When the police arrived, they found 14 bullet holes in the front of the Ruiz house. The bullets went through a big picture window. Some of the bullets struck the house frame and other bullets went through the door of the master bedroom used by Ruiz's parents, hitting the back bedroom wall. The police found Winchester-brand cartridge casings outside the house, and corresponding bullets inside the house that had been fired from a Cobray semiautomatic pistol.

[2] At trial, Witt and Wooldridge testified that Wooldridge did not stay with Florez and Torre. Gonzalez told the police that Torre got into Torre's car with Torre in the driver's seat, Wooldridge in the front seat, and Florez in the back seat. But at trial, Gonzalez testified that she did not recall seeing Wooldridge at Ruus Road, and that she had lied to the police. Gonzalez also refused to say whether she had ever been threatened by Wooldridge.

Torre's car was in the middle of the street in front of the Ruiz house. The police found Torre dead in the driver's seat. The passenger door was open and the passenger's seat was not pushed forward; there was a radio on the back seat. Florez's cellular telephone was on the dashboard. Ballistic evidence showed someone had repeatedly shot Torre at close range with an unknown firearm using Federal-brand ammunition. The shooter most likely fired from the passenger side of the car.

About five minutes after the shooting, members of the Alarcon family that lived nearby saw two unknown men beating Florez. After the beating, Florez collapsed outside the Alarcon house. Florez said he had been shot in the leg or foot and hit on his head with a gun.

In the area between the Ruiz and Alarcon houses, the police found the Cobray semiautomatic gun that was fired at the Ruiz house. The police did not recover the gun that was fired at Torre, but they did find parts of another gun. Additionally, the police found a bloody sweatshirt with Florez's DNA on it and a hole in it surrounded by gunpowder particles, footprints consistent with Florez's shoes, a beanie hat containing the DNA of three people, including Florez but excluding Ruiz, and another beanie hat also containing the DNA of three people, including Ruiz but excluding Florez. The name "Joker" was found carved on a fence adjoining the Ruiz property. Ruiz's father testified that the inscription had been there for several years.

In support of the gang allegations in the information, prosecution witness Officer John Mario Lage testified as an expert regarding gang-related crime in Southern Alameda County. In his opinion, the primary activities of the D.G.F. gang included homicides, attempted homicides, drive-by shootings into inhabited dwellings, stabbings, serious beatings, burglaries, and the sale of drugs. In support of his opinion, Lage testified that in March of 1999, Florez and two other D.G.F. gang members had been arrested and later convicted of selling drugs, and on January 26, 2001, other D.G.F. gang members had been convicted of offenses based upon an incident concerning an attempted murder and shooting into an inhabited dwelling. The prosecution submitted official court records regarding the convictions. After giving

Lage a "hypothetical" based on the facts in this case, Lage opined that the shooting into the Ruiz house was done 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 the criminal conduct of gang members. He based his opinion on the fact that the shooting at the Ruiz house occurred immediately after Florez had been targeted for violence that was attributed to that rival. Additionally, the shooting added to the reputation of the gang's infamy and stature, not just in the rivalry against the C.R.L. gang, but in their gang subculture. Lage also opined that as a general rule, a gang member was expected to take an active part in retaliating against his rivals and not have someone else do it for him. According to Lage, given the timing and the circumstances of the incident, there was no innocent explanation for the presence of a D.G.F. gang member in the neighborhood of a C.R.L. gang member. Lage was also questioned regarding the "Joker" carving on a fence at the Ruiz house. According to Lage, Joker was Florez's nickname, and leaving the name on a rival gang's territory was a sign of disrespect. Assuming "Joker" was a rival gang member's nickname, it was highly unlikely that the inscription would have been left on the fence; normally, it would have been erased very quickly.

Lage described in detail the bases of his opinions, which included: Florez's admissions of gang membership as recorded in field identification cards, tattoos, symbols, nicknames, statements to the police by other gang members, gang affiliates, and community members, the commission of criminal activity by Florez and other D.G.F. gang members, police reports, and items obtained in a probation search of Florez's home two years before the April 21, 2001, incident, including photographs of Florez in gang attire and using gang hand signs, and a notebook that contained gang graffiti, drawings, and writings.

DISCUSSION

I. *Gang Expert's Use of Florez's Notebook*

Before trial, Florez moved to preclude Officer Lage from testifying that his opinions were based upon the notebook found by the police during a probation search

of Florez's house. The 10 page notebook included four pages of drawings, containing D.G.F. symbols and hand signs, the word Joker (Florez's gang nickname), and the initials of other rival gang members with X's crossed over them. The remaining six pages contained poems describing what it meant to be a member of D.G.F., including descriptions of drive by shootings and acts of violence and intimidation to enhance gang status, and otherwise glorifying the gang life and D.G.F.'s supremacy over other gangs. The poems contained "images of violence and death in slang and expletive words [were] used." One particular poem appeared to describe a drug selling incident that was very similar to the circumstances leading to Florez's March 1999 arrest for selling drugs with two other D.G.F. gang members.

