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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE CRUZ, Defendant and Appellant.	B186073 (Los Angeles County Super. Ct. No. BA277034)

APPEAL from a judgment of the Superior Court of Los Angeles County, George R. Gonzalez-Lomeli, Judge. Affirmed with directions.

Daniel Thorr Hustwit for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David A. Voet, Deputy Attorney General, for Plaintiff and Respondent.

Enrique Cruz appeals from the judgment entered following a jury trial in which he was convicted of robbery (Pen. Code, § 211,[1] count 1), assault with a firearm (§ 245, subd. (a)(2), count 2), shooting at an occupied motor vehicle (§ 246, count 3), carrying a concealed firearm while an occupant of a vehicle (§ 12025, subd. (a)(3), count 4), attempted murder (§§ 664/187, count 5), and carrying a loaded firearm while an active participant in a criminal street gang (§ 12031, subd. (a)(1), (2)(C), count 6). In addition, gang enhancements (§§ 186.22, subd. (b)(1)(A), (1)(C)) were found on counts 1 through 5, firearm enhancements under section 12022.5, subdivision (a) were found on counts 2 and 3, and firearm enhancements under section 12022.53, subdivision (c) were found on counts 1, 3, and 5.

Defendant contends that the trial court erred in permitting the filing of amendments to the information to add counts 5 and 6; that his convictions on counts 1, 4, 5 and 6, as well as the street gang findings, were not supported by substantial evidence; that the trial court committed instructional error; that trial counsel rendered ineffective assistance in various respects; and that errors were made in sentencing. We affirm the judgment and remand the matter for resentencing.

BACKGROUND

Around 6:00 p.m. on January 11, 2005, Marvin Melendez was sitting in his parked car on Norton Avenue in Los Angeles. A friend, William Marin, crossed the street to talk with Melendez. As Marin did so, defendant got out of the passenger side of an SUV that was parked nearby. Defendant approached Marin, pointed a gun at him, and asked if Marin was a member of the Mara Salvatrucha (Mara) gang.[2] Marin said he was not in a gang. Defendant then asked Melendez the same question and received the same answer. Defendant said he knew who Melendez was and told him to get out of the car.

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[1] Further section references are to the Penal Code.

[2] Assault with a firearm (count 2).

As described by Melendez, who was wearing a thick silver chain necklace, defendant then grabbed Melendez by the neck, trying to pull him out of the car, but "since I was wearing my seatbelt, he was unable to get me out, so he just yanked my chain" and took it off.[3] Defendant also called out to others in the white SUV that Melendez was from the Mara gang. One of defendant's companions got out of the SUV, approached Marin, and sprayed paint into Marin's eyes.

Meanwhile, Melendez drove away. As Melendez drove, Marin saw defendant fire five to six shots at Melendez's car.[4] Bullets entered the car through the back window and exited through the front windshield. One of the bullets may have grazed Melendez's neck.[5]

Later that evening, defendant emerged from the front passenger door of a van that had been stopped by officers on Venice Boulevard. Initials designating the Harpy street gang were inscribed in dust on the van's window. When defendant saw the officers, he dropped a can of spray paint.

An officer looked into the front passenger window, which was rolled down, and observed six rounds of ammunition. The officer then "looked a little bit to the left and . . . observed the barrel of a handgun protruding." The gun was "wrapped in . . . some type of clothing." When the officer removed the clothing, he "observed . . . a handgun." A different officer searched defendant's person and recovered a bullet from the pocket of defendant's jacket. When the officer who recovered the gun told the occupants of the van what he had found, defendant said that the gun was his and that the others had nothing to

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[3] Robbery (count 1).

[4] Shooting at an occupied motor vehicle (count 3).

[5] Attempted murder (count 5).

do with it.[6] Defendant told the officers that Mara members had come to a family party and beat up his friend, "Christian."

Defendant later waived his *Miranda*[7] rights and gave a statement to the police. He said he had been a Harpy gang member for five or six years. A few days before the shooting, Mara gang members had invaded a family birthday party, displayed guns, and beat up his eight-year-old cousin. On another occasion, Mara members insulted the Harpy gang and attacked his friend, Christian. On the night of the shooting, defendant and his friend "Trickie" were walking to a burrito stand when they saw two Mara members in a car on Norton Avenue. The Mara members made gang threats and one of them displayed a gun. In response, defendant pulled a gun he was carrying and fired twice at the car.

