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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JESUS M. LOPEZ, Defendant and Appellant.	B161668 (Los Angeles County Super. Ct. No. BA212534)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael E. Pastor, Judge. Modified and affirmed.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Jeffrey B. Kahan, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Jesus M. Lopez was convicted, following a jury trial, of one count of first degree murder in violation of Penal Code[1] section 187, subdivision (a). The jury found true the allegations that appellant committed the murder for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1) and that appellant personally used a firearm causing death within the meaning of sections 12022.5, subdivision (a)(1) and 12022.53, subdivisions (b) through (d). The trial court sentenced appellant to 25 years to life in state prison for the murder plus 25 years to life for the firearm use plus 10 years for the gang enhancement.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support the jury's verdict on premeditation, or the finding that the Moonlight Katz are a street gang, and further contending that the trial court erred in excluding evidence of third-party culpability and in failing to instruct the jury with CALJIC No. 2.01. Appellant also contends that the trial court erred in imposing the gang and firearm enhancements and in calculating his presentence custody credits. We correct appellant's presentence custody credits, as set forth in our disposition, and affirm the judgment of conviction.

Facts

On April 25, 2000, before sunset, Tenina Calhoun walked from her home to a payphone outside a Pizza Hut at the intersection of Florence and Figueroa. Eric Pachecho and two other men, all dressed in gang attire, approached Calhoun and began talking to her. One man went inside the Pizza Hut, while Pacheco and the other man remained outside talking with Calhoun.

Appellant, who lived on the same block as Calhoun, interrupted the conversation by walking between Pacheco and Calhoun. Calhoun knew appellant as "Grumpy" and believed him to be a member of the Moonlight Katz gang. Appellant asked Pacheco where he was from. Pacheco replied, "Florencia." Florencia is the name of a large street

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[1] All further statutory references are to the Penal Code unless otherwise specified.

gang. Appellant replied, "Fuck Florencia." Appellant pulled out a handgun, extended his arm and pointed the gun at Pacheco. Appellant fired the gun once or twice as Pacheco began to move toward him. Pacheco fell to the ground. Appellant walked toward Pacheco and fired one or two more shots into his body.[2] Calhoun fled.

The manager of the Pizza Hut, Markeisha Haynes, saw the shooting and called 911.

Los Angeles Police, including K-9 handlers and their dogs, came to the scene. One dog tracked a "fear" scent to an opening in the crawlspace of a nearby house on Estrella Avenue. There, officers found the murder weapon. The officers received consent to search the house itself, but evidence of that search was not admitted at trial.

About two weeks after the shooting, Haynes viewed a photographic line-up and told police that "the picture of [appellant] looks similar to the facial features. The facial features are the same, but I'm not sure."

About eight or nine months later, police contacted Calhoun, who had avoided the police investigation out of fear for her family's safety. She eventually told Los Angeles Police Detective Blair McCormack what had happened at the Pizza Hut on April 25. Calhoun identified appellant's photograph as being that of the shooter.

On January 25, 2001, Detective McCormack and other officers searched appellant's home. In one bedroom, the detective found a shoebox with the word "Grumpy" and the letters "M.L.K" on it. "M.L.K" was an apparent reference to the Moonlight Katz. The detective also found an address book with the word "Grumpy" on it. Another officer found a document with the number "187" next to an arrow pointing to "F-13 bitch."

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[2] An autopsy revealed that Pacheco died from multiple gunshot wounds, including one to the body and one to the head. The muzzle of the gun was in contact with the head when the shot to the head was fired. The bullet fired into Pacheco's torso entered through the left side of the back.

Los Angeles Police Officer Gerald Ballestros, a member of the gang unit in the Newton Division, testified that the shoebox and the address book displayed gang writing. Officer Ballestros understood the F-13 as a reference to Florencia 13. Pacheco had been a member of that gang. Officer Ballestros explained that the question, "Where are you from?" was an inquiry into gang affiliation and a challenge.

Officer Ballestros knew of the Moonlight Katz, who claimed territory in the Newton Division. The gang had about 25 members. Among the Moonlight Katz's rivals were the Florencia 13 gang. According to Officer Ballestros, the Moonlight Katz committed robberies, narcotics sales and murders. In February, 2000, Officer Ballestros had arrested two admitted members of the Moonlight Katz for a robbery near Main and Gage. The two men were subsequently convicted of that offense. In Officer Ballestros's opinion, appellant was a member of the Moonlight Katz and shot a rival to improve his standing in the gang.

