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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RUBEN JOE HERNANDEZ, Defendant and Appellant.	B175866 (Los Angeles County Super. Ct. No. BA236117)
In re RUBEN JOE HERNANDEZ, on Habeas Corpus.	B185049 (Los Angeles County Super. Ct. No. BA236117)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marsha N. Revel, Judge. Original petition for writ of habeas corpus. Judgment affirmed; writ denied.

Neil Rosenbaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruben Joe Hernandez, in propria persona, for Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Adrian N. Tigmo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and II.

A jury found appellant Ruben Joe Hernandez guilty of first degree murder. It also found true allegations the crime was committed for the benefit of a criminal street gang, a principal personally used and discharged a firearm causing death, and Hernandez had suffered a prior conviction and prison term. In sentencing Hernandez the trial court imposed a term of 25 years to life for the murder and added a consecutive term of 25 years to life under Penal Code section 12022.53, subdivisions (d) and (e)(1).[1] On appeal Hernandez contends the evidence was insufficient to convict him of murder and section 12022.53, subdivision (e)(1) is unconstitutional because it treats aiders and abettors in killings for the benefit of a street gang more severely than aiders and abettors in killings for the benefit of other groups. In a petition for habeas corpus Hernandez claims his conviction resulted from the ineffective assistance of his trial counsel. We ordered the petition for habeas corpus heard together with the appeal.

For the reasons set forth below we affirm the judgment and deny the petition.

FACTS AND PROCEEDINGS BELOW

Late one night Eric Estrada stood on the balcony of an apartment building on Poplar Avenue in Montebello drinking with some friends who lived in the building. One of these friends, Joseph Bernal, was a member of Metro 13. Estrada did not belong to a gang.

The group on the balcony saw a White Chevrolet Suburban drive slowly past the building. Bernal thought he recognized the car as belonging to a member of a rival gang, Southside Montebello.[2] Bernal had had previous run-ins with members of Southside including defendant Hernandez. He ran to get a weapon in case the people in the car were "to try something." In the meantime the Suburban made a U-turn and stopped in

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

[2] A Montebello police detective testified members of Southside and Metro had been attacking and assaulting one another for at least 15 years.

front of the apartment building. Dolores Guillen, one of the persons on the balcony, yelled: "Get inside. Get inside. This fool's coming back." Dolores, her sister Rosemary and some others who had been on the balcony quickly ran into Dolores's apartment. Estrada did not.

Looking out the apartment window Rosemary saw a person in a white sweatshirt walking up the driveway. She lost sight of the person for a short time. Then she heard footsteps running up the stairs and a voice shout "Southside Montebello!" When the person came back in view she could see part of his face. The person was pointing a gun at someone and saying: "Where you from? Are you from Metro?" She heard a voice reply: "I ain't from any gang." At that point Rosemary backed away from the window. Moments later she heard a shot and heard footsteps running down the stairs. Estrada had been shot once in the head. He died a few days later.

Howard Cuglietta, another resident of the apartment building, testified he had gotten out of bed to use the bathroom and drink a glass of milk when he heard noises outside. He peeked through his blinds and saw a man in "kind of a grayish sweat shirt with a hood" walk down the driveway and get in the back seat of a car. Then he heard a gunshot and "a few seconds after that" a man dressed in black came down the stairs and got in the front seat of the car. He did not see the men's faces. Cuglietta admitted he told the police a few hours after the shooting the man in black had been the first to get into the car and the man in the white or gray sweat shirt was the one who later came down the stairs.

Mark Chacon, a member of the Southside Montebello gang, entered into a plea bargain with the prosecution in which he admitted to a charge of manslaughter in the Estrada slaying and accepted a 13 year prison term in exchange for his testimony against defendant Hernandez. Chacon testified as follows.

On the night of the murder he drove his white Suburban to the home of defendant Hernandez, a fellow Southside gang member. The two of them picked up a third gang member, Raymond Doktorczyk, and then drove to a friend's house where they visited and drank beer for a short time. Hernandez was wearing a black jacket and was armed

with a .38 revolver. Chacon did not know if Doktorczyk had a gun and could not remember what he was wearing.

