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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMUNDO LOPEZ et al., Defendants and Appellants.	E038946 (Super.Ct.No. FVA 19333) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael R. Libutti, Judge. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant Raymundo Lopez.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Vincent Rodriguez.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-

Ladendorf, Supervising Deputy Attorney General, and Heather F. Crawford, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

A jury convicted Raymundo Lopez and Vincent Rodriguez for crimes arising from an armed carjacking and a subsequent shooting of a police officer, who was shot three times. The defendants were convicted as follows: in count 1, both defendants were convicted of premeditated attempted murder of a police officer (Pen. Code, §§ 187, subd. (a), & 664);[1] in count 2, Lopez was convicted of being a felon in possession of a firearm (§ 12021, subd. (a)(1)); in count 3, Lopez was convicted of unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)); in count 4, Lopez was convicted of receiving stolen property (§ 496, subd. (a)); and, in count 5, Rodriguez was convicted of a carjacking (§ 215, subd. (a).). The jury found true that both defendants committed the crime in count 1 and Rodriguez committed the crime in count 5 for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)). The jury also found true a number of firearm enhancement allegations, including that Rodriguez personally used a firearm (§ 12022.53, subd. (b)) and that Lopez, who also was acting as the principal for Rodriguez, personally used and discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), (d), & (e)(1)). Rodriguez was sentenced to 65 years to life and Lopez was sentenced to 40 years to life.

[1] All future statutory references will be to the Penal Code unless otherwise stated.

In appealing his judgment, Rodriguez challenges on evidentiary and constitutional grounds the application of the natural and probable consequences doctrine as the basis for his attempted murder conviction. Rodriguez also raises an equal protection challenge to the criminal street gang provision of the firearm enhancement statute. In his appeal, Lopez claims the criminal street gang enhancement for his attempted murder conviction must be reversed because it was not alleged in the information. Lopez also asserts a claim under *Blakely v. Washington* (2004) 542 U.S. 296.

For the reasons provided below, we reject the claims of both defendants and affirm the judgment.

2. Factual and Procedural History

At 7:10 a.m. on March 14, 2003, Samuel Jennings sat in his red Pontiac Firebird talking on his cell phone in the parking lot of his office. As Jennings opened the driver's side door to get out his car, a man with a shaved head, later identified as Rodriguez, approached and pointed a revolver at him and motioned to him. Jennings got out of the car and ran inside his office building. As he scanned his card key, Jennings looked back and saw defendant getting in the Firebird and driving off. At the same time, as observed by Jennings and one of his coworkers, a silver compact car also sped out of the parking lot. Jennings called the police.

At 6:00 p.m. on the following day, Fontana Police Officer Kevin Goltara noticed the Firebird speeding past him and decided to conduct a traffic stop. Officer Goltara was in a patrol car and wearing his uniform, including a bullet-proof vest. After Officer Goltara activated his lights, the Firebird continued on for a few blocks before stopping.

Because the Firebird had tinted windows, Officer Goltara was unable to see the occupants inside. He asked the driver to roll down the window. But the driver lowered the window only half way. Officer Goltara saw Lopez in the driver's seat and Rodriguez in the passenger seat.

Officer Goltara ordered the occupants to show him their hands. Rodriguez complied, but Lopez had his right hand tucked between his legs. Officer Goltara began to draw his gun from its holster and again ordered Lopez to show his hands. Lopez, who was holding a gun, swung his hand up toward Officer Goltara and fired four to five shots. Officer Goltara was struck in the neck, back and wrist. Officer Goltara tried to return fire and then radioed for help.

Fontana Police Officer Ungashick located the stolen Firebird in a nearby street. Officers later found the keys to the car.

Rodriguez lived with his girlfriend, Alicia Galvan, in a house about 200 to 300 feet from the scene of the shooting. They lived with two other members of the South Fontana criminal street gang. Galvan owned a silver Honda Civic. Rodriguez bragged to Galvan that he and another gang member had committed the carjacking. Lopez and Rodriguez were members of the South Fontana gang.

