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Court of Appeal, First District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,

v.

Alexander BALBUENA, Defendant and Appellant.

No. A122043.
(Contra Costa County Super. Ct. No. 05-061067-5).
May 5, 2010.

Office of the Attorney General, San Francisco, CA, for Plaintiff and Respondent.

First District Appellate Project, Catherine White, San Francisco, CA, for Defendant and Appellant.

KLINE, P.J.

*1 Alexander Balbuena appeals from convictions of murder, attempted murder and street terrorism. He contends his convictions must be reversed because his confession was coerced in violation of his constitutional rights; the trial court erred in instructing the jury to view his unrecorded statements, but not his recorded ones, with caution; his attorney's failure to object to certain expert testimony constituted ineffective assistance of counsel; and the trial court violated his right to be present at all critical stages of trial. He further contends the trial court erred in failing to instruct the jury on a charged enhancement under Penal Code section 12022.53, subdivision (b), [FN1] and in imposing 25-year-to-life prison terms pursuant to section 12022.53, subdivision (d). We conclude the abstract of judgment must be corrected to strike the 25-year-to-life terms under section 12022.53, subdivision (d), and replace them with terms of 20 years pursuant to section 12022.53, subdivision (c). In all other respects, the judgment is affirmed.

FN1. All further statutory references will be to the Penal Code unless otherwise specified.

STATEMENT OF THE CASE

Appellant was charged by information filed on August 28, 2006, with the murder of Jose Segura (§ 187), attempted murder of Oralia Giron (§§ 187/664), and street terrorism (§ 186.22, subd. (a)), with allegations that he personally used, and intentionally and personally discharged, a 9 millimeter semiautomatic pistol, causing great bodily injury and death (§ 12022.53, subds.(b), (c), (d)), in connection with the murder and attempted murder.[FN2] It was alleged in connection with all counts that appellant was a minor at least 14 years of age at the time the offenses were committed (Welf. & Inst.Code, § 707, subd. (d)(2)(A).) [FN3]

FN2. The information charged Julius Stinson III with the same offenses and gun and gang enhancements. The trials were subsequently severed. According to the probation report, Stinson was convicted of voluntary manslaughter and sentenced to nine years in state prison. Another person involved in the same

incident, Juan Herrera, was scheduled for trial in September 2008 on charges of murder, attempted murder and street terrorism.

FN3. The information also alleged the special circumstance that the murder was committed to further the purposes of a criminal street gang. (§ 190.2, subd. (a)(22).) This allegation was subsequently stricken on the prosecutor's motion.

Appellant's trial began with in limine motions on March 13, 2008. Jury trial began on March 20. On April 1, after two and a half days of deliberation, the jury found appellant guilty of first degree murder, attempted second degree murder, and street terrorism, and found true the allegations that appellant intentionally and personally discharged a firearm in the commission of the murder and attempted murder. The court, outside the presence of the jury, found appellant was over the age of 14.

On June 13, 2008, appellant was sentenced to a prison term of 25 years to life on the murder count, with a consecutive term of 25 years to life for the section 12022.53, subdivision (b), (c) and (d) enhancement; a consecutive middle term of seven years on the attempted murder count, with a consecutive term of 25 years to life for the section 12022.53, subdivision (b), (c) and (d) enhancement; and a concurrent middle term of two years on the count of street terrorism.

Appellant filed a timely notice of appeal on July 7, 2008.

STATEMENT OF FACTS

In the late evening hours of January 16 or early morning of January 17, 2006, Luis Ochoa, also known as Gizmo, was shot and killed with a shotgun while sitting in a vehicle at the corner of Battery Street and Duboce Avenue in North Richmond. Detective Cary Goldberg was investigating this murder when, on January 17, he was notified that another homicide had occurred about two blocks away from the first one, in front of 1218 Battery Street, at the southwest corner of the intersection of Battery Street and Vernon Avenue. At the scene, Goldberg saw a four-door Honda Accord that appeared to have backed up and knocked over a portion of the fence separating the embankment south of Vernon Avenue from the Richmond Parkway. Jose Segura was in the car, dead, with a gunshot wound to his left cheek and two others to the left side of his neck. Goldberg suspected the two homicides might be connected because he noticed a lot of people and vehicle traffic around the residence at 1345 Battery Street, which was unusual for an area where people normally would not be around while police were present and made Goldberg think the people at 1345 Battery had a “vested interest” in what the police were doing.

*2 The police found 13 shell casings on Battery Street, in front of 1218 and slightly to the south of the residence. Four were .32 caliber semi-automatic cartridge casings and the rest were 9 millimeter casings. The police recovered five bullet fragments, one from the fence, three from the car and one from Segura's body. The bullet fragment found in the front passenger foot well of the car was a .32 caliber bullet and the one found in Segura's body was a 9 millimeter. A subsequent autopsy revealed that Segura had suffered five gunshots to his head, neck and upper chest, all the bullets having come from the left side.

Jose Segura lived at 1218 Battery Street with Oralia Giron and their two children, a three-year-old daughter and a three-month-old son. They rented a room from Segura's brother and sister-in-law, and Giron's two brothers also sometimes lived at the house. Segura was not a gang member, but Giron's two brothers were members of the MS13 gang.[FN4]

FN4. The record sometimes refers to “MS13” and other times “MS XIII.” For consistency, this opinion will use “MS13.”

On January 17, Giron, Segura and the children had gotten into their Honda, which was parked by the sidewalk outside the house. Giron got out and went back to the house for the baby's bottle and, when she

returned, Segura got out of the car to close the gate. Giron got into the back seat of the car on the passenger side, next to the baby in the middle of the back seat and the three-year-old behind the driver's seat.

As Segura was closing the gate, a green Astro van passed the Honda slowly, then stopped, and a young Hispanic male got out and walked over to talk to Segura. Segura looked scared. Three other people approached Giron's car from behind, a "black guy" who stood by the driver's side of the car, a Hispanic who stood next to the passenger side, and a Hispanic who stood front of the car. All three looked younger than the man talking to Segura; the black man looked about 16 or 17 and the other two 18, 19 or 20. The one standing in front of the car was "kind of short," had hair "just barely starting to grow out" after having been shaved and was clean-shaven. The person standing on Giron's side of the car was a little bit taller, had long hair, a small goatee and bags under his eyes, and was wearing a black cap. The man who had been talking to Segura was wearing a white shirt and dark blue pants and his head was completely shaved.

Giron asked the person standing next to her side of the car what was happening, and he replied that he was "seeking revenge for a friend and he mentioned the name Gizmo." Segura got back into the car. Giron was looking at the person standing next to her side of the car and saw him move his head, "saying yes to the guy who was in [Segura's] side." Giron looked at Segura very fast and saw "the black guy" take a gun out of his pocket and start shooting. Giron did not see whether the other people around the car were also shooting. She suddenly felt the car going backwards very fast. When the car backed up against the "hill" near the freeway, Giron saw that the people had gotten into the van, which left, stopped at the next corner, then went out of her line of sight. Giron was shot in the leg.

*3 Giron testified that she did not think she would be able to recognize or identify the people involved in the shooting. She had told a police officer that she thought she recognized the person who talked to Segura at the gate as someone she had seen coming and going from one of the houses on Battery Street.

At about 6:00 p.m. on the evening of January 17, the police served a search warrant for the residence at 1345 Battery Street. The one person inside, 15-year-old K.L., was "hesitant, but cooperative." K.L. said she was renting a room in the house from Juan Herrera, also known as Willow. With K.L.'s assistance, the police recovered a 9 millimeter magazine, 9 millimeter ammunition, .22 caliber ammunition, and a .38 caliber revolver from the house. Goldberg testified that at this point he had never heard appellant's name and had no suspects or leads for the shooting.

Goldberg testified that K.L. said she had been standing on her porch and saw a green Astro van parked in front of the house with members of Gizmo's family around it. Julius Stinson (known as Jujakas or Jakas) and appellant were there, and K.L. saw appellant get a gun from the van and Stinson get a gun from a black Chevy Tahoe. The van left the area, as did appellant and Stinson, and within minutes K.L. heard nine gunshots. K.L. looked in the direction of the gunfire and saw a vehicle traveling backwards up the hill, then saw appellant and Stinson running back to the residence. Stinson got into a vehicle, while appellant entered 1345 Battery Street and appeared to be trying to get rid of a gun; the other person on the porch with her told appellant to "get that out of here." Sometime after the shooting, K.L. went to the Green Store and spoke with appellant, asking what had happened, and appellant told her he "shot the individual ... in the forehead."

The police decided to bring K.L. into the field operations building to record her statement. K.L. expressed concern for her safety if people in the area thought she was giving the police information and, at her request, they handcuffed her and made it appear that she was being detained rather than voluntarily leaving the house with them. Goldberg did not know whether K.L. knew her interview at the office was video recorded; he did not specifically tell her that it was and the equipment was not obvious.

In this interview, the video tape of which was played for the jury, K.L. said she was standing on the porch of her house and saw several of Gizmo's cousins arrive in a turquoise van. Appellant got into a red Blazer that drove around the corner, and Jujakas, wearing a "reddish plaid-ish shirt," grabbed a gun from a black Tahoe, put it in his pants and started running toward where the shooting occurred. K.L. saw the turquoise van stop where the shooting happened and heard "like nine shots" with two different sounds she thought were separate guns. She saw the victim's car go "up the hill" and saw Jujakas and appellant running

towards her house. Jujakas got into the back of “Smurf's” black Tahoe truck. Appellant came into the house and K.L. knew he had a gun because she heard Rosa tell him “don't put it there” as he tried to put it under the couch. Appellant ran and jumped into the black Tahoe, which drove down the block. Later, K.L. went to the corner store and saw appellant talking to a “black dude” outside. She first said she did not talk directly with appellant, but listened to the conversation and overheard appellant say “all I did was shoot him in the forehead.” When Goldberg told her this was different from what she had related at the house, she said she asked appellant who got killed and appellant said “I shot him in the forehead,” Jujakas “shot the lady in the chest,” and “(Gizmo)'s cousins shot .357.” K.L. told the officers that appellant lived in the “apartments on 6th,” at the top, with his parents and K.L.'s sister-in-law.

