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Court of Appeal, Third District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Jimmy Lee BENSON, Defendant and Appellant.

No. C055253.
(Super.Ct.No. SF093367B).
Jan. 7, 2010.

Office of the State Attorney General, Sacramento, CA, for Plaintiff and Respondent.

Joan Isserlis, Attorney at Law, Daly City, CA, for Defendant and Appellant.

RAYE, J.

*1 After a birthday celebration began to deteriorate, the host attempted to shut down the party. Gang rivalry escalated and shooting broke out, leaving a teenage boy dead and several others wounded. An information charged defendant Jimmy Lee Benson with murder, attempted murder, and participation in a criminal street gang. (Pen.Code, §§ 187, 664/187, 186.22, subd. (a).) [FN1] A jury found defendant guilty of all charges. The court sentenced defendant to life in prison without the possibility of parole, plus four indeterminate terms of 25 years to life, plus a determinate term of 42 years 4 months. Defendant appeals, contending (1) the court erred in admitting the preliminary hearing testimony of a fellow gang member, (2) the court erred in admitting defendant's statements in violation of his constitutional rights, (3) jury tampering and juror misconduct, (4) the prosecutor acted as his own unsworn witness, (5) instructional error, (6) the prosecution's natural and probable consequences theory was flawed, (7) the special circumstance finding must be reversed, and (8) sentencing error. We shall direct the trial court to amend the abstract of judgment as discussed herein. In all other respects, we shall affirm the judgment.

FN1. All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 2004 members of rival gangs attended a backyard birthday party. When tensions arose, the host attempted to end the party. Gunfire erupted, leaving one person dead and three injured.

An information charged defendant with murder, attempted murder, and participation in a criminal street gang. The information also alleged the special circumstance of murder committed to benefit a criminal street gang as well as enhancements for the personal and intentional discharge of a firearm during the commission of a felony; the personal and intentional discharge of a firearm during the commission of a felony, causing great bodily injury or death; participation in an offense where a principal personally and intentionally discharged a firearm, causing great bodily injury or death; the personal use of a firearm during the commission of a felony; and the commission of an offense to benefit a street gang. (§§ 190.2, subd.

(a)(22), 12022.53, subd. (c), 12022.53, subd. (d), 12022.53, subds. (d)-(e), 12022.5, subd. (a), 186.22, subd. (b)(1).)

A jury trial followed. The prosecution pursued a theory of guilt premised on aider and abettor liability. As explained to the jury, defendant was a member of the North Side Gangster Crips gang. He and his fellow gang members felt disrespected by the presence of a rival gang in their neighborhood. They attended the party armed with guns, and the outcome was predictable. The prosecution conceded that no one likely intended to kill the eventual homicide victim; the deadly shots were directed at rival gang members who were yelling gang epithets, not the innocent bystanders who got in the way. The prosecutor argued that defendant encouraged his fellow gang members through words and by participating in the gunfire; he thus was guilty as an aider and abettor.

*2 The evidence revealed the following:

The Party

Billy Ray Garner and his wife Tanya held a birthday party for their two teenage sons. Since the Garners had previously resided in the Bay Area, some guests from the Bay Area attended.

The Garners' sons advertised the party with a flier circulated in Stockton, including at a mall and a local park. The fliers announced an “ESO-EPA Party.” ESO [East Side Oakland] and EPA [East Palo Alto] are gangs and rivals of the North Side Gangster Crips. Defendant is a member of the North Side Gangster Crips. The sons also invited friends from Oakland, Palo Alto, and Stockton.

The party took place in the Garners' backyard, complete with stereo speakers. The host manned the gate and searched guests' backpacks prior to entry. However, he frequently left his post to watch a televised boxing match.

The party progressed without incident until a rap song was played that encouraged people to call out their hometowns or neighborhoods. Guests started yelling out towns, including East Oakland, East Palo Alto, and Stockton. Other partygoers yelled “North Side Crip,” “Gangster Crip,” “NSGC,” and expletives about Stockton. The yells sparked tension among the partygoers.

The Garners decided to end the party, turned off the music, and asked the partygoers to leave. Billy Ray Garner yelled loudly, “The party's over. That's it. The party's over.”

As the guests began to leave, some partygoers from the Bay Area waited across the street for rides. Other partygoers from Stockton “crip walked” in the street a few houses away.[FN2] A friend of Billy Ray Garner drove up and told him one of the boys in the street had a gun. Garner saw someone with a gun and told his wife to call the police. The gunman was in the group gathered down the street from the Garners' home.

FN2. Billy Ray Garner testified that “Crip walking” is “stuff that they be doing, throwing up gang signs, kicking their feet certain ways, going back and forth.”

Billy Ray Garner approached the man with the gun and said: “Hey, man, you don't have to do this. This is not that type of party. You know. I know what you guys are about. These are high school kids. You know, you don't have to do this, man.” The person with the gun said, “We hear you, OG.” Garner believed “OG” was short for “old gangster.” Garner later told police the man with the gun wore an Indianapolis Colts jacket.

According to Billy Ray Garner, defendant was among the group that included the person with the gun. Defendant said, “Fuck that nigger, he ain't nobody.” Garner testified: “At that point I knew that I was in the wrong place. [¶] ... [¶] I started walking backwards.”

The Shooting

Billy Ray Garner took about six steps backward and then turned around. He saw his wife's friend and told her to run. Suddenly Garner heard "a pop," and gunfire hit him in the arm. He started running and then was shot in the back. Garner's injuries resulted in a hospital stay and follow-up surgery.

Partygoers estimated six to nine shots were fired. Fourteen-year-old Eric Castillo was struck in the head, foot, and stomach. The head wound proved fatal, and Castillo was pronounced dead at the scene.

*3 The Garners' 14-year-old daughter was hit by a bullet in the foot. A 17-year-old partygoer was hit in the calf and a bullet grazed his nose.

Other bullets were fired into the Garner home. These bullets were fired from the same weapon that killed Castillo. Bullets found in the street had characteristics consistent with the bullet that killed Castillo. Officers found evidence that at least 12 rounds were fired.

The Aftermath

Officers arrived to find about 120 hostile people either walking away from the Garners' house or in their driveway. About a mile away, officers found Terrence Murray, who was wearing an Indianapolis Colts jersey. Police detained Murray and four others: David Lewis, Dawayne McDonald, Tim Moppins, and Danny Williams. Gunshot residue was found on Lewis.

In nearby bushes, officers found a .22-caliber revolver with six spent bullets in the cylinder. A prosecution expert could not determine if it had fired the bullet removed from Castillo.

Defendant's Arrest and Interview

Officers arrested defendant the day after the shooting. A gunshot residue test found no residue.

Police Detectives Eduardo Rodgriquez and Youn Seraypheap interviewed defendant twice about the shooting. The jury heard tape recordings of both interviews.

Initially, defendant told officers he did not have a gun and did not shoot anyone. Gradually his story began to change. Detective Rodriquez asked if defendant shot into the air, "Maybe just to scare everybody? You're shaking your head up and down, is that yes? Well you got to say it. [¶] ... [¶] How many times did you shoot? OK. You have two fingers, is it two shots?"

Rodriquez asked what type of gun defendant had, and defendant stated he didn't know. Defendant also stated: "[P]eople started shooting I just started shooting up to the air. [¶] ... [¶] ... So they can get scared so they won't shoot me." After the shooting defendant gave the gun to the "homie." Defendant later identified the gun as a "44 Desert Eagle," which he shot "[t]wo times in the air." Defendant denied having a revolver and said the Desert Eagle was an automatic. He also stated he picked up the two shells after the shooting and later threw them out the window while he was driving.

Defendant told officers the .44-caliber Desert Eagle was in a friend's garage. Officers found the fully loaded gun in the garage. Defendant also told officers three members of the group he was with, Lewis, Jesse Zamora, and Andy Thompson, fired guns.

Dawayne McDonald

Dawayne McDonald, one of the men detained with Terrence Murray, exercised his Fifth Amendment right against self-incrimination and refused to testify at trial. (U.S. Const., 5th Amend.) McDonald's preliminary hearing testimony was read to the jury. During the preliminary hearing, McDonald could not recall any details of the shooting at the party or any previous statements to police.

The prosecution then played for the jurors a videotape recording of a police interview of McDonald. McDonald told officers that partygoers from Oakland and Stockton clashed, yelling and passing out guns.

McDonald stated defendant, along with Lewis, Zamora, someone named Lamont, and Andy Thompson, fired shots. Zamora fired first, shooting a .38-caliber gun. Lewis fired six shots. After the shooting, Lewis threw the revolver into the bushes.

*4 McDonald told officers there were six shooters and about six guns being fired during the melee. He drove around with detectives to show them where the shooters lived.

David Lewis

David Lewis, also detained following the shooting, was tried with defendant. Lewis testified he shot a gun the night of the party but did not fire into the crowd or aim at anybody. Lewis met defendant at juvenile hall but did not see defendant at the party.

Lewis testified he told officers he shot a gun "in the sky" and admitted saying "Fuck Oakland" the night of the shooting. According to Lewis: "I wasn't shooting at nobody. [¶] ... [¶] ... I just shot to clear a way, man." Anyone who said Lewis fired into the crowd was lying.