After the interview, defendant was taken to the house of his cousin. There, officers recovered Melendez's chain necklace, which defendant told the officers he had given to the cousin.

A gang expert testified that Mara and Harpy were rival gangs, each with its own territory. Defendant had Harpy tattoos on his arm and back and was a member of the Harpy gang. The crimes were committed in Mara territory. A Harpy member would not normally go into Mara territory to buy a burrito because it would be too dangerous. If Mara members came to a party of Harpy family members and acted in an insulting manner, Harpy members would be expected to retaliate. The expert was of the opinion that someone with Harpy tattoos who committed a crime against members of the Mara gang in Mara gang territory would be doing so for the benefit of the Harpy gang.

Defendant did not present any evidence on his behalf. In argument to the jury, defense counsel conceded guilt on the firearm possession charges (counts 4 and 6),

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[6] Carrying a concealed firearm while an occupant of a vehicle (count 4), and carrying a loaded firearm while an active participant in a criminal street gang (count 6).

[7] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].

focusing his presentation on the circumstances surrounding the shooting, which he asserted defendant had committed in self-defense.

DISCUSSION

I

Addition of Counts by Amendment

Counts 5 (attempted murder) and 6 (gang member carrying loaded firearm) were alleged by amendments filed after the preliminary hearing. Such amendments are proper only if "shown by the evidence taken at the preliminary examination." (§ 1009.) Defendant contends that these charges were not shown because the evidence did not establish an intent to kill for count 5 or that that he was an active gang member for count 6. Addressing the contention on its merits even though defendant failed to object to the amended informations (see *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1056–1057), we disagree.

At the preliminary hearing, Melendez testified that defendant asked Melendez and Marin if they were from the Mara gang (Melendez said he was not), said "fuck [Mara]," tried to pull Melendez out of the car, tore Melendez's chain off his neck, and fired three shots as Melendez drove away, one of which hit the back window. Marin testified to essentially the same scenario. A police witness testified that defendant acknowledged ownership of the gun recovered from the van that officers had detained.

"The evidentiary showing required for a preliminary hearing is not substantial. A defendant may be held to answer 'if there is some rational ground for assuming the possibility that an offense has been committed and that the accused is guilty of it. . . . Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information. [Citation.]' [Citation.]" (*People v. Superior Court (Lujan)* (1999) 73 Cal.App.4th 1123, 1127.) "Trial court discretion, in granting a motion to amend, 'will not be disturbed on appeal in the absence of showing a clear abuse of discretion.' [Citation.]" (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

Evidence that, after asking Melendez and Marin if they were members of the Mara gang, defendant first assaulted Melendez and then fired multiple shots at Melendez's car

as he attempted to flee, satisfies the requirement for attempted murder that defendant intended to kill Melendez. (See *People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) With respect to the charge of gun possession by an active gang member, we note that a stipulation to the gang enhancement entered at the preliminary hearing was limited to the charges against defendant at the time of that hearing only. Nevertheless, the other evidence adduced at the preliminary hearing, which provided probable cause to bind defendant over for trial on the other charges, is adequate to raise a reasonable inference that defendant's questioning Melendez's and Marin's gang affiliation constituted a gang challenge and that defendant's conduct in assaulting Melendez reflected defendant's active participation in the Harpy gang. Accordingly, the elements of counts 5 and 6 were adequately "shown by the evidence taken at the preliminary examination." (§ 1009.)

II

Sufficiency of the Evidence

Defendant contends that the evidence was insufficient to support his conviction on several of the counts and the gang findings. In conjunction with these contentions, defendant alludes to alleged ineffective assistance of trial counsel regarding a concession of guilt and the failure to object to evidence and request jury instructions. The ineffective assistance issues are also raised separately by appellate counsel and are discussed in section IV of this opinion, *post*. We therefore limit our discussion here to the contentions raising sufficiency of the evidence.