Although both Rodriguez and Lopez left town to avoid capture, Rodriguez was arrested in Arizona and Lopez was arrested in Fresno.

3. Attempted Murder

The jury found that Rodriguez committed attempted premeditated murder while aiding and abetting the unlawful taking or driving of a vehicle under the natural and

probable consequences doctrine. Rodriguez challenges the application of the natural and probable consequences theory in his case. His challenge is twofold: one, whether sufficient evidence supported that the attempted murder was a natural and probable consequence of unlawfully taking or driving a vehicle and, second, whether application of the theory inappropriately allowed a conviction without malice and premeditation.

A. Sufficiency of the Evidence

In addressing a challenge to the sufficiency of the evidence, courts must review the whole record in the light most favorable to the judgment and determine whether it contains substantial evidence—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Horning* (2004) 34 Cal.4th 871, 902.)

The natural and probable consequences doctrine provides one theory of aider and abettor liability. "'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' [Citations.] Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117 (*McCoy*).) There are two basic theories of aider and abettor liability. "First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable

consequence" of the crime aided and abetted.' [Citation.]" (*McCoy, supra,* at p. 1117, citing *People v. Prettyman* (1996) 14 Cal.4th 248, 260 (*Prettyman*).)

"The elements of aider and abettor liability for murder on the natural and probable consequences theory are the following: 'the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; [fn. omitted] and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.' [Citation.] The issue 'is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable.' [Citation.]" (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161.)

The California Supreme Court discusses a couple of classic applications of the natural and probable consequences doctrine in the *Prettyman* case. In the first example, two defendants intend to commit an assault with a deadly weapon and one of them kills the victim. (*Prettyman, supra,* 14 Cal.4th at p. 262 and cases cited therein.) In the second example, two defendants plan and carry out an armed robbery, during which one of them assaults or kills the victim. (*Id*. at pp. 262-263 and cases cited therein.)

Defendant argues that his crime of unlawfully taking or driving a vehicle was qualitatively different than an armed robbery. Defendant specifically contends that,

"[w]hile it may be a natural and probable consequence that a victim or witness may be hurt or shot in an armed robbery, it is not a natural and probable consequence that a suspect caught in the act of unlawfully driving a car—a relatively minor offense [fn. omitted]—will go on a homicidal detour by gratuitously and intentionally attempting to kill a police officer." In the footnote, defendant points out that the crime of unlawfully taking or driving a vehicle under Vehicle Code section 10851, subdivision (a), is a "wobbler" offense punishable as either a felony or a misdemeanor. Defendant also contends that, under the particular facts in his case, it was not reasonably probable that codefendant Lopez, while driving a stolen vehicle, would attempt to kill a police officer during a routine traffic stop.

In making his argument, defendant distinguishes *People v. Cummins* (2005) 127 Cal.App.4th 667 (*Cummins*). In *Cummins*, Joseph Kelly and Donald Cummins took the victim's car and wallet by force, tied the victim up and locked him in the trunk of his car, and then drove around using the victim's ATM card to make purchases and withdraw cash. At some point, Joshua Parks joined Kelly and Cummins. The three men eventually drove to an area near a cliff, where Cummins pushed the victim off the cliff.

In *Cummins*, Kelly argued that there was insufficient evidence that the attempted murder was a natural and probable consequence of the planned carjacking and robbery. The court rejected his argument based on the evidence. (*Cummins, supra*, 127 Cal.App.4th at p. 678.) The evidence indicated that Kelly fully participated in the robbery and carjacking. During the commission of the target offenses, he provided a taser gun that was used on the victim. He also was aware that Cummins was armed with

a firearm. Furthermore, it was Kelly who drove the victim to the area near the cliff and directed the victim to walk to the edge. Based on this evidence, the court concluded that Kelly should have known that harm would befall the victim. (*Ibid*.)