The prosecution also played a taped interview with Lewis and the police. In the interview, Lewis said a fight broke out in the backyard between Oakland guests and Stockton guests. People started throwing gang signs. The two groups traded insults. Oakland partygoers confronted a person from Stockton and someone said, "[B]itch I'm gonna knock you out." In response, "some big dude said, let's take this outside again right now."

As the group gathered out front, people began fighting. According to Lewis, the fight lasted 10 minutes and "We just started shooting." Lewis saw a "whole bunch of people ... from both sides" shooting. Lewis stated: "They was shooting at the direction. [¶] ... [¶] That's when I shot up at them." Lewis shot more than five times.

Lewis described the gun as a chrome revolver with "a wooden handle." He threw away the gun when he saw the officers arrive.

Jesse Zamora

Zamora, also detained at the scene, testified he is a North Side Gangster Crip, or NSGC, as was his friend, Eddie Ortiz.[FN3] Zamora testified defendant was not a gang member.

FN3. According to Zamora's testimony, Ortiz was deceased by the time of trial.

Zamora learned of the party from a flier he saw at a Stockton mall. He thought it was a Bay Area party. Zamora called defendant and Ortiz and told them about the party. He and Ortiz brought guns to the party.

Zamora and Ortiz drove to the party together; Zamora left his gun in the car but did not know if Ortiz did the same. After the party was shut down and tensions escalated, Zamora got his gun from the car and hung out with defendant, Ortiz, and Lewis.

The group yelled "Stockton," and Garner approached the group and told them to leave. People began shooting as Garner walked back toward the house.

Zamora testified he saw defendant with a "[b]ig" automatic handgun but did not see defendant fire the gun. However, Zamora did see Lewis point a gun at the crowd and fire once or twice. Zamora admitted he fired his gun twice in the air but said he only fired to get others to stop shooting.

The jury also heard two statements Zamora gave to the police. Zamora told police he drove to the party with his mother and daughter. He went to the party and people began throwing gang signs and "just screaming out stuff." Zamora saw Lewis firing a gun.

*5 Zamora told officers defendant had a gun with a clip. During the party the gun was visible, hanging out of defendant's pocket. Defendant ignored Zamora's urging to conceal the gun. Defendant showed the gun, danced in the street, and said, "[T]his is northside." Zamora was carrying defendant's gun when shooting broke out but gave it back to defendant when he asked for it. Zamora told police he fired twice in the air.

Gang Evidence

Gang expert Detective Michael George testified that defendant, Lewis, Zamora, and Jonathan Brooks were documented members of the North Side Gangster Crips. The ESO and the EPA were rivals of that gang.

Defendant admitted to Detective Rodriguez that he associated with and was friends with North Side gang members. However, defendant claimed that although he had belonged to the gang when he was younger, he was not currently a member. During a previous stay in juvenile hall, defendant admitted being a member of the North Side Gangster Crips.

Defense Case

Defendant's Testimony

Defendant admitted knowing North Side Gangster Crips members, such as McDonald, Ortiz, and Zamora. However, he denied belonging to the gang.

Defendant learned of the party from some girls just prior to the party. During the party, he went out front to smoke, and when he returned to the backyard everyone was told to leave. Partygoers gathered in front of the house and began exchanging words.

As members of the Stockton group gathered, defendant walked over to them "[t]o see what they was [*sic*] doing next, to see if there was another party that night." As he spoke with a friend from high school about going to another party, defendant heard shots ring out behind him. Defendant did not see anyone with a gun and did not have a gun. After the shooting began, defendant ran to his car.

Defendant testified he initially told officers he did not shoot the gun. He altered his story because he felt he had to say what the officers wanted him to say. The officers repeatedly told him it would be all right if he had fired into the air. According to defendant, "I thought I'd be going home."

In addition, defendant testified that after police played a tape of Zamora stating defendant had fired a bigger gun, defendant falsely claimed that "Booba" gave him a gun, because he knew it was a bigger gun than the one being described and "that gun wasn't at the party that night." Defendant told officers that Zamora used a .22-caliber weapon and Lewis used a chrome revolver because someone told him this after the shooting.

David Lewis

Lewis testified that after the fight broke out, he fired into the air to "clear a way." He denied shooting Castillo. He threw the gun into some bushes.

Other Partygoers

McDonald's cousin testified the party ended shortly after she arrived. She walked around the corner when she left and then heard gunshots coming from "right by the house."

*6 Jasmine Farley also arrived shortly before the party broke up. As she walked home, she saw two groups yelling at each other, with members of each group reaching into their waistbands as if they had guns. After she went around the corner, she heard gunshots ring out from near the house.

Maria Farley testified that the party broke up after people began arguing. As she left, two groups stood on opposite sides of the street arguing, but it did not look like they were going to fight. As she walked away, she heard shots fired.

Defendant's Mother

Defendant's mother testified that defendant is of lower than average intelligence and has learning disabilities. He has trouble concentrating, and when he shuts down he nods or bumps his head.

Defendant's mother drilled into his head that when talking to people like the police, he should tell them what they wanted to hear. Although she knew this was wrong, she did it out of fear that, because of his special needs, he would be taken from her. Defendant's mother was also concerned about some of the people defendant was hanging out with and talked to him about them.

Verdict and Sentencing

The jury found defendant guilty of all charges and found the alleged special circumstance and enhancements to be true. The court sentenced defendant to life in prison without the possibility of parole, plus four indeterminate terms of 25 years to life, plus a determinate term of 42 years 4 months. Defendant filed a timely notice of appeal.

DISCUSSION
DAWAYNE McDONALD'S STATEMENT

Defendant argues the trial court erred in allowing the jury to hear a reading of the transcript of McDonald's preliminary hearing and to view a videotape of McDonald's statement to police. The court's actions, defendant contends, deprived him of his right under the Sixth Amendment to the United States Constitution to confront and cross-examine a witness.

Background

McDonald, when called as a witness at trial, invoked his constitutional privilege against self-incrimination. (U.S. Const., 5th Amend.) The prosecution did not offer McDonald immunity from prosecution.

The trial court ruled that McDonald was unavailable to testify, and it would not order the prosecution to offer immunity; the jury would not be told why McDonald was unavailable; the prosecution could use McDonald's preliminary hearing testimony; and that McDonald could be impeached with his statement to police.

The preliminary hearing transcript was read to the jury, and a videotape of a police interview with McDonald was played for the jury.

During the preliminary hearing, McDonald testified that he did not know who was shooting after the party. He also stated he did not tell officers that defendant and other partygoers had guns. All McDonald could remember about the melee was the sound of gunshots. McDonald testified he did not have a gun or shoot anyone.

During the preliminary hearing, Detective Rodriguez discussed McDonald's statement to police. McDonald told officers that six people, including defendant, fired shots at the party.

*7 The trial court ruled that McDonald's preliminary hearing testimony could be impeached with his statement to officers. The court cited Evidence Code section 770 and determined that evidence of McDonald's prior inconsistent statements was admissible. The court found the statements admissible even though McDonald "may not have been presented with those statements" or been given an "opportunity to address them in some fashion while on the stand during the preliminary hearing."

McDonald's preliminary hearing testimony was impeached with his statement to police. In the taped interview, played for the jury, McDonald told officers that defendant, Lewis, Zamora, Ortiz, Lamont, and Thompson all fired weapons.

Discussion

The People concede the trial court erred by permitting impeachment of McDonald's preliminary hearing testimony with the videotape of his earlier police interview. However, the People argue the error was harmless.

Evidence Code section 1294 allows the statement of a person who is unavailable as a witness to be introduced as evidence in court if the statement was previously introduced at a hearing or trial as a prior inconsistent statement of the witness. This section is designed to overcome the admissibility problems associated with out-of-court statements that are inconsistent with an unavailable witness's former testimony, but it requires that the evidence of the statements be introduced at the prior hearing when the witness actually testified. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 408-409.)

In *People v. Williams* (1976) 16 Cal.3d 663, the Supreme Court considered a factual scenario similar to the present case. In *Williams,* a suspect gave a statement to officers implicating the defendant in a robbery. During the preliminary hearing, the suspect denied making the statement. A detective testified that the suspect had made the statement. (*Id*. at p. 665.) Although the suspect was not available to testify at trial, the court admitted his preliminary hearing testimony under Evidence Code section 1291, subdivision (a)(2). The detective repeated his earlier testimony about the prior inconsistent statement, which was admitted at trial as an inconsistent statement under Evidence Code section 1235. (*Id*. at p. 666.) Without reaching the question of a defendant's right to confrontation, the Supreme Court held that the prior inconsistent statement was not admissible under Evidence Code section 1235 because the hearsay exception was intended to only apply to the prior inconsistent statement of a witness who testifies at trial. (*Id*. at pp. 666-669.)

Here, neither the transcript nor the videotape of the police interview was introduced into evidence at the preliminary hearing. Instead, during the preliminary hearing McDonald was asked if he recalled what he told officers; McDonald testified he could not recall the events surrounding the shooting or his interview with police. Detective Rodriquez then testified that McDonald told officers in the interview that six people fired guns after the party, including defendant.

