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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RICHARD VERNAL MACKLIN and BRIAN ALLEN SAWYER, Defendants and Appellants.	B190650 (Los Angeles County Super. Ct. No. KA071834)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed in part, reversed in part and remanded with directions.

Christopher Darden for Defendant and Appellant Richard Vernal Macklin.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Brian Allen Sawyer.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

In this case two gang members lured a friend out of his house and tried to shoot him to death for allegedly being a "snitch." When the shooting began the friend's uncle ran to his aid and dragged him back inside the house as the gang members continued shooting. The gang members were charged with attempted murder, assault with a semiautomatic firearm, shooting at an inhabited dwelling and related criminal street gang and gun use allegations/enhancements. With certain exceptions, the jury convicted them of the charges and found true the gang and gun use allegations. The gang members appeal, alleging the trial court committed numerous instructional and sentencing errors. They also claim the evidence is insufficient to support their convictions for shooting at an inhabited dwelling. We find no prejudicial error warranting reversal and accordingly affirm the judgments of conviction. On the other hand, we find the trial court erred in imposing an upper term sentence based on facts not found by the jury beyond a reasonable doubt in violation of *Cunningham v. California*.[1] Accordingly, we vacate the sentence imposed on one of the convictions and remand for resentencing.

FACTS AND PROCEEDINGS BELOW

Corey Scrivens lived with his parents in a single family residence at 2369 Academy in Pomona. Other persons living in this house included his brother Michael, his sister Michelle, his uncle Ricky Powell, and other friends and relatives. Scrivens was 23 years old at the time of the trial. He testified he had known appellants, Richard Vernal Macklin and Brian Allen Sawyer, nearly all his life.

Sawyer lived a block and a half away from Corey Scrivens' house with his mother and other family members in a house on Belinda. Macklin lived somewhat farther away but was regularly in the neighborhood.

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[1] *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856.

The Threats:

Macklin and Sawyer were members of the Trey 57 gang. Scrivens was not. However, Scrivens' sister Michelle was then dating a Trey 57 gang member. On August 2, 2005 Scrivens came home to find 20 or more Trey 57 gang members in his backyard. They were "drinking and lifting weights and getting high."

Scrivens joined the gang members in the backyard. Their leader appeared to be a gang member called "Bump." Macklin and Sawyer were also in the backyard standing near Bump. This was unusual because Macklin and Sawyer were younger and more junior than the other members. Bump told Scrivens he and his brother needed "to put in some work." Scrivens took this to mean Bump wanted them to kill someone. As he spoke, Bump paced back and forth and gestured at them. Bump made it clear to Scrivens there would be consequences, namely discipline, if they did not "put in some work." Scrivens refused. Scrivens told Bump his mother was getting very upset and wanted everyone to leave the yard. Eventually everyone left the Scrivens' backyard without incident.

Later that evening around eight cars drove up to the Scrivens' home. Nearly 30 Trey 57 members got out of the cars and surrounded Scrivens' house. Sawyer and Macklin were among them. Scrivens was at the time sitting on the porch with his uncle Ricky Powell. Scrivens and Powell asked them, "Hey, what's up?" A member nicknamed Set Trip said, "Catch this fade," which meant he was challenging Scrivens to a fight. Scrivens' larger brother, Michael, came outside and announced if there was going to be a fist fight it would be with him. Scrivens' father then intervened, stating there would be no fighting at all.

Bump reportedly told Scrivens "a homey done just died, and you guys didn't cooperate with us, you guys didn't come when we told you to come, something got to give." Bump told Scrivens' father to go back inside the house because the matter did not concern him. Scrivens' sister Michelle came outside and told Bump not to talk to her father that way. Bump replied Scrivens was not abiding by the rules and, if he did not do as he said, there was going to be a "blood bath." Several gang members made it clear

they were carrying guns. They tapped on their guns through their clothing, making a recognizably distinctive sound. Scrivens' father got a gun and handed it to Powell, but then took it back as he went to get a second gun from a briefcase in his van which was parked in the driveway. One of the gang members shouted out "Don't shoot his dad." Michelle yelled at Bump and told him she would call the police if they did not leave. A few minutes later the gang members got back into their cars and drove away. They fired several shots into the air as they drove away.

