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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON CHARLES NICHOLS et al.,

Defendants and Appellants.

B190205

(c/w B194024)

(Los Angeles County

Super. Ct. No. BA254738)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Lance A. Ito, Judge. Affirmed and affirmed as modified.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant, Brandon Charles Nichols.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant, Lawrence Randel Fuller.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Jason Tran, Deputy Attorneys General, for Plaintiff and Respondent.

On October 10, 2003, appellants Brandon Charles Nichols (Nichols), a 76 East Coast Crips gang member, and Lawrence Randel Fuller (Fuller), a gang associate, committed two drive-by shootings minutes apart in Fuller's Caprice automobile. The youths apparently were attempting to shoot rival Florencia 13 gang members in Florencia 13 territory. No rival Florencia 13 gang members were wounded. But during the first shooting, Nichols shot Araceli C., a female bystander, with a high-powered rifle. Several minutes later and several blocks away, driving by another corner in Florencia 13 territory, Nichols committed another unprovoked shooting, fatally wounding 68-year-old Carmelo Montes. Montes was standing on a corner near his two grandchildren and his son-in-law, A.O., when he was shot. A.O. got into a car and followed the Caprice. At an intersection, Nichols got out of the Caprice and aimed his rifle at A.O. who turned and returned home.

Nichols and Fuller were arrested and made admissions indicating that Fuller was the driver and Nichols the shooter. Juries convicted appellants of murder and other offenses, and the trial court sentenced appellants to life and to determinate terms as we set out on page 4, *infra*. Appellants filed appeals from the judgments, making various contentions that are summarized on pages 4 and 5, *infra*.

We order Nichols's judgment modified to strike an unauthorized \$10,000 parole revocation restitution fine, and order that Fuller's abstract of judgment be amended to properly state his prison term. Otherwise, the judgments are affirmed.¹

THE CONVICTIONS AND SENTENCING

The trial court ordered a partial unitary trial with separate juries.²

¹ On appeal, appellants were assigned different case numbers. However, as appellants were tried during the same proceeding with separate juries, we ordered the cases consolidated on appeal.

² Originally, the trial court ordered separate juries in a partial unitary trial to preserve Fuller's *Aranda/Bruton* rights. (*Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518, 529-530 (*Aranda*); see also *People v. Fletcher* (1996) 13 Cal.4th 451, 468.) The separate juries heard the same evidence except the appellants' admissions and some gang evidence. As the prosecution's

I. The Convictions

Nichols was convicted of the first degree murder of Montes (Pen. Code, § 187, subd. (a); count 1),³ with the finding of a special circumstance that the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle intentionally at others with the intent to inflict death (§ 190.2, subd. (a)(21)), and with a finding of personal discharge of a firearm proximately causing death (§ 12022.53, subd. (d)); two counts of attempted willful, deliberate and premeditated murder on the John Does 1 and 2 (§§ 664/187, subd. (a); counts 2 & 3); maliciously discharging a firearm from a motor vehicle at another person (§ 12034, subd. (c); count 5); and two counts of assault by machine gun or assault weapon on Araceli C. and A.O (§ 245, subd. (a)(3); counts 4 & 6). In counts 2, 3, and 5, the jury found true that Nichols had discharged a firearm proximately causing great bodily injury. (§ 12022.53, subd. (d).) In count 4, the jury found true that a principal had personally used a firearm (§ 12022.5, subd. (a)) and that Nichols personally inflicted great bodily injury (§ 12022.7, subd. (a)). In count 6, the jury found that Nichols personally used a firearm. (§ 12022.5, subd. (a).)

Fuller was convicted of second degree murder of Montes (§ 187, subd. (a); count 1) and two counts of attempted voluntary manslaughter on John Does 1 and 2 (§§ 664/192, subd. (a)). Fuller was also convicted of two counts of assault with an assault weapon (§ 245, subd. (a)(3); counts 4 & 6) and discharging a firearm from a motor vehicle at another person (§ 12034, subd. (c); count 5).

II. The Sentencing

The trial court sentenced Nichols to determinate terms totaling 25 years, consisting of an upper term of 12 years for the count 4 assault, enhanced by a 10-year upper term for

case-in-chief was coming to a close, Fuller told the trial court that he would be testifying on his own behalf. At that point, the trial court ordered that the two juries would hear Fuller's trial testimony, except some limited cross-examination that involved admissions that Fuller made to booking officers.

³ All further statutory references are to the Penal Code unless otherwise indicated.

use of a firearm and by a three-year term for infliction of great bodily injury, and of a concurrent middle term of eight years for the count 6 assault, plus a four-year middle term for use of a firearm. For the attempted murders in counts 2 and 3, the trial court imposed concurrent indeterminate life terms (with seven-year minimum terms), plus consecutive determinate terms of six years eight months each (one-third of a determinate term of 20 years) for the discharge of a firearm. Consecutively to the determinate terms, for the murder in count 1, the trial court imposed a term of life without the possibility of parole (LWOP), enhanced by a term of 25 years to life for discharge of a firearm.

As to Fuller, the trial court imposed a total determinate term of 16 years eight months, consisting of an upper term of 12 years for the count 4 assault, two consecutive terms of one year (one-third of the middle term of three years) for the attempted voluntary manslaughter offenses in counts 2 and 3, and a consecutive term of two years eight months (one-third of the middle term of eight years) for the assault in count 6. The trial court also imposed an indeterminate term of 15 years to life for Montes's murder.

THE CONTENTIONS

Nichols contends that (1) enhancing his prison term for first degree murder as provided in section 190.2, subdivision (a)(21), constitutes cruel and unusual punishment and violates due process; (2) imposing the discharge-of-a-firearm enhancement violated the multiple conviction rule in *People v. Pearson* (1986) 42 Cal.3d 351 (*Pearson*), as well as section 654 and the merger doctrine in *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*); and (3) the imposition of a parole revocation restitution fine was unauthorized.

Fuller contends that (1) the trial court abused its discretion by admitting gang evidence against him; (2) the evidence is insufficient to show that Fuller was an aider and abettor; (3) the trial court abused its discretion by permitting the detective to demonstrate to the jury that the paint in the spray can found in the Caprice's trunk was similar to that sprayed on the market wall; (4) the prosecution failed to use due diligence to secure witness E.A.'s appearance at trial; (5) the deputy medical examiner lacked the qualifications to render the opinion that Araceli C.'s injury was inflicted by an assault

weapon; (6) cumulative error requires a reversal; and (7) there is *Cunningham* error (*Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856, 127 S.Ct. 856] (*Cunningham*)).

In reviewing the record, we discovered unraised clerical error in Fuller’s abstract of judgment. We asked the parties to brief the issue of whether this error should be corrected on appeal.

In separate letters, Nichols and Fuller joined in any contentions raised by the other appellant where the contention accrued to his benefit.⁴

FACTS

I. The Trial Evidence

A. *The Prosecution Evidence*

At about 8:30 a.m. on October 10, 2003, Araceli C. was standing in front of an apartment building, 7501 South Central Avenue, which was on the west side of the street at the corner of 75th Street and Central Avenue in Los Angeles. She was waiting to cross the street eastbound. Near the corner were three young adult “cholos” to whom she had just sold tamales from her shopping cart. Suddenly, six shots rang out. She believed that the shots came from her left, and the youths on the corner with her quickly bicycled off. A bullet struck her right arm, completely shattering her elbow. The extent of her injury indicated that she had been shot with a high-powered firearm, such as an M16 or AR-15 assault rifle.

Approximately two blocks away, at 76th Street and Wadsworth Avenue, Carmelo Montes, age 68, was mowing his lawn. A.O., Montes’s son-in-law, was inside the family residence. A.O. heard shots, presumably those at 75th Street and Central Avenue, and went outside. He saw Montes standing on the corner of 76th Street and Wadsworth

⁴ We note that during trial, the trial court agreed that any trial objection made by one appellant would be deemed raised also by the other appellant, if such objection was relevant.

Avenue with his grandchildren. Montes's son, M.M., was across the street. A.O. told his children to go inside the house and turned and took several steps away from Montes.

A blue Chevrolet Caprice was approaching northbound on Wadsworth Avenue. It turned left westbound onto 76th Street. Fuller was the driver. The passenger, Nichols, leaned out of the Caprice's window and fired two shots with a rifle in the direction of Montes and A.O. The shots missed, but the passenger then fired one or three more shots, one of which hit Montes in the neck.⁵ When Nichols fired his rifle, the children were still on the sidewalk. M.M. told the police that the rifle was similar to an M16 military rifle. A.O. identified the rifle as an "AK" rifle with a 50-round "half banana" clip.⁶ A.O. said that when the Caprice made the turn and the passenger shot the rifle, the Caprice was driving "pretty" slowly and much slower than most cars travel at that corner.

After the shooting, A.O. followed the Caprice in his wife's car. At the stop sign at 76th Street and Towne Avenue, Nichols got out of the Caprice and pointed the rifle at A.O. who was a half block away. A.O. quickly turned his car into an alley and returned home. A bystander, E.A., a former United States Marine Corps member, saw Nichols as

⁵ The deputy medical examiner gave his opinion that Montes's injuries were consistent with a wound caused by impact with a bullet discharged from a high-powered rifle. The deputy medical examiner also gave his opinion that Araceli C.'s injuries were consistent with a wound caused by a bullet from a high-powered weapon.