At a pretrial hearing, Officer Lage testified to the significance of each page in the notebook, translating the slang phrases. Lage indicated that at trial, his opinions would be based upon the notebook and other evidence. Before seeing the notebook, Lage had formed an opinion that Florez was a member of the D.G.F. gang; the notebook basically confirmed that opinion. The notebook itself also confirmed that it belonged to Florez because of the Joker moniker and references to D.G.F. Lage also told the court that the notebook contributed to his opinion regarding the primary purposes of the D.G.F. gang, but "the opinion is not dependent upon it. It's something that contributes or adds or . . . further confirms." Lage described the poems, indicating that one poem "certainly mirror[ed]" an actual crime that Florez took part in with two other D.G.F. gang members. The other poems were "sort of general glorification of death by violence theme and the suprem[acy] of D.G.F. over rival gangs," and the symbols referred to "the explicit homicide threat to the North Side Hayward Campo Ramos Locos" gang of which Ruiz was a member. Lage would also opine that the primary purpose of the D.G.F. gang was to commit crimes of homicide and serious assaults including shooting into inhabited dwellings and other forms of assault, with and without firearms, and drug dealing. Such acts benefited the gang by enhancing the status or infamy of the gang and its members and intimidating their neighbors, which

further enabled their criminal activity such as drug dealing. In the officer's opinion, those themes were reflected in the notebook.

The trial court denied Florez's preclusion motion for the following reasons. The notebook was not cumulative, but "[i]t is simply additional and corroborative evidence being relied upon by the expert." The court explained that the expert should be able to rely upon as many sources of information in support of his opinion, and that it was for the jury to decide what weight to give the opinions based upon the expert's testimony and sources. Additionally, the notebook had greater evidentiary weight than the field notes and statements by other officers or community members or conversations that the expert may have had with purported gang members to support his opinion that D.G.F. emphasized glorification of violence, death and protection of its territory. Although the notebook was damaging, it was relevant to the issues, including whether Florez committed the charged crimes in furtherance of or for the benefit of the D.G.F. gang. At the request of the prosecutor, the court agreed to tell the jury that the notebook was not being admitted for its truth but only as a basis for Lage's expert opinions regarding the D.G.F. gang and gang psychology.[3]

[3] The court and counsel discussed the issue of redacting portions of the notebook. With regard to the four pages of drawn symbols and signs, the court agreed to redact (1) the phrase "187," because Florez was charged with murder under section 187, and (2) the phrase "live by the gun, die by the gun," because it was a generic phrase. The court refused to redact the words, "death to all who fuck with the D.G.F.," because although the language was provocative, the phrase was probative given the gang expert's proposed testimony that the supremacy of one gang over a rival gang was significant in this case. In the course of the redaction discussion, defense counsel again argued that the poems should be entirely excluded. However, he agreed with the trial court that if the poems were to be shown to the jury, it would not be practical to redact them because it would render the writings incoherent, and even with a limiting instruction, the jury might improperly speculate that something worse had been removed. The court then considered defense counsel's argument that one of the poems should be excluded in its entirety because it appeared to be a "first person" account of a drug selling incident, which was very close to the circumstances of Florez's prior drug sale conviction that was not found to be gang-related. The prosecutor argued that the poem was relevant in that it corroborated how D.G.F. gang members responded to

On appeal, Florez renews his argument that the poems in the notebook should have been entirely excluded under Evidence Code section 352. He contends that the evidence was inflammatory character evidence personal to him and was merely cumulative or tangential to any material element of the gang allegations in this case. He further argues that the evidence posed an undue risk of "confusing the issues, or of misleading the jury," noting that the limiting instruction was insufficient to guard against confusion and substantive use of the basis of the opinion evidence, much less to mitigate the visceral prejudice arising from the notebook itself. We disagree with Florez's contentions.

An expert can reveal the information on which he or she has relied in forming his or her expert opinion, including matter that is ordinarily inadmissible. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "[B]ecause Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*Id.* at pp. 618-619.) A trial court, however, "has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.] This is because a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]" (*Id*. at p. 619.)

There was no abuse of discretion in the trial court's Evidence Code section 352 ruling permitting Officer Lage to testify that his opinion was based, in part, on the poems in the notebook. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.)

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rival gangs and the poem's description of how drugs were sold was very typical of the method use by D.G.F. gang members. The court ruled that the poem of the drug selling incident was probative and notwithstanding that it referred to what might appear to be a specific incident when the author was 19 years old, the prejudicial effect of the poem did not outweigh its probative value.

On the issue of the probative value of the poems, we note that "[e]xpert testimony repeatedly has been offered to show the 'motivation for a particular crime, generally retaliation or intimidation' and 'whether and how a crime was committed to benefit or promote a gang.' [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.) The poems supported the expert's opinion testimony regarding the existence of the D.G.F. gang, Florez's membership in or association with the gang, the primary activities of the D.G.F., the motivation for the charged crimes, whether and how the crimes were committed to benefit or promote the D.G.F. gang, and the rivalries between gangs. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657.) The trial court could reasonably find that the poems had greater evidentiary weight or probative value than other sources that the expert would rely upon in support of his opinions. "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value. [Citation.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 871.)