*8 Under Evidence Code section 1294, McDonald's videotaped statement was not admissible at trial, since the taped statement was not introduced into evidence at the preliminary hearing. We agree with both parties that the trial court erred in allowing the tape to be played.

However, we must determine whether the admission of the taped interview was reversible error. If the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless. (*People v. Schmaus* (2003) 109 Cal.App.4th 846, 860.)

According to defendant, the other evidence that he was involved in the shooting was “extremely weak.” We disagree.

Defendant, an admitted gang member, told officers during an interview that he fired shots into the air after the party broke up. After officers played a tape of Zamora telling them that defendant fired a gun the night of the party, defendant admitted he shot a .44-caliber Desert Eagle twice in the air. Defendant did not challenge Zamora's statements implicating him. Defendant also admitted picking up two shell cases after he fired the gun. Officers located the gun where defendant said he left it.

Defendant attempts to minimize the impact of his statements to officers. According to defendant, although he told officers he fired a gun, he recanted this claim shortly afterward. Defendant also stated he only told police he shot a gun because he believed they would let him go if he made the claim. Defendant

also argues he claimed he used a .44-caliber Desert Eagle because he knew that gun had not been at the party. As for defendant's statement that he picked up the shells, defendant claims that was "an obvious lie. No one during a firefight pauses to scour the ground for shells and thus expose himself to gunfire unnecessarily."

Despite defendant's best efforts to cast doubt on the veracity of his statements to officers, his admissions were compelling. Faced with Zamora's accusation, defendant did not deny his involvement, but told officers he fired twice into the air. He identified a gun, which police later recovered, and removed the evidence, shell cases, from the crime scene.

The jury had more than defendant's admissions to link him to the shooting. As noted, Zamora told officers defendant had a gun with a clip hanging out of his pocket. After the party broke up, defendant danced in the street and said, "[T]his is northside." Zamora was carrying defendant's gun when the shooting began. Defendant asked for his gun and Zamora gave it to him.

When Garner, the host, approached defendant and other gang members in the street, defendant said: "Fuck that nigger, he ain't nobody." As Garner turned, gunfire broke out.

Given the overwhelming evidence before the jury, the improperly admitted statements by McDonald were merely cumulative of the other evidence. The error in the admission of McDonald's videotaped statements was harmless beyond a reasonable doubt. (See *Chapman v.. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

THE INTERROGATION OF DEFENDANT

*9 Defendant argues that during his interrogation, officers violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. First, defendant contends officers began questioning him without providing him with counsel, in violation of his Sixth Amendment right. Second, officers continued the interrogation after defendant requested counsel, in violation of his Fifth Amendment right. Third, officers coerced defendant's statement by making false promises of leniency, violating his Fourteenth Amendment right to due process.

Background

Detectives Rodriquez and Seraypheap interviewed defendant twice about the shooting. The first interview took place on the day officers arrested defendant; the second occurred two days later.

Prior to beginning the first interview, officers read defendant his *Miranda* rights.[FN4] Defendant was booked into juvenile hall. Two days later, officers picked up defendant from juvenile hall and drove him to the police department for a second interview.

FN4. *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

While riding to the police department, defendant asked why he was being held, what he was being charged with, and what other people involved had said about the incident. Detective Rodriquez testified that during the car ride he told defendant he would answer his questions once they got to the police department.

Prior to the start of the second interview, officers again gave defendant his *Miranda* rights, which defendant stated he understood. After expressing some reluctance to tape recording the interview, defendant confirmed that he "still wanted to go through with [it]." We report the contents of this second interview in some detail.

"Benson: I want a lawyer.

"Rodriquez: You want a lawyer? OK.

"Rodriguez: You have any questions for us?

"Benson: Ha?

"Rodriquez: You have any questions for us?

"Rodriquez: No?

"Rodriguez: OK.

"Benson: What did you want to talk to me about then?"

"Rodriquez: Well we want to go over everything to make, you know, your statement seems to conflict [with] what, what other people were saying and we wanted to make sure that you understood the questions that we were asking you ... I don't want these other people to speak for you. I want it to come out of your mouth.... [Y]ou know, like we talked about the other day, there were tons of people out there.... [T]he other two that we arrested, you know, they admitted what they had done.... [T]hey told us what they saw, who else was out there, who else had guns, who else shot and ... it seemed to be pretty credible in relationship to what the witnesses there saw, you know, people there at the party, the neighbors ... and I wanted, you know, [to] give you the every opportunity, cause [*sic*] I spoken [*sic*] to your mom a couple of times ... I know she's pretty upset about everything. You're a young kid and, and I just don't want this to get the best of you so....

*10 "Benson: What they say? Said I did it still?

"Rodriquez: Well, I'll be more than happy to go over this with you, but because you asked for a lawyer, you know, I can't, legally. OK. If, if you want to talk to me right now I'll be more than happy to talk to you. But if you want a lawyer then I'll stop. Cause ... it's up to you.

"Benson: And when, where would I get the lawyer?

"Rodriguez: OK. Well you're, you're going to court today, you're going to be appointed one.

"Benson: Go ahead.

"Rodriquez: You want to talk right now?

"Benson: [Nods affirmative.]

"Rodriguez: Are you sure? Cause you asked for ... I want to make sure you understand your rights. OK. You understand you have the right to a lawyer right? But still want, want to go over this?

"Rodriguez: Is that yes?

"Benson: Ha-huh.

"Rodriquez: OK.

"Seraypheap: Let's go over this one more time.

"Rodriquez: OK.

"Rodriguez: Let's just go over this one more time and then....

"Benson: You have the right to remain silent. Anything you say will, will be held against you in a court of law. You have a right to have a lawyer present with you to speak or what ever, to speak with you while you be questioned."

Rodriquez reiterated defendant's *Miranda* rights, and defendant stated he understood his rights. Benson subsequently told officers he fired a gun twice in the air.

After defendant filed a motion to suppress, Rodriquez testified at the suppression hearing that he understood defendant's request for an attorney at the beginning of the second interview. However, Rodriquez asked defendant if he had any questions for the officers based on the conversation they had had in the police car en route to the interview. According to Rodriquez, he did not terminate the interview when defendant asked for a lawyer "[b]ecause I had promised him a chance to answer any of his questions."

The trial court denied the motion to suppress, concluding Rodriquez did not engage in interrogation when he asked defendant, "Do you have any questions for us?" Rodriquez's question was not "a question which the officer should have known was reasonably likely to elicit an incriminating response from the suspect."

Sixth Amendment Claim

Defendant contends his Sixth Amendment right to counsel attached prior to the second interrogation. Therefore, the officers violated his constitutional rights by questioning him without an attorney present. The time sequence surrounding the second interrogation refutes this contention.

Police arrested defendant on September 26, 2004. His initial interrogation and incarceration in juvenile hall took place the same day. The second interview began at 9:21 a.m. on September 28, 2004. At 9:57 a.m., an order by the juvenile court to transport defendant to the superior court for arraignment was filed. By that point, defendant had admitted to officers during the interview that he had shot twice into the air.

*11 The complaint against defendant was filed at 10:37 a.m. that day. At trial, defendant testified that at the conclusion of the second interview, the detectives attempted to take him to court but could not do so. Instead, they returned defendant to juvenile hall. Ultimately, defendant appeared in court at 1:24 p.m. on September 28, 2004, and counsel was appointed to represent him.

The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions, the accused shall have the right to assistance of counsel. The Sixth Amendment right to counsel attaches " ' "at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ' [Citation.]" (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175 [115 L.Ed.2d 158]; see *People v. Slayton* (2001) 26 Cal.4th 1076, 1079.)

Here, defendant made his incriminating statements to officers prior to the complaint being filed and prior to his initial appearance in court. The complaint was filed at 10:37 that morning; by 9:57 a.m., defendant had already admitted shooting twice into the air. We find no Sixth Amendment violation. [FN5]

FN5. Defendant argues, "if [the People are] correct about when the complaint was filed, then the court order [to transport defendant] was obtained by means of a lie, the seizure of [defendant] was likely a violation of the Fourth Amendment [citation], and the interrogation that followed was the inadmissible fruit of the poisonous tree [citation]." Defendant fails to develop this argument, and we decline to address it further.

Fifth Amendment Claim

Defendant argues the second interview violated his right against self-incrimination. According to defendant, once he invoked his right to counsel at the beginning of the interview, all questioning should have ceased.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." To safeguard this right, the Supreme Court in *Miranda, supra*, 384 U.S. 436 held that once a suspect invokes his or her right to counsel during custodial interrogation, the interrogation must cease until an attorney is present. (*Id.* at pp. 473-474.) Police actions reasonably likely to elicit an incriminating response also constitute interrogation for purposes of *Miranda*. (*Edwards v. Arizona* (1981) 451 U.S. 477 [68 L.Ed.2d 378] (*Edwards*).)