"The proper test to determine a claim of insufficient evidence in a criminal case is whether, on the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt. [Citations.] In making this determination, the appellate court '"must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citations.] . . . "[O]ur task . . . is twofold. First, we must resolve the issue in the light of the *whole record* . . . . Second, we must judge whether the evidence of each of the essential elements . . . is *substantial* . . . ."' [Citation.] [¶] Although the appellate court must ensure the evidence is reasonable in nature, credible, and of solid

value [citation], it must be ever cognizant that '"it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends . . . ."' [Citations.] Thus, if the verdict is supported by substantial evidence, this court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact-finder. [Citations.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 303–304.)

Guided by this standard, we conclude that each of defendant's contentions has no merit.

A. Robbery

"[A] conviction of robbery cannot be sustained in the absence of evidence that the defendant conceived his intent to steal either before committing the act of force against the victim, or during the commission of the act . . . ." (*People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543–544, fn. 5.) Noting Melendez's testimony that defendant grabbed Melendez by the neck, defendant contends this element of robbery was not demonstrated because "the evidence shows that the purpose of this action was to pull Melendez away from his car, it was not done with the specific intent to take Melendez's chain necklace." We disagree that defendant's interpretation of the evidence is the only one that is reasonable. His argument improperly asks this court to reweigh the facts. (See *People v. Bolin* (1998) 18 Cal.4th 297, 333.) A rational trier of fact could well conclude that defendant's intent to steal the chain had been formulated when he took it from Melendez's neck.

B. Carrying a concealed weapon

"Viewed in the abstract, the offense of having a concealed weapon is committed with the fact of possession of the weapon in a concealed *or partially concealed* fashion within a vehicle under the defendant's control or direction." (*People v. Arzate* (2003) 114 Cal.App.4th 390, 399, italics added.) Inasmuch as defendant's gun was partially concealed by the clothing in which it was wrapped, his contention of insufficient evidence of this crime must be rejected.

C. Attempted murder

Defendant's contention of insufficient evidence of attempted murder is based on the premise that he only sought to frighten, rather than kill Melendez. Again, defendant's claim is nothing more than an attempt to reargue the evidence. As in *People v. Lashley*, *supra*, 1 Cal.App.4th at page 945, defendant's argument "rests on the untenable theory that an unsuccessful killing constitutes conclusive evidence of lack of intent." The attempted murder conviction was supported by substantial evidence. (*Id*. at pp. 945–946; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1047–1048 [sufficient evidence of express malice where gang member shot into car of rival gang member].)

D. Active gang participant carrying loaded firearm and gang enhancements

Under section 12031, subdivision (a)(2)(C), it is a crime to carry a loaded firearm "[w]here the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22 . . . ."[8] Defendant contends that the evidence was insufficient to demonstrate that, for purposes of his conviction on count 6 under section 12031, he was an active gang participant as required by *People v. Robles* (2000) 23 Cal.4th 1106, 1115. Under section 186.22, subdivision (b)(1), enhanced punishment is provided for a defendant "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." Defendant further contends that, for purposes of the gang enhancements found in conjunction with counts 1 through 5, the evidence was insufficient to demonstrate that his crimes were committed for the benefit of the gang. We disagree.

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[8] Section 186.22, subdivision (a), 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."

Notwithstanding *People v. Robles, supra*, 23 Cal.4th 1106, section 12031 does not require that a defendant carry a loaded firearm in connection with gang participation. (*People v. Schoppe-Rico* (2006) 140 Cal.App.4th 1370, 1380, 1383.) In any event, evidence that defendant was a Harpy gang member whose family had been "disrespected" by members of the rival Mara gang, that he believed Melendez and Marin to belong to Mara, and that he admitted ownership of a loaded gun which was concealed in a vehicle that had Harpy initials inscribed in dust on the window, was sufficient to support defendant's conviction on count 6 and the gang enhancements found in conjunction with counts 1 through 5.