"For Evidence Code section 352 purposes, prejudice refers to evidence that uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. [Citation.]" (*Killebrew, supra,* 103 Cal.App.4th at p. 650.) That the poems "might be interpreted as reflective of a generally violent attitude could not be said 'substantially' to outweigh their considerable probative value." (*Olguin, supra*, 31 Cal.App.4th at p. 1373.) Florez does not argue that the expert's testimony regarding the notebook took an undue consumption of time. Additionally, there is no showing that the jury was misled or confused by the expert's reliance upon the notebook's poems. The trial court told the jury that the notebook was admitted for a limited purpose, that it could not be considered for its truth but merely as a basis for the gang expert's opinion, and it could not be considered for any other purpose. "Jurors are routinely instructed to make . . . fine distinctions concerning the purposes for which evidence may be considered, and we ordinarily presume they are able to understand and follow such instructions. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Florez has not demonstrated nor does the record indicate that there is

a reasonable possibility that the jury failed to comply with the trial court's admonition by considering the poems for an improper purpose. Florez's reliance upon the prosecutor's closing remarks regarding the notebook is not persuasive. In response to Florez's sole objection to one remark by the prosecutor, the court told the jury that the prosecutor's remark was merely argument, and it was not evidence in this case. Although somewhat inarticulate at one point, the import of the prosecutor's references to the notebook was that the document was evidence, as interpreted by the gang expert, that Florez's shooting into the Ruiz house was gang related.[4]

II. *Instructional Issues*

A. CALJIC No. 2.71.7

At the trial, the prosecution presented evidence concerning Florez's out of court statements made at the meeting on Ruus Road. Inspector Michael Duarte of the district attorney's office testified that he had interviewed Witt and Gonzalez. Witt reported that at the meeting on Ruus Road, Florez said he was going to fuck someone up by which he meant he was going to shoot somebody. Witt also reported that someone in the group said "David" shot at Florez's car. At trial, Witt denied making the statements testified to by Duarte. Similarly, Gonzalez reported to Duarte that at Ruus Road, Florez said David Ruiz had shot at him. At trial, Gonzalez denied that she heard Florez say that David Ruiz had shot at Florez's car; she might have told Duarte that Florez made the statement, but she could not remember.

Florez now argues that the trial court should have instructed the jury sua sponte as to how it should consider the evidence of Florez's out of court statements using

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[4] Florez also argues that Lage's reliance upon the notebook violated his federal and state due process and equal protection rights. Assuming for the sake of argument that the issue is properly before us (*People v. Partida* (2004) 121 Cal.App.4th 202, 211-212, review granted August 31, 2004, S 127505), we reject Florez's federal and state due process and equal protection arguments for the same reasons we reject his Evidence Code 352 arguments. (*Ibid*.)

CALJIC No. 2.71.7.[5] According to Florez, the instruction would have required the jury to decide whether he made any out of court statements, and to consider that evidence "with caution." (CALJIC No. 2.71.7.)

Regardless of whether a defendant's out of court statement is technically an "admission" under traditional rules of evidence, the trial court has a sua sponte duty to give a cautionary instruction after admitting into evidence "any oral statement of the defendant, whether made before, during, or after the crime." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.) The Attorney General concedes, and we concur, that an instruction regarding Florez's out of court statements should have been given here. "We apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to [Florez] had the instruction been given. [Citations.]" (*Id*. at p. 393.) On this record, we conclude that the omitted instruction does not require reversal.

Florez did not object to the trial court's failure to give a specific instruction regarding how the jury was to consider his out of court statements. The failure to request an instruction "does not obviate the court's sua sponte duty, but may be considered in determining prejudice." (*Carpenter*, *supra*, 15 Cal.4th at p. 393.) The jury was aware of the inconsistencies in the witnesses' testimony regarding whether Florez had made any statements regarding who had shot at his car and whether Florez had indicated any intent to retaliate against David Ruiz. Contrary to Florez's contention, the court's instructions were sufficient to permit the jury to properly determine whether he "was really the leader of the efforts to retaliate that night." The court instructed the jury on the believability of witnesses (CALJIC Nos. 2.20, 2.23), prior consistent or inconsistent statements (CALJIC No. 2.13), discrepancies in testimony and weighing conflicting testimony (CALJIC Nos. 2.21.1, 2.21.2, 2.22), and

[5] Florez's failure to object at trial does not preclude appellate review of the issue "because it pertains to the trial court's sua sponte duty to instruct correctly on the basic principles of law applicable to the case. [Citations.]" (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5.)

the sufficiency of the testimony of one witness, noting that the jury "should carefully review all the evidence upon which the proof of [a] fact depends" (CALJIC No. 2.27). The instructions provided guidance on how to determine whether to give credence to the evidence of Florez's out of court statements. (*Carpenter, supra*, 15 Cal.4th at p. 393.) Unlike the situation in *People v. Bemis* (1949) 33 Cal.2d 395, 396, 401, the evidence of Florez's out of court statements was not the only evidence that connected him to the shooting at the Ruiz house. There was evidence regarding the ongoing rivalry between Florez and Ruiz, the timing of the incident and Florez's presence at the crime scene from which the jury could find that Florez believed David Ruiz was responsible for shooting at his car, and that Florez was angry about the shooting and arranged for Torre to drive him to the Ruiz house so he could retaliate by shooting at the house. Based upon the entire record, it is not reasonably probable that Florez would have received a better result had the jury been given the omitted instruction regarding how to consider the evidence of his out of court statements.

B. CALJIC No. 2.21.2

Without objection, the trial court instructed the jury using CALJIC No. 2.21.2, regarding how to consider false testimony: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all of the evidence, you believe the probability of truth favors his or her testimony in other particulars."