However, there is no Fifth Amendment violation when an accused initiates further conversation by making statements that reveal a willingness and desire for a generalized discussion about the investigation. If the accused invokes his right to counsel, courts may admit his responses to further questioning only on a finding that he both initiated further discussions with officers, and knowingly and intelligently waived the right he previously invoked. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045-1046 [77 L.Ed.2d 405]; *Smith v. Illinois* (1984) 469 U.S. 91, 95 [83 L.Ed.2d 488].)

Defendant argues that after he invoked his right to counsel in the second interview, the detectives initiated further conversation. According to defendant: "Rodriguez, in a subtle ploy, asked [defendant] if he had 'any questions for us.' [Citation.] The questions [defendant] had asked in the car were why police wanted to talk to him again, why he was being held, what charges was he facing, and what statements about him had been made by others. [Citation.] Thus, Rodriguez knew that asking [defendant] if he had 'questions for us' was likely to lead to a repetition of these questions, to accusatory answers from police, and then to substantive responses from [defendant] concerning the 9-25-04 shooting."

*12 We disagree with defendant's gloss on the evidence. Prior to arriving at the police station, defendant asked the detectives questions during the car ride. Rodriquez told defendant he would answer his questions at the station. Once at the station, detectives read defendant his *Miranda* rights and defendant requested counsel.

At this point, Rodriquez asked defendant if he had any questions. Defendant indicated he did not, but then asked: "What did you want to talk to me about then?" Rodriquez told defendant he wanted to talk about what other witnesses had told police.

A defendant's *Miranda* rights only come into play when a defendant in custody is subjected to either express questioning or its functional equivalent. The functional equivalent of express questioning consists of words or actions on the part of police that they should know are reasonably likely to elicit an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 302-303 [64 L.Ed.2d 297] (*Rhode Island*).)

California courts have characterized this definition as a two-part inquiry: first, was the officer's remark or action the type reasonably likely to elicit an incriminating response; and second, even if the officer did not intend to elicit such a response, should that officer have known the action or remark was likely to do so? (*People v. Mobley* (1999) 72 Cal.App.4th 761, 792 (*Mobley*); *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 241-242.)

Detective Rodriquez asked defendant if he had any questions after defendant invoked his right to counsel. This neutral inquiry, which could have referred to any type of question, including questions about the requested counsel, elicited a negative response from defendant. Such a remark by an officer is not reasonably likely to elicit an incriminating response, nor should Rodriquez have known his query was likely to do so.

As the United States Supreme Court reasoned: "[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (*Rhode Island, supra*, 446 U.S. at pp. 301-302.) An officer's query as to whether a suspect has any questions does not fall into this category. (See *People v. Clark* (1993) 5 Cal.4th 950, 981-986; *Mobley, supra*, 72 Cal.App .4th at p. 792; *People v. Claxton* (1982) 129 Cal.App.3d 638, 647-655.) [FN6]

FN6. Defendant argues that *United States v. Montgomery* (1st Cir.1983) 714 F.2d 201 compels a different result. In *Montgomery,* after a suspect invoked his rights, he asked about the charges against him. An officer answered: " 'Why do you want to know?' " (*Id*. at p. 204.) The court found a *Miranda* violation, since the officer's question was designed to keep the conversation going and to elicit incriminating information. (*Ibid* .) The officer's query in *Montgomery* directly asked the defendant for information; the officer's query in the present case required only a yes or no answer and did not request any information from defendant.

Defendant then renewed the conversation, notwithstanding his request for counsel, by asking, "What did you want to talk to me about then?" A conversation initiated by a suspect, after he asked for an attorney during custodial interrogation, does not violate *Miranda*. (*Edwards, supra,* 451 U.S. at pp. 485-486.)

Fourteenth Amendment Claim

Defendant contends his due process rights were violated because detectives obtained his statements through false promises of leniency. Defendant cites several comments by both detectives as constituting false promises of leniency.

Background

*13 During the initial interview on September 26, 2004, detectives told defendant many people were saying they saw defendant with a gun. Detective Rodriquez told defendant there could be a "million" reasons defendant had a gun after the party, "but don't dig yourself a hole by ... saying, you know, that wasn't me." Rodriquez also told defendant he did not want to disrupt defendant's life for making "one simple mistake," since "there's a solution to every mistake. You need some help right now." Defendant continued to deny shooting a gun.

Rodriquez noted people often carry guns for protection even though they are not in a gang. Rodriquez said: "If something like that happened last night, that maybe you just had something in your pocket. Someone might have saw [*sic*] it and just cause ... there's a shooting they automatically think Jimmy, that's Jimmy cause I saw em [*sic*] with a gun. I don't want you to get caught on the wrong foot on this one. If you had something in your pocket, it never left your pocket during all this. That's what you need to let us know." Defendant again denied he had a gun, and Seraypheap said other people would testify defendant had a gun and defendant would be charged with homicide. At that point defendant admitted he passed a gun on to Lewis, who shot it.

Rodriquez then said: "Maybe you fired a shot not wanting to hurt someone. Maybe you shot up in the air, maybe you purposely shot in the ground, maybe you just pointed a gun. I mean that's a big difference between, you know, someone getting hurt and trying to shoot someone." Defendant again stated he did not shoot or point a gun.

During the second interview, defendant reiterated that he had not shot a gun. Rodriquez then played a tape of Zamora stating he saw defendant with a big gun. Rodriquez stated all the victims were shot with small-caliber bullets. Rodriquez again suggested that perhaps defendant was simply shooting up in the air or in the ground, but "[i]f you expect us to believe that you're not a murderer then you got to be honest with us." When Rodriquez asked if defendant shot just to scare everybody, defendant nodded his head. When asked how many times he fired into the air, defendant raised two fingers.

Shortly thereafter, defendant recanted, stating the officers had scared him and he merely repeated what they said "so you can help me get out." Defendant said he admitted shooting the gun "[j]ust because, so you all can let me go." Rodriquez denied saying they would let him go, and defendant replied: "[Y]ou didn't say you was going to let me go, but the way you was saying like you all was going to let me go...." Rodriquez told defendant he would face charges, but "what you tell us, that, that's going to depend how they're going to treat you. What's going to happen to you."

Discussion

Under the Fourteenth Amendment to the United States Constitution, any involuntary statement obtained by a law enforcement officer by coercion is inadmissible in a criminal proceeding. (*People v. Neal* (2003) 31 Cal.4th 63, 67 (*Neal*).) A confession is involuntary if it is obtained by overcoming the defendant's will, such as by threats or violence or any direct or implied promise. (*People v. Cahill* (1994) 22 Cal.App.4th 296, 310-311 (*Cahill*).) A confession elicited by promises of benefit or leniency is inadmissible. However, mere advice or pleas by the officer that it would be better for the suspect to tell the truth when unaccompanied by either threat or promise does not render a subsequent confession involuntary. (*People v. Carr* (1972) 8 Cal.3d 287, 296; *People v. Sultana* (1988) 204 Cal.App.3d 511, 522.)

*14 The prosecution bears the burden of proving, by a preponderance of the evidence, that the defendant's confession was voluntary. (*People v. Ray* (1996) 13 Cal.4th 313, 336, fn. 10 (*Ray*).) Voluntariness does not turn on any one fact, but rather on the totality of the circumstances. (*Neal, supra,* 31 Cal.4th at p. 79.) On appeal, we uphold the trial court's findings as to the circumstances surrounding the confession if supported by substantial evidence. The trial court's finding as to the voluntariness of the confession is subject to independent review. (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

Defendant contends the detectives obtained his admissions only after lying about the evidence against him and misstating the law on homicide. In addition, defendant argues, the detectives falsely implied that if he cooperated he would receive more lenient treatment at the hands of the police, the prosecution, or the court.

The People concede the detectives lied to defendant about the caliber of the bullet that killed Castillo. Although detectives told defendant two other suspects had implicated him in the shooting, only one, Zamora, actually implicated defendant. Detectives also told defendant the person who fired the smaller gun fired the lethal shot and implied that the person who fired the larger gun was less culpable in the shooting.

However, the People argue that "although the lies the detective told [defendant] may have contributed to eliciting his admission, those lies were not likely to elicit an unreliable admission." According to the People, if defendant were innocent it would be unlikely the detectives' statements about the size of the gun would compel him to falsely admit firing any gun.

Defendant disagrees, arguing the detectives acted improperly and coerced his admissions. In support, defendant cites *Cahill, supra,* 22 Cal.App.4th 296. In *Cahill,* officers told the defendant they had all the physical evidence they needed to place him at the scene of the crime. One officer told the defendant: " 'I'm here really to try to see what I can do for you.' " (*Id.* at p. 305.) The officer then outlined the law of murder, but made no reference to felony murder. In addition, the officer told the defendant he could help himself by talking and suggested he could avoid a first degree murder conviction by admitting an unpremeditated role in the murder. (*Id.* at pp. 306-307, 314-315 .)

We found the defendant's confession was obtained by a false promise of leniency, that the defendant could avoid a first degree murder conviction by admitting to behavior that was not premeditated. (*Cahill, supra,* 22 Cal.App.4th at p. 314.) We found the officer's description of the law materially deceptive. (*Id.* at p. 315.)