Michelle Scrivens called the police to inform them of the incident.

Scrivens' Probation Search and Detention:

The next day, on August 3, 2005 police conducted a probation search of Scrivens' home. Officers discovered what appeared to be narcotics in the garage. Scrivens was detained and taken to the police station. Police questioned him about the events the day before with the Trey 57 gang members at his home. Scrivens identified by name or moniker as many of the gang members he could recall seeing in his backyard and surrounding his house later in the evening. Scrivens gave the officers Sawyer's name as one of the members present at his house. Scrivens apparently did not mention Macklin by name, although he did say there were other younger members, or "rug rats," among those present. Police released Scrivens a few hours later.

The Shooting:

A few days later on August 6, 2005 Scrivens had just finished eating dinner and was watching television when he heard two male voices asking if he was home. Angel, another resident in the Scrivens' household, told Scrivens there were people outside to see him. Scrivens went to the door and saw Macklin and Sawyer. They were both dressed in dark clothing and both wore hooded sweatshirts with the hoods pulled over their heads. He thought it odd they had come by themselves because they were usually in the company of older gang members. He also thought it unusual they would be coming to see him because they were not in the same age group. Scrivens was then 23 years old

and Macklin and Sawyer were only 15. However, they had known each other a long time and Scrivens considered them part of his extended family. Scrivens thought he should find out what they wanted.

Scrivens' uncle, Ricky Powell, was across the street doing landscaping work on the neighbor's house. The neighbor's yard was illuminated by an exterior floodlight. Sometime after midnight Powell took his shovel and went home. Macklin and Sawyer were in front of the house talking to Scrivens. Powell exchanged greetings with Macklin and Sawyer and then went into the house and fixed himself something to eat.

Sawyer told Scrivens "somebody over here snitching." Macklin grunted in agreement. Scrivens knew it was a bad thing to be called a "snitch" because "snitches" usually get beat up or shot. Macklin pulled a gun out, stuck it in Scrivens' stomach and asked him if he wanted to buy it. Scrivens declined. Macklin removed the clip and pulled back the slide on the gun and chambered a bullet. Scrivens became uncomfortable. He pushed Macklin's hand away and went back inside the house.

Around 20 minutes later Scrivens heard Macklin and Sawyer calling him through the iron mesh of the security door. Scrivens asked Brandon, another resident of the house, to accompany him. Brandon walked with Scrivens to the door but immediately returned to the kitchen. Through the security door Scrivens saw Macklin and Sawyer begin to walk away. As he stepped outside Scrivens heard a gun click. Macklin turned around and began firing at Scrivens. Sawyer stood a few paces to the side and behind Macklin. Scrivens just stood in front of his house and took the shots. He did not want to run back into the house, afraid his family members would also get shot.

With the first shot Powell ran to the front door and saw Macklin firing his weapon at Scrivens. Powell saw Scrivens' body jerking and moving backward with each shot. Powell ran to Scrivens and dragged him into the house. As he did so Powell heard several bullets whizzing past his ears. One of the bullets grazed his hip. Powell believed Macklin had fired at least eight shots.

Inside the house Scrivens fell to the floor. There was blood everywhere. Scrivens told Powell to close and lock the door. As he did so Powell saw Macklin and Sawyer run in the direction of Sawyer's house, a block and a half away.

Scrivens had been shot approximately eight times and sustained 17 bullet wounds in all, many likely through and through wounds. Family members called the police and the paramedics. One of the first officers on the scene was very familiar with the neighborhood, the Trey 57 gang, and the Scrivens family. He asked Scrivens who had shot him. Scrivens replied it was Macklin and Sawyer and Macklin was the actual shooter. Scrivens told the officer they were both dressed in black hooded sweatshirts. The officer relayed this information to other officers in the field.

Police officers removed numerous bullets, shell casings and bullet fragments from the shooting scene. Some of the bullet fragments recovered had mushroomed out as they hit a hard surface. There was a bullet hole in the door jamb of the front door of the house.