Although the situation in this case does not resemble the situation in *Cummins*, each case must be decided on its own facts. As defendant recognizes, whether the crime charged is a natural and probable consequence of the target offense is a factual question for the jury. (*Cummins, supra*, 127 Cal.App.4th at p. 677.) The facts in this case support the jury's finding that a reasonable person in the defendant's position should have known that the attempted murder was a reasonably foreseeable consequence of driving the stolen vehicle.

Even a relatively minor offense may pose a significant danger of resulting in more serious crimes depending on the circumstances. In *People v. Montes* (1999) 74 Cal.App.4th 1050, the defendant objected to the trial court's instruction on the natural and probable consequences doctrine. The court had instructed the jury that the defendant could be convicted of an attempted murder if that offense was a natural and probable consequence of one of three possible target offenses: assault with a firearm, simple assault, or breach of the peace for fighting in public. The defendant argued that the trial court should not have included the last two offenses. Simple assault is a misdemeanor offense punishable by a maximum sentence of six months. (§ 241.) Breach of the peace also is a misdemeanor offense punishable by a maximum sentence of 90 days. (§ 415.)

After discussing the application of the natural and probable consequences doctrine in cases involving an assault with a firearm, the court in *Montes* went on to say: "it is

rarely, if ever, true that 'an aider and abettor can "become liable for the commission of a very serious crime" committed by the aider and abettor's confederate [where] "the target offense contemplated by his aiding and abetting [was] trivial."' [Citation.] 'Murder, for instance, is *not* the natural and probable consequence of trivial activities. To trigger application of the "natural and probable consequences" doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed.' [Citation.]" (*Montes, supra*, 74 Cal.App.4th at p. 1055.)

The court in *Montes* concluded that the possible target offenses of simple assault and breach of the peace for fighting in public were not trivial under the circumstances in that case. The court noted that, during an ongoing violent rivalry between two gangs, it was reasonably foreseeable that the confrontation between the two gangs could lead to deadly results. The court relied on the testimony of the gang expert, who explained how the facts in *Montes* ". . . represent a textbook example of how a gang confrontation can easily escalate from mere shouting and shoving to gunfire." (*Montes, supra*, 74 Cal.App.4th at p. 1055.)

Although this case also is factually distinguishable from the situation in *Montes*, the above cases show that the question of whether the charged offense was a natural and probable consequence of the target offense involves a fact intensive analysis. Rather than relying on the statutory definition or the proscribed punishment, the issue must be resolved on a case by case basis in light of all the circumstances surrounding the incident. (*See People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

In this case, Rodriguez personally committed an armed carjacking the day before the shooting. Both Rodriguez and Lopez were active members of the South Fontana gang. Rodriguez was a younger member and Lopez was a veteran member. Gang expert William Green explained that the younger members of the gang often allowed the veterans to enjoy the fruits of their crime, including allowing them to drive around in a flashy stolen vehicle. On the day of the shooting, Lopez was driving the red Firebird and Rodriguez was sitting in the passenger seat. The Firebird had dark tinted windows and a paper license plate from a used car dealer. When Officer Goltara activated his lights, the two men, rather than immediately pulling over, drove some distance and made a few turns before stopping. They drove northbound on Citrus, turned right on Barbee, and then left on Elwood Court, which is a cul-de-sac. They drove back out onto Barbee and eventually pulled over. During the traffic stop, when Officer Goltara ordered the men to show their hands, Lopez concealed the hand that was holding the gun. He then fired four or five shots at the officer before speeding away. We conclude that, under these facts, a reasonable jury could find that Rodriguez knew or should have known that driving around in a stolen vehicle could lead to a violent confrontation with the police.

Although the causal link was not direct, there was a sufficient nexus between the target offense and the ultimate crime. (See *Prettyman, supra*, 14 Cal.4th at p. 291.) Specifically, driving around in a stolen vehicle could lead to a traffic stop. The police might be actively searching for the vehicle. The person driving the stolen vehicle might be driving erratically to avoid capture. Also, certain alterations, such as a removed license plate, might draw attention to the vehicle. Regardless of the exact reason, a

person driving a stolen vehicle should have known that he could be pulled over by the police.