*4 K.L. testified at trial that, in November 2006, she and her son were living at 1345 Battery Street with Rosa and Rosa's husband, Willow. K.L.'s son's father, Bache, was a friend of Willow's but did not stay at the house. By the time of trial, she and Bache had a second son and K.L. was expecting a third child. As far as she knew, no one K.L. associated with was connected to the Richmond Sur Trece (RST) gang. On the morning after Gizmo was killed, K.L. testified, she went to her porch and did not see anyone outside. She went to school from 8:30 to 11:00 a.m., then went to a wig appointment. K.L. denied hearing any shots fired; seeing appellant walking on Duboce Avenue with a gun; running into the house and attempting to hide a gun; going to the Green Store later that day; or hearing appellant say he had shot the man in the car. She recalled being interviewed by the police, but did not remember telling Detective Goldberg she did not want to testify and was afraid to do so. She acknowledged that she was on electronic home detention because of an arrest warrant based on her failure to appear in court, but claimed she had not been aware she was supposed to appear.

K.L. claimed that when the police were searching the house on January 17, Goldberg threatened to charge her with possession of firearms or ammunition and to take away her child if she did not tell him what he wanted to hear. Goldberg took her telephone, searched through the photographs, showed her one of appellant, whom she knew as Jay Leno, and tried to get her to say that appellant was involved in the shooting that day and that he had told her about it at the Green Store. Goldberg told K.L. that he believed appellant was one of several people involved in the shooting, had run into her house to hide a gun, and had told her at the Green Store that he shot someone. At the police station, K.L. told the police the story Goldberg had given her because she was afraid of his threats. K.L. testified that she did not know where appellant lived and when the police took her to an area and asked if he lived there, she identified a random house.

Goldberg testified that when he attempted to serve K.L. with a subpoena before the preliminary hearing, she had moved and her mother refused to provide her current location; he eventually found her through a telephone number her mother gave him and, when she refused to tell him her location, through her employer. K.L. refused to testify because she was scared of retaliation, as Bache and Willow were associated with RST. On cross-examination, Goldberg denied threatening to take away K.L.'s children or charge her based on the items found in the house if she did not tell him what he wanted to hear. He did not recall taking K.L.'s cell phone from her.

Detective Shawn Pate testified that when he attempted to serve K.L. with a subpoena for the trial, she became very angry and refused. Later, after being told she could be arrested, she said she would appear but would not cooperate. She never said she had not witnessed anything on the day of the shooting and everything she said about it had been fed to her by Goldberg. K.L. came to court on the scheduled date but the case was being trailed and she was asked to wait to be given the new trial date. Within five minutes, she fled the building. An arrest warrant issued and she was subsequently arrested.

*5 After interviewing K.L. on January 17, Detective Pate drove her to the apartment building she had said appellant lived in and she pointed out his apartment. Goldberg obtained a warrant, went to the apartment and arrested appellant at about 2:00 a.m. on January 18. Appellant was in bed with his pregnant girlfriend and a small child who turned out to be K.L.'s son. Although appellant did not have a shaved head or shoulder length hair, as Giron had described the assailants, Goldberg testified that many individuals subjected to high stress in violent crimes will mistake physical characteristics and details.[FN5]

FN5. As seen in the videotaped interrogation, appellant had a full head of hair. Willow, a Hispanic man with shoulder length hair, fit Giron's description of the man standing next to her side of the car during the shooting, and Jujakas, an African American man, fit her description of the man on the driver's side of the car.

Goldberg and Pate interviewed appellant for approximately 90 minutes, beginning at about 2:45 a.m. Goldberg testified that appellant did not say he felt tired or could not think straight because of the hour and that, based on his body language, demeanor and conversation, appellant seemed "somewhat at ease" and did not seem to be experiencing stress or obvious fatigue. Appellant was advised of his *Miranda*[FN6] rights and waived them.

FN6. *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

The tape of appellant's interview was played for the jury.[FN7] Initially, appellant denied being at the scene of the shooting. Subsequently, he admitted being at the scene, in front of the car, but denied having a gun. Eventually he acknowledged having shot three or four rounds with the .32 caliber gun. Appellant first said he disposed of the gun by throwing it in the ocean, then later said he threw it in the park and explained the location. He first said he was the only shooter, but eventually stated that Jujakas and Willow were also shooting, that they were joined by a person from a van, and that Willow directed them to shoot. Appellant said he did not know there were children in the car, that he shot at the front window and that the victim was "a thirteen." He said that he was not trying to kill anyone, just to scare them, and that he did not think he hit the victim. Appellant acknowledged he was a member of RST and was trying to represent RST, and that the shooting was a gang retaliation.

FN7. Two different transcripts of the tape appear in the record, one that was attached to the defense motion to suppress and used by the court at the suppression hearing, and the other, People's exhibit No. 2, provided to the jury. References in this opinion are to the version of the transcript used by the court at the suppression hearing.

Detective Goldberg testified that he viewed several things appellant said during the interview as validating the account he gave. These included his mentioning a woman sitting in the back seat of the car, which Goldberg did not believe a distant onlooker would have known; his saying he shot four times, as the police found only four .32 caliber shell casings at the scene; his referring to Segura being shot in the head, which Goldberg believed only someone in the immediate vicinity would have known; his saying he approached the car from behind, which was consistent with Giron's account; and his referring to a point when only the man was in the car and the woman "came back out," which was again consistent with Giron's account.

Asked whether he lied to appellant during the interrogation, Goldberg testified that they "employed a ruse," a commonly employed technique to give the person being interrogated the feeling that "they caught me ... the games over, I need to be honest." Contrary to what he told appellant, prior to the interrogation Goldberg had not spoken with Stinson and appellant had not been picked out of a photo lineup. Goldberg denied threatening appellant or promising him anything during the interrogation.

*6 In November 2006, Goldberg interviewed Kay Daniels, who was in federal custody for drug related offenses and facing a significant amount of prison time. Goldberg testified that Daniels admitted being a member of Mad Circle, part of the Project Trojan gang, and wanted to trade information for a reduction in his sentence. Daniels said that "RST" and "MS[13]" were "having issues" and "it was a result of the recent killing" of Gizmo. He said he was standing near 1345 Battery Street prior to the shooting and heard Willow and appellant (known to him as Jay Leno), who were in the garage, say something about "catching someone slipping," which in gang terms means doing violence to an enemy when it is not anticipated. Daniels also saw K.L. in front of the house. He saw Julius Stinson walking toward 1345 Battery Street,

then saw a van pull up and an unidentified Hispanic male get out and talk with Stinson and Herrera. The three then walked toward a gold color Honda parked near the end of Battery Street by Vernon. Several minutes later, Daniels heard gunshots, looked in the direction of the shots at the end of Battery near Vernon, and saw the Honda driving backwards, first slowly and then accelerating as the shots progressed. Daniels identified Stinson and the Hispanic male as the shooters. Daniels did not notice appellant being with the others walking to the scene of the shooting, but said he was not particularly paying attention at that point.

The jury also heard Daniels's taped statement. Daniels said that he was in front of Willow's house a few days after Gizmo was killed, talking with Willow, appellant, Oso, and "a Mexican" who "used to work at Beacon." The group was "mad and shit talking about what they [were] gonna do ... [¶] ... [¶] Lets go down there and get on the fools." Daniels saw Stinson "hit the corner in the van" and then saw "a Honda hit the corner. A dude with his broad." Willow, Stinson and the "dude that used to work at Beacon" started "funning a little bit, running up...." Daniels heard "hella shots," ran over and saw the car going in reverse, with Stinson, Willow and the "Beacon" man shooting at it. Stinson was on the driver's side of the car, the "Beacon" man was "in the middle." Daniels did not actually see Willow firing, but saw him with a gun. Daniels initially said he was not sure whether appellant went with the others toward the Honda, saying "I know something was bouts to happen." Later in the interview, he said that appellant was with the others when they started "going up this way," but he did not remember seeing appellant during the shooting. As Stinson ran away from the scene, Daniels asked him, " 'what the fuck?' " and Stinson said, " 'yeah, they my boys ... I gotta do whatever, whatever.' " Daniels saw Willow run back to the garage with two guns. Willow said, " 'Those the fools that smoked Gizmo.' " The "Beacon" man ran back and got into his car, which was parked by Willow's house.

*7 Goldberg interviewed Herrera (Willow), who said he fired a 9 millimeter one time before the gun malfunctioned.

Detective Pate testified as an expert in the recognition and identification of Hispanic gangs. Pate opined that appellant was a member of RST, which came under the umbrella of the Sureno gangs. RST's main purpose was selling narcotics and RST members often worked with the Project Trojans, who controlled most of the street level narcotics in North Richmond. Gizmo, Willow and Bache were RST members; Stinson was not but was a member of Project Trojan. Pate's opinion that appellant was an RST member was based in part on the fact that he lived in the "RST compound," a narcotics distribution area and place RST members lived; he socialized at the house where K .L. lived, which was known to be an RST house; and he was contacted by K.L. at the Green Store, which was controlled by the Project Trojans and RSTs. Appellant equivocated about his RST membership during the interrogation, but at juvenile hall he clearly claimed to be a member of RST.

Additionally, Pate believed appellant was an RST because he got "engaged in a retaliatory shooting for a hard core RST who is killed allegedly by an MS[13]." Pate testified that the police had known throughout the investigation that there were problems between the MS13 and RST gangs. MS13 is also considered a southern gang, but was in conflict with RST, particularly over narcotics. There had been three or four shootings between MS 13 and RST in the months before Gizmo was shot, and the present shooting "was clearly because they believed, or had in their mind that the people who killed Gizmo were the MS[13]s down the street and which they targeted." The crime was "[a]bsolutely" committed for the benefit of RST because it "is them representing themselves as a gang" against another gang trying to take over their area, acting in concert "for [the] respect of the gang," to maintain their presence and control of the drug trade.

DISCUSSION

I.

Appellant argues his confession should have been excluded because it was an involuntary product of police coercion. "The law governing voluntariness of confessions is settled. 'In reviewing the voluntary character of incriminating statements, " '[t]his court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.]