Around midnight Chacon, Hernandez and Doktorczyk left to go "cruising" in Chacon's car. Chacon drove, Hernandez sat in the front passenger seat and Doktorczyk sat in the rear. They made their way to Poplar Avenue in Montebello where Chacon knew members of a rival gang, Metro 13, congregated. According to Chacon they were not "hunting" for rival gang members but if they saw any they were going to "gang bang," "fight," and "maybe more . . . if it leads to that." Chacon drove slowly past the apartment building where Estrada and his friends were standing on the balcony. Either Hernandez or Doktorczyk said "Turn around." Chacon made a U-turn and drove back to the apartment building "to see if there was anybody from Metro there." He parked in front of the driveway and Hernandez and Doktorczyk got out of the car.

Asked what he thought Hernandez and Doktorczyk were going to do Chacon answered he thought they were going to "hit them up." "Hit them up," he explained, meant "ask them where they were from" which is a challenge in gang culture.

Chacon lost sight of Hernandez and Doktorczyk when they went up the driveway. Moments later he heard a gunshot and the two men came running back to the car. Hernandez was carrying the revolver and got into the front seat. Doktorczyk got in the back. Chacon testified to statements made by Doktorczyk and Hernandez as they drove away. According to Chacon, "[Doktorczyk] goes 'I hit that fool' and then he said he just shot him." Chacon turned to Hernandez and asked what happened. Hernandez replied, "'I shot that fool because he got too close.'" Chacon later clarified his testimony regarding Doktorczyk's statement. He explained Doktorczyk did not say "I shot him" he said "he" shot him, the "he" referring to Hernandez.

A Montebello police officer testified a search of Doktorczyk's residence produced a white sweat shirt. The shirt was not shown to the jury.

In closing argument the prosecutor acknowledged the evidence would allow a reasonable juror to conclude either Hernandez or Doktorczyk fired the shot which killed Estrada but contended it really did not matter which one was the shooter. Even assuming

Doktorczyk was the shooter Hernandez was an aider and abettor and therefore equally guilty of murder.

The jury found Hernandez guilty of first degree murder. It also found he committed the murder for the benefit of a criminal street gang under section 186.22 and that he had suffered a prior prison term. As to the gun enhancements the jury found it true that in the commission of the offense a principal personally used a firearm, true that a principal personally and intentionally discharged a firearm and true that a principal personally and intentionally discharged a firearm which proximately caused the death of the victim. The jury, however, found it not true that Hernandez personally used or discharged a weapon in the commission of the crime.

The trial court sentenced Hernandez to a term of 25 years to life for the murder, a consecutive 25 years to life for the gun discharge enhancement and a consecutive one year term for the prior prison term enhancement. The gang enhancement was stayed. Hernandez filed a timely appeal.

DISCUSSION

I. THE EVIDENCE SUPPORTS HERNANDEZ'S CONVICTION FOR FIRST DEGREE MURDER.

Hernandez concedes the person who killed Estrada did so intentionally. He maintains, however, the evidence was insufficient to prove he was the person or, if he was, that he acted with premeditation. In the alternative he argues if Doktorczyk was the gunman the evidence was insufficient to prove he knew and shared Doktorczyk's criminal purpose to kill Estrada and acted with the intent to aid Doktorczyk accomplish this purpose. We reject both arguments.

Viewing the evidence in the light most favorable to the judgment we conclude a reasonable juror could find beyond a reasonable doubt Hernandez was the person who shot Estrada and that he acted with premeditation.

With respect to the identity of the shooter, Chacon testified Hernandez was wearing a black jacket and Cuglietta testified the person he saw coming down the stairs *after* the gunshot was dressed in black. Chacon further testified Hernandez told him as they were leaving the scene: "I shot that fool because he got too close."

In *People v. Anderson* our Supreme Court laid out a framework to assist reviewing courts in assessing whether the evidence supports an inference of premeditated murder.[3] The court identified three categories of evidence which could support a finding of premeditation: facts showing prior planning, facts showing motive and facts about the manner of the killing which show a preconceived plan.[4] The record here shows evidence of willful premeditation under each of the three *Anderson* categories.

Facts showing prior planning include the evidence Hernandez brought a gun with him when he went "cruising" into Metro 13 territory with Chacon and Doktorczyk and he was armed with the gun when he got out of the car in front of the apartment building. He knew the apartment building was the residence and gathering place for members of Metro.[5]

The motive for the killing was plain. It was undisputed Southside and Metro were enemies. Either Hernandez or Doktorczyk yelled out "Southside" just before the shooting. Killing someone believed to be a member of Metro would promote Southside as the preeminent gang in the area as well as promoting the shooter's reputation within the gang.