III

Instruction on Active Gang Participant Carrying a Loaded Firearm

Defendant's jury was instructed on the offense of being an active gang participant carrying a loaded firearm (§ 12031, subd. (a)(2)(C)) pursuant to CALJIC No. 16.470. The text of the instruction states that it applies to "[e]very person who, with knowledge of its presence, and who is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, unlawfully carries a loaded firearm." The instruction provides that for active participation "the person must have a relationship with the criminal street gang that is more than in name only, passive, inactive or purely technical." The instruction does not include the elements of section 186.22, subdivision (a) (see fn. 8, *ante*). Nevertheless, the jury was instructed on those elements pursuant to CALJIC No. 17.24.2[9] in connection with the gang allegations under section 186.22.

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[9] The jury was instructed pursuant to CALJIC No. 17.24.2 as follows:

"It is alleged in Counts 1 to 5 that the crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.

"'Criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, Attempted Murder, Assault with a Firearm, Shooting at an Inhabited Dwelling or Vehicle and Drug

(footnote continued on next page)

Relying on *People v. Robles*, *supra*, 23 Cal.4th at page 1115, defendant contends the CALJIC No. 16.470 instruction is defective for failing to set forth the elements of section 186.22, subdivision (a). But as noted above, there is no requirement under section 12031 that a defendant be engaged in conduct that benefits the gang at the time he or she is carrying a loaded firearm. (*People v. Schoppe-Rico*, *supra*, 140 Cal.App.4th at pp. 1380, 1383.) And in any event, instruction on the elements of gang enhancements under CALJIC No. 17.24.2, which enhancements were found by the jury to be true, renders harmless any possible deficiency in instructing under section 12031. Accordingly, defendant's contention must be rejected.

(footnote continued from previous page)

Sales, (2) having a common name or common identifying sign or symbol and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

"'Pattern of criminal gang activity' means the commission of, or conviction of two or more of the following crimes, namely, Attempted Murder, Assault with a Firearm, Shooting at an Inhabited Dwelling or Vehicle and Drug Sales, provided at least one of those crimes occurred after September 26, 1988, and the last of those crimes occurred within three years after a prior offense, and the crimes were committed on separate occasions, or by two or more persons.

"The phrase 'primary activities,' as used in this allegation, means that the commission of one or more of the crimes identified in the allegation, be one of the group's 'chief' or 'principal' occupations. This would of necessity exclude the occasional commission of identified crimes by the group's members. In determining this issue, you should consider any expert opinion evidence offered, as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crimes charged in this proceeding.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

"Include a special finding on that question, using the form that will be supplied to you.

"The essential elements of this allegation are:

"1. The crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang; and

"2. These crimes were committed with the specific intent to promote, further, or assist in any criminal conduct by gang members."

IV

Ineffective Assistance of Counsel

"To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239.) The futility of an objection or motion that counsel is accused of neglecting provides a valid explanation for counsel's conduct. (*People v. Price* (1991) 1 Cal.4th 324, 387; *People v. Diaz* (1992) 3 Cal.4th 495, 563.)

"In determining whether an attorney's conduct so affected the reliability of the trial as to undermine confidence that it 'produced a just result' [citation], we consider whether 'but for' counsel's purportedly deficient performance 'there is a reasonable probability the result of the proceeding would have been different.' [Citations.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 263.)

"*Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 2069, 80 L.Ed.2d 674], informs us that 'there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019–1020.)

A. Concession of guilt

Defendant faults counsel for conceding guilt on the two firearm offenses, arguing that counsel could have defended against count 4 by arguing that the gun was not

concealed and against count 6 by arguing that defendant was not an active gang member. (Although defendant admitted membership in the Harpy gang, there was no evidence that authorities had any information on defendant before his arrest in this case.) But in conceding these counts, counsel focused on the charges carrying a greater exposure in sentencing, especially the three counts involving discharge of a firearm, on each of which defendant faced a 20-year enhancement under section 12022.53, subdivision (c). We are not in a position to say that this was an unreasonable tactical choice under the circumstances of the case. (See *People v. Gurule* (2002) 28 Cal.4th 557, 611–612; *People v. Freeman* (1994) 8 Cal.4th 450, 498–499.)