With respect to the conflicting testimony, the court must "accept that version of events which is most favorable to the People, to the extent that it is supported by the record." ' ([*People v. Hogan* (1982) 31 Cal.3d 815,] 835.)" (*People v. Thompson* (1990) 50 Cal.3d 134, 166.) "In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] ... When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness." (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)' (*People v. Maury* (2003) 30 Cal.4th 342, 404 (*Maury*).)

*8 " 'A statement is involuntary if it is not the product of " 'a rational intellect and free will.' " (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) " 'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" (*People v. Thompson, supra,* 50 Cal.3d at p. 166.)' (*Maury, supra,* 30 Cal.4th at p. 404.)

" 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. (*People v. Benson* (1990) 52 Cal.3d 754, 778, citing *Colorado v. Connelly* [(1986)] 479 U.S. [157,] 167.) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*Benson, supra,* at p. 778.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The statement and the inducement must be causally linked. (*Benson, supra,* at pp. 778-779.)' (*Maury, supra,* 30 Cal.4th at pp. 404-405.)" (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.)

"A confession is 'obtained' by a promise within the proscription of both the federal and state due process guaranties if and only if inducement and statement are linked, as it were, by 'proximate' causation. This is certainly true for the federal right. The requisite causal connection between promise and confession must be more than 'but for': causation-in-fact is insufficient. (*Hutto v. Ross* [(1976)] 429 U.S. [28,] 30 (*per curiam*).) 'If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action.' (*U.S. v. Leon Guerrero* (9th Cir.1988) 847 F.2d 1363, 1366, fn. 1.) The foregoing is also true for the state right. (*People v. Kelly* [(1990)] 51 Cal.3d [931,] 973 (conc. opn. of Mosk, J.).)" (*People v. Benson* (1990) 52 Cal.3d 754, 778-779.)

" 'It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.... Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if ... the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible...." ' (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17.)" (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

*9 At the beginning of his interrogation, appellant denied being Sureno, but said he was "with RST" and MS13 was "trying to take over." Appellant denied being at the scene of the shooting or having seen Jujakas since Gizmo was shot. Detective Pate told appellant they already knew he was at the present shooting because they had talked to Jujakas, and that they knew two guns were fired and one of the people in the car had "picked you all out." The detective told appellant that "[t]his is where it's important for you to be

honest with us so if there is some way to help yourself out, this is the time to do it," said the police needed to know what appellant was thinking at the time, offered suggestions of how he might have been feeling, and told him several facts he said the police knew about the shooting. Appellant said, "I was just right there and that shit happened."

Detective Goldberg then suggested that it might not have been appellant's gun that killed the victim, and appellant denied having had a gun. The detectives told him they had already established that he did have a gun and the question was which gun had killed the victim. They again discussed needing to know what appellant was thinking and told appellant, "the thing that is gonna hurt you is if you lie or not be honest," because witnesses would tell the jury "we saw this guy, he had a gun, this is what the gun looked like...." Appellant said he was at the house and "that shit just happened." The detectives asked about the people in the green van, whom appellant said he did not know, and appellant said the guy in the van "just hopped out and started shooting." Goldberg expressed appreciation for appellant's honesty about being present, but urged him to go further so the jury would see he was trying to be honest, and Pate reiterated the possibility that appellant's gun might not have killed the victim.

Appellant stated that he was "right there in front of [the victim's] car" at the time of the shooting, but insisted he did not have a gun. At this point, Goldberg told appellant, "You got to remember, we're giving you the opportunity to try and work through this so maybe you can be there for your kid in a few years." Pate told him it was a good thing that not everyone died in the shooting, but it meant someone had identified appellant and witnesses had said he had a gun and pulled the trigger. Appellant continued to insist he did not shoot anyone and was just standing in front of the car.

At this point Pate told appellant the important thing was whether he was shooting the .32 caliber or the 9 millimeter, because only one of them hit someone. Goldberg asked, "Now you figure it out. What's a bigger round? What's a bigger gun? A nine? Or a thirty-two?" Appellant said "a nine" and Goldberg asked, "Okay. So what do you think is more likely to go through windows and kill someone?" Appellant said, "Nine." Goldberg asked which gun appellant had and appellant said, "The thirty-two." Pate asked whether appellant was saying this because it was the truth or because it was what he thought the police wanted to hear, and appellant said, "Nah. I had the thirty-two. I had the thirty-two."

*10 In response to further questioning, appellant said he threw the gun in the ocean, acknowledged that he and Jujakas were both shooting, and said he shot "three, four" rounds. When asked where he got the gun, appellant first said a "dopefiend came and sold it to us," then when told the detectives did not believe him, said he found it in a stolen car. Appellant said he did not know there were babies in the car, but only saw the woman in the back and man in the front. Asked who he aimed at, appellant said he "just shot the front window." Appellant said the victim said he was "a thirteen."

Appellant tried to say he was the only one shooting and the detectives told him there were two shooters and "[h]onesty's the only thing that's gonna help you out now." They told appellant they knew he ran with Jujakas after the shooting, stressed the seriousness of the crime, and told appellant the only thing that would help him when the case went before a jury would be if he "showed some sort of remorse and you showed some bit of honesty. This ain't about, oh well now it's a whole coat, I'm not down for snitching. You're fighting for your life now. You want to be able to get out sometime in your life. To be able to see your baby. Don't you?" Appellant said he did not want to be a snitch. The detectives told him they were "pass [*sic*] that now" and Jujakas was not looking out for him.

The detectives told appellant he was looking at 25 years to life for murder and outlined the significant additional penalties for shooting the passenger, endangering the children and related enhancements, then told appellant he needed to be honest and show remorse because he was looking at "[t]wenty-five to life or life without. [¶] ... [¶] It's gonna be one of those two different things. You got to figure it out."

Goldberg suggested he could draw a map that appellant could fill in and appellant moved forward and worked on this with him. He first denied anyone told him to "do this hit," then said Willow pointed out, "that's the dude. That's the dude," said "let's go over there," and he, appellant and Jujakas walked around the block to the car on Battery so they would not be seen approaching. Appellant said Willow had a "nine"

and Jujakas had a gun but he did not know what kind; appellant shot four bullets, Willow and Jujakas each fired four or five; and a person wearing a number 45 Oakland jersey got out of the green van and joined in the shooting.

Goldberg told appellant he did not believe he had thrown the gun in the ocean and suggested it would help appellant to be honest about this because "they'll know your not lying and that you are showing some remorse" and if appellant directed the police to the gun it would show he, not the others, had had the .32 caliber, which would be better for appellant if the .32 did not kill anyone. Appellant said he threw the gun in the park and explained the specific location; the detectives got a map and appellant pointed out where he was running and where he threw the gun. Appellant said he did not think he hit the man in the car "cause all those thirty-two don't go through, I was just hitting at the window." Appellant said he was not trying to kill anyone, just scare them; he was shooting at the front window; and he thought whoever was on the side hit the man in the head. Appellant said he knew the man had been shot in the head because as soon as he heard a shot he saw the man bleeding, demonstrating what he saw by motioning with his hands to show blood running down his face and slumping over in his chair. Appellant said Willow told the group to shoot, Jujakas started shooting first, and appellant shot after Willow and Jujakas had already hit the victim. He said he had "barely start[ed] hanging" with RST, but acknowledged he was a member of RST and trying to represent it, and the shooting was a gang retaliation. Appellant spontaneously showed Goldberg a tattoo on his arm, but said it was not an RST tattoo, "[j]ust the smile face, the clown face, you don't know the clown faces?"

*11 At the suppression hearing, Goldberg testified appellant's interview began at about 2:41 a.m. on January 18, 2006, and lasted about an hour and a half. Appellant did not ask for food or beverage during the interview, and was allowed to use the rest room when he asked to do so at the end. Goldberg had previously interviewed K.L., who identified appellant and said he had confessed to her. He had interviewed Oralia Giron, who said she had been in the rear passenger compartment of the car when shots were fired but did not identify appellant. Goldberg had taken part in inspecting the crime scene, where shell casings, including four .32 caliber casings, had been found, and he had seen Segura, with a gunshot to his head, in a Honda Accord. He and Detective Pate had not spoken with Julius Stinson (Jakas or Jujakas) but, as a "ruse" to elicit the truth, told appellant that they had, and that Jujakas had said appellant was at the scene of the shooting.

Richard Ofshe testified as an expert "on the influence used in police interrogations." In his view, the interrogators, "working in tandem," used a "psychologically coercive" strategy "that is pushed forward by offering leniency through suggestion, and then ultimately through blatant statement of the same point to overcome resistance.... [I]t is a motivational strategy that is all about benefit if you comply, and more serious punishment if you don't. And that's the strategy that is used repeatedly, was developed and then used repeatedly throughout this interrogation. It's not a simple one statement." The detectives used a "coherent strategy" throughout the interrogation, promising appellant he would receive "the worst possible punishment" if he continued to maintain he had no involvement with the crime, while if he agreed to various suggestions it would "open the door to and result in his receiving great leniency, or relative leniency.... [¶] Once compliance is gained, it's then used to overcome subsequent resistance."

Appellant's primary argument is that the detectives elicited his confession by means of a strategy of offering leniency in sentencing in exchange for honesty, including directing appellant as to what story would be viewed as honest. Specifically, he maintains that the detectives gave him the "very clear impression" that if they believed he was " 'honest' and told the 'truth,' he would not get 'twenty-five to life or life without' and 'die in prison,' but would instead see his baby 'in a few years.' " He cites several points at which the detectives urged him to be honest, told him that without cooperation he would be tried as an adult, be "fighting for his life" and "face 'twenty-five to life or life without' and then 'die in prison,' " and told him that if he confessed he would " 'see your baby' and 'be there for your kid in a few years.' " Appellant argues the detectives told him what they would accept as "honesty" and "truth" by falsely claiming they had evidence placing him at the scene of the shooting and witnesses who had seen him with a gun, thereby eliciting from him the story they wanted him to supply-that he was the shooter Giron saw in front of the car.