The manner of the killing also supports the conclusion the killing was planned in advance. The shot which killed Estrada was not fired from a passing car or even from the

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[3] *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.

[4] *People v. Anderson*, *supra*, 70 Cal.2d at pages 26-27.

[5] See *People v. Adcox* (1988) 47 Cal.3d 207, 240 (bringing gun to scene of shooting is evidence of prior planning).

street. It was fired by a person who had entered the apartment building itself. Moreover, the shot was not wild or random but a clean shot through the victim's head.[6]

Alternatively, a reasonable juror could find Hernandez aided and abetted Doktorczyk in the shooting.[7]

To convict a defendant of a crime based on an aider and abettor theory of liability a jury must find the defendant "act[ed] with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense."[8] Mere presence at the scene is not enough.[9] It is not necessary, however, to prove the defendant acted with premeditation.[10]

Assuming Doktorczyk was the perpetrator, the evidence showed he and Hernandez were members of Southside and that Southside and Metro had a violent relationship. The killing occurred in Metro territory. After Chacon had cruised by the apartment building either Hernandez or Doktorczyk told him to turn around and go back. Hernandez got out of the car with Doktorczyk and accompanied him at least part of the way into the apartment building. Hernandez or Doktorczyk yelled out their gang's name and confronted Estrada with the gang challenge "where you from?" Most significantly, since there was no evidence Doktorczyk had a gun before he entered the apartment building it would be reasonable for the jury to conclude the gun used to kill Estrada came

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[6] See *People v. Adcox*, *supra*, 47 Cal.3d at page 240 (single shot to the head of unarmed victim is evidence shooting was conceived in advance).

[7] Hernandez argues the fact the jurors found "not true" the allegations he personally used and discharged a firearm but found "true" the allegations a principal used or discharged a firearm means the jurors must have convicted him of murder as an aider and abettor, believing Doktorczyk did the actual shooting. Not so. The jurors could have convicted Hernandez of murder without agreeing whether he was the perpetrator or an aider and abettor. (*People v. Maury* (2003) 30 Cal.4th 342, 423.) And, if they did not agree whether Hernandez was the perpetrator or an aider and abettor, they could still find true the allegation a principal in the crime used and discharged a firearm. Nothing in the trial court's instructions prevented this result.

[8] *People v. Beeman* (1984) 35 Cal.3d 547, 560.

[9] *People v. Salgado* (2001) 88 Cal.App.4th 5, 15.

[10] *People v. Lee* (2003) 31 Cal.4th 613, 624.

from Hernandez. After the shooting Hernandez joined Doktorczyk in running back to the car and escaping the scene.

Based on the foregoing there is sufficient evidence Hernandez aided and abetted the murder of Estrada. Hernandez was not merely present at the scene of the crime. A reasonable juror could find Hernandez knew the reason Chacon turned the car around and stopped in front of the apartment building and the reason Doktorczyk got out of the car was to engage in a fight with members of the Metro gang. By accompanying Doktorczyk toward the building and furnishing him a firearm Hernandez demonstrated his knowledge and intent Doktorczyk would use the weapon to kill any Metro member, real or suspected, he encountered inside the building.[11]

We conclude, therefore, the evidence was sufficient to convict Hernandez of first degree murder.

II. HERNANDEZ DID NOT RECEIVE INEFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL.

In his petition for a writ of habeas corpus Hernandez contends he received ineffective assistance from his trial counsel for reasons we discuss below. In order to prevail on a claim of ineffective assistance the defendant must show his trial attorney's representation fell below prevailing professional norms and it is reasonably probable the result of the case would have been more favorable had it not been for counsel's neglect.[12] Hernandez has failed to satisfy either prong of this test.

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[11] See *People v. Cabral* (1975) 51 Cal.App.3d 707, 714, (furnishing the weapon used in the crime supports conviction for aiding and abetting); *People v. Cowling* (1935) 6 Cal.App.2d 466, 470 (furnishing weapon and accompanying perpetrator to and from the scene of the crime support conviction for aiding and abetting).

[12] *People v. Fosselman* (1983) 33 Cal.3d 572, 584.

A. Conflict of Interest.

Hernandez first contends his conviction should be reversed because his trial counsel had a conflict of interest.