Discussion

1. Premeditation and deliberation

Appellant contends that there is insufficient evidence to support the jury's verdict that the murder was premeditated and deliberate. We see more than sufficient evidence to support the verdict.

In reviewing the sufficiency of the evidence, "courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People* v. *Cuevas* (1995) 12 Cal.4th 252, 260-261.)

Circumstantial evidence may be sufficient evidence to support a verdict, and the standard of review is the same when the prosecution relies on circumstantial evidence to prove guilt. (*People* v. *Bean* (1988) 46 Cal.3d 919, 932.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two

interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*Id*. at pp. 932-933.)

In *People* v. *Anderson* (1968) 70 Cal.2d 15, our Supreme Court explained that: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as planning activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed [Citation.]; . . . (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id*. at pp. 26-27.)

As our Supreme Court later made clear: "'The *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way.' [Citation.] The *Anderson* guidelines were formulated as a synthesis of prior case law, and are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case." (*People* v. *Hawkins* (1995) 10 Cal.4th 920, 957, disapproved on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101.)

"The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . .' [Citations.]" (*People* v. *Mayfield* (1997) 14 Cal.4th 668, 767.)

Here, there is evidence of each of the *Anderson* factors. Appellant sought out Pacheco while the latter was talking with a young woman outside a restaurant. Pacheco was dressed in gang attire. Appellant immediately asked Pachecho for his gang affiliation, a challenge certain to result in some form of violence. It is reasonable to infer that since appellant sought a confrontation while armed, he intended to use the gun in the confrontation. This evidence supports an inference of planning, the first *Anderson* factor. Although appellant does not appear to have known Pacheco, the two men's memberships in rival gangs and the presence of Pacheco in appellant's gang's territory, provides a motive for appellant to shoot Pacheco, the second *Anderson* factor. Appellant's manner of killing was so particular and exacting that it created an inference that he had a preconceived plan to kill Pacheco, the third *Anderson* factor. As soon as the victim confirmed that he was a member of a rival gang, Florencia, appellant stated "Fuck Florencia," pulled out his handgun, straightened his arm and pointed the gun at the victim, and fired once or twice from a distance of about two feet. The victim fell to the ground and appellant shot him in the head at point blank range.

To the extent that appellant suggests that the fact that the victim took a few steps toward appellant after appellant pointed the gun at him somehow renders the killing less particular and exacting, we cannot agree. Appellant's arm was fully extended at that point, and his intent to shoot at close range clear. The victim's defensive reaction does not alter that.

2. Gang allegation

Appellant contends that the evidence is not sufficient to show that the Moonlight Katz was a criminal street gang within the meaning of section 186.22. Specifically, appellant contends that Officer Ballestros had only a "sparse basis" for his "unadorned opinion" that the one of the Moonlight Katz's primary activities included criminal offenses specified in section 186.22. We cannot agree.

Officer Ballestros testified that he had worked in the Newton Division for twelve and a half years, nine and a half of which were in the gang unit, and that the Moonlight Katz gang claimed territory in that Division. He had talked with Moonlight Katz members, arrested Moonlight Katz members, reviewed field identification cards for Moonlight Katz members and spoken with other police officers about Moonlight Katz activities. Officer Ballestros had personally arrested two admitted Moonlight Katz gang members for robbery and the two were subsequently convicted of that crime. These activities formed the basis for the officer's opinion that the Moonlight Katz's primary activities included robbery, narcotics sales, shootings and murder.[3]

We cannot agree with appellant that this evidence is insufficient under the "norm" set by *People* v. *Gardeley* (1996) 14 Cal.4th 605. In *Gardeley*, the gang expert relied on "investigations of hundreds of gang-related offenses, conversations with defendants and other Family Crip members, as well as information from fellow officers and various law enforcement agencies" in forming his opinion that the Family Crip gang's primary purpose was to sell narcotics. (*People* v. *Gardeley*, *supra*, 14 Cal.4th at p. 612.) Apart from the number of investigations conducted, we see no differences between the evidence relied on by Officer Ballestros and the evidence relied on by the expert in *Gardeley*. Since the Moonlight Katz gang consisted of only about 25 members, we see no

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[3] An expert may properly comment on the ultimate fact of whether the Moonlight Katz met the statutory definition of a criminal street gang. (Evid. Code § 805; *People* v. *Killebrew* (2002) 103 Cal.App.4th 644, 651.)

significance in Officer Ballestros's presumably smaller number of investigations of gang-related offenses.[4]

3. Third-party culpability

After the police dog alerted to the murder weapon in a crawlspace under a house near the murder scene, police received permission to search the house. Inside, the police dog "tepidly" alerted on some clothing. In the room where the clothing was found, police also discovered a picture of a light-skinned Hispanic man with a mustache. Appellant contends that these facts were evidence of third-party culpability and that the trial court erred in refusing to admit this evidence. We see no error.