B. Failure to seek dismissal of counts 4 and 6

Contrary to defendant's assertion, trial counsel was not ineffective for failing to seek dismissal of counts 4 and 6 (carrying a concealed firearm while an occupant of a vehicle and gang member carrying a loaded firearm), which were added by amendments following the preliminary hearing. As noted above, the evidence adduced at the preliminary hearing was sufficient to support both of those charges, and a motion to dismiss them would have been futile. (Cf. *People v. Burnett* (1999) 71 Cal.App.4th 151, 181–182.)

C. Failure to object to prosecutorial misconduct

1. Opening statement

In his opening statement, the prosecutor told the jury that Harpy is one of the most violent criminal street gangs in Los Angeles, that defendant was before the court because of the choices he had made in his life, and that defendant had acted because he felt his gang had been "disrespected" by Mara. Defendant contends that trial counsel should have objected to these statements because the prosecution did not ultimately produce evidence to support them. We disagree.

"The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case. [Citation.]" (*People v. Millwee*

(1998) 18 Cal.4th 96, 137.) Nothing in the prosecutor's statements about which defendant now complains compelled an objection.

2. Hypothetical questions to gang expert

Hypothetical questions to gang experts "must be rooted in facts shown by the evidence." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) We reject as unsupported defendant's assertion that, because Melendez was not shown to be a Mara gang member and was not killed, it was improper to ask hypothetical questions of the gang expert regarding the prestige that might be gained if a Harpy killed a Mara.

3. Closing argument

a. Injury to Melendez's neck

Melendez was not asked at the preliminary hearing whether he had been injured during the incident. On the prosecutor's direct examination at trial, Melendez was shown a photograph taken of him that night and asked if it depicted the injury he had sustained. Melendez responded, "I don't know. When the bullet went through, it might have just touched me lightly. I don't know." On cross-examination, defense counsel did not inquire into the subject. In final argument, the prosecutor stated, "[W]e know for a fact that at least one of the bullets nicked . . . Mr. Melendez's neck . . . ."

Defendant argues that trial counsel should have cross-examined Melendez about his injury to determine whether it was caused by a bullet or by the chain being pulled off of Melendez's neck, and that counsel should have objected to the prosecutor's mischaracterization of the evidence. But counsel understandably would have been quite hesitant to cross-examine about the injury after Melendez had already testified that he did not know the origin of his neck injury. And given that the sole defense in this case was that defendant shot at Melendez in self-defense after someone in Melendez's group threatened defendant with a gun, defendant could not have been prejudiced by the omissions about which he complains.

b. Experiment

Melendez's chain was received in evidence at trial. Defense counsel argued in closing that Melendez and Marin were not credible witnesses, asserting as part of this

argument: "Now, Mr. Melendez says that [defendant] snatched the chain off of his neck. I don't know what happened out there, but examine the chain. It doesn't appear to be broken. And I'm trying to figure out how a chain that gets snatched off of one's neck is not broken."[10] The prosecutor responded in closing that defendant's argument was a "red herring, because if you were to look at the necklace, which you will get when you go back there, you'll notice that there is a gap to the closure, to the top portion. Is it possible that if you pull this hard enough that it came off? Absolutely. You will be able to do your little experiment in the back because you will get this in the back." The prosecutor continued that it did not matter how the chain came off because defendant admitted that he took it from Melendez.

Defendant contends that it was improper for the prosecutor to tell the jurors to conduct an experiment, to which defense counsel should have objected. Indeed, CALJIC No. 1.03, with which the jury was instructed, admonishes to "not independently investigate the facts," including the example of "conduct[ing] experiments . . . ." But there would be no reason for defense counsel to object here because he first invited examination of the chain. And in any event, "[t]o prohibit jurors from analyzing exhibits in light of proffered testimony would obviate any reason for sending physical evidence into the jury room in the first instance." (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 316.) There was nothing improper about the "experiment" suggested by both counsel in this case. (*Id*. at pp. 316–317.)

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[10] Contrary to defendant's contention that trial counsel was ineffective for failing to pursue a theory of after-acquired intent, the quoted argument evinces a considered attempt by trial counsel to defend against the robbery charge by raising a doubt as to Melendez's testimony regarding the chain. Nevertheless, contrary to defendant's related contention, we cannot conceive of any prejudice suffered by defendant based on the lack of a pinpoint instruction regarding this theory.

c. "Automatic guilties"

After defense counsel in closing argument conceded guilt on counts 4 and 6, the prosecutor responded that these counts should be "crossed out" by the jurors as "automatic guilties." Defendant has not provided any pertinent authority to support his contention that such argument constituted misconduct to which an objection should have been interposed. Accordingly, defendant's contention of ineffective assistance of trial counsel must be rejected.