Defendant analogizes his situation to that of the defendant in *Cahill*. The two cases are quite different.

Here, Detective Rodriguez did tell defendant there was "a big difference between ... someone getting hurt and trying to shoot someone." However, the detectives made no promises or representations that defendant's cooperation would garner more lenient treatment or lesser charges. "No specific benefit in terms of lesser charges was promised or even discussed, and [the detective's] general assertion that the circumstances of a killing could 'make[ ] a lot of difference' to the punishment, while perhaps optimistic, was not materially deceptive." (*People v. Holloway* (2004) 33 Cal.4th 96, 117.) The general assertion that the circumstances of a killing could make a difference was not materially deceptive. It is not deceptive to

state that an accomplice to murder may be better off than the shooter. (*People v. Garcia* (1984) 36 Cal.3d 539, 546-547.)

*15 Nor does the detectives' use of false information render defendant's admissions involuntary. Lies told by officers to a suspect during questioning may well affect the voluntariness of a confession, but they are not per se sufficient to render a confession involuntary. Where the deception by the officer is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. (*People v. Farnam* (2002) 28 Cal.4th 107, 182 (*Farnam*).) Courts prohibit only those psychological ploys that, under the totality of circumstances, are so coercive they tend to produce a statement that is both involuntary and unreliable. (*Ray, supra,* 13 Cal.4th at p. 340.)

In *Farnam, supra,* 28 Cal.4th 107, the court found the defendant's confession to an assault and robbery was voluntary. The officers falsely told the defendant that his fingerprints had been found on the victim's wallet. (*Id.* at pp. 182-183.) Nor did the court find a confession coerced when an officer made false statements regarding evidence the officer said tied the defendant to a murder. (*People v. Thompson* (1990) 50 Cal.3d 134, 167.)

Here, while the officers made several false representations while questioning defendant, those representations were not of a sort likely to produce an unreliable statement. Nor did the officers make any offers of leniency or threaten defendant with dire consequences for failing to confess. We do not find defendant's admissions involuntary.[FN7]

FN7. Defendant argues *People v. Chun* (2007) 155 Cal.App.4th 170 compels a different result. However, review was granted in *Chun*. Defendant argues *Chun* can be cited under the doctrine of collateral estoppel because an issue that defendant now raises was resolved in *Chun* adversely to the Attorney General in a final judgment in a proceeding involving another criminal defendant. Review was granted on a different issue. We are not persuaded. Although *Chun* involved one of the detectives who participated in defendant's questioning, the facts of the two cases differ greatly. In *Chun,* the detective explicitly offered to advocate for the defendant before the judge to obtain more lenient treatment. (*Id.* at pp. 184-185.) In any event, the Supreme Court reversed our judgment and remanded the matter for further proceedings. (*People v. Chun* (2009) 45 Cal.4th 1172, 1206.) Our opinion after remand was not certified for publication. (*People v. Chun* (Dec. 2, 2009, C049069).)

JURY TAMPERING AND JURY MISCONDUCT

Defendant alleges the impartiality of jurors was compromised when one juror complained she was being intimidated by trial spectators. The juror "broke down in tears, revealed her fears first to her fellow jurors and next to the court." Although the juror in question was excused from the jury, defendant argues the impartiality of the other jurors was compromised. In addition, defendant claims the juror disobeyed court orders and violated her oath by failing to notify the court in a timely fashion of the contacts and threats.

Background

During jury selection, one prospective juror stated she was fearful of serving on a jury because she might be recognized as a juror after the verdict. In fact, the prospective juror had been forced to move to a small town to avoid living near gang members.

The court told the jurors that jury information was sealed at the end of trial. The court continued: "With regard to the course of the trial, certainly any attempt verbally or otherwise to influence your decision must be brought to the Court's attention, will be dealt with immediately and will be dealt with strongly. You should realize that. You need to bring that to the Court's attention. [¶] ... [¶][I]f there were any concerns at all, we look both for verbal issues and nonverbal, we look for attitudes and for any activities that go on in the courthouse, surrounding or here in the courtroom, so [you] should understand people are very vigilant about your concerns."

*16 Unfortunately, juror intimidation did take place during the trial. On the first day of deliberations, Juror No. 6 informed the court of several troubling incidents involving third parties. During a break in the trial, a woman from the courtroom audience who was getting into a car at a nearby drugstore tried to get Juror No. 6's attention. The woman kept saying "Miss, Miss." A male followed Juror No. 6 into the store. Frightened, Juror No. 6 left the store. Juror No. 6 told Juror No. 9 she was afraid, and the two jurors began carpooling to and from the courthouse.

On another occasion, as Juror No. 6 waited for a bus, someone passed by in a van and extended his or her forefinger and thumb "like they was going to shoot me or something." Juror No. 6 did not connect the person who made the gesture with anyone present at the trial.

Juror No. 6 also saw the mother of one of the defendants at a department store. The juror had two sons, ages 22 and 35, and was "scared for my boys because I saw one of the ladies-one day I saw one of the boy's mother when we went to JC Penney's. And she don't know me and I don't know her, but I saw her out. And then I thought about what if I be out-and I have a teen-age boy that's 22-see us walking together and see me. And I just don't want nothing to happen to my kids."

Juror No. 6 told the court she had told the other jurors about the incident where the person in the van simulated a gun. The court excused Juror No. 6. The prosecutor proposed questioning the jurors to see "if they can put this out of their mind." Defendant's counsel requested a mistrial or, in the alternative, that the court advise the jurors that the persons responsible for the intimidation were related to codefendant Lewis, not to defendant. The court deferred its ruling, noting it was unsure whether the matter "can be remedied even if [the jurors] say it doesn't impact" them.

The court and counsel interviewed each juror about the impact of Juror No. 6's revelations.

Juror No. 1

Juror No. 1 stated that Juror No. 6 "thought she had been threatened on a couple of occasions." Juror No. 6 was frightened and had encountered relatives of one of the defendants. Juror No. 1 did not know who was responsible for the intimidation and stated it would not "bother me one way or another."

Juror No. 2

According to Juror No. 2, someone from the courtroom audience tried to get Juror No. 6's attention, and when "she did turn to look at these people, that the gentleman gestured like he had a gun." Juror No. 6 did not know who was responsible. However, Juror No. 6 was scared that "these people could recognize her away from here in her everyday life." Juror No. 2 said, "I don't think it's going to affect me."

Juror No. 3

Juror No. 3 told the court that Juror No. 6 said "members of one or the other defendant's families appeared or were in the area and one of them apparently followed her into [a store] and did a hand gesture which sounded very threatening." Juror No. 3 did not know which defendant's family was involved, but did not doubt her story. Juror No. 3 stated all the jurors told Juror No. 6 she had a "legitimate fear" given the "nature of the case" and she should "say something" to the court. Juror No. 3 stated the information would not affect his/her ability to be fair.

Juror No. 4

*17 Juror No. 4 related that Juror No. 6 "mentioned that there had been a situation where she felt as though there was family members that she had seen in the courtroom that tried to get her attention after court one day." Juror No. 6 was uncomfortable, fearful, and visibly upset. Juror No. 4 said it would not impact his/her ability to be fair.

Juror No. 5

Juror No. 5 stated Juror No. 6 mentioned a relative of one of the defendants made a gun gesture with a thumb and finger, but "she said she didn't really look at them, just kind of got a glance in, perhaps she may

not have even seen a reflection." Juror No. 5 concluded it was "probably some relative or friend from one of the defendants." Juror No. 5 said it would not carry over into his/her deliberations.

Juror No. 7

According to Juror No. 7, when Juror No. 6 recounted the incident, she teared up, worried about her sons' safety. Juror No. 7 said it would not impact his ability to be fair.

Juror No. 8

Juror No. 8 recounted that Juror No. 6 said she "thought she recognized some family member from one of the defendants in the court. And then at noon, I guess she was walking over to the [store] and somebody called out to her and gave her a sign, something like this [indicating a gun with thumb and index finger].... [¶] ... [¶] Like you were playing with a gun or something. And it seemed to unnerve her an awful lot." According to Juror No. 8, there was a "50/50 chance" defendant's family was involved. Juror No. 8 said this was "just like in the movies or in the papers" where "you hear someone being intimidated ." Juror No. 8 said it would not impact his ability to be fair.

Juror No. 9

Juror No. 9 told the court that Juror No. 6 said someone from the courtroom audience, "family members or who, I don't know if they had said something to her or made some sort of gesture. They made her very uncomfortable.... It's got her very shaken." Juror No. 6 said someone said, "Hey, Miss" to her and she saw a hand gesture, but Juror No. 9 was not sure if the gesture was directed at Juror No. 6.

Juror No. 9 began carpooling with Juror No. 6 because Juror No. 6 had trouble getting to court on time when taking the bus. Juror No. 6 mentioned she was uneasy, but Juror No. 9 considered it a "general thing" and did not know the details until the first day of deliberations.

Juror No. 6 did not know who the intimidators were and had not determined whether they were related to defendant or to Lewis. Juror No. 9 stated the information would not impact her ability to be fair to both sides.