⁶ A firearms examiner explained with the use of an illustrative AR15 A2 rifle that the AR15 A2 rifle is a civilian copy of the military M16 rifle. The civilian versions of the M16 rifle usually fire only semiautomatically. The military versions are sometimes automatic; others are semiautomatic. Some of these M16 military-type models are designed to shoot three bullets in rapid succession each time the trigger is pressed. More recent civilian models, such as the "A2," discharge ammunition in three-round bursts. The M16 and AR rifles use .223 ammunition. A "banana magazine" can hold 20 to 100 rounds and can be used with the M16 or A2 rifles. An AK-47 is a Russian rifle. It is shaped differently than an M16 rifle. It fires a larger round than an M16 and does not fire in three-bullet bursts. Assault rifles other than the M16 and A2 are also designed to shoot .223-caliber shells. A civilian assault rifle is designed to fire semiautomatically, but such a weapon can easily be altered to become a machine gun, i.e., to be fully automatic. Assault rifles are more powerful weapons than ordinary handguns.

he lowered the rifle, which he identified as an M16-2 assault rifle. When the Caprice drove off, E.A. followed the Caprice and telephoned 911. Using the information provided to them by E.A., Los Angeles police officers found Nichols and Fuller at a market at 62nd and Main Streets and arrested them. E.A. identified appellants as the Caprice's occupants.

Near or on the market wall, the officers observed gold graffiti, which was still tacky and said "76+62 (six Deuce)=F-13 K." In the graffiti, the "F-13" was crossed out. There was a large "ECC" below the "76" and "62," as well as "BGC" and "MSB" below that. BGC and MSB were crossed out. The detective testified that "ECC" means East Coast Crips, "BGC" means Broadway Gangster Crips and "MSB" stands for Mad Swan Bloods. He said that F-13, BGC, and MSB were rivals to the East Coast gangs, and the crossing out indicated that these gangs were rival gangs to the gangs whose signs were not crossed out. "K" means kill.

A blue Caprice was parked nearby. Inside the Caprice's trunk, a criminalist found a spray can containing gold metallic paint. A Philadelphia 76ers baseball cap was found in the Caprice's backseat.

At the market, along with appellants, the officers detained Treveon "T-Bone" M., who had an "S" tattoo on one arm and a "D" tattoo on the other.

At the 7501 South Central Avenue apartment building, the officers observed "Florencia" graffiti in the stairwell.

The officers recovered 11 .223-caliber shell casings from the crime scenes. A firearms examiner testified that all but one of the casings were fired from the same high-powered rifle. One casing had such poor markings that the firearms examiner could not determine whether that bullet had been fired from the same rifle. Four of the expended casings fired from the high-powered rifle were found inside the Caprice, and seven were found on the street near 7501 South Central Avenue. The officers found 7 nine-millimeter expended casings grouped together at the front edge of the courtyard of the 7501 South Central Avenue apartment building, all of which had been fired from the

same gun. Two more nine-millimeter expended casings, fired from a different gun, were recovered from the location where Montes was shot.

In addition, five bullet fragments were recovered at 7501 South Central Avenue. The fragments had been fired by two different handguns, most likely semiautomatics. Four of the fragments were consistent with having been discharged from a nine-millimeter firearm and were found lodged in a building on the east side of South Central Avenue; one of the fragments had been discharged from an M16 .223-caliber rifle, and it was lodged in the 7501 South Central apartment building. The bullet fragment retrieved from Montes's body was consistent with a .223-caliber bullet.

The firearms examiner opined that the shootings probably involved one firearm that discharged .223-caliber ammunition and two firearms that discharged nine-millimeter, .38-caliber, or .357-caliber ammunition.

At trial, A.O. testified that Fuller was the driver and that Nichols was the passenger and gunman. After the arrests, A.O. had identified appellants as the assailants from six-pack photographic displays. At the preliminary hearing, A.O. testified that Nichols was the driver. However, after the hearing, A.O. informed the deputy district attorney and a detective that Nichols was not the driver. A.O. also testified that his family's residence is in Florencia 13 territory and that Florencia gang members congregate at the 7501 South Central Avenue apartment building. A.O. acknowledged that he had been a member of an East Los Angeles gang, but that he had been inactive for years. He also said that the only persons on the street during the shooting were the members of the Montes family and M.M.'s boss, who was across the street with M.M. A.O. claimed that his family members and M.M.'s boss were unarmed, they made no gang gestures at the Caprice, no one was wearing any gang-type clothing, and no one made eye contact with the assailants. A.O. identified a photograph of the Caprice found at the market and commented that the Caprice had no license plate.

Postarrest, M.M. identified photographs of persons other than Nichols and Fuller from six-pack photographic displays. M.M. testified at the preliminary hearing and at trial that Nichols was the driver. At trial, M.M. admitted that he was not certain whether

Nichols was the driver or the passenger, but he was certain that Nichols had been in the Caprice during the shooting. He explained that he had deliberately failed to identify Nichols and Fuller previously and explained that Nichols was a former neighbor. M.M. said that when Nichols lived in the neighborhood, there were no conflicts with the Montes family.

B. The Separate Evidence as to Fuller

The following evidence was admitted as to Fuller only.

1. *Fuller's Booking Statement*

At booking, Fuller told the booking officer that he offered his friend a ride and noticed that the friend apparently had a gun. On the way to their destination, the friend shot at some Hispanics standing on a corner. He and the friend then saw two other Hispanic men on a corner, one of whom was bald. He and his friend exchanged gang signs with these men, and his friend asked him to make a U-turn. Fuller did so, and the friend repeatedly shot at one of the Hispanics.

At trial, the booking officer explained that every gang has its own hand sign. When rival gang members encounter one another, they exchange these gang signs to establish the territory they claim.

Fuller made a similar statement to the booking officer's partner.

2. *Fuller's Postarrest Statement to the Detectives*

At the police station, Fuller spoke to the detectives after a *Miranda* waiver. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).) Fuller told the detectives that Nichols is from "76 East Coast" and that he and Nichols had been best friends since elementary school. Fuller claimed that he has family from "76," "68," and "69," but he did not "gang bang." Fuller said that he had recently purchased the blue Caprice. During the purchase, he was not asked to sign anything, and the Caprice was never registered in his name. On the morning of the shootings, he dropped by the market to see who was there. He denied knowing anything about a shooting.

Fuller interrupted his explanation of the events to tell the detectives that he was concerned that if he told the truth, it would eventually get out, and he would be killed.

The officers told Fuller that he had to put his “cards on the table” before they could address his concerns.

Fuller then explained that Nichols had Fuller pick him up that morning. When Fuller arrived at Nichols’s house at 81st and Hooper Streets, Nichols got into the Caprice with a large army gun under his red shirt. It was similar to an AR-15. Nichols gave Fuller directions on where to drive. Some Hispanic youths were “throwing up stuff.” Nichols shot at the youths, and the youths returned fire. Fuller was not sure who shot first. He and Nichols drove another two blocks and saw a “chunky bald guy and an older guy” who were not armed. Fuller made a U-turn. As he drove on Wadsworth Avenue, Nichols shot three times at several individuals. They were followed, and Nichols stood part way out of the passenger door. Their pursuer turned off in his car. At the market at 62nd and Main Streets, Nichols got out of the car, met T-Bone, walked down the alley, and returned without the rifle. Appellants were then arrested. Fuller protested that he did not plan the shooting.

The detectives showed Fuller the Philadelphia 76ers baseball cap, and Fuller admitted that it was his. Fuller was asked whether the cap had anything to do with the gang, and he replied, “Oh, yeah, I say, yeah, I do because I got friends from there.” He explained that the fresh graffiti at the market meant that the 76 East Coast Crips would “hook up” with the Six Deuce Crips and East Coast Crips, and when they did, they would get rid of the F-13s. The “K” in the graffiti meant “killer.”

3. *Fuller’s May 2003 Acknowledgement of Association with the Gang*

A Los Angeles Police Department gang officer testified that in May 2003, she had stopped Fuller driving a car. Nichols was Fuller’s passenger. In response to questioning, Fuller had admitted that he “hung with” the East Coast Crips, an admission the officer explained indicated that the youth “associated” with that gang. The officer explained that an “associate” in the gang world meant that the youths “hang with” each other, and the youth would not have had friends from a different gang. An associate might be a potential gang recruit, a person who was not yet a full-fledged gang member.

4. *The Gang Expert's Testimony*

Los Angeles County Sheriff's Department Detective Terry Burgin, a gang investigator who was assigned locally to the operations safe streets bureau, testified as the prosecution's gang expert. He said that he is familiar with the East Coast Crips gangs and primarily with the 76 East Coast Crips. He explained that the symbols, "76 ECC" and "76," are the signs for the 76 East Coast Crips gang. Florencia 13 is a rival gang, and "F-13" is one common designation for that gang. Central Avenue is the boundary between these two gangs' territories. The "62" or Six Deuce East Coast Crips are another East Coast Crips gang.

The detective said that in the gang world, graffiti has three purposes: (1) to communicate current events, (2) to claim territory, and (3) to build a gang's reputation. The graffiti found near the market indicated that the two Crips gangs got along and that they kill Florencia 13 gang members.