It is beyond dispute the right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest."[13] The kind of conflict which may deprive a defendant of effective assistance of counsel is not limited to a situation involving counsel's responsibilities to another client or a third person. A conflict may also arise when an attorney's duty to the defendant conflicts with the attorney's own interests.[14]

Hernandez asserts a conflict of the latter type. In his petition for habeas corpus Hernandez alleges his trial attorney wanted to present a defense based on an alibi: that Hernandez was not present when Estrada was shot; he was somewhere else. At a hearing on a *Marsden* motion[15] to obtain new counsel Hernandez told the trial court such an alibi would not be true because "I was there." Hernandez made it very clear in the trial court he did not want a defense based on an untruthful alibi. "That's not how it's going to be," he told the court.[16]

We agree an attorney's insistence on presenting a defense which lacks any factual basis and is opposed by his own client would create a conflict of interest between attorney and client. Counsel is just as ineffective when he seeks to assert an unmeritorious defense as when he withdraws a potentially meritorious one.[17]

The record here, however, shows counsel for Hernandez did not base his defense on a contention Hernandez was somewhere else on the night Estrada was shot. Counsel

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[13] *Wood v. Georgia* (1981) 450 U.S. 261, 271.

[14] *People v. Bonin* (1989) 47 Cal.3d 808, 835.

[15] *People v. Marsden* (1970) 2 Cal.3d 118.

[16] The trial court denied the *Marsden* motion. Hernandez has not appealed from that ruling.

[17] *People v. Cox* (1987) 193 Cal.App.3d 1434, 1444.

presented no witnesses to establish such an alibi and he told the jury in closing argument Hernandez was in fact one of the people who got out of Chacon's car at the apartment building. Furthermore the record does not support Hernandez's claim his counsel at one time contemplated basing Hernandez's defense on a false alibi. The *Marsden* hearing was held in January 2004. In September 2003 Hernandez made a statement to the police admitting he was present at the scene when the murder took place. While it is highly improbable Hernandez's trial counsel would violate the canons of ethics by asserting an alibi defense he knew was untrue[18] it is even more unlikely he would do so in the face of his own client's statement to the police contradicting the alibi.

Even if defense counsel had contemplated or suggested an untruthful alibi based on Hernandez being somewhere else at the time of the shooting Hernandez would not be entitled to reversal of his conviction. To obtain reversal for ineffective assistance of counsel based on defense counsel's conflict of interest it is not enough to show an actual conflict existed. The defendant must also show the conflict "adversely affected counsel's performance."[19] As we noted above counsel did not make any attempt to use a false alibi in defense of his client at trial. Moreover, as we will discuss below, counsel's performance did not fall below "prevailing professional norms" and therefore it could not have been adversely affected by his alleged conflict of interest.

B. Failure to Present Evidence Showing Doktorczyk Shot Estrada.

Hernandez next contends his trial counsel was negligent in failing to produce evidence from which the jury reasonably could find Doktorczyk was the person who shot

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[18] Rule 5-200 of the Rules of Professional Responsibility states: "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; [and] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact[.]"

[19] *People v. Bonin*, *supra*, 47 Cal.3d at pages 837-838.

Estrada. Specifically he maintains defense counsel (1) failed to subpoena Doktorczyk as a defense witness or even interview him although he was in custody and accessible to counsel; (2) failed to move for production of the white sweatshirt found in a search of Doktorczyk's residence following the murder; and (3) failed to obtain and test the caliber of a spent bullet allegedly found at the scene by Bernal several days after the shooting.

This claim of negligence fails for several reasons.

Above all it fails because proving Doktorczyk shot Estrada would not have affected the outcome of the trial. As we discussed above,[20] there was substantial evidence from which the jury could find Hernandez guilty of murder as an aider and abettor even if it found Doktorczyk did the actual shooting.[21]

Furthermore, defense counsel reasonably could have concluded there was no point in interviewing Doktorczyk or calling him as a witness. Counsel knew the police had already taken a statement from Doktorczyk in which he had "basically deni[ed] everything" including being in the car. It is speculation bordering on fantasy to assert Doktorczyk, who denied even being at the scene, would come to court, waive his privilege against self-incrimination, and give testimony exonerating Hernandez.

Hernandez argues competent counsel would at least have moved to continue his trial until after Doktorczyk had been tried for Estrada's murder. We disagree. A continuance would have been within the trial court's discretion and there is little possibility the court would have granted a continuance in this case. At the time Hernandez went to trial Doktorczyk had not been charged with the murder of Estrada much less given a trial date. For a defendant to obtain a continuance of his trial in order to take advantage of a codefendant's testimony the defendant "must make a 'clear showing' as to the substance of the codefendant's testimony, and that the testimony will

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[20] See discussion at pages 7-8, *ante*.