Juror No. 10

Juror No. 10 said Juror No. 6 told jurors that a member of one of the two families was "trying to talk to her. And so she ignored them. And then she felt like they followed her into a store and she felt like somebody did a hand movement that was scary." Juror No. 6 was frightened because she lived near where the shooting occurred, and she might run into someone involved in the incident. Juror No. 10 said it would not impact her ability to be fair, nor did she know who was involved.

Juror No. 11

*18 According to Juror No. 11, Juror No. 6 reported family members from the courtroom called out to her and made a threatening hand gesture. Juror No. 6 "was visibly upset today when she was talking about that and felt that any decision that she made regarding the case could have some repercussions." Juror No. 11 was not sure who was involved in the incidents, and they would not impact his/her ability to be fair.

Juror No. 12

Juror No. 12 told the court Juror No. 6 was emotional when recounting the incident that occurred at the store. Juror No. 6 did not connect the incident to defendant. Juror No. 12 said it would not impact his/her ability to be fair.

Trial Court's Ruling

After the interviews, defense counsel requested a mistrial. The court denied the motion, reasoning: "I would like to note for the record that in questioning the-the eleven remaining jurors ..., the demeanor of each juror when asked the question whether or not if these events occurred at all it would affect their ability to be fair in each case, that each of the eleven gave what I found to be a strong response, without hesitation

or doubt, that it would not affect their ability to be fair and to deliberate in this matter. And that it would not have any effect on their ability to do so. [¶] Each seemed to clearly understand that this was not evidence, that it would not enter into their deliberations in any fashion. [¶] And I think it's important to note for the record their demeanor in this regard: None of them seemed to bear-or to have been personally affected by the emotional response [Juror No. 6] had to her responsibilities to deliberate. Each seemed to be quite sanguine and to be quite rational and very as I say strongly and directly and without doubt or hesitation, responded to each of the Court's questions regarding their ability to be fair. [¶] The Court feels that the jury has not been so-has not been tainted and has not in any manner, and as a result that the trial may in fact proceed and the motion for mistrial must be denied."

The trial court also denied defense counsel's request for a jury instruction or admonition as to who intimidated Juror No. 6. The court substituted an alternate juror for the dismissed Juror No. 6 and deliberations recommenced. The newly constituted jury reached verdicts after a little more than three additional hours of deliberation. Defendant made a motion for a new trial based in part on jury tampering and jury misconduct. The court denied the motion.

Discussion

The Sixth Amendment gives a defendant the right to a trial by an impartial jury. (U.S. Const., Amend. VI; see U.S. Const., Amend XIV & Cal. Const., art. I, § 16.) " 'In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial....' [Citation.]" (*Remmer v. United States* (1956) 350 U.S. 377, 379 [100 L.Ed. 435].)

*19 "Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.] [¶] The standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.] Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection.... If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias." (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

Defendant contends the trial court's denial of his motion for a new trial "rested primarily on the jurors' assurances" and labels this purported reliance "irrational." According to defendant, the image of a trial spectator "following a juror, attracting her attention and pretending to fire a gun at her is simply too vivid to forget and too horrifying to ignore." Therefore, it was highly unlikely that a juror could exercise independent judgment after exposure to this information regardless of the juror's verbal representations to the contrary.

Although Juror No. 6's experiences clearly troubled her, the connection between the incidents and defendant was tenuous at best. Juror No. 6 stated a courtroom spectator called out to her, but she did not know the person's relation to any of the parties at trial. On another occasion, while Juror No. 6 waited for a bus, someone passed by and simulated a gun with a hand gesture. Juror No. 6 did not connect that person with anyone present at trial.

However, these two discrete events became entangled in the retelling by various fellow jurors. Faced with this distraction, the trial court questioned each juror as to his or her understanding of what Juror No. 6 had reported and his or her reaction. All of the jurors stated, without equivocation, that Juror No. 6's experiences would not influence them in their duty as jurors. The court noted their demeanor: "None of them seemed to bear-or to have been personally affected by the emotional response" of Juror No. 6. All of

the jurors appeared to the court to be “quite rational” and expressly responded to the court's queries about their ability to be fair “without doubt or hesitation.”

Our review of the record reveals the trial court's determination is supported by substantial evidence. (*People v. Farley* (2009) 46 Cal.4th 1053, 1094.) Nothing in the jurors' answers raised the specter of partiality stemming from Juror No. 6's experiences. While each juror remembered Juror No. 6's recitation of events slightly differently, each and every juror assured the court that this knowledge would have no impact on his or her evaluation of the evidence at trial. We accept the trial court's credibility determinations, since the trial court is in a far superior position to evaluate the tenor and demeanor of each juror's responses. (*People v. Danks* (2004) 32 Cal.4th 269, 303-304.)

PROSECUTORIAL MISCONDUCT

*20 Defendant argues the prosecution committed misconduct by telling jurors how a witness who never testified would have testified. According to defendant, this violated his Sixth Amendment right to confront witnesses against him. (U.S. Const., 6th Amend.)

Background

At trial, Garner, the host and homeowner, testified that prior to the shooting his friend Eric Hamilton drove up the street, looked in his rearview mirror, spotted danger, and alerted him to it. Hamilton saw a man with a gun. When Garner approached the gunman, defendant told the gunman, “Fuck that nigger, he ain't nobody.”

During closing argument, defense counsel cast doubt upon the veracity of Garner's testimony. Defense counsel asked the jury, “by the way, where's Mr. Hamilton? But you don't have to bring all your witnesses in, I guess.”

The prosecutor, in rebuttal, responded: “They talked about Eric Hamilton; ‘Where's Eric Hamilton?’ They say why didn't we call Eric Hamilton? They didn't call him either. We didn't need to call him ‘cause we had Mr. Garner. He would have said exactly what Mr. Garner-“ Defense counsel interjected: “Judge, I don't mean to object, Mr. Hamilton was subpoenaed and [the prosecutor] knows that and didn't respond.” The court told the prosecutor to continue. The prosecutor then told the jury that Garner's testimony corroborated the testimony of Zamora, Lewis, and McDonald.

Defense counsel asked for a mistrial based on prosecutorial misconduct. The court denied the motion, finding no prosecutorial misconduct occurred.

Discussion

A prosecutor commits misconduct by using deceptive or reprehensible methods to persuade either the court or the jury. (*People v. Price* (1991) 1 Cal.4th 324, 447.) When the defendant claims the prosecution committed misconduct during argument, the question becomes whether there is a reasonable likelihood that the jury considered or applied any of the comments in an objectionable fashion. We view the allegedly improper remarks in the context of the closing argument as a whole and in the context in which they were made. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.) If the prosecution did commit misconduct, reversal is not required unless the defendant can show he suffered prejudice. (*People v. Arias* (1996) 13 Cal.4th 92, 161.)

Defendant argues the prosecution committed misconduct by presenting a condensed version of what he claimed an uncalled witness, Hamilton, would have told the jury. The People argue the prosecution's comments were harmless.

Defendant argues the prosecution's statement, during closing argument, that Hamilton's testimony would have been consistent with Garner's testimony, deceived the jury and harmed defendant. According to defendant, Hamilton would have testified that he saw two men with guns, neither of whom was defendant. This would contradict Garner's testimony that defendant accompanied the man with the gun. This, defendant postulates, would have caused jurors to suspect defendant was not involved in the shootings.

*21 However, to establish prosecutorial misconduct, defendant must show the prosecution engaged in deceptive or reprehensible methods to persuade the jury. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) The prosecutor's brief reference to Hamilton's testimony during closing argument does not rise to the level of deceptive or reprehensible tactics.

Nor is it reasonably probable that absent the prosecutor's remark defendant would have reached a more favorable result. Garner identified defendant as being in the group that included the man with the gun. Garner testified that when he asked the man not to interfere with the party, defendant responded verbally. Defense counsel's assertion that Hamilton would have testified he saw two men with guns, neither of whom was defendant, is not at odds with Garner's testimony.

More importantly, the court instructed the jury that "[n]othing that the attorneys say is evidence. [¶] In their opening statements and closing arguments the attorneys will discuss the case, but their remarks are not evidence." The court repeatedly informed the jury that statements by counsel during trial are not evidence. Given the nature of the evidence that Hamilton's testimony might have provided and the court's cautions against considering the prosecution's comments as evidence, we find no error.

INSTRUCTIONAL ERROR

Accomplice Testimony

Defendant contends the court erred in failing to instruct the jury that McDonald might be an accomplice whose word had to be viewed with caution and adequately corroborated. According to defendant, based on the evidence before it, the court had a sua sponte duty to instruct on McDonald as an accomplice.

Background

The court instructed the jury that it might use the statement or testimony of an accomplice to convict defendant only if the accomplice's statement or testimony was supported by other evidence that the jury believed, the supporting evidence was independent of the accomplice's statement, and the supporting evidence tended to connect the defendant to the commission of the crime.

The instructions defined an accomplice as a person subject to prosecution for the identical crime charged against the defendant. A person is subject to prosecution if he or she committed the crime or knew of the criminal purpose of the person who committed the crime, and if he or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime.