In response to a hypothetical question, Detective Burgin testified that T-Bone's "S" and "D" tattoos indicated that he is a "62" or "Six Deuce" East Coast gang member. Detective Burgin said that Nichols, who had an "EC" tattoo on his triceps and an "ECC" tattoo on his abdomen, was probably an East Coast Crips gang member. The detective gave his opinion that if Fuller possessed or was wearing a "76ers" baseball cap upon his arrest, he was broadcasting that he was associated with the 76 East Coast Crips gang.

Detective Burgin explained that youths growing up in gang neighborhoods know where and when they should stay within their own gang areas for safety. To get from 81st Street and Hooper Avenue north to Six Deuce territory, the safest and quickest route would have been to drive up Central Avenue to Gage Avenue and then go westbound to Main Street. That way the youths would not have been traveling through Florencia 13 territory, which is north and east of the 76 East Coast Crips territory, south of Gage Avenue, and east of Central Avenue.

The prosecutor asked Detective Burgin another hypothetical question based generally on the facts of the case. In response, Detective Burgin gave his opinion that during this shooting, Nichols and Fuller were probably on what is known as a gang

“mission.” The detective elaborated that a mission is when one or more gang members deliberately look for rival gang members to assault. The route described by Fuller during his postarrest interview indicated that Fuller and Nichols drove through three areas containing a high concentration of Florencia 13 gang members. In two of those areas, they committed drive-by shootings.

Detective Burgin admitted that conducting a mission so early during the day is highly unusual. However, the time may have been chosen to catch the rival gang “slipping,” gang terminology for not paying attention. If the youths had accidentally encountered Florencia 13 gang members and engaged in a shooting, they probably would have immediately returned eastbound into 76 East Coast Crips territory as that was the nearest safe haven.

The detective clarified that there are 14 different subsets of “East Coast Crip[s]” gangs, and the use of the term “East Coast” merely means that the designated gangs are Crips gangs with territories east of Main Street.

C. The Separate Evidence as to Nichols

The following evidence was admitted only as to Nichols.

1. Nichols’s Postarrest Statement to the Detectives

At the police station, after a *Miranda* waiver, Nichols spoke to homicide detectives. Regarding the South Central Avenue shooting, Nichols claimed that he saw several Hispanics shoot at him and Fuller while they were driving by in the Caprice. In response, Nichols fired two to five shots from a rifle that he was carrying for protection. As for the second shooting several blocks away, Nichols said that he fired possibly five shots at a Hispanic man whom he suspected might be after him. After the shooting, Nichols discarded the rifle. Nichols said that he was a 76 East Coast Crips affiliate with the moniker of “Little Maniac” or “Yak.” Nichols had the tattoos, “Maniyacc” and “ECC,” part of his gang’s symbol, on his body. Nichols told the detectives that the ammunition he used in the rifle was the same size as the .45-caliber ammunition the detective used in his handgun.

2. *Nichols's 2003 Acknowledgement that He was a Gang Member*

In 2003, a Los Angeles Police Department gang officer stopped Fuller after she observed him speeding in his car. Nichols, Fuller's passenger, told the officer that he was an East Coast Crips.

3. *The Gang Expert's Testimony*

For Nichol's jury, Detective Burgin again set out his background, described the territories of the respective gangs involved in the shootings, the significance of their tattoos and gang signs, and the function of graffiti. The detective testified about the message contained in the graffiti located near the market. He gave his opinion that if Nichols had an "ECC" tattoo on his body, that meant that Nichols was a member of an East Coast Crips gang.

Hypothetically, the detective gave his opinion that the shootings Nichols and Fuller engaged in were "missions" to assault rival gang members. As one basis for his opinion, he indicated that a high-powered rifle is not an item that a gang member normally carries for protection; typically, a gang member would be carrying a firearm he could easily conceal. The detective said that the youths' flight after the shootings into Six Deuce territory may well have been planned so as to evade retaliation, as well as arrest, because after the shooting, Florencia 13 gang members and law enforcement would assume that the assailants would drive eastbound into 76 East Coast Crips territory. The detective explained that one motive a gang member may have for shooting rival gang members is that committing a brazen crime builds a gang member's reputation, and reputation means a lot to gang members. The detective also explained that generally, on such missions, the gang members will target any rival gang member they encounter, not just a particular gang target.

II. The Defense

A. *Nichols*

Nichols did not testify. He called Los Angeles Police Detective Ernie Jones as a witness. Jones reiterated that on October 10, 2003, M.M. had told him that during the shooting, M.M. did not see the driver. M.M. also said that he did not get a good look at

the gunman, although he added that he probably could identify him. Nichols was in the six-pack photographic display shown to M.M. But M.M. did not select Nichols as the assailant and identified another photograph in the display. During the post-shooting interview, M.M. did not mention that he knew Nichols. When Jones spoke to A.O. that day, A.O. said that the children were already inside when Montes was shot. Also, A.O. claimed that just before Montes was shot, he heard gunfire that seemed to come from the area of 72nd Street and Central Avenue. Then, he heard the sound of more gunfire coming from the south, in the area of 76th Place and McKinley; thus, what he heard were two episodes of shooting before the passenger in the Caprice shot Montes. A.O. initially told Jones that the gunman was small and skinny.⁷

B. Fuller

Fuller testified that on October 10, 2003, he had a job at Staples Center at least three days a week and was attending adult school. He denied that he was a gang member, but admitted that his best friend, Nichols, belonged to the 76 East Coast Crips gang. Fuller said that on the date in question, Nichols wanted Fuller to drive him to make a purchase of marijuana, and Fuller agreed. When Fuller arrived at Nichols's residence, Nichols got into the Caprice wearing a baggy pair of pants and a sweater. After Nichols was seated in the Caprice, Nichols pulled a military rifle out of his clothing. The rifle was similar to an M16 or AR-15 assault rifle. Nichols told Fuller that he was going to sell the rifle to the drug dealer. Fuller explained that usually, the youths purchased marijuana at 62nd and Main. But this time, after they started driving, Nichols said that he wanted to go to 85th and Main Streets to make the purchase. At that point, Fuller was driving northbound, and he turned west off Hooper Avenue onto 75th Street in order to drive to this alternate location.

⁷ Fuller's booking information disclosed that he was five feet nine inches tall and weighed 230 pounds; Nichols's booking information disclosed that he was six feet two inches tall and weighed 220 pounds.

At Central Avenue and 75th Street, Fuller stopped at the stop sign and was waiting to make a left turn. Fuller saw two Hispanic youths across the street throwing gang signs. One youth had a gun. As Fuller turned left, shots suddenly rang out. The youths and Nichols were both shooting, and Fuller could not tell who had initiated the gunfire.

Southbound on Central Avenue, a light turned red, and Nichols told him to turn right. He did so. At Nichols's directions, Fuller then drove several blocks and made a few turns. At Wadsworth Avenue and 75th Street he saw two older Hispanic guys, one of whom was A.O. He negotiated a U-turn, and Nichols shot again. After the second shooting, Fuller looked back and saw that one man was staggering, but he did not believe anyone was hurt.

Fuller claimed that at this point, he was totally overwhelmed by what was happening and that all he was doing was following Nichols's directions about where to drive. At 76th Street and Towne Avenue, Nichols said that someone was following them. At the next stop sign, Nichols put a foot out of his car door and looked behind them. Nichols said, "What, what, what?" and reached for the rifle. Fuller saw the car behind them turn off. After that, Fuller's mind was a blur. He recalled arriving on 62nd Street, and he told Nichols to get out of his car with the gun. He parked, and Nichols returned with another youth and without the rifle. A few minutes later, the police officers arrived and arrested them.

Fuller claimed that he had no idea when Nichols pulled out the rifle that he would decide to use it. Fuller said that he regularly drove by 75th and Central Avenue, and there was never any trouble. He was unaware that the area just west of Central Avenue was Florencia 13 territory; he believed that two other gangs claimed that territory. He had just purchased the Caprice, and there were two prior incidents that made him suspect that the Caprice had a gang history. He was unaware that the spray can was in the Caprice, and he knew nothing about the graffiti. Fuller agreed that the message in the graffiti meant the two Crips gangs would get together to get rid of Florencia 13. He disagreed that Hispanic gang members had been repeatedly shooting at his car and explained that there was just one prior incident at about 75th Street and Central Avenue

where Hispanic youths had thrown gang signs at him and one youth reached under his shirt as if he had a firearm. He agreed that when he spoke to the detectives, he had initially denied the shooting. He explained that at that time, he did not want to talk about the shootings because he was afraid that if he cooperated, he and his family would be in danger.⁸

DISCUSSION

NICHOLS'S CONTENTIONS

I. The Drive-By Special Circumstance

Nichols contends that California's death penalty scheme violates the Eighth and Fourteenth Amendments to the United States Constitution as it fails to genuinely narrow the class of death-eligible defendants. (See, e.g., *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244.)

There is no merit in this contention.