Relying upon *People v. Rivers* (1993) 20 Cal.App.4th 1040, Florez argues that the use of the phrase "probability of truth" constitutes federal constitutional error because it permits the jury to evaluate pivotal prosecution testimony by a probability standard, and not proof beyond a reasonable doubt.[6] He concedes, however, that his

[6] Although Florez did not object at trial to the instruction, because his "claim . . . is that the instruction is *not* 'correct in law,' and that it violated his right to due process of law[,] the claim . . . is not of the type that must be preserved by objection. [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7.)

argument has been rejected by our Supreme Court, which has held that CALJIC No. 2.21.2 does not reduce the prosecution's burden of proof. (*People v. Riel* (2000) 22 Cal.4th 1153, 1200.) As explained in *Riel*: "Even if the language 'probability of truth' standing alone would be 'somewhat suspect' (*Rivers, supra*, at p. 1046) when applied to a prosecution witness, it does not stand alone. The trial court correctly instructed the jury on the reasonable doubt standard and told it to 'consider all the instructions as a whole and . . . to regard each in the light of all the others.' The instructions as a whole correctly instructed the jury on the prosecution's burden of proof. [Citation.]" [7] (*Riel, supra*, 22 Cal.4th at p. 1200.)

III. *Trial Court's Responses to Jury's Questions During Deliberations*

The jury was initially instructed using the standard instructions for reasonable doubt[8] (CALJIC No. 2.90), definitions of direct and circumstantial evidence[9] (2.00),

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[7] So, too, in this case the court correctly instructed the jury on reasonable doubt, and told the jury, "Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others." (CALJIC Nos. 1.01, 2.90).

[8] CALJIC No. 2.90 told the jury: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

[9] CALJIC No. 2.00 told the jury: "Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact. [¶] Evidence is either direct or circumstantial. [¶] Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact. [¶] Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. [¶] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [¶] It is not necessary that facts be proved by direct evidence. They may be proved

and the sufficiency of circumstantial evidence[10] (CALJIC No. 2.01). During five days of deliberations, the jury asked several questions, which the trial court responded to without objection by defense counsel. Florez now challenges some of the court's responses, which we conclude do not warrant reversal.[11]

At some point during the first day of deliberations, the jury asked, "in order to reach an alternate interpretation of circumstantial evidence must the alternate or alternative interpretation have equal weight?" The court responded by referring the jury to the instructions regarding the difference between direct and circumstantial evidence, indicating that the prosecution could prove its case either through circumstantial or direct evidence, and that both types of evidence were to be given essentially equal weight. As to circumstantial evidence, the court referred the jury to CALJIC No. 2.01, and then called their attention specifically to some important

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also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other."

[10] CALJIC No. 2.01 told the jury: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to the defendant's guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

[11] Although Florez did not object at trial to the court's responses to the jury's questions, because his "claim . . . is that the [responses were] *not* 'correct in law,' and that [they] violated his right to due process of law[,] the claim . . . is not of the type

matters, noting that : "First of all, and most importantly, each fact that is essential to complete or to come to the inference that you're coming to, or the interpretation of the evidence, each of the underlying facts to establish an inference must be . . . proved beyond a reasonable doubt. . . . [¶] And the question is . . . what weight do you give . . . each of the underlying facts upon which you are coming to an inference about? [¶] . . . [T]he answer is you give it whatever weight you want. So you look at each piece of evidence, . . . upon which you're trying to draw an inference and you make a decision as to what weight you want to give it." The court gave the jury some examples of how the instructions should be applied, and then concluded its response by stating: "[I]f you're looking at circumstantial evidence, and you're trying to look at alternative interpretations of the evidence and inferences, that what you're really wanting to look at is what is the underlying evidentiary facts supporting each of those inferences . . . and deciding each individually in your own mind what kind of weight do you want to give the underlying evidence. It's not a question of amount or number. It's a question of what's convincing to you in terms of the overall when you look at all of the evidence."

The next day, the jury asked whether deliberations should continue "if a dissenting juror is unable to say they feel an abiding conviction of the truth of the charges of Penal Code section 12021[, subdivision] (a)(1) following extensive review of evidentiary facts. . . ." At the same time, the jury asked whether Florez had to have custody and control "over and above possession" to be guilty of violating section 12021. In response to the questions, the court instructed the jury on the definitions of custody and control, which had not been previously given to the jury, and told the jury it could find that Florez had either possession or custody and control of the gun. In light of the additional instructions, the court directed the jury to continue their deliberations.

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that must be preserved by objection. [Citations.]" (*Smithey*, *supra*, 20 Cal.4th at pp. 976-977, fn.7.)