Also, the encounter between the police and a person driving a stolen vehicle could result in a violent confrontation and, if the person is armed, even a murder or an attempted murder. (See, e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 760; *People v. Durham* (1969) 70 Cal.2d 171, 185.) During a routine traffic stop, a person with a stolen vehicle would be unable to comply with the officer's requests. There would be only two options: surrender or evade arrest. Evasive action, whether before the stop or after the initial encounter, is highly probable. And this response might be violent, particularly when the person previously has resorted to violence or used a weapon. (See, e.g., *Rodriguez, supra*, at p. 744.)

Under the circumstances in this case, including that the persons involved in the crimes were members of a criminal street gang, at least one of the gang members was armed, one of them stole the car at gunpoint the day before, and immediately preceding the stop both were not cooperative in responding to the officer's signals to pull over, it was reasonably foreseeable that the encounter with the police officer might erupt into a violent confrontation or shooting. We conclude that there was sufficient evidence to support the jury's finding that the attempted murder was a natural and probable consequence of aiding and abetting the unlawful taking or driving under the specific facts in this case.

B. Mental State

Under three separate headings, Rodriguez claims that the application of the natural and probable consequences doctrine in his case violated his constitutional rights to due process and a jury trial. He specifically argues that, because the natural and probable consequences doctrine imposes criminal liability upon the aider and abettor for the foreseeable consequences of the perpetrator's acts, it essentially predicates liability based on criminal negligence. He also argues that application of the doctrine resulted in a conviction for attempted murder without a finding of malice or premeditation.

Similar arguments have been rejected repeatedly by the California Supreme Court. (See *People v. Coffman* (2004) 34 Cal.4th 1, 107; *McCoy, supra,* 25 Cal.4th at pp. 1117-1119.) As with any other crime, a crime committed by an aider and abettor also has two components: the act or omission and the necessary mental state. (*McCoy*, *supra*, at p. 1117.) The mental state required of the aider and abettor, under the natural and probable consequences doctrine, is the intent to encourage or aid in the commission of the target offense. (See *Prettyman, supra*, 14 Cal.4th at p. 261.)

An "'[aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably

foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.] Thus, . . . a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*Id*. at p. 261; see also *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) Criminal liability, therefore, is not predicated solely on the foreseeability of the ultimate offense, but on the aider and abettor's intentional act of encouraging and facilitating the commission of the target crime.

As noted by the People, Rodriguez's reliance on *People v. Smith* (1997) 57 Cal.App.4th 1470 is unavailing. In *Smith*, the appellate court held that the trial court's abbreviated instructions on the natural and probable consequences doctrine allowed the jury to convict the defendant of assault with a vehicle based on a finding of criminal negligence. (*Id*. at pp. 1484, 1488.) The instruction required only that the jury find that the defendant intentionally moved his vehicle forward and that the natural and probable consequence of such action was great bodily injury. The trial court omitted the statutory requirement for an assault, namely, the intent to commit a battery. (*Id*. at p. 1484; but see *People v. Williams* (2001) 26 Cal.4th 779, 787-790.)

Although the instruction in *Smith* was held to be inadequate, the court's holding does not support the blanket rule that the application of the natural and probable consequences doctrine permits convictions without the requisite mental state. The *Smith*

case did not involve aider and abettor liability. If the trial court in this case omitted the statutory requirements for aider and abettor liability, then *Smith* might apply. But that was not the case. The court provided complete instructions on aider and abettor liability. Specifically, the court instructed the jury that it must find that defendant aided and abetted the commission of the crime with knowledge of the perpetrator's unlawful purpose and with intent to encourage or facilitate the commission of the target offense.