"[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. [Citations.]" (*People* v. *Bradford* (1997) 15 Cal.4th 1229, 1325.)

Here, there is nothing to link the man in the picture to the actual perpetration of the crime. Evidence from the officer in charge of the K-9 dog showed that "fear" scent is not linked to an individual person. Thus, the presence of fear scent on the murder weapon and on clothing did not connect the two items to the same person. Appellant offered no evidence that the man in the photograph lived in the house or had a current relationship to someone in the house. He offered no evidence that the clothing with the "fear" scent was male clothing, let alone that it had been worn by or in contact with the man in the photograph. Although the man in the photograph may have borne some resemblance to appellant when the photograph was taken, there was no evidence to show

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[4] Officer Ballestros testified that he had arrested Moonlight Katz members, but did not specify a number.

what he looked like at the time of Pacheco's murder. The photograph could have been ten or twenty years old. Thus, the photograph and clothing had virtually no relevance.

To the extent that appellant contends that the federal law requires the admission of the evidence even though state law does not, we cannot agree. Nothing in the U.S. Constitution requires the admission of evidence with little to no relevance. (See *Perry* v. *Rushen* (9th Cir. 1983) 713 F.2d 1447, 1455 [while proffered evidence of third-party culpability was "not actually irrelevant," it was "sufficiently collateral and lacking in probity on the issue of identity that its exclusion did not violate the sixth and fourteenth amendments"].)

4. Circumstantial evidence instruction

Appellant contends that the trial court erred in refusing his request to instruct the jury with CALJIC No. 2.01 concerning the sufficiency of circumstantial evidence. We see no error.

CALJIC No. 2.01 provides in pertinent part: "[A] finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion."[5]

CALJIC No. 2.01 is unnecessary absent "substantial" reliance by the prosecution on circumstantial evidence. (*People* v. *Anderson* (2001) 25 Cal.4th 543, 582.)

Here, the prosecution relied primarily on the eyewitness testimony of Calhoun, who saw appellant issue a gang challenge to Pacheco and then shoot him. This is direct

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[5] CALJIC No. 2.01 further provides: "Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

evidence of appellant's guilt and so CALJIC No. 2.01 was not required. (*People* v. *Sassounian* (1986) 182 Cal.App.3d 361, 407 [CALJIC No. 2.01 not required in murder case when eyewitnesses place the defendant at the scene of the killing with a handgun].)

The prosecutor did use the Pizza Hut manager's testimony that appellant looked similar to the shooter and appellant's written reference to "187" to corroborate Tenina's eyewitness identification of appellant as the shooter. Both pieces of evidence were circumstantial. However, CALJIC No. 2.01 need not be given when circumstantial evidence is only incidental to and corroborative of direct evidence. (*People* v. *Williams* (1984) 162 Cal.App.3d 869, 874.)

The prosecutor also used circumstantial evidence to show premeditation and appellant's intent to benefit his gang. However, there is a specific instruction for situations such as this, where the prosecution relies on circumstantial evidence to show a specific intent or mental state. The jury was given that instruction.[6]

Appellant contends that he relied on circumstantial evidence to cast doubt on the eyewitness's identification and description of the shooting and was therefore entitled to CALJIC No. 2.01 because it pinpointed his theory of defense. Appellant has not cited and we are not aware of any case holding that CALJIC No. 2.01 should be given when the defense uses circumstantial evidence to cast doubt on the prosecution's direct evidence. As the cases cited above show, the instruction is meant to be used when the *prosecution* relies on circumstantial evidence to prove guilt.