After continued deliberations, the jury reported a deadlock, and asked the court for assistance. The court told the jury to continue its deliberations, and to attempt to focus on the issues for which further instructions might be helpful. In response, the jury asked the court for "clarifying instructions with respect to reasonable doubt and the interplay between circumstantial evidence and reasonable doubt." The court indicated that CALJIC No. 2.90 was the general instruction defining reasonable doubt. When the court asked the jury whether the real question was the interplay between reasonable doubt and circumstantial evidence, the jury foreman replied: "That coupled with how a possibility of an inference versus an evidentiary trail." In response, the court re-read the definition of reasonable doubt, and then stated: "It's not just any doubt or some speculation on the part of a juror, but a doubt which in . . . your mind leaves in you that condition that you could not say that [there is] an abiding conviction of the truth of the charge, okay. [¶] . . . So as I indicated to you, that's kind of your state of mind with respect to it's not a doubt based on some speculation or just some imaginary doubt or any possible doubt at all. Typically it's a doubt based upon some reason, something in the evidence. . . ." As to circumstantial evidence, the court re-read the first paragraph and the first sentence of the second paragraph of CALJIC No. 2.01, telling the jury that "a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but two, cannot be reconciled with any other rational conclusion. [¶] . . . [F]urther, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." The court then stated that inferences "must be proved beyond a reasonable doubt," and that "because the inference itself rests on other facts, you have to look at each of those facts and . . . determine that each of the facts which support that inference are proved beyond a reasonable doubt. So . . . if you reach an inference that the defendant was guilty beyond a reasonable doubt on a particular count, that . . . requires you to have . . . reached a determination that each of the facts which support that inference was also [proved] beyond a reasonable doubt, so

that's where the interplay comes. You have to find each of the facts supporting the inference beyond a reasonable doubt to reach the overall inference having been proved beyond a reasonable doubt. [¶] . . . That's what is required in this case if you are going to base a finding of guilt on circumstantial evidence." The court then noted, "Now, there, are some other . . . paragraphs in this jury instruction 2.01. It seemed to me that that second paragraph is the one that you were focusing on and the question is whether you need further instruction as to any of the rest of that particular instruction on circumstantial evidence." The jury foreman immediately responded, "[T]he only question that arises is you mentioned that the reason must be based on something in evidence; is that correct? Did I hear that correct?" The court replied: "Well, you're - - yeah. I mean the point is that . . . this is true whether or not it's circumstantial evidence or otherwise which is that your determinations must be based upon the evidence in this case and not from any other source. . . ."

After further deliberations, the jury asked a question regarding the scheduling of future deliberations. At that time, the court asked if any instructions or testimony would assist the jury, to which the jury foreman replied: "I don't think so, no. What we're doing right now is going through each individual piece of testimony and evidence in order to see whether there could be a different prospective put on it. . . ." The jury foreman indicated that the jury was still deliberating but that certain jurors' schedules required a break in deliberations. After another day of deliberations, the court responded to the jury's additional questions regarding certain language on the verdict form and the concept of aiding and abetting. After more deliberations, the jury returned its verdict, finding Florez guilty of discharging a firearm at an inhabited dwelling committed for the benefit of a criminal street gang and possessing a firearm as an ex-felon, and also finding true the gang enhancement allegation relating to the latter count. The jury reported that it was unable to reach a verdict on the murder count. The court accepted the verdicts, and declared a mistrial on the murder count.

Florez now argues that the jury's first question asking whether "alternate interpretation" of circumstantial evidence had to have "equal weight" appeared to be

directed toward a dissenting juror's "interpretation" pointing to innocence, referring to CALJIC No. 2.01. According to Florez, the court should have, but never conveyed to the jury that so long as an innocent interpretation is reasonable such an interpretation does not need to be equal in weight to competing guilty interpretations. Florez also argues that in response to the jury's questions regarding the interplay between reasonable doubt and circumstantial evidence, the trial court should have, but never conveyed that the ultimate inference or overall interpretation leading to a reasonable doubt is based on a combination of the trial evidence, inference (application of jurors' common sense), and sometimes the absence of evidence as well.

"Section 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law. [Citations.] If, however, ' "the original instructions are themselves full and complete, the court has discretion under . . . section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." ' [Citations.]" (*Smithey, supra,* 20 Cal.4th at p. 985, fn. omitted.) We conclude there was no abuse of discretion in this case.

Florez does not argue that the court's initial instructions to the jury concerning the prosecution's burden of proof, the difference between direct and circumstantial evidence, and the sufficiency of circumstantial evidence were incomplete or incorrect. The trial court interpreted the jury's first question regarding the "weight" to be given to alternative interpretations of circumstantial evidence as a request to clarify the instructions regarding direct and circumstantial evidence as well as the sufficiency of circumstantial evidence. With regard to the jury's later questions regarding the interplay of reasonable doubt and circumstantial evidence, the trial court interpreted those questions as seeking clarification of the interplay between reasonable doubt and the sufficiency of circumstantial evidence. The court referred the jury to CALJIC Nos. 2.90 and 2.01. The court indicated to the jury that it was focusing on the second paragraph of CALJIC No. 2.01 in response to their questions, but that it would give them additional instructions if they had questions about the other paragraphs in CALJIC No. 2.01. We do not interpret the jury foreman's query regarding the

"possibility of an inference versus an evidentiary trail," as necessarily requiring the court to sua sponte give clarifying instructions regarding all of the paragraphs in CALJIC No. 2.01, as Florez argues. If the jury had questions, the court told the jury it could ask for additional instructions regarding any of the paragraphs in CALJIC No. 2.01, but the jury did not do so. We are confident that "it was clear to the jury that the court's explanation . . . did not purport to be a complete reinstruction . . . ." (*Smithey, supra*, 20 Cal.4th at p. 985.) In the absence of any further requests from the jury, we assume that the court's responses dispelled any confusion on the jury's part regarding the law to be applied in this case. (*Ibid.*)

IV. *Cumulative Effect of Alleged Errors*

We have concluded Florez's challenges to the trial court's evidentiary ruling and jury instructions, and the prosecutor's closing remarks, are either without merit or do not warrant reversal. When viewed in combination, the alleged errors did not prejudice him. (*People v. Price* (1991) 1 Cal.4th 324, 465 [superseded by statute on other grounds].)