Earlier in the evening Sawyer's mother had been standing outside with a friend when they heard the sound of gunshots nearby. A few minutes later Macklin and Sawyer appeared. Sawyer asked his mother to drive Macklin home. She agreed. She got into the driver's seat of her van and Macklin and Sawyer sat on the bench seat behind her. Moments later officers pulled the van over and ordered everyone to get out and to sit on the curb. During a pat down search the officer noticed Macklin was sweating profusely, his heart was racing and he seemed very nervous. Sawyer also had a rapid heartbeat but he was sweating somewhat less than Macklin. Officers took photographs of Macklin and Sawyer which were later shown to Scrivens. Scrivens confirmed their identity as his assailants before he was airlifted to the hospital.

In a search of the van officers recovered a nine millimeter semiautomatic handgun under the bench seat, wrapped in a black sweatshirt. The gun was unloaded and the gun's magazine was empty. Later ballistic tests confirmed it had been the gun used in the shooting.

Scrivens remained in the hospital for nearly a month. He returned several times thereafter for therapy and other treatment.

Counsel stipulated Trey 57 satisfied the statutory elements for being a criminal street gang. Pomona Police Detective Michael Lange testified as an expert on criminal street gangs. Lange testified he was familiar with the Trey 57 gang, which was a subset of the Crips gang. He said the Trey 57 gang claimed a territory which included Scrivens' and Sawyer's residences. From prior contacts Detective Lange knew Macklin and Sawyer were members of the Trey 57 gang. Sawyer's moniker is "Busy B" and Macklin's moniker is "Little Rich Mack."

Detective Lange explained when someone is labeled a "snitch" that person's life is in immediate jeopardy. A gang fears a "snitch" because the snitch may provide information concerning the gang's criminal activity. This information, in turn, could cause the arrest and imprisonment of gang members, and as a result, the possible demise of the gang itself.

Detective Lange explained when a gang member tells someone to "put in work," it means to do something to benefit the gang. The expert opined a likely consequence for refusing to "put in work" when ordered to do so was physical violence, including death.

Detective Lange was of the opinion the Trey 57 gang members labeled Scrivens a "snitch" because he was arrested but then released only a few hours later. In Detective Lange's opinion shooting Scrivens was an act which benefited the gang. In his words, "it shows if you go against the gang and you're perceived as a snitch or a threat to the criminal element of a gang, you'll be dealt with and you will be retaliated against. And that's exactly what happened."

Detective Lange testified Macklin and Sawyer were at the lower end of the Trey 57 hierarchy and were thus expected to "put in work" to achieve status within the gang.

Macklin and Sawyer presented no affirmative defense.

An information charged both Macklin and Sawyer with two counts of attempted, willful, deliberate and premeditated murder;[2] two counts of assault with a semiautomatic firearm;[3] and of one count of shooting at an inhabited dwelling.[4] The information alleged related gun use,[5] criminal street gang,[6] and infliction of great bodily injury[7] allegations and enhancements.

The jury acquitted Sawyer of count 2 (the attempted murder of Powell charge) and deadlocked on count 1 (the attempted murder of Scrivens charge). The jury found Sawyer guilty of the three remaining charges of two counts of assault with a semiautomatic firearm and of one count of shooting at an inhabited dwelling. The jury found true the related gang and gun allegations and enhancements on these counts.

The jury also acquitted Macklin of Powell's attempted murder and could not reach a unanimous decision regarding the gang allegation on the charge of assault with a semiautomatic firearm on Powell. The jury convicted Macklin of the remaining charges and found true the related gang and gun enhancements/allegations.

The trial court declared a mistrial on the deadlocked count and allegation which were ultimately dismissed.

Macklin and Sawyer appeal from the ensuing judgments of conviction.

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[2] Penal Code sections 664/187, subdivision (a) (count 1, Corey Scrivens, count 2, Ricky Powell). All further statutory references are to the Penal Code unless otherwise noted.

[3] Section 245, subdivision (b) (count 3, Corey Scrivens, count 4, Ricky Powell).

[4] Section 246 (count 5).

[5] Sections 12022.53, subdivisions (b) (c) and (d), section 12022.5, subdivision (a)(1).

[6] Section 186.22, subdivisions (b)(1)(A), (b)(1)(C), (b)(4).

[7] Section 12022.7, subdivision (a).

DISCUSSION

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONVICTIONS FOR SHOOTING AT AN INHABITED DWELLING.