[21] In *Avila v. Galaza* (9th Cir. 2002) 297 F.3d 911, 919, relied on by Hernandez, the court found trial counsel was ineffective in not investigating or introducing evidence at trial someone else shot the victim. But in that case there was no evidence which would have supported Avila's guilt as an aider and abettor. (*Id.* at pp. 914-915.)

be exculpatory."[22] Here, there was no reason to believe if Doktorczyk testified at Hernandez's trial Doktorczyk's testimony would be exculpatory. As noted above, Doktorczyk denied even being at the scene when the murder occurred. Surely there was no reason to believe Doktorczyk would have taken the stand and admitted the sweatshirt seized by the police belonged to him or he was wearing it the night of the murder. "Counsel cannot be faulted for failing to make a doomed motion."[23] In any case, the jury heard testimony from a police witness a white sweatshirt was discovered in a search of Doktorczyk's residence following the murder.

Defense counsel could also have reasonably believed the issue of the caliber of the bullet allegedly found by Bernal was better left alone. Hernandez argues if the bullet proved not to be from a .38 caliber revolver this evidence would tend to show the fatal shot was not fired from the weapon Chacon testified Hernandez possessed on the night of the murder. Hernandez fails to consider the other side of the coin. If a test showed the bullet *was* .38 caliber the prosecution could subpoena the expert who conducted the test to prove this fact which would support its case against Hernandez, albeit marginally. Counsel's decision not to pursue the caliber of the bullet meant the bullet was a non-issue in the trial since there was no evidence connecting it to the shooting except for Bernal's testimony and Bernal had previously testified he "hated" Hernandez.

C. Failure to Produce and Object to Evidence Relating to Hernandez's Gang Involvement.

An important issue at the trial was whether Estrada's murder was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the intent to promote, further, or assist in any criminal conduct by gang members."[24] The jury found this allegation true which not only triggered a street gang enhancement but

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[22] *Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1393.

[23] *People v. Farnam* (2002) 28 Cal.4th 107, 173.

[24] Section 186.22, subdivision (b)(1).

more importantly resulted in a 25 years to life gun enhancement under section 12022.53, subdivisions (d) and (e)(1).[25]

Hernandez argues his counsel provided ineffective assistance on the gang issue. Specifically he maintains defense counsel (1) failed to subpoena witnesses to testify to his good character and that he was no longer active in the Southside Montebello gang; (2) failed to stipulate he was a former member of Southside; (3) failed to object to evidence of an uncharged crime allegedly committed by defendant; and (4) failed to object to hearsay evidence of crimes committed by Southside members.

"In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is [admissible] if such evidence is [offered] by the defendant to prove his conduct in conformity with such character or trait of character."[26]

According to Hernandez he had character witnesses who would have testified he had ended his involvement with the Southside gang and was actively working to turn young people away from gangs by giving talks to students about gang life and working at the Montebello Parks and Recreation Department helping with day care, athletic field maintenance and coaching football.

Evidence of past specific acts to prove conduct (or non-conduct) at a later time does not fall within Evidence Code section 1102 and would have been excluded if offered.[27]

Hernandez could have presented evidence of his reputation for not being an active gang member but a number of factors cause defense attorneys to consider the wisdom of calling character or reputation witnesses on behalf of their clients. One is the likelihood defendant's friends and co-workers will not be taken seriously by the trier of fact when providing opinion or reputation testimony. Their impeachment for bias is obvious. In addition, the constraints on their testimony under Evidence Code section 1102 are likely

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[25] We discuss this enhancement in Part III of our opinion, *post*.

[26] Evidence Code section 1102, subdivision (a).

to deprive the evidence of much convincing force. The most serious drawback to reputation evidence is it allows the prosecutor to cross-examine the witness about specific instances of the defendant's conduct which are inconsistent with the witness's reputation testimony.[28] Here, a witness who testified to Hernandez's reputation for not engaging in gang activity and for opposing gang membership could be asked if she was aware on the night of the murder Hernandez was "partying" and "cruising" with active members of his former gang and that the Montebello police still considered him an active member of Southside Montebello. Thus, the decision to call character witnesses was a tactical decision by Hernandez's trial counsel which must be evaluated in the context of the facts and circumstances of the case.[29] The record shows defense counsel considered but rejected the strategy of calling character witnesses. For the reasons explained above we cannot say counsel's decision not to call such witnesses fell below applicable professional norms.