V. *Sentencing Issues*

A. Calculation of Presentence Conduct Credit Under Section 2933.1

Florez was convicted of the felony offense of discharging a firearm at an inhabited dwelling in violation of section 246 committed for the benefit of a criminal street gang under section 186.22(b)(4) and of possessing a firearm as an ex-felon in violation of section 12021(a)(1), with a criminal street gang enhancement under section 186.22(b)(1)(A). Without objection, the trial court calculated Florez's presentence conduct credits under section 2933.1, awarding him only 15 percent of the actual days he spent in presentence custody.

Section 2933.1 provides, in pertinent part: "(a) . . . [A]ny person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit. . . [¶] . . . [¶] (c) Notwithstanding Section 4019 [which authorizes presentence conduct credit] or any other provision of law, the maximum credit that may be earned against a period of confinement in . . . a county

jail, . . . following arrest and prior to placement in the custody of the Director of Correction, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." Florez argues that none of his convictions qualifies as a felony offense listed in section 667.5, subdivision (c) (§ 667.5(c)), and therefore, the court erred in limiting the award of presentence conduct credit under section 2933.1.[12] We disagree, concluding that the felony conviction for discharging a firearm at an inhabited dwelling house in violation of section 246 committed for the benefit of a criminal street gang under section 186.22(b)(4) qualifies as "a felony offense listed in subdivision (c) of Section 667.5, " thereby limiting Florez's presentence conduct credit to 15 percent. (§ 2933.1.)[13]

By voting for Proposition 21 (Gang Violence and Juvenile Crime Prevention Act of 1998, eff. March 8, 2000), the electorate created six new life-term gang-related felony offenses. Paragraph (4) of Section 186.22(b) "is an alternate penalty provision that provides for an indeterminate life sentence for certain underlying felony offenses that are gang related." (*People v. Briceno* (2004) 34 Cal.4th 451, 460, fn.7, citing *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6; see also *People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) The paragraph provides that when certain enumerated

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[12] A challenge to an award of presentence conduct credit may be raised at any time. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8.) Section 1237.1 provides that a request for a correction should be first presented to the trial court. Although Florez moved ex parte for a correction, he has not notified us whether the request has been ruled upon by the trial court. In any event, when other issues are litigated on appeal, like in this case, section 1237.1 "does not require defense counsel to file [a] motion to correct a presentence award of credits in order to raise that question on appeal." (*Acosta, supra,* 48 Cal.App.4th at p. 427.)

[13] Florez's conviction for possession of a firearm as an ex-felon under section 12021, subdivision (a)(1), in aid of a criminal street gang does not qualify as a "violent felony" under any paragraph of section 667.5(c). However, "by its terms, section 2933.1 applies to the offender not to the offense and so limits a violent felon's [presentence] conduct credits irrespective of whether or not all of his or her offenses come within section 667.5." (*People v. Ramos (*1996) 50 Cal.App.4th 810, 817; see *In re Reeves* (2005) 35 Cal.4th 765, 774-775.)

felonies are committed for the benefit of a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, the defendant shall be punished for the enumerated felony by "an indeterminate term of life imprisonment" with a specified minimum term. (§ 186.22(b)(4).)[14] One of the numerated felonies includes the offense at issue in this case, the felony offense of discharging a firearm at an inhabited dwelling in violation of section 246. (*Ibid*.)

Section 667.5(c) includes "both specific, enumerated crimes and descriptions of criminal conduct," which are deemed "violent" felonies. (*People v. Ruiz (*1999) 69 Cal.App.4th 1085, 1089.) At issue here is section 667.5(c), paragraph (7), which states, "Any felony punishable by death or imprisonment in the state prison for life." The life term punishment under section 186.22(b)(4) is imposed " '*for the underlying felony itself,* when the jury has determined that the defendant has satisfied the conditions specified in the statute.' " (*Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 900, fn. 6, quoting *People v. Jefferson* (1999) 21 Cal.4th 86, 101, italics added.) Thus, a felony conviction under section 186.22(b)(4), punishable by life imprisonment, qualifies as "[a] felony punishable by . . . imprisonment in the state prison for life," within the plain meaning of paragraph (7) of section 667.5(c).

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[14] Section 186.22 (b)(4) reads: "Any person who is convicted of a felony enumerated in this paragraph 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 any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraphs (B) or (C) of this paragraph. [¶] (B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55. [¶] (C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519 [*sic*- should be 518, which defines extortion]; or threats to victims and witnesses, as defined in Section 136.1."