*12 Drawing on Ofshe's testimony, appellant urges the detectives first used false claims to get him to admit he was present at the scene of the shooting, telling him that they had talked to Jujakas; evidence had been presented to a judge who signed a warrant for appellant's arrest; and they knew where appellant ran, knew he got into Smurf's car, and knew a red Bronco was involved. Only the first of these claims was false: The police had not yet talked to Jujakas. Appellant *had* been arrested pursuant to a warrant, and K.L. had told the police she saw appellant get into a red Blazer, saw appellant and Jujakas running from the scene, and saw Jujakas and then appellant get into Smurf's car. Appellant argues the detectives again falsely claimed to have evidence when, in the face of appellant admitting his presence but denying having had a gun, they told appellant that "witnesses' put the gun in your hand." This was not a false claim, inasmuch as K.L. had told the detectives she knew appellant had a gun when he came to the house immediately after the shooting and she heard Rosa tell him "don't put it there" as he tried to put it under the couch, as well as that appellant later told her he had shot the victim in the forehead. While the communication of false information is a factor weighing against voluntariness, it " 'does not alone render a resulting statement involuntary.' " (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209, quoting *People v. Hogan, supra*, 31 Cal.3d at pp. 840-841.) " 'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' " (*Maury, supra*, 30 Cal.4th at p. 411, quoting *People v. Ray* (1996) 13 Cal.4th 313, 340.) Given what information the detectives did have linking appellant to the crime, the deception used here "was not of the type to induce an innocent man to implicate himself in the crime." (*People v. Watkins* (1970) 6 Cal.App.3d 119, 125 [defendant falsely told his fingerprints had been found on get away car; defendant had been identified by victim of robbery and found in vicinity shortly after it].)

Appellant also argues the detectives coerced appellant's confession by offering him various scenarios for how the crime might have been committed that would mitigate his liability: "Either you are a young man that is angry because your best friend was just killed, and that's understandable that's a logical explanation. Or somebody like Jujakas forced you to do this.... [M]aybe you weren't thinking straight, maybe you were upset, maybe that guy aimed the gun at you, maybe he's a gang member, maybe he's the guy that killed Gizmo.... [¶] ... [¶] Was it a spur of the moment type thing or did you plan it for the whole night?" It was after the last of these questions that appellant first acknowledged he was present, but maintained he did not have a gun. Addressing the latter point, the detectives again offered various scenarios: "[I]f it's a justifiable homicide or its something you did out of rage and you just weren't thinking straight then that's important for us to get down accurately. If you're just a killer that just wants to go around to kill people and skin cats and all that type of stuff, then by all means tell us and we'll document that as such." "Maybe you were shooting in defense and just, right maybe tying to scare him."

*13 This tactic was permissible. (*People v. Holloway, supra*, 33 Cal.4th at pp. 116-117.) As the *Holloway* court explained, "[Detective] Hash's further suggestions that the killings might have been accidental or resulted from an uncontrollable fit of rage during a drunken blackout, and that such circumstances could 'make[ ] a lot of difference,' fall far short of being promises of lenient treatment in exchange for cooperation. The detectives did not represent that they, the prosecutor or the court would grant defendant any particular benefit if he told them how the killings happened. To the extent Hash's remarks implied that giving an account involving blackout or accident might help defendant avoid the death penalty, he did no more than tell defendant the benefit that might ' "flow[ ] naturally from a truthful and honest course of conduct" ' (*People v. Jimenez, supra*, 21 Cal.3d at p. 612), for such circumstances can reduce the degree of a homicide or, at the least, serve as arguments for mitigation in the penalty decision. As the appellate court explained in *People v. Andersen* [(1980)] 101 Cal.App.3d [563,] 583, 'Homicide does possess degrees of culpability, and when evidence of guilt is strong, confession and avoidance is a better defense tactic than denial.' " (*People v. Holloway, supra*, 33 Cal.4th at p. 116.) To the same effect, the court found in *People v. Carrington* (2009) 47 Cal.4th 145, 171, "Detective Lindsay's suggestions that the Gleason homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime." Here, in presenting appellant with different scenarios for how the crime could have occurred, the detectives told appellant time and again that it was important for them to know what he was thinking. This was relevant and accurate, as appellant's mental state would bear on the determination of which offense he could be charged with and found to have committed.

Throughout the interview, the detectives urged appellant that it would help him to tell the truth and hurt him not to. This is the main basis of appellant's argument, that the police impermissibly promised appellant lenient treatment in return for his confession.

Several of the passages appellant cites involve general exhortations for appellant to tell the truth, sometimes combined with suggestion that this might allow the officers to "help" him: "This is where it's important for you to be honest with us so if there is some way to help yourself out this is the time to do it"; "Be honest. This is the only time we can help you out man"; "[W]e are giving you the opportunity to try and work through this so maybe you can be there for your kid in a few years"; "Honesty is the only thing that's going to help you out now"; and "Be honest with me. [¶] ... [¶] Tell me the truth." These statements by the detectives did not promise any specific benefit to appellant, but only such benefits as "flow[ ] naturally from a truthful and honest course of conduct," which is permissible. (*People v. Holloway, supra,* 33 Cal.4th at p. 115.) Encouraging a suspect to tell the truth by suggesting this will be to his or her advantage is permissible. (*People v. Vasila, supra,* 38 Cal.App.4th at p. 874.)

*14 There are places in the interrogation where the detectives crossed the line. For example, the detectives told appellant, "See let's be very honest right now. The only thing that's going to help you in about 2 years when this goes before a jury of 12 people, like he was telling you about, is the fact that you showed some sort of remorse and you showed some bit of honesty. This ain't about, oh well now it's a whole coat, I'm not down for snitching. You're fighting for your life now. You want to be able to get out sometime in your life. To be able to see your baby. Don't you?" Clearly the detectives at this point were implying appellant would be viewed more favorably and treated more leniently if he was "honest." In the passages appellant offers as examples of "blatant" offers of leniency in exchange for honesty, the detectives told appellant he would be tried as an adult and would soon be "fighting for [his] life," that he faced "twenty-five to life," and that if he did not show remorse, he would be "looking at ... [¶][t]wenty-five to life or life without. [¶] ... [¶] It's gonna be one of those two different things. You got to figure it out." After the detectives outlined the various prison terms attached to the offenses, they suggested, "what you need to salvage my friend is.... [¶] Do you show remorse? [¶] Do I wanna get out of prison when I'm forty-five years old? Or do I wanna die in prison?" These were unquestionably improper offers of leniency in exchange for honesty. (See *People v. Vasila, supra,* 38 Cal.App.4th at p. 874 [one investigator promised not to institute federal prosecution; the other promised to release the defendant on his own recognizance]; *People v. Jiminez, supra,* 21 Cal.3d at pp. 611-612 [defendant was told he faced the death penalty and things would go better for him with the jury if he talked about the case].)

In determining whether these improper offers rendered the confession involuntary, the question is whether, "given all the circumstances, the promise was a motivating factor in the giving of the statement." (*People v. Vasila, supra,* 38 Cal.App.4th at pp. 873-874.) This is where appellant's claim fails.

First, appellant's critical admissions were made before improper tactics were employed-that he was in front of the car, that he had the .32 caliber gun, and that he had shot three or four rounds at the front window of the car. What followed was further elaboration of the details of the shooting, with appellant's primary resistance being to revealing his companions' actions. In claiming that the detectives promised leniency in exchange for cooperation "well before" he "actually confessed," appellant cites two pages in the transcript of the interrogation as the points where he made his confession. FN8 At these pages, appellant stated that he was standing in front of the car and that he shot after Jujakas and Willow had hit the victim. This claim simply ignores appellant's earlier statements that he was standing in front of the car and fired four bullets from the .32 caliber at the front window. FN9

FN8. The trial court viewed the first point in the interrogation implicating promises of leniency to be when the detectives specifically linked an amount of prison time to appellant's cooperation, "indicating life without possibility of parole without cooperation, as opposed to 25 to life with cooperation." Appellant contends the court's characterization was wrong, that the detectives linked his cooperation with being able to "see your baby" and "be there for your kid in a few years." We do not agree. The detectives never promised appellant he would be able to get out of prison "in a few years." Detective Goldberg did at one point tell appellant, "You got to remember, we are giving you the opportunity to try and work through this so maybe you *can* be there for your kid in a few years." (Italics added.) This suggestion of a general

possibility did not amount to a promise, and, as is clear from the video recording of the interview, the suggestion was made at a point when the detectives were talking at the same time, making it questionable whether appellant even heard Goldberg's comment. He did not appear to react to it. This was the only time there was any suggestion of appellant facing anything less than a substantial prison term. The other reference to appellant being able to see his baby came in the statement, "You're fighting for your life now. You want to be able to get out sometime in your life. To be able to see your baby. Don't you?" When the detectives specifically linked appellant's cooperation with his prospective sentence, as the trial court noted, the linkage was phrased in terms of the alternative between life in prison and 25 years to life with the possibility of parole. Pate asked appellant, "Do I wanna get out of prison when I'm forty-five years old? Or do I want to die in prison?" Appellant responded that he wanted to get out and Pate told him he needed to be "100% honest" and "show some sort of remorse because otherwise your looking at...." Goldberg broke in with "[t]wenty-five to life or life without.... [¶] It's gonna be one of those two different things. You got to figure it out." Later, Pate told appellant, "You're going to be thirty-five years old, sitting in San Quentin wishing that you would have been completely honest and not just ... [¶] ... [¶] 'Cause the difference will be life without, as oppose to twenty-five with the possibility...."

FN9. Similarly, appellant's description of how the police coerced him into giving them the story he says they wanted-that he was the shooter Giron saw in front of the car-is not borne out by the record. Appellant urges that he told the detectives he shot from in front of the car only after the detectives told him they would believe that he was "shooting at the front guy" and "aiming at the guy in the driver's seat" because this showed he was being honest and telling the truth. Appellant refers to two pages of the transcript, but only the second reference, in fact, couples the quote with a reference to appellant's honesty; the first is simply a question, "[s]o you were shooting at the front guy then right?" This question actually *followed* appellant's statement that he "shot the front window." Earlier in the interview appellant had stated that he was in front of the car (albeit at first claiming he did not have a gun), that he had the .32 caliber gun, and that he shot three or four rounds. Thus, appellant had admitted shooting from the front of the car even before the detectives made the statements appellant now claims precipitated his crucial admission.