Further, CALJIC No. 2.01 would make no sense if given in a situation where circumstantial evidence was used to cast doubt on direct evidence of guilt. The opening

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[6] The jury was instructed with CALJIC No. 2.02 in pertinent part as follows: "The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime of murder in the first degree as charged in Count 1 or the crime of murder in the second degree, which is a lesser crime, or find the allegation pursuant to Penal Code section 186.22(b)(1) to be true, unless the proved circumstances

sentence of the instruction states that "a finding of guilt may not be based on circumstantial evidence unless" certain conditions are met. The instruction does not give the jury any guidance for the situation which appellant claims was presented to the jury: how to evaluate circumstantial evidence which is used to cast doubt on direct evidence of guilt.

5. Cumulative error

We do not consider appellant's claim that the cumulative effect of the trial court's errors was prejudicial because we have found no errors.

6. Gang enhancement

Appellant was sentenced to 25 years to life for the murder conviction. He contends that the trial court erred in adding a 10-year determinate enhancement term to this sentence pursuant to section 186.22, subdivision (b)(1)(C).

Section 186.22, subdivision (b)(1) provides: "*Except as provided in paragraphs (4) and (5),* any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

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are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other conclusion."

(C) If the felony is a violent felony as defined in subdivision (C) of Section 667.5, the person shall be punished by an additional ten years." [Italics added.]

Subdivision (b)(4) applies only to certain specified felonies and is not applicable in the present case.

Subdivision (b)(5) provides: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subdivision (b)(5).)

Appellant contends that when a defendant receives a life sentence, the court must look to paragraph (b)(5) to determine what, if any, gang enhancement the defendant receives. He further contends that when, as here, the minimum parole eligibility term for a defendant's life sentence is longer than the minimum parole eligibility term provided in subdivision (b)(5), no gang enhancement should apply. Appellant acknowledges that this Court held in *People* v. *Herrera* (2001) 88 Cal.App.4th 1353 that an additional determinate term as specified in paragraph (b)(1) applies in situations such as appellant's. He contends that *Herrera* is not good law after the passage of Proposition 21.

In *Herrera*, this Court found that where a defendant received a 25 year-to-life sentence for the underlying felony conviction, subdivision (b)(4) [now (b)(5)], providing for a minimum parole eligibility term of 15 years, did not apply. We based this finding on the fact that the defendant was sentenced under section 190, a voter enacted initiative, and that the voters clearly intended a first degree murderer to serve 25 years before being considered for parole. We found that section 186.22, subdivision (b)(4), a legislative enactment, could not override the voter-approved initiative and reduce the sentence for a gang-related murder to 15 years to life. (*Id*. at p. 1359.)

We found that subdivision (b)(1) provided guidance in such a situation: subdivision (b)(1) stated "except as provided in paragraph (4)," the court was to impose a one-, two-, or three-year additional term to that specified for the underlying felony. We construed this language to mean that if paragraph (4) was inapplicable for any reason,

then one of the three determinate terms applied to the defendant. (*Id*. at p. 1364.) In *Herrera*, it was the three-year term which applied.

Further support for our conclusion in *Herrera* is found in an enrolled bill report for the legislative version of section 186.22 stating that paragraph (b)(4) [now paragraph (b)(5)], would result in "lifers having their first parole hearing delayed, except for first degree murderers with a sentence of 25 years to life." (*People* v. *Montes* (2003) __ Cal.4th __, ___.) An attachment to the report showed that the minimum eligible parole date for a first degree murder sentence of 25-years-to-life would not be changed by the enactment of section 186.22. (*Id*. at p. __ & fn 10.)

We see nothing in Proposition 21 to undermine our holding in *Herrera*. "'Where a voter initiative contains a provision that is identical to a provision previously enacted by the Legislature, in the absence of an indication of contrary intent, we infer that the voters intended the provision to have the same meaning as the provision drafted by the Legislature.' [Citation.]" (*People* v. *Montes*, *supra*, __ Cal.4th at p. __.) Although, paragraph (4) has been renumbered as paragraph (5), the language of that paragraph remains unchanged and still provides for a fifteen year minimum parole eligibility period, and so we infer that the voters intended the provision to leave a first degree murderer's minimum parole eligibility term at the term provided by section 190 , as was the case under the legislative version.

The essential language of subdivision (b)(1) was not changed by Proposition 21 either. As set forth above, subdivision (b)(1) currently provides "except as provided in Paragraphs (4) and (5)" the trial court is to impose one of three additional terms to that specified for the underlying felony. Paragraphs (4) and (5) are not applicable here. Therefore, the applicable additional term is found in subdivision (b)(1)(C), which provides that when the underlying felony is a violent felony specified in section 667.5, the additional term is 10 years. Murder is a violent felony.