Florez's reliance upon *People v. Thomas* (1999) 21 Cal.4th 1122 is misplaced. In *Thomas*, the defendant was convicted of first degree residential burglary, making a terrorist threat, possession of a firearm by a felon, and false imprisonment of a hostage. (*Id*. at p. 1124.) None of the offenses were listed as violent offenses in section 667.5(c) nor were any of the offenses punishable by a life term. (*Id*. at p. 1127, 1130.) The basis for the trial court's imposition of life sentences was that the convictions qualified as the defendant's "third strike" under the three strikes law. (*Id*. at p. 1127.) The Supreme Court held that under those circumstances, the defendant was entitled to presentence conduct credit under section 4019 for the convictions, and not the lesser maximum amount of 15 percent under section 2933.1. (*Id*. at p. 1127.) In so ruling, the Court concluded that "sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist" under the three strikes law. (*Id*. at p. 1130.)

Unlike the recidivist situation in *Thomas*, section 186.22(b)(4)'s inquiry "focuses on 'an element of the commission of the crime' (the intent to assist a criminal street gang) that justifies particularly severe punishment." (*Jefferson*, *supra*, 21 Cal.4th at p. 101.) As noted, paragraph (4) of section 186.22(b) " 'sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.' " (*Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 900, fn. 6, quoting *Jefferson, supra,* 21 Cal.4th at p. 101.) Because the underlying felony conviction (discharging a firearm at an inhabited dwelling in violation of section 246) committed for the benefit of a criminal street gang, under section 186.22(b)(4) "is itself punishable by life imprisonment" (*Thomas, supra*, 21 Cal.4th at p. 1130), it is a felony offense within the meaning of paragraph (7) of section 667.5(c).

" 'In interpreting a voter initiative . . ., we apply the same principles that govern statutory construction. [Citation.] Thus, [1] "we turn first to the language of the

statute, giving the words their ordinary meaning." [Citation]. [2] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] [3] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] [¶] In other words, our 'task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.' [Citation.]" (*Robert L. v. Superior Court, supra,* 30 Cal.4th at pp. 900-901.)

We are not persuaded by Florez's argument that because section 667.5(c) specifically includes certain felonies for which a life term could be imposed under section 186.22(b)(4),[15] the electorate intended to exclude as violent felonies the other life term felony offenses enumerated in section 186.22(b)(4). It is not uncommon for section 667.5(c) to list violations of Penal Code sections even though such a violation obviously would be covered by the general category of "any felony" subject to life term imprisonment under paragraph (7) of section 667.5(c). For example, by Proposition 21, the electorate added to section 667.5(c)'s list a violation of section 12310 (§ 667.5(c)(13)), even though a violation of section 12310 already met the definition of a violent felony under paragraph (7) of section 667.5(c) because it was a felony punishable by imprisonment in the state prison for life. (§ 12310.) Thus, that two of the enumerated felonies in section 186.22(b)(4) are expressly listed in section 667.5(c) does not require us to conclude that the electorate meant to exclude the other life-term enumerated felonies under section 186.22(b)(4) from being deemed violent felonies under paragraph (7) of section 667.5(c). (See *People v. Athar* (2005) 36

[15] By Proposition 21, the electorate, in pertinent part, added to section 667.5(c)'s list the following paragraphs: "(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code. [¶] (20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code." (§ 667.5(c)(19)(20).)

Cal.4th 396, 405 ["general plain meaning expressed" in statute "does not require additional . . . clarity"].)

Florez does not argue that the electorate did not intend to create new life-term gang-related felony offenses under section 186.22(b)(4). He further concedes that under his interpretation, a gang-related violation of section 246 would be the only new life-term gang-related felony not subject to the section 2933.1 limitation otherwise applicable to the other new life-term gang-related felonies under section 186.22(b)(4).[16] According to Florez, the voters could easily have determined that a violation of section 246 under certain circumstances might be less serious than the other enumerated felonies, and therefore, presentence conduct credit restrictions placed on violent felons under section 2933.1 should not apply to defendants who commit a gang-related violation of section 246. However, we see no reason for the electorate to treat differently the new life-term gang-related felony offenses under section 187.22(b)(4). It is not likely that the electorate contemplated the various ways in which a defendant could violate the life term gang-related felonies in determining whether those offenses should be deemed violent offenses under section 667.5(c)(7).

In any event, "it matters not whether the . . . voters . . . consciously considered all the effects and interrelationships of the provisions they . . . enacted. We must take the language . . . as it was passed into law, . . . without doing violence to the language and spirit of the law, interpret it so as to harmonize and give effect to all its provisions." (*People v. Garcia* (1999) 21 Cal.4th 1, 14, fn. omitted.) Our reading of the statutes that the section 186.22(b)(4) life-term gang-related felony offenses,

[16] Section 667.5(c)'s list of violent offenses includes: "[a]ny robbery;" "[c]arjacking, as defined in subdivision (a) of section 215;" "[a]ny felony in which the defendant uses a firearm which use has been charged and proved as provided in Section . . . 12022.55;" "[e]xtortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 under the Penal Code;" and "[t]hreats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code." (§ 667.5(c)(8), (9), (17), (19), (20).)

including the felony violation of section 246, qualify as felony offenses under section 667.5(c)(7) is consistent with the rules of statutory construction.

Because Florez's felony conviction for discharging a firearm at an inhabited dwelling in violation of section 246 committed for the benefit of a criminal street gang under section 186.22(b)(4) is a felony offense within the meaning of section 667.5(c)(7), the trial court properly limited Florez's presentence conduct credit to 15 percent under section 2933.1.