Once the jury makes these findings, contrary to Rodriguez's argument, there is no additional requirement that the jury must find that the aider and abettor intended to commit the ultimate offense, including attempted murder. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) While the direct perpetrator must act with express or implied malice, the aider and abettor only must knowingly and intentionally aid and abet the perpetrator in committing the target offense. So long as the ultimate offense was a natural and probable consequence of the target offense, the jury can find the aider and abettor guilty of attempted murder. (*Ibid*.; *People v. Patterson* (1989) 209 Cal.App.3d 610, 614-615.)

Likewise, there is no additional requirement that jury must find that the aider and abettor personally premeditated the attempted murder. (See *People v. Lee* (2003) 31 Cal.4th 613, 628-629 (*Lee*); *Cummins, supra*, 127 Cal.App.4th at p. 681.) The attempt statute, section 664, subdivision (a), ". . . requires only that the murder attempted was willful, deliberate, and premeditated, but not that an attempted murderer personally have acted with willfulness, deliberation, and premeditation even if he or she is guilty as an

aider and abettor." (*Lee, supra,* at p. 629, discussing *People v. Laster* (1997) 52 Cal.App.4th 1450, 1473.)

Contrary to Rodriguez's argument, because the crime of aiding and abetting an attempted murder under the natural and probable consequences theory does not require that the aider and abettor personally premeditated the attempted murder, his sentence for premeditated attempted murder did not violate his right to due process under *Apprendi v. New Jersey* (2000) 530 U.S. 466. The maximum statutory punishment for aiding and abetting an attempted premeditated murder, even under the natural and probable consequences doctrine, is life imprisonment. "Of course, where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy. In light of such a possibility, it would not have been irrational for the Legislature to limit section 664(a) only to those attempted murderers who personally acted willfully and with deliberation and premeditation. But the Legislature has declined to do so." (*Lee, supra,* 31 Cal.4th at p. 624.) Under existing law, Rodriguez received only the maximum statutory punishment.

We conclude that Rodriguez has failed to show that he was convicted or sentenced without a jury finding as to a required mental state. The jury was instructed to find that Rodriguez knowingly and intentionally encouraged or facilitated the target offense. The jury made this finding. Nothing more was required.

4. Firearm Enhancement

In Rodriguez's final claim, he argues that section 12022.53, subdivisions (d) and (e)(1), violated his rights under the equal protection and due process clauses. He

specifically contends that the statute is unconstitutional because it exposes an aider and abettor to greater liability when he commits a crime with a firearm for the benefit of a criminal street gang.

Under section 12022.53, subdivision (d), a 25-years-to-life term applies to a person who personally discharged a firearm causing great bodily injury. Under section 12022.53, subdivision (e)(1), a 25-years-to-life term applies to a person who is charged as a principle in a crime that includes allegations under section 12022.53, subdivision (d), and section 186.22, subdivision (b). Rodriguez argues that the statute unconstitutionally treats aider and abettors differently.

As Rodriguez acknowledges, his constitutional claims have been rejected by other courts. As to the equal protection claim, the Second Appellate District has held that an aider and abettor in a gang case cannot establish that he and an aider and abettor in an ordinary case are even similarly situated. (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480-481 (*Hernandez*); citing *People v. Gonzales* (2001) 87 Cal.App.4th 1, 13 (*Gonzales*).) According to the court in *Gonzales*, they are not similarly situated because an aider and abettor in gang cases has committed the crime for the purpose of promoting and furthering a criminal street gang. (*Ibid*.) Even if an aider and abettor in a gang case is compared with an aider and abettor who commits a crime for the benefit of other groups engaged in criminal activity, such as a drug cartel, the equal protection claim still fails. In *Hernandez*, the court explained that the state may treat similar groups differently where the law bears a rational relationship to a legitimate state interest. (*Hernandez, supra*, at p. 483.) The court in *Hernandez* applied the rational relationship test because