*15 Second, the totality of the circumstances reflect that appellant's crucial admissions were voluntary and not coerced. Having reviewed the videotape of appellant's confession, we find ourselves in agreement with the trial court's commendably thorough and detailed ruling regarding the nature of the interview. While appellant was a minor without criminal history, he was hardly a "child" as characterized in his briefs: He was 16 years old, arrested in bed with his pregnant girlfriend, and well versed in the gang activities in his neighborhood. The atmosphere of the hour and a half long interview (which included periods when he was left in the interview room by himself) was not overtly harsh or threatening, and appellant's demeanor throughout was relaxed and displayed no intimidation or fear. (See *People v. DePriest* (2007) 42 Cal.4th 1, 35.) As the trial court noted, "it was a non-threatening atmosphere for a police interrogation, and the defendant did not demonstrate or exhibit any fear of the officers." "[T]he tone of the interview was quite professional, relatively moderate, mostly conversational. Most of it was back and forth between the detectives and the defendant. And my sense is the defendant did answer the questions he was asked freely. [¶] ... [¶] ... [T]he officers did not raise their voices excessively. There was no browbeating of the defendant." Although the detectives became "somewhat animated" regarding the children in the car, "their conversations with the defendant were never abusive toward him." Toward the end of the interview, appellant spoke "conversationally," "willingly" worked on the map with the detectives and "volunteered to show the tattoo no one had asked about." The trial court concluded that it was "left with a strong and consistent impression that the defendant at all times was acting voluntarily, that he was not intimidated by the officers. He made calculated decisions as to how much he could or should tell the officers, but when he did so, he had done so calmly, casually, and without any apparent fear of the officers."

Finally, to the extent any portions of appellant's confession should have been suppressed as induced by improper interrogation tactics, the error was harmless beyond a reasonable doubt. (*People v. Cahill, supra*, 5 Cal.4th at pp. 509-510.) As explained, the crucial admissions that appellant shot at the front window of the car with a .32 caliber were admissible. And even aside from appellant's confession, the evidence against him was very strong. According to Goldberg's description of K.L.'s statements at the house, she saw

appellant get a gun from a van and Jujakas get a gun from a Chevy Tahoe, saw the van, appellant and Jujakas leave the area, and minutes later heard nine gunshots. She then saw appellant and Jujakas running back to the house, Jujakas getting into a vehicle and appellant entering the house and apparently attempting to get rid of a gun. Later in the day, appellant told her he had shot the victim in the forehead. In the taped interview that was played for the jury, K.L. told the police she saw appellant get into a car that drove toward the scene of the shooting while Jujakas ran toward it with a gun, and after hearing the gun shots, saw appellant return to the house and attempt to put what she believed to be a gun under the couch, then run and jump into the black Tahoe that Jujakas had already gotten into. Later, appellant told her he shot the victim in the forehead.

*16 While K.L. testified that none of the above statements were true, and that Detective Goldberg had coerced her into identifying appellant and providing the story she gave, there is virtually no chance the jury believed her. K.L. testified at trial that she was not present for any of the events she described, but Kay Daniels testified that he saw her in front of the house before the shooting. K.L. testified that she did not know where appellant lived and that she identified a random house when the police asked her to show them. Yet when the police went to precisely the apartment K.L. pointed out, they found not only appellant but also K.L.'s own child. There is little chance the jury could have concluded K.L.'s trial testimony, rather than her prior statements to the police, was truthful.

Appellant suggests that the physical evidence demonstrates the admissions K.L. described him having made did not describe what actually happened: K.L. related appellant having said he shot the victim in the forehead; Jujakas shot Giron in the chest; and Gizmo's cousins shot .357's. But in fact, Segura was shot behind his left ear, in his neck and in his upper chest; Giron was shot in the leg; and the police found evidence of .32 caliber and 9 millimeter weapons, but not .357's. None of these points is so inconsistent with the facts as to necessarily discredit K.L.'s statement or the statement she attributed to appellant. If appellant shot from the front of the car and saw blood on Segura's face, he could well have thought he hit Segura in the forehead. Similarly, seeing Giron in the backseat of the car, appellant could have assumed she was shot in the chest rather than the leg. Appellant did not necessarily know what type of gun the other shooters fired.

Additionally, Daniels told the police that appellant was one of the group outside Willow's house talking about doing violence and that he saw appellant going with the others toward the scene of the shooting, although he did not see where appellant was during the shooting.

II.

As has been described, the jury saw and heard the videotape of appellant's confession to the police. They also were given evidence that appellant told K.L., in a conversation at the Green Store, that he shot Segura in the forehead. The trial court instructed the jury pursuant to CALJIC No. 2.70: "You are the exclusive judges as to whether the defendant made a confession or an admission, and, if so, whether that statement is true in whole or in part. [¶] Evidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution." After these instructions had been given, the prosecutor requested a modification of CALJIC No. 2.70, arguing that the direction to view an admission with caution applies to an admission made out of court and related by a witness, but not to an admission that is recorded, because with a recording, "the making of the statement and the rendition of the words are preserved in their pristine form as they were stated." The court then told the jury it needed to correct a mistake in the instructions it had given and reread the instructions on confessions and admissions, this time stating, "Evidence of an oral confession or an oral admission of the defendant not recorded on audiotape or videotape and not made in court should be viewed with caution."

*17 Appellant argues the instruction to view *unrecorded* admissions and confessions with caution indicated that the jury should not view *recorded* admissions and confessions with caution. Because his defense depended on convincing the jury that his recorded confession was coerced and therefore *should* be viewed with caution, appellant argues that the modified instruction undercut his defense and lightened the prosecution's burden of proof.

Appellant recognizes the general rule that CALJIC No. 2.70 should be given sua sponte when evidence of a defendant's oral statement is used to prove the prosecution's case (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200; *People v. Beagle* (1972) 6 Cal.3d 441, 455; *People v. Shoals* (1992) 8 Cal.App.4th 475, 498), as well as that the cautionary instruction should *not* be given when the jury is presented with a tape recording of the oral admission (*People v. Slaughter,* at p. 1200). The reason for the latter rule is that " 'the purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.' [Citation.]" (*Ibid.,* quoting *People v. Beagle,* at p. 456.) There is no need for this determination in the case of a recorded statement.

Accordingly, appellant acknowledges that, under "normal circumstances," the trial court would have been correct to modify the cautionary instruction to apply only to the evidence of appellant's unrecorded statements. He urges that the circumstances in this case were "extraordinary," however, because his defense asked the jury to view his recorded statements with caution and the instruction told them not to do so.

Appellant contends the present case is controlled by *Cool v. United States* (1972) 409 U.S. 100 (Cool). In *Cool,* at a trial for possession of counterfeit bills, an accomplice testified for the defense that he was guilty of the offense but the defendant was not involved. (*Id.* at pp. 100-101.) The trial court instructed the jury that "an accomplice's testimony is 'open to suspicion,' " but also that if the jury was convinced " *beyond a reasonable doubt* " that the accomplice's testimony was true, it should be given the same effect as any other witness's testimony. (*Id.* at p. 102.)

Appellant characterizes *Cool* as holding that the "standard" accomplice instruction posed no problem where the accomplice testifies for the prosecution, but where the accomplice testifies for the defense, "an instruction telling the jury to view the accomplice's testimony skeptically 'places an improper burden on the defense.... ([*Cool, supra,*] 409 U.S. at p. 103)" and "improperly reduces the state's burden of proof." This is not an accurate portrayal of the holding.

In explaining the propriety of accomplice instructions when the accomplice testifies for the prosecution, because the instructions represent "no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity," *Cool* stated that "[n]o constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony 'with care and caution.' " (*Cool, supra,* 409 U.S. at p. 103.) The court went on to say, "But there is an essential difference between instructing a jury on the care with which it should scrutinize certain evidence in determining how much weight to accord it and instructing a jury, as the judge did here, that as a predicate to the consideration of certain evidence, it must find it true beyond a reasonable doubt." (*Id.* at p. 104.) The instruction given by the trial court in *Cool* impermissibly obstructed the defendant's exercise of her right to present exculpatory evidence from an accomplice "by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable." (*Ibid.*) Additionally, the court explained, by telling the jury it could not consider the accomplice's testimony unless it found that testimony believable beyond a reasonable doubt, the instruction reduced the prosecution's burden of proof "[b]y creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence." (*Ibid.*)

*18 While *Cool* was concerned with the effect of a cautionary instruction applied to accomplice testimony for the defense rather than for the prosecution, the focus of the court's attention was the erroneous use of the beyond a reasonable doubt standard. Absent that erroneous standard, courts have held that cautionary instructions may be given when the accomplice is testifying for the defense. (*U.S. v. Tirouda* (9th Cir.2005) 394 F.3d 683, 687.) Here, as the cautionary instruction was a correct statement of law, *Cool* does not support appellant's claim.

The question we must determine is whether there is a reasonable likelihood that the jury misunderstood and misapplied the law. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Boyde v. California* (1990) 494 U.S. 370, 380-381; *People v. Kelly* (1992) 1 Cal.4th 495, 525) As the Supreme Court pointed out in *Boyde v. California,* at pages 380-381, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the

instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." We consider the language of the instruction at issue in the context of the instructions as a whole and the record of the trial, including the arguments of counsel. (*Estelle v. McGuire,* at p. 72; *People v. Prettyman* (1996) 14 Cal.4th 248, 272-273; *People v. Kelly,* at pp. 525-526.)

The jury was told first that it had to determine whether appellant made an admission or confession and, if he did, whether the statement was true, then second, that an unrecorded, out-of-court admission or confession should be viewed with caution. As applied to appellant's statement to K.L., the instruction directed the jury to determine whether appellant made the statement and whether it was true, and to view the statement with caution. As applied to appellant's recorded confession to the police, the terms of the instruction directed the jury simply to determine whether it was true: Because the statements were recorded, there could be no question whether appellant made the statements, so there was no direction to view the statements with caution. Nor was there any express direction *not* to view the recorded confession with caution.

Appellant's argument is based on the negative inference he draws from the instruction, that because it told the jurors to view unrecorded statements with caution, it necessarily directed them *not* to view *recorded* statements with caution. The entire defense, as well as the arguments of counsel, however, worked against this negative inference. Appellant's defense depended completely upon convincing the jury that his confession was not true. The defense closing argument focused on the tactics used by the detectives to elicit the confession and argument that they were interested in getting a confession rather than getting the truth, and the claim that no evidence other than the confession tied appellant to the crime. For the jurors to have inferred from the challenged instruction that they were not permitted to view recorded admissions and confessions with caution, they would have had to believe that the trial court permitted the defense to present a theory of the case that was entirely irrelevant.