A. *Background*

Nichols was convicted of first degree murder with a finding of the special circumstance that the murder was intentional and committed by the discharge of a firearm from a motor vehicle at persons outside the vehicle where the perpetrator has the specific intent to inflict death. The trial court instructed the jury as to first degree murder on two theories: (1) that the murder was willful, deliberate and premeditated, and (2) that it was perpetrated by means of discharging a firearm from a motor vehicle intentionally at

⁸ A certain portion of Fuller's trial testimony was heard only by his jury, as follows. Fuller claimed that he had the 76ers cap because several nights before the shooting, he and Nichols went to a party where everyone had to wear a sports jersey. For the party, he had purchased the cap to go with his Alan Iverson 76ers sports jersey, the only sports jersey he owned. He claimed that the cap he had purchased was "official" and was not the type of 76ers cap worn by gang members. During cross-examination, he admitted that he had told the detective that the 76ers cap was a gang cap. He denied that he told the booking officer that before the second shooting, he and Nichols "threw up gang signs" and that he made the U-turn.

another person outside of the vehicle when the perpetrator specifically intended to inflict death.

B. The Analysis

Nichols argues that the California drive-by-shooting special circumstance, section 190.2, subdivision (a)(21), when applied to a defendant found guilty of first degree drive-by murder, constitutes a legislative scheme that selects an arbitrary group of second degree murderers and transforms the murders into first degree death-eligible murderers using identical criteria. He asserts that such a scheme violates the Eighth Amendment's prohibition against cruel and unusual punishment and the due process clause of the Fourteenth Amendment and that his term of punishment should be reduced to that for first degree murder, a term of 25 years to life.

“To pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’” (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 244; citing *Zant v. Stephens* (1983) 462 U.S. 862, 877 & *Gregg v. Georgia* (1976) 428 U.S. 153.)

This division has previously addressed a similar issue in *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 166-181 (*Rodriguez*). In that case, we rejected the above argument in part because that defendant had no standing to raise the issue as framed—the defendant had not been sentenced to death. (*Id.* at pp. 165-166.) As explained in *Rodriguez*, the decisions in *Lowenfield v. Phelps*, *supra*, 484 U.S. at page 246 and *People v. Edelbacher* (1989) 47 Cal.3d 983, at footnote 12 on page 1023, rejected the same claims in two capital cases. More recently, the California Supreme Court has rejected this and related claims. (See, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 528; *People v. Millwee* (1998) 18 Cal.4th 96, 164-165, fn. 35; *People v. Catlin* (2001) 26 Cal.4th 81, 158-159; see also *People v. Marshall* (1990) 50 Cal.3d 907, 945-947 [“the ‘triple use’ of the same facts, i.e., to support (1) the conviction of first degree murder on a theory of felony murder, (2) the finding of the felony-murder special circumstance, and (3) the imposition of the penalty of death” does not violate due process or cruel and unusual

punishment clauses of United States Constitution]; *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 309-311.)

For the reasons stated in *Rodriguez*, we find the contention to be unpersuasive.

II. The Firearm Enhancement

Nichols contends that firearm discharge enhancement (§ 12022.53, subd. (d)) cannot be imposed as it is “necessarily included” within a first degree, drive-by shooting murder (see *Pearson, supra*, 42 Cal.3d 351), and the enhancement’s use violates section 654, as well as the merger doctrine in *Ireland*.

We disagree.

The recent decisions in *People v. Sloan* (2007) 42 Cal.4th 110 (*Sloan*) and *People v. Izaguirre* (2007) 42 Cal.4th 126 (*Izaguirre*), companion cases, settled the issue of whether the *Pearson* multiple conviction rule applies to enhancements. In these decisions, the court also settled the issue of whether the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*) have any effect on the decision in *Sloan*.

The court in *Sloan* held that under the statutory or legal elements test, “enhancements are neither recognized nor considered in determining whether the defendant can be convicted of multiple charged crimes based on necessarily included offenses. This result is . . . in accord with the long-standing rule that enhancements may not be considered as part of an accusatory pleading for purposes of identifying lesser included offenses.” (*Sloan, supra*, 42 Cal.4th at p. 114; *Izaguirre, supra*, 42 Cal.4th at p. 128.) The court then concluded there is no *Apprendi* issue because the enhancement was submitted to the jury and found true beyond a reasonable doubt. (*Izaguirre, supra*, at p. 131.) Also, the “federal double jeopardy protection at issue in *Seel* is not implicated” in these circumstances. (*Id.* at pp. 133-134.)

With respect to the section 654 claim, the court in *People v. Palacios* (2007) 41 Cal.4th 720 held that “by enacting section 12022.53, the Legislature made clear that it intended to create a sentencing scheme unfettered by section 654.” (*Id.* at pp. 727-728;

see also *Sloan, supra*, 42 Cal.4th at p. 123 [section 654 not implicated]; *Izaguirre, supra*, 42 Cal.4th at p. 134 [the same].)

As for the claim that the merger doctrine in *Ireland, supra*, 70 Cal.2d 522, requires that the firearm discharge enhancement be stricken, the court in *People v. Sanders* (2003) 111 Cal.App.4th 1371 (*Sanders*) addressed a similar contention. The *Sanders* court observed that in *Ireland*, the Supreme Court held that the felony-murder rule could not be applied when the underlying felony is an assault. It explained that the assault is an integral part of the homicide, and to hold otherwise would relieve the prosecution of the need to prove malice, as most homicide cases involve assault. (*Ireland, supra*, at p. 539.) The *Sanders* court observed that the Supreme Court has not applied the *Ireland* doctrine other than in the context of felony murder and assault and that the doctrine has no application to enhancements. (*Sanders, supra*, at p. 1374.)

We are bound by the Supreme Court cases cited above (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and we agree with the reasoning in *Sanders*.

III. The Parole Revocation Restitution Fine

At sentencing, the trial court imposed a restitution fine of \$10,000 and a section 1202.45 parole revocation restitution fine of \$10,000, the latter of which was ordered stayed.

Nichols contends that the parole revocation restitution fine does not apply as he was sentenced to an LWOP term.

The People concede the issue, and we agree. In *People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183-1186, Division Five of the Second District Court of Appeal addressed the identical issue. The court said: “The statutory language itself is clear, the additional restitution fine is only imposed in a ‘case’ where a sentence has been imposed which includes a ‘period of parole.’” (*Id.* at p. 1183.) The court held that this was the rule even when the court imposes other terms of imprisonment, which imposed without the LWOP term, would make the defendant eligible for parole. (*Id.* at pp. 1183-1185; accord, *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.)

We shall modify Nichols's judgment to strike the unauthorized \$10,000 section 1202.45 parole revocation restitution fine.

FULLER'S CONTENTIONS

I. Gang Evidence

Fuller contends that he was not a gang member and there was no allegation of a gang enhancement, and thus, it was improper to introduce gang evidence against him during his separate trial proceedings.

The contention is unpersuasive.

A. Background

Before trial, Fuller's counsel objected to the use of any evidence identifying Fuller as a gang member, but conceded that Fuller was a gang associate. Trial counsel also objected to the use of opinion testimony by a gang expert and argued that further preliminary facts had to be produced as a foundation suggesting that the shooting had a gang motive, such as the assailants shouted out a gang affiliation, before the expert could give his opinion that the shootings constituted gang warfare. Trial counsel made an Evidence Code section 352 objection that the expert officer's testimony was more prejudicial than probative.

During a pretrial section 402 hearing, the trial court listened to the prosecution's proffer as to the probable gang evidence in the case, which conformed to the trial evidence. After hearing the proffer and counsels' arguments about admissibility, the trial court concluded that the expert testimony was relevant and would assist the jury's understanding of the potential motives for the shootings.⁹

B. The Relevant Legal Principles

We review the question of the admissibility of gang evidence for an abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

⁹ Pretrial, the trial court ruled that the expert would not be permitted to use Fuller's statements as a basis for expert opinion in Nichols's proceedings. During the trial, Fuller decided to testify on his own behalf, and the trial court reversed this ruling.

“[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193 [motive and identity]; *People v. Beyea* (1974) 38 Cal.App.3d 176, 194 [motive]; *People v. Frausto* (1982) 135 Cal.App.3d 129, 140-141 [motive and intent].)

“Gang evidence should not be admitted at trial where its sole relevance is to show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.” (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449; accord, *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) Due to its potential prejudicial impact on a jury, gang evidence is inadmissible where it is “only tangentially relevant, given its highly inflammatory impact.” (*People v. Cox* (1991) 53 Cal.3d 618, 660.) However, gang evidence is admissible where the very reason for the crime is gang-related. (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 239-240.)

C. The Analysis

It is unnecessary here to detail the expert testimony that Fuller claims was improperly admitted. On appeal, Fuller complains that since there was no evidence demonstrating that he was a gang member, as contrasted with being a gang associate, the expert’s testimony on a gang motive for the shooting was irrelevant and should have been excluded. Or, he asserts that the expert’s opinion testimony was so marginally relevant to the issues in the case that it should have been excluded pursuant to Evidence Code section 352. He also asserts a due process violation based on the use of such inflammatory gang evidence.

At trial, as appellant concedes, the primary issue with respect to Fuller’s guilt was whether he aided and abetted the two shootings. Before Fuller testified, identity was also

a hotly contested issue. The prosecution's theory was that Fuller was the driver during two separate intentional, drive-by shootings committed by his passenger, "associate," and good friend for years, Nichols, whom Fuller admitted he had observed earlier that morning getting into his passenger seat with a high-powered rifle. The prosecutor asserted that the murder was of the first degree on theories it was an intentional drive-by gang shooting, as well as a willful, deliberate, and premeditated murder. A police gang expert testified that the shootings had all the earmarks of a gang mission, in which gang members invade rival gang territory in order to shoot any rival gang member they find on the streets. The prosecutor asserted that based on Fuller's association with Nichols and/or the 76 East Coast Crips gang, Fuller had to have known and shared Nichols's specific intent to kill rival gang members with the rifle.