Sawyer and Macklin contend the evidence is insufficient to sustain their convictions for shooting at an inhabited dwelling. They argue there was no evidence Macklin shot *at* the house and no evidence he *intended* to hit the *house*. They assert the evidence instead shows Macklin intended to only shoot Scrivens. They claim the jury's finding Macklin deliberately and willfully attempted to murder Scrivens establishes the absence of any evidence of intent to shoot *at* the house. Accordingly, they contend their convictions of section 246 must be reversed.

"In assessing the sufficiency of the evidence to sustain a conviction, this court must view the entire record, including all reasonably deducible inferences, in the light most favorable to the judgment. The conviction will be upheld if it is supported by substantial evidence, i.e., evidence which is solid, credible and of reasonable value. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) It is only when the evidence, so viewed, would not permit any reasonable trier of fact to have found the defendant guilty beyond a reasonable doubt that the judgment will be reversed. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)"[8]

Section 246 provides in pertinent part: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, . . . , is guilty of a felony, . . ." Section 246 is a general intent crime.[9] Thus, a conviction of section 246 does not require a specific intent to do a further act or to achieve a further consequence or result.[10]

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[8] *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250-1251; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 260.

[9] *People v. Watie* (2002) 100 Cal.App.4th 866, 879.

[10] *People v. Overman* (2005) 126 Cal.App.4th 1344, 1357.

Indeed, the statute does not even require the defendant to shoot directly at the inhabited dwelling, or intend to hit it. As explained by the Court of Appeal in *People v. Overman*, "the act of shooting 'at' a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant's conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act."[11]

In *People v. Chavira*,[12] as in the present case, the defendant argued the evidence was insufficient to support his conviction of section 246. The defendant claimed he did not shoot "at" the inhabited dwelling, but at the persons standing in front of it, and any shots hitting the building was purely accidental. The Court of Appeal disagreed with the defendant's contention a conviction of section 246 required an intent to hit the building. "Defendant and his associates, engaged in a fusillade of shots directed primarily at persons standing close to a dwelling. The jury was entitled to conclude that they were aware of the probability that some shots would hit the building and that they were consciously indifferent to that result. That is a sufficient 'intent' to satisfy the statutory requirement."[13]

The evidence in this case established Macklin fired his semiautomatic firearm directly at Scrivens as Scrivens stood only a few feet away from his front door. Scrivens was hit approximately eight times. The shooting left a bullet hole in the inner door jamb of the front door.

The shooting was in such close proximity to the inhabited residence there was a very real risk the house, or persons inside the house, might be hit. On these facts the jury was entitled to conclude Macklin and Sawyer were aware of the probability one or more

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[11] *People v. Overman, supra,* 126 Cal.App.4th 1344, 1367-1357, footnote omitted.

[12] *People v. Chavira* (1970) 3 Cal.App.3d 988, 992.

[13] *People v. Chavira, supra,* 3 Cal.App.3d 988, 993; see also, *People v. Cruz* (1995) 38 Cal.App.4th 427, 433 [the term "at" in the statute does not require an intent to hit the building].

of the shots could hit the dwelling, or persons inside it, and were consciously indifferent to this result. The jury was capable of making this inference from the evidence even without the assistance of an instruction on "conscious disregard." If, as they now claim, such an instruction was necessary to an understanding of the evidence it was incumbent on Sawyer and Macklin to request it.[14]

Contrary to Sawyer and Macklin's argument, it was not necessary for the prosecution to conclusively establish the bullet hole in the door jamb was from this shooting rather than from a drive-by shooting six months earlier. This is because it is not necessary for a conviction of section 246 to actually hit the dwelling.[15] In any event, we are confident defense counsel would have brought it to the jury's attention if the bullet hole in the door jamb appeared to be anything less than a fresh bullet hole.

In sum, the record contains substantial evidence Macklin shot at an inhabited dwelling to support the convictions of section 246 as consistently interpreted and applied by the courts of this state.[16] Accordingly, the convictions in count 5 need not be

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[14] See *People v. Talamantes* (1992) 11 Cal.App.4th 968, 974-975 [no error could be predicated on the trial court's failure to give clarifying or amplifying instructions on its own].

[15] *People v. Overman, supra*, 126 Cal.App.4th 1344, 1361 [there was no evidence of bullet holes or impacts anywhere on the buildings; a conviction of section 246 could nevertheless be proper because all that is required is "shooting at or in the general vicinity or range of the target. . . ."].