The ballot pamphlet for Proposition 21 supports our analysis. It states in part: "Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties."

(See *People* v. *Montes*, *supra*, ___ Cal.4th at p. ___, quoting from Ballot Pamphlet.) Further, the voter's intent section of Proposition 21 provides: "It is the intent of the people of the State of California in enacting this measure that if any provision in this act conflicts with another section of law which provides for a greater penalty or longer period of imprisonment that the latter provision shall apply, pursuant to Section 654 of the Penal Code." (Prop. 21, § 37.) We understand these statements as indicating that the people desire that a defendant who commits a gang-related offense receive the longest possible sentence. Imposing a ten-year determinate term pursuant to section (b)(1)(C) when a defendant commits first-degree murder accomplishes that goal.

7. Section 12022.53 enhancement

Appellant contends that imposition of the section 12022.53 gun discharge enhancement in addition to a 25 year to life term for murder violated section 654 as well as federal principles of due process and double jeopardy.

Section 654 provides in part that "in no case shall [an] act or omission be punished under more than one provision."

We agree with our colleagues in the First District Court of Appeal that "[w]hat the Legislature has done by enacting section 12022.53 is not to punish the same single criminal act more than once or in more than one way. Instead, in determining that a criminal offender may receive additional punishment for any single crime committed with a firearm, the Legislature has chosen to enhance or expand the punishment imposed on a single underlying crime, where committed by use of a firearm, in order to deter a particular form of violence judged especially threatening to the social fabric." (*People* v. *Hutchins* (2001) 90 Cal.App.4th 1308, 1313-1314.)

Section 12022.53 clearly and unambiguously states that "*[n]otwithstanding any other provision of law*, any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any

person other than an accomplice, *shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony*." (§ 12022.53, subd. (d) [italics added].) Further, section 12022.53 prohibits striking a section 12022.53 allegation or a true finding on such an allegation and further prohibits suspending execution or imposition of sentence when a section 12022.53 allegation is found true. (*Ibid*.; § 12022.53, subds. (g), (h).)

We agree with the conclusion of the Court in *Hutchins*: "Clearly, in enacting this provision the Legislature intended to mandate the imposition of substantially increased penalties where one of a number of crimes, including homicide, was committed by the use of a firearm. In so doing, the express language of the statute indicates the Legislature's intent that section 654 not apply to suspend or stay execution or imposition of such enhanced penalties. Nor should section 654 logically apply in such a situation. The manner in which any crime is accomplished may vary in innumerable respects. . . . Section 654 is not implicated by the imposition of a sentencing enhancement on a particular manner of committing murder -- with the use of a firearm -- adjudged by society through its legislative representatives as particularly egregious and dangerous." (*People* v. *Hutchins*, *supra*, 90 Cal.App.4th at p. 1313.)

Appellant's double jeopardy and due process claims are premised on his belief that the Legislature did not specifically authorize cumulative punishment for using a firearm in a murder. Since we have found that the Legislature did specifically authorize such punishment, appellant's claims fail.

8. Presentence custody

Appellant was 17 years old when he killed Pacheco and so proceedings against him were initiated in juvenile court. After he was found unfit to be tried as a minor, he was remanded to adult authorities and tried as an adult. The trial court did not award appellant presentence credit for the time he spent in juvenile hall. Appellant contends that he is entitled to such credit. Respondent does not oppose such credits in principle,

but contends that the record does not show whether appellant was in custody during those proceedings.

We have taken judicial notice of and reviewed the juvenile court file in this matter. The court's orders leave no doubt that appellant was in juvenile hall during the pendency of the juvenile proceedings. He is entitled to credit for those 321 days. (See *People* v. *Twine* (1982) 135 Cal.App.3d 59, 62 [defendant entitled to credit for days spent in juvenile custody prior to unfitness finding].) When those 321 additional days are added to appellant's 280 days in county jail, appellant is entitled to a total of 601 days presentence credit.

Disposition

The clerk of the superior court is instructed to prepare an amended abstract of judgment showing that appellant has 601 days of actual presentence custody, and to deliver a copy of the amended abstract to the Department of Corrections. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P.J.

GRIGNON, J.