The contention counsel was ineffective in not stipulating Hernandez was a *former* gang member is without merit. It takes two to stipulate. Hernandez has not cited us to any evidence in the record the prosecutor offered such a stipulation nor is it likely the prosecutor would have agreed to such a stipulation if it had been offered by defense counsel. It was important to the prosecution's case, in showing motive for the murder, to establish Hernandez was an *active* gang member. The prosecution had the testimony of Chacon and a Montebello police "gang investigator," Andy Vuncanon, to establish this fact. Thus it is not reasonable to believe the prosecution would stipulate Hernandez was not an active gang member on the day of the murder.

In response to a question about how he knew Southside and Metro 13 were enemies Vuncanon testified that in preparation for his testimony he "came across an incident [in] which defendant had an altercation with a rival Metro 13 gang member."

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[27] *People v. McAlpin* (1991) 53 Cal.3d 1289, 1309.

[28] See Mendez, Evidence: The California Code and the Federal Rules (2d ed. 1999) at pages 42-43.

Hernandez faults his counsel for not objecting and moving to strike this testimony. There were no grounds for objection. "[E]vidence that a person committed a crime, civil wrong, or other act [is admissible] to prove some fact (such as motive . . .) other than his or her disposition to commit such an act."[30] Here, evidence Hernandez had an altercation with a member of Metro 13 was relevant to prove hostility between the gang members and Hernandez's motive in killing someone he believed belonged to the rival gang.

Finally, Hernandez contends his counsel was negligent in not objecting to evidence of crimes committed by members of the Southside Montebello gang on the grounds such evidence was hearsay and unduly prejudicial. This contention lacks merit.[31]

Through the testimony of Vuncanon and the introduction of "prison packets" the prosecution presented evidence of the prior felony convictions of two Southside members: Robert Alonzo convicted of robbery in January 2000 and George Ortiz convicted of assault in July 2001. The introduction of records of convictions commonly referred to as "prison packets" is not barred by the hearsay rule because such evidence is specifically made admissible by section 969b. Nor was the introduction of this evidence unduly prejudicial to Hernandez. In order to prove the street gang enhancement the prosecution had to establish members of Southside had committed specified crimes, those crimes were committed after September 26, 1988, the last of those crimes occurred within three years after a prior offense, and the crimes were committed on separate occasions or by two or more persons.[32] The prosecution's evidence was narrowly tailored to meet these statutory requirements.

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[29] *People v. Bolin* (1998) 18 Cal.4th 297, 333.

[30] Evidence Code section 1101, subdivision (b).

[31] Also without merit is Hernandez's contention the prison packets were inadmissible hearsay under *Crawford v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 1354. Records of prior convictions are not "testimonial" and therefore not subject to *Crawford*'s confrontation requirement. (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225.)

[32] Section 186.22, subdivisions (e), (f).

D. Failure to Bifurcate Trial on Prior Convictions.

Hernandez argues trial counsel rendered ineffective assistance by stipulating in front of the jury he had been convicted of being a felon in possession of a firearm based on a prior conviction for battery.

No declaration from trial counsel has been submitted explaining why he agreed to enter into this stipulation and since Hernandez did not testify it is difficult to see any tactical reason for it. Nevertheless we find no basis here for reversing Hernandez's present conviction.

A trial counsel's tactical error is generally not ground for reversal. The defendant must show a reasonable probability that but for trial counsel's error the result of the trial would have been more favorable.[33] Hernandez has not made such a showing here. The only way this stipulation could prejudice Hernandez would be if the jurors viewed his prior gun possession conviction as supporting Chacon's testimony Hernandez was carrying a gun when he went with Doktorczyk to the apartment building. The jurors, however, were specifically told not to consider Hernandez's prior convictions in determining his guilt of the present charges. Absent any evidence to the contrary we must assume the jurors followed this instruction.[34]

III. SECTION 12022.53 DOES NOT DENY THE RIGHT OF EQUAL PROTECTION OR DUE PROCESS OF LAW TO THOSE WHO AID AND ABET A GANG-RELATED MURDER IN WHICH THE PERPETRATOR USES A GUN.