*19 Moreover, the prosecutor never asked the jury to draw the inference appellant suggests. Addressing the issue in closing argument, the prosecutor noted that there were two confessions in the case, "[t]he confession heard by [K.L.] and the confession on videotape." After reciting the instruction that an unrecorded out-of-court admission or confession should be viewed with caution, the prosecutor explained why an unrecorded statement should be viewed with caution by analogy to the game "telephone," in which a message gets passed from person to person and by the time it reaches the last person, "the essential fact of the matter is the same, but the details will have changed." The prosecutor did not suggest this instruction had any bearing on the recorded confession to the police. He did argue that the jury should believe appellant's confession to the police, for reasons including that "people are not likely to say something bad about themselves unless it's true," that appellant gave many details about the shooting that he would only have known by being there, [FN10] and that the confession was corroborated by other evidence. It was never suggested that the confession should be taken as truth because it was recorded. There is no reasonable likelihood the jury would have interpreted the instruction to view unrecorded admissions and confessions with caution as directing it to accept appellant's recorded confession as truthful.

FN10. The prosecutor pointed to a number of facts, including: that the number of shots appellant said he fired, without prompting from the detectives, matched the number of .32 caliber casings found at the scene; that appellant knew the woman was in the back seat of the car, whereas it would commonly be assumed that a passenger would be in the front seat; that he knew there was a conversation with the driver before the shooting, just as Giron described; that appellant said he shot at the front window and photographs confirmed the windshield had been shot out; that appellant described walking up to the car from behind, consistent with Giron's description; that appellant knew Segura was shot in the head; and that he knew a fourth person was involved in the shooting, a point confirmed later by Daniels.

Unlike the situation in *Crane v. Kentucky* (1986) 476 U.S. 683, 690, the challenged instruction did not deprive appellant of a " 'meaningful opportunity to present a complete defense.' " In *Crane,* after the trial court found his confession voluntary, the defendant sought to present evidence regarding the circumstances in which the confession was obtained in order to suggest the jury should not find it worthy of belief. (*Id.* at p. 684.) The trial court, viewing the evidence as relevant only to the already determined question of

voluntariness, ruled it inadmissible. (*Ibid.*) *Crane* reversed, finding the exclusion of "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence" deprived the defendant of his right to present his defense. (*Id.* at pp. 690-691.) Here, appellant was in no way prevented from presenting evidence and argument to support his defense that his confession to the police was coerced and should not be taken as truth. The instruction at issue did not undermine the jury's ability to consider the defense. Nor does the present case involve anything like the situation in *Washington v. Texas* (1967) 388 U.S. 14, which reversed a conviction because the defendant had been prevented from presenting a crucial defense witness.

III.

Appellant next contends he received ineffective assistance of counsel because his attorney failed to object to Detective Pate's testimony that he committed the shooting with the specific intent to promote the RST gang. This argument concerns appellant's conviction of street terrorism in violation of section 186.22, subdivision (a), which provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

*20 "In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness ... under prevailing professional norms.' (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688); [*People v.] Ledesma* [(1987)] 43 Cal.3d [171,] 215-216.) Second, he must also show prejudice flowing from counsel's performance or lack thereof. (*Strickland, supra,* at pp. 691-692; *Ledesma, supra,* at pp. 217-218.) Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*In re Sixto* (1989) 48 Cal.3d 1247, 1257; *Strickland, supra,* at p. 694.)" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

The initial question is whether defense counsel's failure to object to Pate's testimony constituted deficient performance. "In general, this court and the Courts of Appeal have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case. 'Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id.,* subd. (a).) The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion.' (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 438; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 ['The use of expert testimony in the area of gang sociology and psychology is well established.'].)" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.)

"Expert testimony repeatedly has been offered to show the 'motivation for a particular crime, generally retaliation or intimidation' and 'whether and how a crime was committed to benefit or promote a gang.' " (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, quoting *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.) Expert testimony "as to [the] defendant's motivations for his actions" is permissible. (*People v. Ward* (2005) 36 Cal.4th 186, 209.) An expert witness may not, however, testify to his or her opinion of the knowledge or intent of the defendant on trial. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513; *People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1551; *People v. Killebrew,* at p. 658; see *People v. Gonzalez, supra,* 38 Cal.4th at p. 947.)

Appellant argues that Pate improperly expressed his opinion on appellant's guilt or innocence, and on appellant having had a specific intent of promoting the RST gang, when he testified that appellant got "engaged in a retaliatory shooting for a hard core RST who is killed allegedly by an MS[13]," that the "retaliation was clearly because they believed, or had in their mind that the people who killed Gizmo were the MSs down the street and which they targeted," that the shooting "in fact is a gang crime," that the shooting was "absolutely" committed "for the benefit of or the purposes of RST," that the crime was "a

retaliatory shooting" with "them representing themselves as a gang," and that "they do it together, they do it for respect of the gang, they do it to retaliate for the gang."

*21 Detective Pate's testimony addressed the reasons that he believed appellant was a gang member-including his residing and socializing with RST members, talking with K.L. at the Green Store, which was controlled by the gang, and admitting being a member at Juvenile Hall and in his confession to the police, as well as his participation in a gang shooting. As to the last of these, Pate discussed the reasons for his belief that the shooting was committed to benefit the gang, as retaliation for the prior shooting of an RST member and to maintain their presence and drug trade. None of this testimony was directed at appellant's subjective intent with respect to the shooting; it concerned the actions and motivations of the gang members in general. (See *People v. Olguin, supra,* 31 Cal.App.4th at p. 1371 [allowing expert testimony "focused on what gangs and gang members typically expect and not on [defendant's] subjective expectation in this instance"].)

Appellant's claim that Pate's comments were improper expressions of his opinion on appellant's guilt is also unavailing. *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47, found a violation of the rule that "a witness cannot express an opinion concerning the guilt or innocence of the defendant" where, at the defendant's trial for murder with a robbery special circumstance and attempted robbery, an expert witness gave his own definition of "robbery" and testified: " 'That is what happened in this particular case.' " (*Id.* at p. 44.) *Torres* explained that the reason for the rule against witnesses expressing opinions on guilt or innocence "is not because guilt is the 'ultimate issue of fact' to be decided by the jury. Opinion testimony often goes to the ultimate issue in the case. (See [*People v.] Brown* [(1981)] 116 Cal.App.3d [820,] 827-828, and cases cited.) Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*People v. Torres,* at p. 47.) *Torres* held that "under the facts of this case, expressing the opinion the crimes were robberies was tantamount to expressing the opinion defendant was guilty of robbery and the first degree felony murder of [the victim]." (*Id.* at p. 48.) Here, Pate testified that the shooting was a gang crime, committed in retaliation for Gizmo's killing, and for the benefit of RST. The jury still had to determine that appellant participated in the shooting and subjectively acted to promote RST.

In *People v. Clay* (1964) 227 Cal.App.2d 87, the other case appellant cites for this point, a police officer testifying as an expert in investigation of the crime of " 'till tapping' " was given a hypothetical based on the facts of the case and asked whether he would have an opinion as to what crime had been committed. He responded, " 'That is the usual procedure of till tappers.' " (*Id.* at pp. 92-93.) The defendant's claim that this amounted to an improper testimony as to his guilt was rejected because the expert testified only that the conduct of the defendant "was consistent with the procedure of a till tapping operation" and this "was a permissible opinion although directed to an ultimate issue in the case." (*Id.* at p. 99.)

*22 Pate's testimony was admissible. As appellant's trial attorney had no basis for objection on the ground appellant now claims, his ineffective assistance of counsel argument is without merit.

IV.

The information alleged in connection with all counts that appellant was a minor at least 14 years of age at the time the offenses were committed (Welf. & Inst.Code, § 707, subd. (d)(2)(A).) Section 707, subdivision (d)(2)(A), provides that a minor 14 years of age or older may be prosecuted in a court of criminal jurisdiction if alleged to have committed an offense "that if committed by an adult would be punishable by death or imprisonment in the state prison for life." "A minor accused of a crime is subject to the juvenile court system, rather than the criminal court system, unless the minor is determined to be unfit for treatment under the juvenile court law or is accused of certain serious crimes." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 548.) Welfare and Institutions Code section 707, subdivision (d), "confers upon prosecutors the discretion to bring specified charges against certain minors directly in criminal court, without a prior adjudication by the juvenile court that the minor is unfit for a disposition under the juvenile court law." (*Id.* at p. 545.)

On March 28, while the jury was deliberating, the court held a hearing to address the allegation and whether appellant was subject to prosecution in superior court. Defense counsel waived appellant's presence for purposes of this inquiry and agreed that it was an issue for the court to decide based upon the evidence presented at trial. The prosecutor stated that appellant confirmed in his confession he was over the age of 14, noting that appellant said he was 16 years old, the birth certificate that was submitted in connection with the motion to suppress the confession indicated he was 15, and "by either account it's over 14 years old." Defense counsel did not remember a birth certificate being submitted, but stated, "the issue to me is there is no issue, basically." The court stated that it had reviewed a birth certificate at the beginning of trial in connection with the question whether appellant should continue to be housed at Juvenile Hall, but had not admitted it as an exhibit; defense counsel agreed that it should be admitted for purposes of the current issue. The court stated that appellant told the police officers he was 16 at the time of the offense, the birth certificate indicated he was 15, and, in any event, it was clear he was over the age of 14 and therefore he came within the provisions of Welfare and Institutions Code section 707, subdivision (d)(2)(A).

Appellant argues the trial court violated his constitutional right to be present at all critical stages of trial by holding this "jurisdictional hearing" in his absence. He maintains there was conflicting evidence as to his age in that he told the police his birthday was November 17, 1999, making him six years old at the time of the shooting; then said his birthday was November 17, 1989, making him 16 years old; then later said he was actually 15; and after that said he was 16. Appellant contends the state relied upon a birth certificate "allegedly" belonging to him, "the authenticity of which the state itself conceded was 'a little dubious,' " which showed a birth date of November 17, 1990, indicating he was 15 at the time of the offense.