Discussion

The trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law are those principles closely and openly connected with the facts before the court and necessary for the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Edwards* (1985) 39 Cal.3d 107, 117.)

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) Whether a person is an accomplice presents a factual question for the jury, unless the evidence permits only a single inference. (*People v. Williams* (1997) 16 Cal.4th 635, 679 (*Williams*).)

*22 A trial court can determine as a matter of law that a witness is an accomplice only when the facts regarding the witness's criminal culpability are clear and undisputed and the evidence permits only a single inference. (*Williams, supra*, 16 Cal.4th at p. 679.) If the evidence establishes as a matter of law that a witness was an accomplice, the jury must be so instructed. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) The failure to give an instruction on accomplice testimony is harmless unless it is reasonably probable that had the instruction been given, the defendant would have enjoyed a more favorable outcome. (*People v. Lewis* (2001) 26 Cal.4th 334, 371.)

Defendant contends the evidence revealed McDonald was an accomplice, and the court erred in failing to instruct the jury to view his testimony with caution. In support, defendant cites a plethora of evidence he contends makes McDonald an accomplice as a matter of law. Zamora told investigators he thought McDonald might have said something to encourage Lewis to shoot. Defendant told officers that McDonald gave him the gun, which defendant then gave to Lewis. Lewis stated McDonald fired a .22-caliber gun six times. Shortly after the shooting, officers found McDonald and four others, and a .22-caliber weapon with six spent bullets near the group. At the preliminary hearing, Detective Rodriquez testified McDonald was one of several suspects. While interviewing McDonald, officers told him he was going to jail for the shooting.

In contrast to the evidence defendant cites, McDonald, during his police interview, said there were six others who fired shots after the party. McDonald denied firing a gun and claimed the gun residue test would come back negative. Lewis claimed McDonald fired a .22-caliber gun six times and then threw it in the bushes. Lewis was accused of the exact same conduct. Although Zamora said he thought McDonald encouraged Lewis to shoot, he was uncertain in his testimony.

Thus, the facts regarding McDonald's criminal culpability were not clear and undisputed, nor did they permit only a single inference that McDonald was an accomplice. (*Williams, supra*, 16 Cal.4th at p. 679.) Therefore, the trial court did not err in finding McDonald an accomplice as a matter of law, and did not fail to properly instruct the jury.

Natural and Probable Consequences Theory

Defendant points to three flaws in the instructions on the prosecution's natural and probable consequences theory: the term “likely” was not defined for the jury, a unanimity instruction was not given, and an element of each target offense was erroneously described. The prosecution tried defendant for first degree murder on the theory that he aided and abetted others in shooting guns in a grossly negligent manner, and as a natural and probable consequence, murder and attempted murder resulted.

A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime, but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor actually foresaw the additional crime, but whether, under an objective standard, it was reasonably foreseeable. Liability under this theory is measured by whether a reasonable person in defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act defendant aided and abetted. (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

*23 Defendant failed to object to the instructions at trial. However, we review an instruction not objected to if the instruction affects the substantial rights of the defendant. If the error resulted in a miscarriage of justice, a defendant's substantial rights would be implicated and reversible error might arise. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) Our review reveals no such error.

Background

The court instructed the jury pursuant to CALCRIM No. 403 on the natural and probable consequences theory of liability: “Before you may decide whether the defendant is guilty of murder and attempted murders, you must decide whether he is guilty of assault with a firearm or shooting a firearm in a grossly negligent manner. [¶] To prove the defendant is guilty of murder and attempted murders, the People must prove that, one, the defendant is guilty of assault with the firearm or shooting a firearm in a grossly negligent manner; [¶] Two, during the commission of the assault with a firearm or shooting a firearm in a grossly negligent manner, the crime of murder and attempted murders was committed; [¶] And, three, under all of the circumstances, a reasonable person, in the defendant's position, would have known that the commission of the murder and attempted murders was a natural and probable consequence of the commission of the assault with a firearm, or shooting a firearm in a grossly negligent manner. [¶] A ‘natural and probable consequence’ is one that a reasonable person would know is likely to happen if nothing unusual intervenes.”

The court further instructed: "In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] If the murder and attempted murders was [*sic*] committed for a reason independent of the common plan to commit the assault with a firearm, or shooting a firearm in a grossly negligent manner, then the commission of murder and attempted murders was not a natural and probable consequence of assault with a firearm or shooting a firearm in a grossly negligent manner. [¶] To decide whether the crime of murder and attempted murders was committed, please refer to the separate instructions that I will give you on those crimes."

Discussion

The trial court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial and that are necessary to the jury's understanding of the case. (*People v. Roberge* (2003) 29 Cal.4th 979, 988 (*Roberge*).)

Definition of "Likely"

Defendant faults the trial court for failing to provide a definition of the word "likely" in defining the concept of natural and probable consequences. Under defendant's reasoning, the term "likely" has no plain, unambiguous meaning, requiring the court to provide a definition even in the absence of a request.

The court has no duty to give a clarifying instruction in the absence of a request if the term in the instruction has a plain and unambiguous meaning, commonly understood by those familiar with the English language. (*People v. Kimbrel* (1981) 120 Cal.App.3d 869, 872.) However, the court must give a clarifying instruction when a term used has a particular and restricted meaning, or where the term has a technical meaning peculiar to the law. A word has a technical, legal meaning when it has a definition that differs from its nonlegal meaning. (*Roberge, supra*, 29 Cal.4th at p. 988; *People v. Estrada* (1995) 11 Cal.4th 568, 574.)

*24 The court instructed the jury that a "natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." The word "likely" is defined as "having a high probability of occurring or being true." (Webster's 11th New Collegiate Dict. (2006) p. 721.) This common meaning fits within the context of the instruction and does not require a clarifying instruction.

Defendant, however, disagrees. In support, he relies on *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888 and *Roberge*. In these cases, the Supreme Court considered the use of the term "likely" in connection with the Sexually Violent Predators Act. (Welf. & Inst.Code, § 6600 et seq.) In *Ghilotti*, the court determined the use of the word "likely" was flexible in connection with the act and could cover a wide range of expectability from possible to probable. (*Ghilotti, supra*, 27 Cal.4th at p. 916.) Given the purposes of the act and the difficulties inherent in predicting human behavior, a narrow definition was required when instructing on the act. (*Id.* at pp. 921-922.) The Supreme Court in *Roberge* agreed, finding the definition of "likely" had a particular and technical meaning under the act. (*Roberge, supra*, 29 Cal.4th at pp. 988-989.)

As used in the present case, in conjunction with the natural and probable consequences instruction, "likely" has no such particular and technical meaning. The trial court did not err in failing to provide a further definition of "likely."

Unanimity Instruction

Defendant argues the trial court erred in failing to instruct that the jury had to unanimously agree on what acts constituted the target offense for the natural and probable consequences doctrine to apply. The jury was told that a verdict of murder and attempted murders could be based on a finding that defendant was guilty of assault with a firearm or of shooting a firearm in a grossly negligent manner. According to defendant, the lack of a unanimity instruction requires reversal because the natural and probable consequences doctrine does not hold up when a target offense is a grossly negligent shooting and the charged offenses are first degree murder and attempted murder.

Under defendant's analysis, "when a defendant only encourages a grossly negligent shooting and not an assault with a firearm, it is not likely an intent to kill will be engendered in the person or persons encouraged. It is, at the most, likely there will be an *implied malice* murder, to wit, a killing done by a person who does an act dangerous to human life, who knows the act is dangerous to human life, and who acts in conscious disregard for human life."

Defendant contends that when a defendant encourages a negligent, rather than an intentional, discharge of a firearm, he is not likely to engender an intent to murder in the person he encourages. Therefore, according to defendant, the lack of a unanimity instruction improperly allowed the jury to conclude the premeditated murder and attempted murders were a probable consequence of the negligent discharge. In support, defendant relies on *People v. Leon* (2008) 161 Cal.App.4th 149 (*Leon*).

*25 In *Leon,* two gang members, Jose Leon and Javier Rodriguez, burglarized a truck in a rival gang's territory. The truck's owner confronted them, and Rodriguez fired a gun in the air and the duo fled. The prosecution charged Leon with witness intimidation as a natural and probable consequence of the crimes he aided and abetted, including burglary, possession of a concealed firearm by an active gang member, and possession of a loaded firearm by an active gang member. (*Leon, supra,* 161 Cal.App.4th at pp. 153-157.)

The appellate court found insufficient evidence that Leon aided and abetted the crime of witness intimidation. The court concluded: "The People have cited no case, and we are aware of none, in which a court has concluded that the crime of witness intimidation was the natural and probable consequence of either vehicle burglary or illegal possession of a weapon. There is not 'a close connection' between any of the target crimes Leon aided and abetted, and Rodriguez's commission of witness intimidation. [Citation.] In considering 'all of the circumstances surrounding the incident' [citation], the fact that the crimes were gang related and that they were committed in a rival gang's territory clearly increased the possibility that violence would occur. However, witness intimidation cannot be deemed a natural and probable consequence of any of the target offenses." (*Leon, supra,* 161 Cal.App.4th at p. 161.)