Fuller argues that it was never established that he was a gang member, and thus, gang evidence should not have been admitted during his separate trial proceedings. But Fuller admitted he was a gang associate. That admission was sufficient, along with evidence that Nichols was a gang member and that the two youths were closely associated in other respects, to suggest that Fuller may have assisted Nichols during the shootings and despite his denial, planned the shooting with Nichols and Treveon "T-Bone" M. The gang testimony was relevant to the issues in the case and established a potential motive for the shooting, which explained why Fuller would have engaged in such cold-blooded shootings at strangers and demonstrated Fuller's and Nichols's specific intent. (*People v. Williams, supra*, 16 Cal.4th at p. 193; see *People v. Carter, supra*, 30 Cal.4th at pp. 1195-1196.)

It was up to the jury to determine whether Fuller's conduct and his claim of gang association made it likely that he was either a member of the 76 East Coast Crips gang or whether, despite a lack of gang membership, he nevertheless assisted Nichols by committing drive-by gang shootings. As his relationship to the gang was at issue, the trial court did not err in admitting gang evidence permitting the prosecution to show the shooting was gang-related.

Fuller claims that the foundation for the gang testimony was inadequate because the prosecutor never established that during the shooting the assailants shouted out a gang name or that the youths on the corner at South Central Avenue were Florencia 13 gang members. This argument is unpersuasive.

There was an adequate foundation here for the use of gang evidence. Fuller admitted to the detectives that gang signs were thrown during the initial shooting and to the booking officer that he and Nichols threw gang signs before Montes was shot. A.O. testified that the apartment building on 75th Street and Central Avenue was a Florencia 13 hangout, and Araceli C. described the youths on the corner with her as “cholos.” The gang expert testified to Florencia 13’s gang territory and that Nichols’s gang was a rival gang to Florencia 13. Such evidence was sufficient for the trial court to conclude, along with a proffer of the gang expert’s testimony of a gang mission, that what was at issue was possibly two gang-related, drive-by shootings. As we mentioned above, where the prosecution asserts that the very purpose for the shooting is gang-related, it is permissible to introduce testimony about gang culture. (*People v. Ruiz, supra*, 62 Cal.App.4th at pp. 239-240.)

The decision in *People v. Perez* (1981) 114 Cal.App.3d 470 is distinguishable. There, the trial court improperly admitted evidence of the defendant’s gang membership, which had little tendency to prove the disputed issue in the case, which was defendant’s identity as the sole kidnapper in a kidnapping-robbery. On appeal, the court concluded that such evidence was not sufficiently probative and too inflammatory to be admissible. (*Id.* at p. 479.) Here, the primary issue during the trial was motive and intent, not identity.

Similarly, the decision in *People v. Bojorquez* (2002) 104 Cal.App.4th 335 (*Bojorquez*) is distinguishable. In *Bojorquez*, the victim was robbed at gunpoint by several men in a residence. Apart from possible bias evidence, the gang evidence was not relevant to the issues in the case. The reviewing court held that the trial court abused its discretion where there was other evidence showing an association between the gang members, and gang evidence was more prejudicial than probative. (*Id.* at pp. 342-345.)

Our case differs from *Bojorquez, supra*, 104 Cal.App.4th 335 because the gang testimony here was the centerpiece of the prosecution's case, and the gang evidence was highly relevant to issues of motive and intent, and thus properly admitted during the trial. (*People v. Ruiz, supra*, 62 Cal.App.4th at pp. 239-240.)

In *People v. Avitia* (2005) 127 Cal.App.4th 185 (*Avitia*), appellant was charged with various gun violations after a neighbor complained that he had been shooting a small handgun in his backyard. Police officers arrived, searched appellant's bedroom, and found numerous firearms, including a shotgun and two assault weapons. Appellant offered to stipulate to the ownership of one assault rifle, but the stipulation was declined. The reviewing court held that the mention at trial by a police officer of the presence of gang graffiti in appellant's bedroom did not link appellant to the ownership of the guns as the prosecution had claimed it would. It concluded that the graffiti was irrelevant to the issues in the case, was unnecessary to link appellant to the firearms, and consequently, should have been excluded. (*Id.* at p. 193.)

Avitia does not persuade us that this trial court abused its discretion. Here, the evidence of the graffiti was highly relevant to show that appellants had a gang-related motive for the shootings.

Evidence that Treveon "T-Bone" M. had East Coast gang tattoos on his forearms was also relevant to the issues in the case. The graffiti at the market suggested that the drive-by shootings were a joint operation of the Six Deuce Crips, another East Coast Crips gang, and appellants, respectively, a 76 East Coast Crips gang member and an associate. The Six Deuce contribution to the shooting was apparently the high-powered rifle. Such evidence was further proof suggesting that, along with the graffiti, the shootings were gang-related.

"In *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 . . . the court explained that '[t]he requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.] Such evidence is admissible even though it

encompasses the ultimate issue in the case. . . .’ On the other hand, ‘[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.’ [Citations.]” (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

In this instance, the officer did not testify to Fuller’s intent. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657-658.) “A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a ‘classic’ example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence.” (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619; accord, *People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.)

The officer here responded to the prosecutor’s hypothetical question by essentially describing that the shooting fit the modus operandi of a gang mission. The testimony was admissible as it was helpful to the jury and was not tantamount to an expression of the officer’s subjective opinion as to Fuller’s guilt or whether Fuller had the specific intent necessary for an aider or abettor. The officer was merely expressing his opinion in the abstract that Nichols’s and Fuller’s conduct generally constituted classic gang conduct: he testified that it appeared that the shootings fit the profile of two classic drive-by shootings in rival gang territory.

Fuller argues that the trial court should have used Evidence Code section 352 to exclude the gang evidence. However, our review of the record discloses that the gang testimony was necessary and not cumulative of other properly admissible evidence. As it was vital for the prosecution to inform the jury about gang conduct and mores in order to prove its case and to show a gang-related shooting, the trial court properly ruled that Evidence Code section 352 did not require exclusion.

The trial court properly exercised its discretion. Moreover, there is no error here that may serve as the basis for a claim of a violation of due process. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

II. The Sufficiency of the Evidence

Fuller contends that the evidence is insufficient to show that he aided and abetted second degree murder.

The contention is meritless.

A. *Standard of Review*

In reviewing a challenge to the sufficiency of the evidence, . . . we “‘examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—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. Kraft* (2000) 23 Cal.4th 978, 1053; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319–320; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft, supra*, at p. 1053.) [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence (*People v. Maury* [(2003)] 30 Cal.4th [342,] 396.) ‘[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ (*People v. Farnam, supra*, 28 Cal.4th at p. 143.) We do not reweigh evidence or reevaluate a witness’s credibility. [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

B. *Aiding and Abetting*

Section 31 provides in pertinent part: “All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed.” The California Supreme Court has discussed the mental state necessary for liability as an aider and abettor: “To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted ‘with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ [Citation.] When the offense charged is a specific intent crime, the accomplice must ‘share the

specific intent of the perpetrator’; this occurs when the accomplice ‘knows the full extent of the perpetrator’s criminal purpose *and* gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.’ [Citation.] Thus, we held, an aider and abettor is a person who, ‘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 the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.’ [Citation.]” (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.)

Additionally, the Supreme Court has explained: “[A]n 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.’” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, quoting *People v. Prettyman, supra*, 14 Cal.4th at p. 260.) In *McCoy*, the Supreme Court further noted: “When a person ‘chooses to become a part of the criminal activity of another, [he] says in essence, “your acts are my acts”” (*People v. McCoy, supra*, at p. 1118, quoting Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem* (1985) 37 *Hastings L.J.* 91, 111; see also *People v. Garcia* (2002) 28 Cal.4th 1166, 1173 [the aider and abettor doctrine ““obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role””].)

Further, to aid and abet the charges of attempted murder, the jury had to find the assailant had the intent to kill. To convict an aider and abettor, the jury had to find the aider and abettor acted with (1) knowledge of the assailant’s criminal purpose, and (2) the intent to encourage or facilitate that purpose. Once the jury made these findings, it could convict the aider and abettor of the intended crime and any other crime the perpetrator actually committed that was a natural and probable consequence of the intended crime. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; see also *People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

C. Transferred Intent

The mental state required for attempted murder is further distinguished from the mental state required for murder in that the doctrine of “transferred intent” applies to murder, but not to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 328–329.) “In its classic form, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder.’ ([*People v. Bland*] at p. 317.) In contrast, the doctrine of transferred intent does not apply to attempted murder: ‘To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else.’ ([*Id.*] at p. 328.) Whether the defendant acted with specific intent to kill ‘must be judged separately as to each alleged victim.’ (*Id.* at p. 331.)” (*People v. Smith* (2005) 37 Cal.4th 733, 739-740, quoting from *People v. Bland, supra*, at pp. 317, 328 & 331.)