*23 "A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution, as well as by article I, section 15 of the California Constitution and by sections 977 and 1043 of the California Penal Code. (*People v. Jones* [(1991]) 53 Cal.3d [1115,] 1141; *People v. Douglas* (1990) 50 Cal.3d 468, 517.) A defendant, however, 'does not have a right to be present at every hearing held in the course of a trial.' (*People v. Price* (1991) 1 Cal.4th 324, 407.) A defendant's presence is required if it 'bears a reasonable and substantial relation to his full opportunity to defend against the charges.' (*People v. Freeman* (1994) 8 Cal.4th 450, 511.)" (*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039; *People v. Wallace* (2008) 44 Cal.4th 1032, 1052.) "A defendant's right to be present depends on two conditions: (1) the proceeding is critical to the outcome of the case, and (2) the defendant's presence would contribute to the fairness of the proceeding. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *People v. Perry* (2006) 38 Cal.4th 302, 312.)" *People v. Concepcion* (2008) 45 Cal.4th 77, 82.) "The defendant must show that any violation of this right resulted in prejudice or violated the defendant's right to a fair and impartial trial. (*People v. Jackson* (1980) 28 Cal.3d 264, 310.)" (*People v. Hines,* at p. 1039; *People v. Wallace,* at p. 1052.)

Appellant urges the hearing in this case implicated his constitutional right to be present because it was evidentiary in nature, requiring proof of his "age and fitness to be tried as an adult." He argues that a defendant's presence at such a hearing "bears a 'reasonably substantial relation to the fullness' of the opportunity to defend himself" because "the defendant himself may very well have information critical to the determination of the truth of the allegation, as the allegation is often based on documentation of age which the defendant himself could review and refute or explain." FN11

FN11. Appellant's quotation is a paraphrase of Court's language in *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106: "We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."

First, appellant's fitness to be tried as an adult was not at issue: As explained above, the significance of Welfare and Institutions Code section 707, subdivision (d)(2)(A), is that it permits prosecution of a minor over the age of 14 years upon proof that the minor was over the age of 14 years *without* a determination of fitness. (*Manduley v. Superior Court, supra,* 27 Cal.4th at p. 548.)

The sole issue for the court's determination here was whether appellant was over the age of 14. The court based its decision on appellant's statements to the police, as introduced into evidence at trial, and the birth certificate it had considered earlier in the proceedings with respect to the question whether appellant should be housed at Juvenile Hall. At that earlier hearing, the prosecutor had referred to the birth certificate as being of "dubious" authenticity because it indicated appellant was 15 years old, while appellant told the police he was 16 years old. While appellant is correct that he was not consistent in his statements about his age during his interrogation, the inconsistency does not amount to the "conflicting evidence" he suggests. Appellant's first statement, that his birthday was "November 17, 1999" was an obvious misstatement: Appellant immediately corrected himself, saying, "Not ninety-nine. Eighty-nine." As can be seen on the videotape, he chuckled and said, "Man, I'm not eight years old." His stated birthday of November 17, 1989, would make him 16 years old at the time of the shooting. At the outset of the interrogation, Detective Pate asked appellant if he had been arrested before and said, "You know you're a juvenile, right? You're fifteen." Appellant responded, "Yup." Pate went on to discuss appellant's rights. A little later, in the course of questioning appellant about the RSTs, MS13s and Gizmo's shooting, Pate said, "You're fifteen years old." Appellant corrected him, saying, "I'm sixteen."

*24 The birth certificate differed from appellant's statement about his birth year, listing it as 1990, which would make appellant 15 years old at the time of the shooting. As the trial court noted, however, in either case appellant was over the age of 14. The magistrate at the preliminary hearing had found appellant to "at least 14 years of age" at the time of the offenses and, specifically, "at least 16 years of age." No question on this point was ever raised at trial and appellant suggests nothing he could have offered to demonstrate he was *not* over 14 years old. As the only conflict in the evidence appellant points to is whether he was 15 or 16 years old, and the allegation was supported by uncontradicted proof he was over 14 years old, he has shown no prejudice from having the court determine the truth of the Welfare and Institutions Code section 707, subdivision (d)(2)(A) allegation in his absence. [FN12] There is no reasonable possibility the outcome of the hearing would have been different if appellant had been present.

FN12. Appellant suggests that prejudice is presumed, and reversal required, when the constitutional right to be present at trial is violated. The cases he relies upon do not support his position. *People v. Kennedy* (1960) 180 Cal.App.2d 862, 872-873, reversed the defendant's convictions because the prosecutor interrogated a witness with neither the defendant nor defense counsel in the courtroom, even though a showing was made that nothing prejudicial had actually happened. The court stated, "It was the right of the defendant to be present with his counsel at all times during the progress of the trial and the acts of the prosecuting attorney had violated that right." (*Id.* at p. 873.) *Kennedy* cited no authority for its holding, which is contrary to the law requiring prejudice for reversal, as stated above. (*People v. Hines, supra,* 15 Cal.4th at pp. 1038-1039.)

Black v. U.S. (D.C.App.1987) 529 A.2d 323, 324-325, reversed without application of a harmless error analysis because the situation involved the defendant's absence during questioning of witnesses, distinguishing that situation from others in which a violation of the defendant's right to be present might be found harmless error.

People v. Ewing (Mich.App.1973) 211 N.W.2d 56, 57-58, following state precedent, held that "[i]njury is conclusively presumed" from violation of a defendant's right to be present. The Michigan Supreme Court subsequently rejected this principle, stating "it is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial," and adopting in its place the rule that " '[t]he standard by which to determine whether reversible error occurred [is] * * * whether there is "any reasonable possibility of prejudice".' " (*People v. Morgan* (Mich.1977) 255 N.W.2d 603, 606.)

Branham v. State (Okla.App.1971) 480 P.2d 281, 282, reversed a conviction on the basis of a state statute, with no discussion of any standard for weighing prejudice.

Finally, as appellant's quotation from the case demonstrates, *Proffit v. Wainwright* (11th Cir.1982) 685 F.2d 1227, 1260, recognizes the application of harmless error analysis: "Applied in the right-to-presence context, the harmless error rule has been stated as requiring that '[w]here there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings, a [judgment] cannot stand.' [Citations.]" (*Id.* at p. 1260.) No such reasonable possibility exists in the present case.

V.

Appellant next urges the trial court violated his constitutional right to a jury trial by failing to instruct the jury on the charged section 12022.53, subdivision (b) enhancement. Appellant contends this error forced the jury into an improper all or nothing choice on the section 12022.53, subdivision (c) allegations, and that the true findings on those allegations must be stricken as a result.

As indicated above, in connection with the murder and attempted murder charges, the information alleged three enhancements under section 12022.53: That appellant personally used a firearm (§ 12022.53, subd. (b)), that he personally used and discharged a firearm (*id.*, subd. (c)), and that he personally used and discharged a firearm, proximately causing great bodily injury or death (*id.*, subd. (d)). The enhancements carry different penalties, a consecutive 10 years under subdivision (b), 20 years under subdivision (c), and 25 years to life under subdivision (d). Section 12022.53 applies to enumerated offenses including murder and attempted murder. (§ 12022.53, subd. (a).)

At the conference on jury instructions, it was established that the prosecution was not proceeding on the section 12022.53, subdivision (d) enhancement, and the court would instruct on subdivisions (b) and (c) only. The court instructed the jury that if it found appellant guilty of murder or attempted murder, or an attempt to commit these offenses or a lesser included felony offense, it had to determine whether appellant "personally used a firearm" in the commission of the offenses. It further instructed that if the jury found appellant guilty of murder or attempted murder, it had to determine whether he "intentionally and personally discharged a firearm in the commission of those felonies."

Outside the presence of the jury, the prosecutor told the court it had mistakenly instructed on "personal use without discharge" for all the offenses whereas, in fact, this enhancement only applied to the lesser offenses (voluntary manslaughter, attempted voluntary manslaughter and assault with a deadly weapon), while only the "use with discharge enhancement" (§ 12022.53, subd. (c)) applied to the charged offenses (murder and attempted murder). The prosecutor stated that instructing on subdivisions (b) as well as (c) with respect to murder and attempted murder was superfluous, because appellant could not be punished under both subdivisions, only under the one carrying the greater punishment. Therefore, the prosecutor stated, the jury should be instructed on use alone with respect to the lesser offenses and on use with discharge for murder and attempted murder.[FN13] Defense counsel did not participate in the discussion and, when asked by the court whether he agreed or disagreed, he expressed no concern on this issue.[FN14]

FN13. The prosecutor was correct that section 12022.53, subdivision (b), does not apply to the lesser offenses of voluntary manslaughter, attempted voluntary manslaughter and assault with a deadly weapon, because these offenses are not among those listed in section 12022.53, subdivision (a). As the prosecutor pointed out, the appropriate enhancement for personal use of a firearm in commission of these lesser included offenses is section 12022.5. Both section 12022.5 and section 12022.53, subdivision (b), punish a defendant who "personally uses a firearm," but the enhancement under section 12022.5 carries a penalty of 3, 4 or 10 years. (§ 12022.5, subd. (a).)

The prosecutor's assertion that only subdivision (c) of section 12022.53 applied to the charged offenses, and not subdivision (b), is another matter. The prosecutor was certainly correct that a defendant cannot be punished separately under both subdivisions in connection with a single offense-that is, for both personal use and, separately, for personal use and discharge of a firearm. That fact does not explain why subdivision (b) would not *apply* to the charged counts of murder and attempted murder: In theory, a defendant could be guilty of these offenses as an aider and abettor based on personal use of a firearm even if the firearm was not discharged.

FN14. Defense counsel's only input was to question whether the personal use enhancement could be attached to the offense of assault with a deadly weapon.

*25 Back with the jury, the court stated it needed to correct some mistakes in its previous instructions and the corrected version would also be provided in written form. It then instructed that if the jury found appellant guilty of voluntary manslaughter or attempted manslaughter, it had to determine whether he personally used a firearm. The jury was provided with written instructions which, with respect to the murder and attempted murder counts, included the instruction on discharge of a firearm (§ 12022.53, subd .(c)) and did not include an instruction on firearm use alone (§ 12022.53, subd. (b)). The verdict form for the murder and attempted murder counts contained only one enhancement finding, asking the jury to determine the truth of the allegation that appellant personally used and discharged a firearm in the commission of the offenses. The jury returned a true finding on this allegation for both counts.