Here, defendant argues that, although there is a close connection between the assault defendant encouraged and the serious crimes his gang associates committed, there is no such connection between the negligent discharge of a firearm and the murder and attempted murders. Since the court failed to give a unanimity instruction, some jurors may have found defendant guilty on the basis of the assault, while others may have found defendant guilty on the basis of the legally erroneous negligent discharge theory.

We disagree. Unlike in *Leon,* here negligent discharge of a firearm is closely connected to the murder and attempted murders. When defendant fired into the air to frighten and intimidate partygoers, it was reasonably probable that his fellow gang members would join in the gunplay with sadly predictable results. No unanimity instruction was required.

Self-Defense Instruction

Defendant claims the court's instructions on self-defense misled the jury and led to his conviction. The court instructed the jury: "Before you may decide whether the defendant is guilty of murder and attempted murders, you must decide whether he is guilty of assault with a firearm or shooting a firearm in a grossly negligent manner." The court also instructed that in order to find defendant guilty of an assault with a firearm, the prosecution must prove "the defendant [did] not act in self-defense or in defense of someone else." In the same vein, the court instructed that to find defendant guilty of shooting a firearm in a grossly negligent manner, the prosecution must prove "the [defendant] did not act in self-defense or in defense of someone else."

*26 The court also instructed on the definition of selfdefense: "[T]he defendant acted in lawful self-defense if: [¶] One, the defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] Two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against the danger; [¶] And, three, the defendant used no more force than

was reasonably necessary to defend against that danger." The court also instructed on imperfect self-defense.

A trial court has a duty to instruct on a defense only if the defense is supported by substantial evidence. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) Self-defense requires that the defendant show he was in actual fear of his life or serious bodily injury and that the conduct of the other party was such as to produce that state of mind in a reasonable person. (*People v. Watie* (2002) 100 Cal.App.4th 866, 877.)

Defendant faults the trial court for instructing that in order to find he acted in self-defense, he must have believed deadly force was necessary. According to defendant, in a videotaped interview he told officers he shot a gun into the air the night of the murder after others started shooting. He fired so others would "get scared so they won't shoot me." Therefore, defendant argues, he did not believe he had to use deadly force, but instead used nondeadly force to defend himself. Even if the jury believed his videotaped statements, under the instructions given it could not find defendant acted in self-defense.

However, even if the court erred in instructing on self-defense, any error was harmless. (*People v. Salas* (2006) 37 Cal.4th 967, 984.) The evidence revealed defendant and his fellow gang members arrived at the party armed and, without provocation, opened fire on partygoers. There was no evidence that the victims or anyone else provoked the attacks or opened fire on defendant and his fellow gang members. The only evidence that defendant acted in self-defense was his own self-serving testimony during police questioning. There is no reasonable likelihood that had the court instructed as defendant suggests, the jury would have found defendant fired into the air in self-defense.

Special Circumstance Finding

The jury found true the special circumstance allegation that defendant "intentionally killed Eric Castillo while the defendant was an active participant in a criminal street gang, and the murder was carried out to further the activities of the criminal street gang, within the meaning of Penal Code section 190.2(a)(22)." Defendant argues the finding is improper because section 190.2 applies only to the actual killer or to those who aid and abet with the intent to kill.

Section 190.2, subdivision (a) provides, in pertinent part: "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] ... [¶] (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang ... and the murder was carried out to further the activities of the criminal street gang."

*27 Defendant focuses on the phrase "defendant intentionally killed the victim," arguing the special circumstance is limited to the actual killer. According to defendant, the statute's use of the active voice, rather than the passive voice, reveals a legislative intent that the gang special circumstance apply only to the actual killer. We disagree.

Section 190.2, subdivision (c) provides: "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4."

Subdivision (c) of section 190.2 applies to all special circumstances listed in subdivision (a) of section 190.2; nothing in the language of the statute limits its application to any particular circumstance. When construing a statute, we look to the words of the statute, giving the language its usual, ordinary meaning. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) The special circumstance applies to defendant by the plain language of the statute.

Defendant further contends that even if the statute applies to defendants other than the actual killer, it only applies to a defendant who possessed the intent to kill. Several courts, in analogous circumstances, have rejected this argument. (*People v. Padilla* (1995) 11 Cal.4th 891, 932-933 [one who intentionally aids or encourages a person in the deliberate killing of another for financial gain is subject to special circumstances]; *People v. Freeman* (1987) 193 Cal.App.3d 337 [defendant who aids a person in the killing of another for killer's own financial gain supports a special circumstance finding].)

Here, defendant aided and abetted his fellow gang members in the gang-related shooting when he fired his gun after the party. The jury did not err in finding the special circumstance allegation true under the evidence at trial.

SENTENCING ERROR

Finally, defendant argues the court erroneously believed a sentence of life without the possibility of parole on count 1 was mandatory, it erred in imposing 10-year enhancements on counts 1 through 4, and it erred in imposing 25-years-to-life enhancements as full terms on counts 3 and 4.

According to defendant, since he was 17 years old at the time of the murder, the trial court had the discretion to impose a prison term of 25 years to life instead of life without the possibility of parole. However, defendant claims the court was unaware of this discretion.

The probation report states the "penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true...." Defense counsel informed the court: "I understand what the Court has to do with life without possibility of parole term, there is but one alternative based upon the Court's findings in that regards [*sic*]. [¶] ... [¶] I believe the Court is going to have to-and has no choice, but to impose life without possibility of parole."

*28 Section 190.5, subdivision (b) states the punishment for a defendant guilty of first degree murder with special circumstances, who was age 16 to 18 years of age at the time of the crime, "shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

Life without the possibility of parole is the "presumptive punishment for 16-or 17-year-old special-circumstance murderers, and the court's discretion is concomitantly circumscribed to that extent." (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1142.) The defendant must be sentenced to life without the possibility of parole " *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." (*Id.* at p. 1141.)

Here, although the record is silent as to the court's exercise of its discretion, we must presume the trial court understood its discretion and sentenced defendant accordingly. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944-946; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497.)

Defendant also objects to the court's sentence of three 10-year enhancements under section 186.22, subdivision (b)(1). Section 186.22, subdivision (b) establishes alternative methods for sentencing defendants convicted of crimes committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) imposes a 10-year enhancement when a defendant commits a violent felony. This section does not apply where the violent felony is "punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) applies and imposes a minimum term of 15 years before the defendant may be considered for parole. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1007.)

The Supreme Court in *People v. Montes* (2003) 31 Cal.4th 350 (*Montes*) explained: "[S]ection 186.22(b)(5) still has vitality where the defendant is convicted of attempted murder with premeditation. In this situation, section 186.22(b)(5) raises the seven-year minimum eligible parole date (see § 3046, subd. (a)) to a 15-year minimum eligible parole date." (*Montes,* at p. 361, fn. 14.)

In *Montes,* the defendant was convicted of attempted murder and sentenced to 25 years to life under section 12022.53, subdivision (d), a sentence required when the defendant's personal and intentional discharge of a firearm caused great bodily injury or death. The court held that section 186.22, subdivision (b)(5) applies only where the underlying felony, without enhancements, provides for a life sentence. (*Montes, supra,* 31 Cal.4th at pp. 352, 358-361.)

In the present case, the underlying felony did not call for such a sentence. Therefore, the trial court correctly imposed the 10-year sentence enhancements.

Defendant argues the section 12022.53, subdivision (d) enhancements of 25 years to life were improperly imposed as full terms on counts 3 and 4. However, this contention was rejected in *People v. Mason* (2002) 96 Cal.App.4th 1. In *Mason,* the trial court imposed full consecutive section 12022.53, subdivision (d) enhancements to attempted robbery counts that had been reduced by the one-third limitation rule under section 1170.1. (*Mason,* at pp. 14-15.)

*29 In a supplemental brief, defendant argues that if his convictions on the gang enhancements are not struck or stayed, two of the gang enhancements should be shortened. The People concede defendant's sentence should be modified.

The jury convicted defendant of three counts of attempted murder. The attempted murder counts included enhancements for participation in a criminal street gang. The court sentenced defendant to one-third the midterm on the attempted murder counts, but imposed a full-term sentence for the street gang enhancements.

Under section 1170.1, subdivision (a), when a defendant is convicted of multiple felonies and a consecutive term of imprisonment is imposed, the term for the subordinate offenses is one-third the midterm "and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." Section 1170.11 provides: "As used in Section 1170.1, the term 'specific enhancement' means enhancements that relate to the circumstances of the crime...."

Therefore, the trial court should have imposed a one-third term of three years four months instead of the consecutive 10-year terms appended to counts 3 and 4. (*People v. Williams* (2009) 170 Cal.App.4th 587, 642-643.) We shall direct the trial court to amend the abstract of judgment accordingly.

DISPOSITION

The trial court is directed to amend the abstract of judgment to impose the one-third term of three years four months on counts 3 and 4, and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

We concur: NICHOLSON, Acting P.J., and ROBIE, J.

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