D. The Analysis

At the outset, Fuller complains of instructional error because he asserts that trial court’s reply to one jury inquiry was confusing. The jury was fully instructed on aiding and abetting and as to the elements of murder, including instructions on the target offenses of assault with an assault weapon and shooting from a motor vehicle.¹⁰ As

¹⁰ During deliberations, the jury inquired, “For count 1—whose malice aforethought to kill do we need to consider? The defendant [Fuller]? Or the co-principal [Nichols]?” In reply, the trial court charged the jury, as follows: “Murder is the unlawful killing of a human being with malice aforethought. [¶] The defendant can be liable for the crime of murder in two ways: [¶] 1) If he harbored malice aforethought, that is a specific intent to kill, and while having such an intent to kill, assisted his co-defendant to commit the crime of murder. [¶] 2) If he had the specific intent to aid and abet his co-defendant to commit the crimes of Shooting From A Motor Vehicle or Assault With An Assault Weapon, and by act or conduct assisted in the commission of either of those crimes, and if the natural and probable consequences of the commission of the crimes of Shooting From A Motor Vehicle or Assault With An Assault Weapon was the murder of Carmelo Montes. In this circumstance you must determine whether the co-defendant harbored the required malice aforethought. [¶] The prosecution has the burden of proving these matters beyond a reasonable doubt.”

Fuller concedes, the trial court's reply to the jury's inquiry was a correct statement of law. The trial court reiterated for the jury that there were two theories for finding that Fuller was an aider and abettor. Under the initial theory, both Nichols and Fuller shared the same intent to kill. Under the latter natural and probable consequences theory, only Nichols had to entertain the intent to kill.

We conclude that in context, the trial court's instruction reasonably would have been understood by the jury. Also, the jury would have not have misunderstood in what context Fuller had to have the specific intent to kill. (*Boyde v. California* (1990) 494 U.S. 370, 381 [the issue is whether there is a "reasonable likelihood" that the jury understood the charge as the defendant asserts]; *People v. Huggins* (2006) 38 Cal.4th 175, 193.)

As to the sufficiency of the evidence, Fuller argues that the "prosecutor's alternative theories" that he was an aider and abettor fail to "support the inference that appellant knew of Nichols's intent, shared that intent, and deliberately performed an act to advance Nichols's intent." He further urges that A.O. was thoroughly impeached as he was a gang member and was convicted of a felony in 1995, 2001 and 2004, and M.M. was not frank with the detectives about identity. And, in any event, testimony of A.O. and M.M. sheds no light on motive and intent.

The contention amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the jury. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) Nichols and Fuller were close friends, and they grew up together in 76 East Coast Crips territory, near 80th Street and Hoover Avenue. Fuller associated with East Coast Crips, who were his friends and relatives. Fuller lived near the intersection of 75th Street and Central Avenue. He testified that his mother owned a store on Central Avenue, several blocks to the south of the intersection at 75th Street and Central Avenue. Central Avenue was the north-south border between 76 East Coast Crips territory and that of the Florencia 13 gang. Recently, there had been an increase in violence between the gangs. Fuller claimed during this testimony that he was unaware of these gang territories. The jury could have rejected that

testimony as incredible in light of Fuller's gang-associate background and his long residence in that neighborhood. Fuller also claimed that he was ignorant of gang matters.

Furthermore, the multiple shooting incidents had the characteristics of a gang mission. Fuller drove Nichols to a selected location where Florencia 13 gang members were known to hang out well aware of Nichols's possession of the high-powered rifle. Fuller's Caprice was not registered and had no license plates. When appellants saw several youths who appeared to be gang members, Nichols shot at them with the rifle. Then Fuller drove through the adjacent residential area. A.O. heard shots before the youths arrived at Montes's location and went outside. Fuller saw Montes and A.O. on the street, made a U-turn, and returned so that Nichols could shoot at these pedestrians. As Fuller approached Montes, he turned westbound, driving the Caprice slowly in order to assist Nichols complete the shooting. Fuller then facilitated their escape by driving away into Six Deuce gang territory. To thwart their capture, Fuller stopped the Caprice while Nichols pointed his rifle on A.O.'s vehicle, which was in pursuit. When A.O. turned off, the youths continued. As soon as they arrived at the market, someone connected with the gangs celebrated the news of the shooting by spraying fresh graffiti on the market wall.

Such evidence supports the jury's conclusion that Fuller either shared Nichols's intent to kill or that Fuller was fully aware that Nichols intended the assaults or the drive-by shootings. Fuller assisted Nichols by driving during the shootings, and the evidence suggested that he was fully aware of Nichols's purpose in possessing the rifle. The second degree murder and the attempted voluntary manslaughter convictions were the natural and probable consequence of his participation in the target offenses. The jury was under no duty during the trial to assess Fuller's trial testimony at its face value; it was entitled to afford Fuller's testimony the credibility the jury deemed it deserved. (See *People v. Guerra, supra*, 37 Cal.4th at p. 1129.)

III. The Comparison of the Gold Spray Paint

In this contention, Fuller asserts that (1) the trial court acted as a prosecutor by setting up an experiment to establish a foundation for the admission of evidence that a can of gold spray paint in the Caprice was used to paint graffiti on the wall of the market

in Six Deuce Crips gang territory, and (2) that the trial court abused its discretion by admitting the results of an unscientific experiment.

The contention lacks merit.

A. Background

Upon Nichols's and Fuller's arrest, the officers saw graffiti on the market that said, "76+62=F-13 K." The F-13 was crossed out. "ECC" was painted below the formula. According to a police officer, the graffiti was freshly painted in gold spray paint. A criminalist found a can of gold spray paint in the trunk of the Caprice. After appellants' arrests, the detectives had the fresh graffiti photographed. At trial, the detective testified that no expert paint comparison had been conducted so as to unequivocally tie the spray can to the graffiti on the market wall. The detective explained that he had planned to have such an analysis conducted, but the marker owner had the graffiti painted over before a criminalist could obtain a sample of the paint.

At trial, Fuller and Detective Burgin testified as to the graffiti's meaning.

Before trial, the prosecutor told the trial court that the spray can found in Fuller's Caprice contained paint that was similar in color to the graffiti. Out of the presence of the jury, trial counsel complained that no scientific tests were performed and that no one had compared a sample of the paint in the spray can with the graffiti. Trial counsel asserted that in the circumstances, the spray can's significance was speculative and using the spray can in evidence was more prejudicial than probative.

The trial court commented that there was a quick solution to trial counsel's complaints. It suggested that the prosecutor have the detective spray a sample of the paint from the spray can onto a manila folder. After the paint dried, the trial court would compare the color of the sample and the color of the graffiti in the photograph to determine whether there was a plausible connection between the two. Trial counsel then raised an objection that absent a foundation that the victims of the shootings were F-13 gang members, the spray can and the graffiti were irrelevant.

After the paint was dry, out of the presence of the jury, the trial court made a comparison of the sample and the photograph of the graffiti. It overruled trial counsel's

objections, commenting that the paint was “gold metallic” paint and that “there [was] a sufficient foundation” to admit the photograph of the graffiti and the spray can. The trial court said that it would leave it to the jury to determine whether the paints matched sufficiently to connect the graffiti to appellants.

B. The Relevant Legal Principles

Generally, “except in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency.” (*People v. Adamson* (1946) 27 Cal.2d 478, 486, overruled on another point as explained in *In re Gaines* (1965) 63 Cal.2d 234, 238; accord, *People v. Cavanaugh* (1955) 44 Cal.2d 252, 267; see also *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 550-552.) Also, “[t]he rules pertaining to the admissibility of photographic evidence are well-settled. Only relevant evidence is admissible (Evid. Code, § 350; [citations]), and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).) Relevant evidence is defined in Evidence Code section 210 as evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” The test of relevance is whether the evidence tends “‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]” (*People v. Heard* (2003) 31 Cal.4th 946, 972-973.)

To establish a foundation for experimental evidence, it must be shown that the experiment is relevant and was conducted under the same or similar conditions to those events at issue. (*People v. Bonin* (1989) 47 Cal.3d 808, 846-848; *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521.) The conditions need only be substantially identical, not absolutely identical. (*Id.* at pp. 521-522.)

C. The Analysis

A trial court has a duty to conduct a trial in a fair and impartial manner, and it may not intervene in a trial to such an extent that it creates the unmistakable impression that the trial court has allied itself with the prosecution in an effort to secure a conviction. (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-1207.) Where the trial court engages in numerous instances of impropriety that are so egregious that a defendant is denied a fair trial, a conviction may be reversed. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 270.)

Here, the trial court was merely responding to the objections by trial counsel. It did not engage in misconduct, nor did the trial court's ruling on the use of this evidence indicate bias. A trial court "has a duty to see that justice is done and to bring out facts relevant to the jury's determination." (*People v. Santana, supra*, 80 Cal.App.4th at p. 1206; see also *People v. Raviart, supra*, 93 Cal.App.4th at p. 270.) That is all that the trial court did here.

As to the claim that the spraying of the paint on the manila envelope and its comparison to the graffiti amounted to an improper scientific experiment, we think it is mere demonstrative evidence and that the trial court properly left the weight of the evidence to the jury.

Even if we concluded that there was error, we would find it was harmless. The spray can evidence, in combination with the fresh graffiti evidence, was relevant only to establishing identity, and that issue became insignificant after Fuller testified that he was the driver during the shooting and Nichols was the assailant. (*People v. Bonin, supra*, 47 Cal.3d at p. 848 [failure to carry burden of demonstrating necessary foundation facts for experimental evidence amounts to harmless error].)