V

Sentencing

Defendant was sentenced to an aggregate term of 40 years to life, comprised of a 5-year middle term for shooting at an occupied vehicle, and enhanced by 20 years for personally discharging a firearm and by a term of 15 years to life for the gang finding.[11] (Sentence for attempted murder was stayed under section 654, and concurrent terms were imposed for the remaining offenses.) Defendant contends that the firearm enhancement was improper because the underlying crime did not permit it, and that the 5-year base term should not have been imposed because the indeterminate term specified for the gang finding is an alternative sentence. We agree and accordingly remand for resentencing.

The 20-year firearm enhancement was imposed under section 12022.53, subdivision (c), which provides a 20-year sentence enhancement for "any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm." Subdivision (a) of section 12022.53 enumerates certain felonies to which the statute applies. The list includes robbery (see subd. (a)(4)), which was one of the crimes of which defendant was convicted, but not shooting at an occupied vehicle under section 246, on which the enhancement was imposed.

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[11] Section 186.22, subdivision (b)(4)(B), provides a term of 15 years to life for shooting at an occupied vehicle under section 246.

The Attorney General argues that application of the subdivision (c) enhancement is valid under two separate theories. The first is that subdivision (a)(17) brings within the statute "[a]ny felony punishable by death or imprisonment in the state prison for life," and violation of section 246 becomes punishable by life in prison where, as here, it has been found in conjunction with a gang enhancement. (See fn. 10, *ante*.)

In *People v. Montes* (2003) 31 Cal.4th 350, the Supreme Court considered section 186.22, subdivision (b)(5), which prohibits the possibility of parole for a minimum of 15 years for the commission of a felony for the benefit of a criminal street gang that is punishable for life. The defendant in *Montes*, who had been convicted of attempted murder, was sentenced to 25 years to life under section 12022.53, subdivision (d), which requires such sentence where the defendant's personal and intentional discharge of a firearm has caused great bodily injury or death. (*People v. Montes*, *supra*, 31 Cal.4th at pp. 352–353.) The *Montes* court held that section 186.22, subdivision (b)(5), applies only where the underlying felony itself, without the consideration of enhancements, provides for a life sentence. (*Id*. at pp. 358–359.) By parity of reasoning with *Montes*, we decline the Attorney General's invitation to consider the life term available for gang-enhanced section 246 punishment to constitute an enumerated felony under section 12022.53, subdivision (a)(17).

The Attorney General next relies on section 12022.53, subdivision (e)(1), which states: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." The Attorney General is correct that there was pleading and proof of defendant's violation of section 186.22, subdivision (b), and that a principal (namely defendant) "personally and intentionally discharge[d] a firearm" as required by section 12022.53, subdivision (c). But the Attorney General fails to note subdivision (c)'s limitation that the enhancement be applied only to "any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm." Because, as noted

above, defendant's violation of section 246 is not a felony specified in section 12022.53, subdivision (a), enhancement under section 12022.53 was improperly imposed at sentencing here. Under these circumstances, the matter will be remanded for resentencing.

Defendant further contends, and the Attorney General aptly concedes, that the 15-year-to-life term imposed under section 186.22, subdivision (b)(4)(B), was an alternative penalty. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) The parties also note that the abstract of judgment erroneously reflects that defendant was convicted of first degree robbery (the robbery was of the second degree) and that the jury found the firearm enhancement true on the robbery count (it was found not true). Such issues may be resolved at the resentencing hearing on remand.

Finally, defendant erroneously argues that the trial court erred in failing to apply section 654 with respect to his convictions of firing a gun at an occupied vehicle and attempted murder. As noted above, imposition of sentence for attempted murder was stayed under section 654.

DISPOSITION

The judgment is affirmed, the sentence is vacated, and the matter is remanded for resentencing.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

ROTHSCHILD, J.