B. Term Imposed on Possession of Firearm Conviction Not Stayed Under Section 654

The trial court sentenced Florez to 15 years to life for discharging a firearm into an inhabited dwelling, and a concurrent term of 7 years for possessing a firearm as an ex-felon with a gang enhancement. Florez contends that his sentence for possessing a firearm should have been stayed under section 654. We disagree.

Section 654 bars multiple punishment for offenses committed in one course of conduct when those offenses arise from a single intent and objective on the defendant's part. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18-21.) However, "[w]here a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he may be punished for more than one crime even though the violations share common acts or are parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

By imposing concurrent terms, the trial court impliedly found that Florez "harbored a separate intent and objective for each offense." (*Blake*, *supra*, 68 Cal.App.4th at p. 512.) We will uphold that finding "if it is supported by substantial evidence." (*Ibid.*)

" 'Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms . . . constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case.' " (*People v. Bradford* (1976) 17 Cal.3d 8, 22, quoting *People v. Venegas* (1970) 10 Cal.App.3d 814, 821.) "It is clear that multiple punishment is

improper when the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . .' [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144.) Alternatively, "section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Id*. at p. 1145.)

In support of his argument that separate punishments are not permissible in this case, Florez relies upon the trial court's statement that "the possession of the semiautomatic weapon in this case was used for the purpose of shooting into a residence." However, he ignores the court's statement that "[t]he defendant's actions in obtaining a gun and later using it to shoot into the Ruiz home was [the] result of planning and deliberation." Thus, the trial court implicitly found that Florez already possessed, either actually or constructively, the semiautomatic gun before it was used to shoot at the Ruiz house. (*Jones*, *supra*, 103 Cal.App.4th at pp. 1148-1149.) We are not persuaded by Florez's attempt to factually distinguish *Jones* on the ground that in *Jones*, there was direct evidence that the defendant possessed the gun used in a drive-by shooting, whereas in this case, there is no direct evidence that Florez possessed or used the firearm in the shooting. Based upon the circumstances leading to the shooting at the Ruiz house, the trial court could reasonably find that Florez's possession of the gun, either actually or constructively, "necessarily occurred antecedent to the shooting." (*Jones*, *supra*, 103 Cal.App.4th at p. 1147.) "*[I]t is of no consequence that the trial court . . . drawing other reasonable inferences, might have reached a contrary conclusion*. [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) Because substantial evidence supports the trial court's implicit finding that section 654 did not apply, the imposition of multiple punishments must be upheld.

C. 15-Year Minimum Parole Eligibility Period Under Section 186.22 (b)(5)

The parties agree, and we concur, that the trial court erred by noting that Florez would not be eligible for parole until he served a minimum of 15 calendar years under section 186.22(b)(5). Section 186.22(b) establishes a sentence enhancement under paragraph (1) and two alternative penalty schemes for punishing felons whose crimes were committed for the benefit of a criminal street gang under paragraphs (4) and (5).[17] (*People v. Lopez, supra,* 34 Cal.4th at p. 1004.) Florez was sentenced on his conviction for discharging a firearm at an inhabited dwelling under section 186.22(b)(4), and a gang-related sentence enhancement was imposed under section 186.22(b)(1)(A) in connection with his conviction for possession of a firearm as an ex-felon. Because Florez was not convicted of any offense that was subject to the 15 year minimum parole eligibility period under paragraph (5) of section 186.22(b), the limitation in paragraph (5) is not applicable. We therefore remand the matter to the trial court to modify the sentence accordingly.[18]

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[17] Section 186.22(b) reads, in pertinent part: "(1) *Except as provided in paragraphs (4) and (5),* any person who is convicted of a felony committed for the benefit of . . . 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 . . . be punished as follows: [¶] (A) . . . [T]he person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] . . . [¶] (4) Any person who is convicted of a felony enumerated in this paragraph 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, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated [as provided]. . . . [¶] (5) "*Except as provided in paragraph (4),* any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (Italics added.)

[18] We note that the abstracts of judgments for the indeterminate and determinate sentences, which appear in the clerk's transcript at pages 177-180, contain

DISPOSITION

The matter is remanded to the trial court to modify the sentence imposed upon the conviction for discharging a firearm at an inhabited dwelling committed for the benefit of a criminal street gang to reflect that the sentence was imposed under Penal Code section 186.22(b)(4), and the 15-year minimum parole eligibility period under Penal Code section 186.22(b)(5) is not applicable. As so modified, the judgment is affirmed. The trial court is directed to issue amended abstracts of judgments for the indeterminate and determinate terms of imprisonment, reflecting the modified sentence, case number H33067, the total number of days to be credited for presentence time served of 552 days, and that presentence conduct credit was computed under Penal Code section 2933.1. The court shall forward copies of the amended abstracts to the Department of Corrections.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Pollak, J.

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typographical errors. Some of the pages of the abstracts contain the wrong case number, the wrong number of days to be credited for presentence time served, and the wrong Penal Code section the court relied upon in computing presentence conduct credit. The amended abstracts of judgments issued on remittitur should reflect case number H33067, total credit for time served of 552 days, and that the court used section 2933.1 in computing presentence conduct credit.

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Jo-Lynne Q. Lee

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Rene A. Chacon and Ryan B. McCarroll, Deputy Attorneys General for Plaintiff and Respondent