the issue involved the length of punishment rather than a complete deprivation of liberty. (*Ibid*.; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 837-838, distinguishing *People v. Olivas* (1976) 17 Cal.3d 236; and *People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1388-1387.) As noted by the court, the state has a legitimate interest in suppressing criminal gangs: "Clearly the Legislature had a rational basis for imposing a 25 years to life enhancement on one who aids and abets a gang-related murder in which the perpetrator uses a gun regardless of the relationship between the aider and abettor and the perpetrator. [T]he purpose of this enhancement is to reduce through punishment and deterrence 'the serious threats posed to the citizens of California by gang members using firearms.'" (*Ibid*., fn. omitted.) We agree with the analysis in *Gonzales* and *Hernandez* and, therefore, reject defendant's equal protection claim.

As to his due process claim, Rodriguez argues that section 12022.53, subdivision (e), unfairly subjects an aider and abettor in a gang-related attempted murder case to the same punishment as an accomplice in an ordinary murder case and that it permits such punishment without a jury finding that defendant intended to commit premeditated murder with a firearm. As noted by the court in *Gonzales*, the Legislature was entitled to impose harsher sentence enhancements in cases involving gang members who use firearms to commit serious felonies. (*Gonzales, supra*, 87 Cal.App.4th at p. 15.) The court in *Gonzales* explained that, in enacting section 12022.53, subdivision (e), the Legislature specifically extended such punishment to those who aid and abet in the commission of serious felonies, such as premeditated attempted murder, for the benefit of criminal street gangs. (*Gonzales, supra,* at p. 15; see also *People v. Garcia* (2002) 28

Cal.4th 1166, 1172.) As mentioned in *Gonzales* and discussed earlier in this opinion, aider and abettor liability does not require a finding that the person intended to commit the premeditated murder. (*Gonzales*, *supra*, at p. 15; see also *People v. Laster* (1997) 52 Cal.App.4th 1450, 1473.)

We conclude that defendant has failed to establish a constitutional violation.

5. Criminal Street Gang Enhancement

Lopez argues, and Gonzales joins in his argument, that the gang enhancement in count 1 must be set aside because the enhancement was not alleged in the information.

The People respond that defendants waived their right to raise this argument by failing to object at trial. The People also argue that, although technically deficient, the information provided adequate notice of the enhancement by referring to the sentencing provision in section 186.22, subdivision (b)(4), and the reporting requirement in section 186.30, subdivision (a). We agree.

It is true that a criminal defendant must be advised of the specific charges against him to allow him to prepare a defense and avoid unfair surprise by the evidence offered at trial. (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438 (*Haskin*).) The same rule applies to sentence enhancement allegations. (*People v. Jackson* (1985) 37 Cal.3d 826, 835; *Haskin*, *supra*, at p. 1438.)

Section 952 provides, "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise

language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." Even if the allegation is technically inadequate, a defendant cannot demonstrate prejudice so long as the charging document accomplishes its purpose of providing notice of the charges. (See *In re Michael D.* (2002) 100 Cal.App.4th 115, 127.) "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (§ 960.)

In this case, the prosecutor alleged the crime of attempted murder in count 1 of the second amended information. In this count, the prosecutor did not include the usual criminal street gang enhancement allegation under section 186.22, subdivision (b)(1). It is apparent from the information, however, that this omission was the result of inadvertence. The information contains other language clearly indicating the prosecutor's intent to seek an enhanced sentence under the Street Terrorism Enforcement and Prevention (STEP) Act (§ 186.20 et seq.). In count 1, the prosecutor included the language: "It is further alleged that the offense(s) charged in Count(s) 1 cause the sentencing to be pursuant to Penal Code section 186.22,(b)(4)." That statement is followed by the warning: "NOTICE: Conviction of this offense will require you to register pursuant to Penal Code Section 186.30(a). Willful failure to register is a crime." Section 186.22, subdivision (b)(4), authorizes the trial court to impose an additional

indeterminate life term for any person who is convicted of a felony committed for the benefit of a criminal street gang. As obvious from the language of the warning, section 186.30, subdivision (a), sets forth the registration requirement for those convicted of gang-related crimes or, specifically, crimes under section 186.22, subdivisions (a) or (b).