Further, excluding the spray from the can would have had no effect on the admissibility of the photographs of the fresh graffiti. No paint comparison was necessary as a foundation to the jury's consideration of the photographs of the graffiti. No matter who put the graffiti on the wall of the market, the graffiti had independent significance to the issues of motive and intent, and the fresh graffiti's presence in Six Deuce gang

territory, at the very location where the 76 East Coast Crips and Six Deuce Crips spent time together, and where appellants were arrested, rendered the graffiti relevant to show that the 76 East Coast Crips and Florencia 13 were rivals. The message in the graffiti was highly relevant, and the trial court properly exercised its discretion by refusing to exclude it pursuant to Evidence Code section 352. There was no reasonable likelihood that the jury would have considered the paint comparison evidence for an improper purpose, and there was no danger of undue prejudice. (See *Culpepper v. Volkswagen*, *supra*, 33 Cal.App.3d at p. 520.)

IV. Due Diligence

E.A. was the witness to the aftermath of the shootings. He corroborated that Nichols had pointed the rifle at O.A., described with specificity the nature of the rifle, and led the officers to the market preceding the arrests. E.A. testified at the preliminary hearing. At trial, the prosecution claimed that they were unable to locate E.A. for trial. Law enforcement personnel testified on the issue of due diligence, and the trial court admitted E.A.'s preliminary hearing testimony into evidence over an objection of a lack of confrontation.

Fuller contends that he was denied his federal and state constitutional rights to confrontation as the prosecution failed to establish due diligence as a prerequisite to admitting E.A.'s preliminary hearing testimony.

We are satisfied that any error in the use of the testimony is at best harmless.

Where there is no due diligence and a defendant is denied his right to confrontation, the error is not structural. The issue is whether the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [applying *Chapman's* beyond a reasonable doubt standard to violations of the confrontation clause].)

E.A.'s testimony about the events of the assault on A.O. and the type of rifle Nichols used was cumulative of A.O.'s and M.M.'s testimony. Otherwise, E.A.'s testimony was relevant only with respect to impeaching Fuller as to whether Nichols pointed the assault weapon at A.O. during the pursuit at Towne Avenue. E.A.'s

testimony was also relevant to establishing identity and the events leading to appellants' arrests. The latter testimony became insignificant when Fuller testified. Fuller made a number of claims that he failed to observe what Nichols was doing with his high-powered rifle after the shooting began at 75th Street and Central Avenue. Common sense dictates that all these claims are probably disingenuous, so this one instance of impeachment would not have affected the jury's evaluation of Fuller's credibility. Also, the evidence demonstrating that Fuller aided and abetted second degree murder was overwhelming. Consequently, even if the use of the testimony violated Fuller's right to confrontation, the error at best was harmless beyond a reasonable doubt.

V. The Medical Testimony

Fuller contends that the deputy medical examiner's opinions as to whether Araceli C.'s and Montes's injuries were consistent with having been caused by a high-powered rifle were inadmissible. He argues that the deputy medical examiner, a 17-year veteran forensic pathologist who had performed 6,500 autopsies, approximately 1,000 to 1,200 of which involved gunshot wounds, was unqualified to render such an expert opinion. We disagree.

A. Background

Dr. Jeffrey Gutstadt, the deputy medical examiner, testified that the fatal bullet had entered Montes's neck and pierced his spinal cord. It then fragmented, probably having hit the bone, and caused extensive internal bleeding. The prosecutor inquired whether the injuries caused by the bullet were consistent with the use of an assault weapon. Trial counsel objected on grounds there was no foundation that the expert was familiar with the term "assault weapon." During direct examination, the prosecutor inquired whether Dr. Gutstadt was familiar with an assault rifle known as an "AR-15 or M16." Dr. Gutstadt replied that he was "somewhat familiar with those" and that during previous autopsies, he had recovered projectiles that were discharged by rifles. Over an objection that there was "no foundation" with respect to the type of projectiles, Dr. Gutstadt testified that some of the projectiles from an M16 or AR-15 rifle have a "smaller base" as compared with a .38-caliber handgun and that projectiles vary in size.

Without an objection, the prosecutor asked whether Montes's injuries were consistent with the injuries that are caused by an M16 or AR-15 rifle. The doctor replied that Montes's wound was consistent with having been caused by a bullet discharged from a high-powered rifle, and there was extensive fragmentation of the bone and tissues. The prosecutor asked about the reference to a high-powered weapon, and Dr. Gutstadt explained that a bullet from a high-powered rifle gives off a lot of kinetic energy as it passes through the body. Also, such a bullet results in a lot of damage to the tissues. Over an objection that the question assumed facts not in evidence, the doctor said that Montes's injuries were more extensive than would have been expected had he been shot with a small caliber handgun. The doctor qualified his opinion by stating that "this can vary depending on the type of weapon used."

The prosecutor then prepared to show Dr. Gutstadt a photograph of the injuries Araceli C. had received during the shooting. The trial court requested a side bar conference.

During the side bar conference, the prosecutor told the trial court that she had previously asked Dr. Gutstadt whether he could give an opinion on whether a high-powered rifle caused Araceli C.'s wound based on a photograph of her injuries and the victim's claim that the bullet had basically removed "the entire back part of her elbow." The doctor responded that he had sufficient expertise to opine that Araceli C.'s injury was consistent with the type of injury Montes suffered. During the discussion of this evidence, trial counsel asked whether the doctor had examined Araceli C.'s medical records and whether the doctor could distinguish the wounds caused by surgery from the bullet wound. The prosecutor indicated that all she had asked the doctor was whether he could give an opinion on this subject.

The trial court told trial counsel that it assumed there was an objection, which the trial court was overruling. It said, "I think Dr. Gutstadt, based on his background, [and] having done so many gunshot wound autopsies—plus he's a board-certified pathologist—can give an opinion." Also, the trial court commented that it was within the province of the jury to decide whether the doctor's opinion was valid.

Before the jury, the prosecutor had Dr. Gutstadt testify to his opinion that Araceli C.'s injury was also caused by a high-powered weapon. The doctor explained, "The passage of the bullet through the elbow and the loss of that much bone is indicative of a lot of kinetic energy being imparted to the bone and adjacent tissues and would most probably indicate the use of a high-powered weapon." The doctor then gave his opinion that the cause of Montes's death was a gunshot wound to the neck.

Trial counsel cross-examined the doctor about his knowledge of firearms. The cross-examination indicated, and the doctor acknowledged, that he did not know much about forensic ballistics. Dr. Gutstadt agreed that he did not know whether the bullet wounds in this case were also consistent with having been inflicted by less powerful firearms.

B. The Analysis

The failure to challenge Dr. Gutstadt's opinion with respect to Montes's wounds forfeits that portion of Fuller's contention. (*People v. Panah* (2005) 35 Cal.4th 395, 478.) In any event, the trial court specifically found that Dr. Gutstadt's medical background and his 17 years as a forensic pathologist constituted a sufficient basis to allow the doctor to render an opinion on the subject of whether the gunshot wounds were consistent with the use of a high-powered rifle. Our review of that determination is governed by the deferential abuse of discretion standard, and the trial court's ruling "will not be disturbed absent a showing of manifest abuse." (*People v. Bolin* (1998) 18 Cal.4th 297, 322) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness "“clearly lacks qualification as an expert.””” (*People v. Farnam* (2002) 28 Cal.4th 107, 162, quoting *People v. Chavez* (1985) 39 Cal.3d 823, 828.)

In this case, Dr. Gutstadt was explicit that his opinion was based on the kind of damage that occurred upon impact and that there was some proof that there was significant kinetic energy generated by the bullets that caused the victims' injuries. The doctor fully acknowledged that he knew little about forensic ballistics.

We conclude that the doctor had sufficient medical expertise to give his opinion as to whether the gunshot wounds were likely made by a high-powered weapon. (*People v. Robinson* (2005) 37 Cal.4th 592, 631 [error regarding a witness’s qualifications as an expert will be found only if the evidence shows the witness clearly lacks qualification as an expert].) Dr. Gutstadt’s opinion did not require that he have expertise beyond that which was shown—that is, that he was an experienced pathologist who possessed extensive familiarity with similar gunshot wounds. (*Id.* at pp. 631-632.) The trial court also properly observed that in such circumstances, the defense complaints regarding an expert’s knowledge “go more to the weight of the evidence than to its admissibility.” (*People v. Combs* (2004) 34 Cal.4th 821, 849.) It was up to the jury to determine the validity and weight of the doctor’s opinion.

VI. Cumulative Error

Fuller contends that cumulative error requires a reversal as this was a close case on the issue of guilt. We disagree. There are no cumulative errors, which combined, warrant a conclusion that the trial was unfair and a miscarriage of justice has occurred. At best, there were two errors, which we concluded, had they occurred, would have been harmless beyond a reasonable doubt. The potential errors did not go to the heart of the case, and this is not a close case where several errors would have tipped the balance with respect to denying Fuller a fair trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1056 [the trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred].)

VII. Cunningham Error

Fuller contends there was *Cunningham* error. (*Cunningham v. California, supra*, 549 U.S. ___ [166 L. Ed. 2d 856, 127 S. Ct. 856].)