Section 12022.53, subdivisions (d) and (e)(1) when read together require the trial court to impose a consecutive 25 years to life sentence enhancement when a defendant is convicted of murder for the benefit of a criminal street gang and "*[a]ny* principal in the offense" "personally and intentionally discharges a firearm and causes . . . death, to any

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[33] *People v. Maury*, *supra*, 30 Cal.4th at page 389.

person other than an accomplice[.]"[35] (Italics added.) Under this sentencing regime an aider and abettor who is found guilty of murder is subject to the 25 years to life enhancement even though he or she did not personally and intentionally discharge a firearm causing death if the murder was committed for the benefit of a criminal street gang and "any principal" in the offense personally and intentionally discharged a firearm causing death.[36] In all other killings subject to section 12022.53, subdivision (d)—that is, killings not for the benefit of a criminal street gang—a principal, including an aider and abettor, is only subject to the 25 year enhancement if he or she personally and intentionally discharged a firearm causing death.

In *People v. Gonzales*, a case not cited by either party, the Court of Appeal upheld this sentencing scheme against a claim it unreasonably discriminated between aiders and abettors of gang crimes and other aiders and abettors.[37] The court held defendants had failed to meet a prerequisite for equal protection analysis—a showing the two groups being compared are sufficiently similar with respect to the purpose of the law in question to trigger an inquiry into whether their disparate treatment is justified.[38] "Defendants' arguments fail to establish that they are similarly situated to other aider and abettors," the court stated, because "[u]nlike other aiders and abettors who have encouraged the

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[34] *People v. Cunningham* (2001) 25 Cal.4th 926, 1014.

[35] Section 12022.53, subdivision (d) states: "Notwithstanding any other provision of law, any person who, in the commission of [murder] personally and intentionally discharges a firearm and proximately causes . . . death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Subdivision (e)(1) of section 12022.53 provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: (A) The person violated subdivision (b) of section 186.22 [i.e., committed the offense for the benefit of a criminal street gang and with the specific intent to promote, further or assist in any criminal conduct by gang members]. (B) *Any principal* in the offense committed any act specified in subdivision (b), (c) or (d)." (Italics added.)

[36] Under section 31 a "principal" includes not only those persons who directly commit the act but also those who "aid and abet in its commission."

[37] *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12-13.

commission of a target offense resulting in a murder, defendants committed their crime with the purpose of promoting and furthering their street gang in its criminal conduct."[39]

Hernandez makes a more narrow claim of unconstitutionality. He argues section 12022.53 violates the guarantee of equal protection of the law because it unreasonably discriminates between aiders and abettors of firearm users who commit murder for the benefit of a "criminal street gang" and aiders and abettors of firearm users who commit murder for the benefit of equally dangerous criminal associations such as drug cartels, white supremacist groups and terrorist organizations.

Certainly a cogent argument can be made those who aid and abet a murder for the benefit of a "criminal street gang" are similarly situated with those who aid and abet a murder for the benefit of other outlaw organizations. Indeed it could be argued the two classes of aiders and abettors are so similar section 12022.53 does not distinguish between them and there is no equal protection issue.[40] Assuming Hernandez has established disparate treatment of similarly situated aiders and abettors his equal protection claim nevertheless fails.

Hernandez contends the sentencing scheme in section 12022.53, subdivisions (d) and (e)(1) is unconstitutional on the grounds it is underinclusive and overinclusive.

It is beyond dispute the state has a legitimate interest in suppressing criminal street gangs. Hernandez concedes this. He also acknowledges the state has a legitimate interest in punishing criminal gun use more severely than the use of other weapons. But, he

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[38] *People v. Gonzales, supra,* 87 Cal.App.4th at page 12.

[39] *People v. Gonzales, supra,* 87 Cal.App.4th at page 13.

[40] Section 186.22, subdivision (f) defines a "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [specific criminal acts including murder, robbery, arson, kidnapping and torture], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Although the statute was aimed at gangs such as the Bloods, the Crips and Southside Montebello (see section 186.21) a case could be made it also covers the White Knights of the Klu Klux Clan, the "Mexican Mafia," and Al-Qaeda.

maintains, the sentencing scheme in section 12022.53, subdivisions (d) and (e)(1) is underinclusive because it punishes aiders and abettors of crimes committed for the benefit of street gangs more severely than aiders and abettors of crimes committed for the benefit of other groups which are equally or more dangerous than street gangs including hate groups, terrorist organizations and the like.