Although the information was technically deficient, we conclude that the information contained words sufficient to give the accused notice of the prosecutor's intent to seek an enhanced sentence under the STEP Act. Also, defendants cannot demonstrate any unfair surprise or prejudice where, as here, the fact that the crimes were gang-related was central to their case.

Moreover, as argued by the People, if defendants felt that the language in the information failed to state the enhancement adequately, they should have demurred to the information. "The well-established rule is that failure to demur on the ground that a charging allegation is not sufficiently definite waives any objection to the sufficiency of the information. [Citations.] Counsel's failure to object may well be explained by another established rule: 'Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate . . . .' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 672.) Because defendants failed to demur to the information, they waived any claim of error on appeal.

We conclude that defendants have failed to show that they received inadequate notice of the gang enhancement allegation in count 1.

6. *Blakely*

Lopez also claims that the trial court erred by imposing the aggravated or upper term in count 3 and consecutive terms in counts 2, 3, and 4 in violation of the rule established in *Blakely v. Washington, supra,* 542 U.S. 296.

Under the United States Supreme Court's decision in *Blakely*, which clarified its decision in *Apprendi v. New Jersey, supra,* 530 U.S. 466, any fact that increases a defendant's sentence beyond the statutory maximum (i.e., the maximum sentence allowable under the law without additional findings) must be admitted by the defendant or found by a jury beyond a reasonable doubt. (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.) The California Supreme Court concluded that the rule in *Blakely* did not affect the trial court's exercise of its judicial discretion under the California sentencing scheme when it considers various factors in selecting an upper-term or consecutive-term sentence. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) In *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856], the United States Supreme Court partially overruled the holding in *Black*, making explicit that the statutory maximum term was not the upper term, but the middle term. (*Cunningham v. California, supra,* at p. __ [127 S.Ct. at p. 871.]) Under *Cunningham*, the trial court's selection of the upper term should not have been based on facts that were not found by the jury beyond a reasonable doubt.

An exception, however, exists for facts pertaining to the defendant's recidivism. The United States Supreme Court has held that a jury is not required to determine the facts of the defendant's prior conviction specifically or facts related to the defendant's recidivism in a broader sense. (See *Apprendi v. New Jersey, supra*, 530 U.S. at p. 489,

citing *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.)

In this case, the trial court relied on Lopez's recidivism in making its sentencing decisions. The court agreed with the probation officer's findings and cited the reasons stated in Lopez's probation report. The court specifically noted Lopez's prior convictions and the increasing seriousness of his crimes.{CT 1263} Although these facts were mentioned with the other reasons for denying probation, the record shows that the court considered the same or similar facts in selecting the upper term.{CT 1263-1264; Prob. Rpt. 4-5} The facts pertaining to defendant's recidivism alone were sufficient to support the trial court's selection of the upper term. Because a single valid factor in aggravation is sufficient, the court's reliance on other facts was harmless beyond a reasonable doubt. (See *People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1759.)

In his supplemental brief, Lopez also argues that, because the fact of his prior conviction was an element of the offense charged in count 2, possession of a firearm by a felon, the court impermissibly violated the prohibition against the dual use of facts by also considering it to impose the upper term. (California Rules of Court, rule 4.420(d).) Even if the court should not have considered the fact of his prior conviction, the court nevertheless could have relied on the increasing seriousness of his crimes, which also is a fact pertaining to defendant's recidivism. (See *People v. Sanchez* (1982) 131 Cal.App.3d 718, 738-739; *People v. Pinon* (1979) 96 Cal.App.3d 904, 911.) There remains,

therefore, a valid factor in aggravation and remand is unnecessary. (See *People v. Forster*, *supra*, 29 Cal.App.4th at p. 1759.)

7. Disposition

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Ramirez
P.J.

We concur:

s/Hollenhorst
J.

s/Richli
J.