We disagree.

As we indicated previously, the trial court imposed a total determinate term of 16 years eight months, consisting of an upper term of 12 years for the count 4 assault, two consecutive terms of one year (one-third of the middle term of three years) for the attempted voluntary manslaughter offenses in counts 2 and 3, and a consecutive term of

two years eight months (one-third of the middle term of eight years) for the assault in count 6. The trial court also imposed an indeterminate term of 15 years to life for second degree murder.

Fuller complains about the use of the 12-year upper term in count 4 and the imposition of consecutive sentences.

A. *The Consecutive Sentences*

In *People v. Black* (2007) 41 Cal.4th 799, 821-823 (*Black*), the California Supreme Court settled that a trial court's imposition of consecutive sentences does not implicate a defendant's Sixth Amendment right to a jury trial. This claim lacks merit as we are bound by the decision in *Black*. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

B. *The Imposition of the Upper Term*

“[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions.” (*Black, supra*, 41 Cal.4th at p. 816.) “[R]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.” [Citation.]” (*Id.* at p. 818.)

Fuller contends that his prior juvenile adjudication is not the equivalent of prior “convictions,” and thus cannot provide a basis for imposing an upper term sentence in the absence of a jury trial with a burden of proof of beyond a reasonable doubt. Further, he argues that no official records were examined by the trial court prior to sentencing; and the only notation of the juvenile adjudication was a notation in the probation report. In response, the People assert that the trial court's reliance on Fuller's recidivism—that he was on probation at the time of the current offense—is sufficient to render the upper term the presumptive maximum.

Fuller's probation report indicates that in 2000, at age 15, the juvenile court sustained a Welfare and Institutions Code section 602 petition alleging that Fuller had committed burglary and received stolen property. The juvenile court placed Fuller home

on probation, and shortly thereafter, ordered Fuller into camp community placement. Ten days after the instant shooting, on October 20, 2003, it terminated jurisdiction in the probation matter.

At sentencing, the trial court cited the following factors in aggravation of the term: “There was a threat and the infliction of great bodily injury and violence and harm in this matter. The victim . . . was unarmed and defenseless. This was a planned attack which indicated . . . premeditation. The defendant at the time was on [juvenile] probation, and his performance on probation was clearly unsatisfactory.”

We conclude that a sentencing court may impose an upper term sentence on the basis of prior juvenile adjudications without violating a defendant’s constitutional right to a jury trial. The procedures afforded to a juvenile during Welfare and Institutions Code section 602 proceedings are sufficient to ensure the reliability of a juvenile adjudication and the lack of a jury trial does not undermine reliability in any significant way.

The Ninth Circuit addressed this issue in *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187 (*Tighe*). The *Tighe* court reasoned that because juveniles are not afforded the right to a jury trial, juvenile proceedings are not subject to the “fundamental triumvirate of procedural protections” that guarantee reliability and thus did not fall within the “‘prior conviction’” exception to *Apprendi*’s general rule. (See *Tighe, supra*, at pp. 1193-1194.)

However, there is contrary authority, and we agree with the decision in *U.S. v. Smalley* (8th Cir. 2002) 294 F.3d 1030 (*Smalley*). As the *Smalley* court explained, the *Tighe* court relied for its conclusion on the following language from *Jones v. United States* (1999) 526 U.S. 227, 249: “One basis for [the] possible constitutional distinctiveness [of prior convictions] is not hard to see: unlike any other consideration used to enlarge the possibility for an offense . . . a prior conviction must itself have been established through procedures satisfying fair notice, reasonable doubt, and jury trial guarantees.” (See *Tighe, supra*, 266 F.3d at pp. 1193-1194.)

However, the *Smalley* court disagreed with the *Tighe* court’s conclusion. It explained that in *Apprendi*, the court said that prior convictions are excluded from the general rule because of the “certainty that procedural safeguards,” such as trial by jury

and proof beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 488.) The *Apprendi* court said that “there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt,” on the one hand, and accepting the validity of findings of fact by judges that are subject to a lesser burden of proof, on the other. (*Id.* at p. 496.) The *Smalley* court concluded that while the *Apprendi* court held what would be sufficient, i.e., a jury trial and proof beyond a reasonable doubt, and what was insufficient, it did not take a position on the adequacy of procedural protections afforded between these two poles. (*Smalley, supra*, 294 F.3d at p. 1032.)

The *Smalley* court construed the decision in *Jones* not to require a jury trial as a prerequisite to a prior conviction’s use. It concluded that the import of *Jones* was that if a prior conviction results from proceedings outfitted with sufficient safeguards to ensure reliability, then the prior conviction can constitutionally be used to increase the penalty for a crime without having been submitted and proved to a jury. (*Smalley, supra*, 294 F.3d at p. 1032.) The *Smalley* court concluded after examining the procedural safeguards afforded to a juvenile during juvenile proceedings that juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by their exemption. (*Id.* at pp. 1032-1033.)

We also conclude that as the juvenile court functions much like a criminal court with regard to its procedural safeguards, with the exception of a right to a jury trial, we see no reason that in California, the court may not consider Welfare and Institutions Code section 602 proceedings as demonstrating recidivism for the purpose of applying the decision in *Cunningham*. (Accord, *People v. Lee* (2003) 111 Cal.App.4th 1310, 1316; *People v. Bowden* (2002) 102 Cal.App.4th 387, 393-394.)

The trial court also relied on Fuller’s probationary status in aggravation at sentencing. The record supports the existence of such an aggravating factor. That factor

is in the nature of a “prior conviction” and permits a trial court to impose the upper term in the absence of a jury trial. (*People v. Black, supra*, 41 Cal.4th at p. 819.)¹¹

Fuller’s last complaint is that one prior juvenile adjudication of receiving stolen property does not constitute “recidivism,” and in the absence of other criminal history, Fuller was entitled to a jury trial before the trial court could use aggravating factors to impose the upper term. We disagree. The court said nothing in its decision in *Black* requiring two or more prior convictions or adjudications before a current conviction evidences “recidivism.” One prior conviction or juvenile adjudication of a crime is a sufficient circumstance allowing a trial court to impose the upper term without a jury trial. (See *Black, supra*, 41 Cal.4th at p. 818 [“The United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior

¹¹ On July 14, 2004, a petition for review was granted in *People v. Towne*, S125677. Apart from the issue stated in the petition for review, the court asked the parties to address the issue of whether *Blakely v. Washington* (2004) 542 U.S. 296 precluded a trial court from making the required findings on aggravating factors for an upper term sentence, and the standard for a reversal if there was error. Also, later, the court asked for supplemental briefing on the following issues: “(1) Do *Cunningham v. California, supra*, and *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239–247 [140 L. Ed. 2d 350, 118 S. Ct. 1219], permit a trial judge to sentence a defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant’s prior convictions as an adult are numerous and of increasing seriousness; the defendant has served a prior prison term; the defendant was on parole when the crime was committed; the defendant’s prior performance on probation or parole was unsatisfactory (Cal. Rules of Court, rule 4.421, subds. (b)(2)–(b)(5))? [¶] (2) Is there any violation of the defendant’s Sixth Amendment rights under *Cunningham v. California, supra*, if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities—by, for example, a jury finding, the defendant’s criminal history, or the defendant’s admission—even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible?” (*People v. Towne (Shawn)*, S125677, order of February 7, 2007.) Also, on February 7, 2007, the Supreme Court granted review in five more cases to address the impact of *Cunningham*: *People v. Sandoval*, S148917, *People v. Mvuemba*, S149247; *People v. French*, S148845; *People v. Hernandez*, S148974; and *People v. Pardo*, S148914.

conviction . . . “[r]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence”].)

In his reply brief, Fuller asserts that (1) “the fact of being on probation is not something that can be proved by simple reference to official records, as those records are subject to challenge,” and (2) “there are no official records at all” in the record to support the use of the aggravating factor of defendant’s poor performance on probation, “only . . . a single notation in a probation report without any supporting documentation.” We construe Fuller’s assertions as argument that the criminal history set out in his probation report cannot provide an adequate basis for the trial court’s finding on recidivism, defendant’s probationary status, or the nature of a defendant’s performance on probation. We disagree. The court in its decision in *Black, supra*, 41 Cal.4th at pages 818 to 820 and footnote 7 reached a contrary conclusion. We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

VIII. Unaddressed Error

In reviewing the record, we discovered an unraised clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186–188.) Fuller’s abstract of judgment shows a total determinate term of nine years eight months, in lieu of the 16 years eight months actually imposed by the trial court. The error in the abstract of judgment is due to the clerk’s inadvertent use of a five-year term, in lieu of the 12-year term the trial court actually imposed for count 4.

We will order the clerical error corrected.

DISPOSITION

Fuller’s judgment is affirmed. Nichols’s judgment is modified to strike the section 1202.45 parole revocation restitution fine of \$10,000, and as modified, that judgment is affirmed.

Upon receipt of the remittitur, the superior court shall prepare an amended abstract of judgment for Nichols reflecting the modification in the judgment. The superior court shall also correct Fuller’s abstract of judgment to indicate that it had imposed a 12-year term for the assault in count 4 and that the total determinate term is 16 years eight months. The superior court shall send the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
DOI TODD

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