Appellant argues that the trial court improperly failed to ask the jury to determine whether he personally used but did not discharge a firearm in committing the murder and attempted murder. Because the jury did not make this finding, appellant maintains, his sentence could not be increased under the section 12022.53, subdivision (c) enhancement.[FN15]

FN15. Appellant maintains that the trial court gave correct oral instructions, but incorrect written ones, and bases his contention on a presumption that the jury considered the written instructions controlling. (*People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2; *People v. Crittendon* (1994) 9 Cal.4th 83, 138; *People v. Andrews* (1989) 49 Cal.3d 200, 215-216.) Once the court told the jury it needed to correct a mistake and reinstructed on the use enhancement, however, the oral instructions and written instructions were consistent. The court's original use instruction told the jury to consider whether appellant personally used a firearm in connection with each of the charged offenses and each of the lesser offenses. The corrected instruction told the jury to consider whether appellant personally used a firearm in connection with only the lesser offenses. This instruction left intact the original instruction to consider whether appellant personally discharged a firearm in connection with the murder and attempted murder.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) The trial court has a sua sponte duty to instruct the jury on all elements of charged offenses and enhancements. (*People v. Wims* (1995) 10 Cal.4th 293, 303, limited on other grounds in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) "A trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction) is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.' " (*People v. Sengpadychith,* at p. 326, quoting *Apprendi v. New Jersey,* at p. 490.)

There was no violation of the *Apprendi* rule: The jury was asked to determine whether, in commission of the murder and attempted murder, appellant personally discharged a firearm. It found that he did. Appellant does not argue this finding was unsupported by the evidence.

The question is whether the trial court was required to also ask the jury to determine whether, in the commission of these two charged offenses, appellant simply *used* but did not discharge a firearm. Respondent contends there was no error because the prosecution "abandoned" the section 12022.53, subdivision (b), "use" enhancement and it was "[i]n practical effect" dismissed when the trial court did not include the instruction in the written packet given to the jury or on the verdict form. Appellant's insistence that the record reflects neither a motion to dismiss nor an express dismissal of the use allegation begs the question. Appellant notes the court's statement that "B is personal use, and relates to murder and attempted murder" as a demonstration that the court believed an instruction on this enhancement was required. This statement, however, was simply part of a discussion in which the court was trying to understand the prosecutor's point with respect to the instructions. The prosecutor had stated the use enhancement pertained only to the lesser offenses and the discharge enhancement only to the charged offenses, and that the use

enhancement applicable to the lesser offenses was section 12022.5, rather than 12022.53, subdivision (b). The court said, "I thought B was use and C was discharge," and the prosecutor replied, "You can't really have a C without a B." The court said, "I agree with that. B is personal use, and relates to murder and attempted murder .[¶] ... [¶][a]nd C is discharge." The court and the prosecutor went on to conclude that the jury had been correctly instructed on the discharge enhancement with respect to the charged offenses, but needed to be told that the use enhancement applied only to the lesser offenses.

*26 By asking the trial court not to instruct on use alone with respect to the murder and attempted murder counts, and submitting a verdict form including only the enhancement allegation for discharge of a firearm, the prosecutor necessarily offered the jury only the option of the section 12022.53, subdivision (c) enhancement. It would appear that the section 12022.53, subdivision (b) enhancement could have been offered as another alternative; it is not clear why the prosecutor believed instructing on this lesser included enhancement would be superfluous, unless he believed the evidence did not support a determination that appellant used but did not discharge a firearm. In any event, the prosecutor asked the court not to submit this enhancement to the jury and defense counsel said nothing to the contrary. The trial court does not have a sua sponte obligation to instruct on " 'lesser included enhancements.' " (*People v. Majors* (1998) 18 Cal.4th 385, 411.) The verdict form, like the instructions, asked the jury only to consider whether appellant discharged the weapon as the basis for an enhancement in connection with the murder and attempted murder. The jury was not, as appellant suggests, forced to make an all or nothing choice between finding appellant discharged the firearm and finding he did not have a gun at all. A "not true" finding on the discharge allegation could reflect a determination that appellant had a firearm but did not discharge it as well as a determination that he did not have a firearm at all.

Appellant's assertion that the prosecutor "went to great lengths to explain aider and abettor liability," giving the jury a theory of culpability that did not involve appellant discharging a firearm, mischaracterizes the prosecutor's argument. The prosecutor's argument clearly portrayed appellant as one of the shooters; the prosecutor did not ask the jury to consider, as an alternative, that appellant had been present, and armed, but did not fire his weapon. The prosecutor introduced the topic of aider and abettor liability as an explanation of why it did not matter that there was no way to know whose bullet actually killed Segura.[FN16] He went on to explain the difference between "mere presence and being an aider and abettor, even though you're just standing there," based on the "purpose" of being there, and how each of the separate acts-helping to surround a victim, even without holding a gun, surrounding a victim while holding a gun, taking out the gun, firing the gun-could be part of aiding and abetting. He continued, "There should be no question, no question whatsoever that when this man went with his RST gang member friends around the block with a gun, when he stood in front of Jose Segura's car, you notice there is people on the sides, there is one in front, gives you that surrounded feeling. When he did that, and then pulled out a gun, and then started firing, and it doesn't matter who fired first. It doesn't matter which bullet actually went in to Mr. Segura. It doesn't matter if it was all the same gun. It couldn't matter if it was multiple guns, because by the act of actually being there as backup they have made themselves aiders and abettors. By the act of surrounding the car they have made themselves aiders and abettors. And there is no question by the and [*sic*] of firing into the car, attempting to commit the crime they have made themselves aiders and abettors." Similarly, likening gang behavior to wolves hunting in a pack, the prosecutor argued that gang members act together so "if your shot doesn't get them, somebody else's will.... [¶] In this case, when the defendant went around the block with a gun with his fellow gang members he was aiding and abetting the crime. When he went in front of that car and helped surround the car and intimated the people inside with a gun in his waistband, he was aiding and abetting the crime. When he took out that gun and shot, as he said, into the front window, he was aiding and abetting the crime." [FN17]

FN16. "You have got three, possibly four guys shooting into that car. There is no way we are ever going to know whose bullets killed Jose Segura. Does it matter? [¶] No, it does not matter. And I'm going to show you why. Each and every one of those people ... are all responsible for murder.... [¶] ... [¶] ... They are guilty of murder because each and every one of them is an aider and abettor to murder...."

FN17. Appellant offers several of the prosecutor's statements as examples of suggestions that appellant could be guilty of murder as an aider and abettor without having fired a gun. In context, however, none of

these statements was divorced from the central portrayal of appellant being one of the shooters. One of the statements appellant points to-"when he has armed himself with a handgun and is walking with his fellow RST gang member friends, he is aware of and has knowledge of the unlawful purpose"-was part of the prosecutor's explanation of the intent requirement for aiding and abetting: "When he is talking about [shooting] prior to the crime, and then he is walking around the block so that he can sneak up on the victim, Mr. Segura. And when he has armed himself with a handgun and is walking with his fellow RST gang member friends, he is aware of and has knowledge of the unlawful purpose. Why is he doing it? Is he doing it because he wants to stop them from committing the crime? Is he doing it because he just feels like being on Vernon and Battery at that particular time? No, the answer is obvious and self-explanatory, he is doing it for the purpose of committing the crime." Another-that appellant was an aider and abettor "by standing there as backup"-was part of a hypothetical example: "So if I have knowledge of the unlawful purpose of committing the robbery, and I go out with my friend looking for the victim, but my friend commits the crime while I stand there, you now have the dividing line between mere presence and somebody who is standing there as backup, because by standing there as backup you have now made yourself an aider and abetter. You have facilitated the crime. You have encouraged the crime. You have promoted the crime." Appellant also notes the prosecutor's statements that appellant aided and abetted "[b]y the act of surrounding the car" and "[w]hen he went in front of that car and helped surround the car and intimated [*sic*] the people inside with a gun in his waistband." These statements, as indicated in the text, were part of the prosecutor's description of the events culminating in the actual shooting.

*27 Appellant may be correct that, in theory, he could have been convicted as an aider and abettor even if he had not fired a gun. The theory actually presented to the jury, however, was that appellant was one of the people who shot at Segura's car. The jury was properly instructed on the only enhancement it was asked to consider in connection with the murder and attempted murder counts.

VI.

At sentencing, the trial court imposed two consecutive terms of 25 years to life for the section 12022.53 enhancements connected to the murder and attempted murder counts. In each case, while the court referenced "[s]ection 12022.53, subdivision (b), (c) and (d)," it described the subdivision (d) enhancement for "personally using and discharging a firearm causing great bodily injury," which carries the 25-years-to-life penalty. As respondent acknowledges, the subdivision (d) enhancement allegation was not submitted to the jury because the prosecutor chose not to pursue it. The allegation the jury found true was that appellant discharged a firearm in committing the murder and attempted murder, as specified in section 12022.53, subdivision (c). Section 12022.53, subdivision (c), carries a penalty of a consecutive 20-year prison term. Accordingly, the trial court had no basis for imposing the 25-years-to-life terms under section 12022.53, subdivision (d). These terms must be stricken and the judgment modified to substitute for each a consecutive term of 20 years under section 12022.53, subdivision (c).[FN18]

FN18. Based on his argument that the jury's findings under section 12022.53, subdivision (c), were not valid, as discussed in section V of this opinion, appellant argues the sentence on the section 122022 .53, subdivision (d) enhancements should simply be stricken and not replaced. Having rejected appellant's challenge to the section 12022.53, subdivision (c) enhancements, we reject this contention as well.

DISPOSITION

The abstract of judgment shall be modified to strike the two 25-year-to-life enhancements pursuant to section 12022.53, subdivision (d), and replace each with a term of 20 years pursuant to section 12022.53, subdivision (c). As so modified, the judgment is affirmed.

We concur: HAERLE and RICHMAN, JJ.

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