Courts have long recognized, however, a Legislature "acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach." It may direct its attention "to those classes of cases where the need is deemed to be clearest."[41] In enacting the street gang legislation in 1988 the Legislature found, among other things, "in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986."[42] When the Legislature enacted section 12022.53 ten years later and made aiders and abettors of gang crimes involving gun use equally liable with the actual perpetrator it did so "in recognition of the serious threats posed to the citizens of California by gang members using firearms."[43] As our Supreme Court has stated, the Legislature "is not prohibited by the equal protection clause from striking the evil where it is felt the most."[44]

Hernandez further maintains the sentencing scheme in section 12022.53, subdivisions (d) and (e)(1) is overinclusive because it imposes the draconian punishment of 25 years to life on aiders and abettors whose relationship with the street gang may, in his words, be only "nominal, passive or purely technical."[45] Statutes such as section 12022.53 which affect the fundamental right of liberty must be subjected to strict scrutiny, Hernandez argues, and subdivisions (d) and (e)(1) cannot survive such scrutiny because they are not narrowly tailored to address the state's legitimate interest in

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[41] *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 400.

[42] Section 186.21

[43] *People v. Gonzales*, *supra*, 87 Cal.App.4th at page 19, quoted with approval in *People v. Garcia* (2002) 28 Cal.4th 1166, 1172, 1176.

[44] *Werner v. Southern Cal. Etc. Newspapers* (1950) 35 Cal.2d 121, 132.

deterring gun use by gang members. We find this argument unpersuasive for several reasons.

Initially we do not believe Hernandez has standing to bring an equal protection challenge to the statute "as applied" to aiders and abettors who have only a tangential relationship with the street gang for whose benefit the crime was committed. In the present case substantial evidence exists to show Hernandez had more than a "nominal, passive or purely technical" relationship with Southside Montebello. Even though Hernandez suffered an "'injury in fact'"—he was sentenced under the challenged statute—he has not shown he has a "close relationship" with any tangential aider and abettor or that there is any reason why persons with tangential relationships to a gang could not raise an equal protection challenge in their own right.[46]

Furthermore, although our Supreme Court has applied strict scrutiny to invalidate a sentencing scheme which punished young people more severely than adults convicted of the same crime,[47] subsequent Court of Appeal decisions have not read this case as requiring strict scrutiny of every criminal law imposing punishment.[48] Where as here the question is not whether to deprive Hernandez of his liberty but for how long, we believe rational basis review, not strict scrutiny, is the appropriate test to resolve an equal protection challenge.

Clearly the Legislature had a rational basis for imposing a 25 years to life enhancement on one who aids and abets a gang-related murder in which the perpetrator uses a gun regardless of the relationship between the aider and abettor and the perpetrator. As we previously observed, the purpose of this enhancement is to reduce

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[45] Compare section 186.22, subdivision (a) which punishes a person who "actively participates" in a criminal street gang."

[46] See *Powers v. Ohio* (1991) 499 U.S. 400, 411.

[47] *People v. Olivas* (1976) 17 Cal.3d 236, 250-251.

[48] See for example, *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116; *People v. Owens* (1997) 59 Cal.App.4th 798, 802; *People v. Bell* (1996) 45 Cal.App.4th 1030, 1047-1049; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1330-1331; and see *People v. Gonzales*, *supra*, 87 Cal.App.4th at page 13 and cases cited therein.

through punishment and deterrence "the serious threats posed to the citizens of California by gang members using firearms."[49] One way to accomplish this purpose is to punish equally with the perpetrator a person who, acting with knowledge of the perpetrator's criminal purpose, promotes, encourages or assists the perpetrator to commit the murder. It is irrelevant to this purpose whether the aider and abettor was a hard-core gang member or merely a "wannabe."

Finally, Hernandez contends section 12022.53, subdivisions (d) and (e)(1) violate due process because they allow the imposition of an enhancement on an aider and abettor when the perpetrator uses or discharges a firearm without any requirement the aider and abettor knew or intended the murder be committed by the use or discharge of a firearm. This same argument was made and rejected in *People v. Gonzales*.[50] We agree with the reasoning in *Gonzales*.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied.

CERTIFIED FOR PARTIAL PUBLICATION

JOHNSON, J.

We concur:

PERLUSS, P.J. WOODS, J.

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[49] *People v. Gonzales, supra,* 87 Cal.App.4th at page 19.

[50] *People v. Gonzales, supra,* 87 Cal.App.4th at pages 13-15.