[16] *People v. Overman, supra*, 126 Cal.App.4th 1344; *People v. Watie, supra*, 100 Cal.App.4th 866, 879; *People v. Cruz, supra*, 38 Cal.App.4th 427, 433; *People v. Chavira, supra*, 3 Cal.App.3d 988, 993.

Our decision in *In re Daniel R.* (1993) 20 Cal.App.4th 239 is not to the contrary. There we held the crime of assault with a deadly weapon is not a lesser and necessarily included offense of discharging a firearm at an occupied vehicle. In *In re Daniel R.* we explained assault with a deadly weapon was not a lesser included offense because it was not necessary for a human being to be the target of the shooting, or for the defendant's act to demonstrate a conscious disregard for the life and safety of others. (*Id.* at p. 246.) To sustain a conviction under section 246, under the particular pleading in that case, we noted it was "enough if the probable result of the defendant's willful act is some shots *may* make contact with any part of the car." (*Ibid.*, italics added.) The decision in *In re Daniel R.* is of no assistance to Sawyer and Macklin.

reversed.[17]

II. POTENTIAL ERROR IN INSTRUCTING THE JURY ON AN AIDER AND ABETTOR'S LIABILITY FOR THE NATURAL AND PROBABLE CONSEQUENCES OF THE CRIME OR CRIMES AIDED AND ABETTED WAS HARMLESS.

An accomplice is a person who acts with knowledge of the perpetrator's criminal purpose and with the intent or purpose either of committing, or of encouraging or of facilitating commission of the offense.[18] An accomplice is liable not only for the crime encouraged or facilitated, "but for any other offense that was a 'natural and probable consequence' of the crime aided and abetted."[19] The "natural and probable consequences" doctrine "is based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.' [Citation.]"[20]

In this case the prosecution's theory was Sawyer was liable as an aider and abettor. The trial court provided the full complement of instructions on aider and abettor liability. The court also instructed the jury with CALJIC No. 3.02 regarding an aider and abettor's liability for natural and probable consequences. This instruction directed the jury to decide whether attempted murder, assault with a semiautomatic firearm and shooting at an inhabited dwelling were natural and probable consequences of the target

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[17] In a single sentence assertion, Macklin claims there is insufficient evidence great bodily injury was caused during the commission of the offense of shooting at an inhabited dwelling to support the jury's true finding under section 12022.53, subdivision (d). His assertion, however, is unsupported by either argument or authority. Accordingly, this court need not consider the issue. (*People v. Williams* (1997) 16 Cal.4th 153, 206, quoting *People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15 ["Points 'perfunctorily asserted without argument in support' are not properly raised."].)

[18] *People v. Beeman* (1984) 35 Cal.3d 547, 560.

[19] *People v. Prettyman* (1996) 14 Cal.4th 248, 260.

[20] *People v. Prettyman*, *supra*, 14 Cal.4th 248, 260.

crimes of attempted murder, assault with a semiautomatic firearm and shooting at an inhabited dwelling.

However, according to the reporter's transcript, when the trial court orally instructed the jury it instead told them: "One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, or those crimes, but is also guilty of any other crime committed by a principal which is *not* a natural and probable consequence of the crimes originally aided and abetted."[21]

Sawyer contends if the jury followed this instruction as read, they could have found him guilty without determining he aided and abetted any target offense and without finding any charged offense was the natural and probable consequence of any target offense. Sawyer cites the familiar principle it is presumed jurors follow the instructions of the trial court.[22] He thus argues this court has no choice but to reverse his convictions, claiming it is impossible to know whether they jury convicted him based on a correct or legally incorrect theory.

In reviewing an ambiguous instruction an appellate court inquires "'"whether there is a reasonable likelihood the jury has applied the challenged instruction in a way" that violates the Constitution.' (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380 . . . .)"[23]

In this case there is no reasonable likelihood the jury relied solely on the trial court's oral pronouncement of the instruction to convict Sawyer as an aider and abettor of offenses which were *not* the natural and probable consequences of the target crimes.

Although CALJIC No. 3.02 as delivered orally by the court made the instruction ambiguous, the instructions when read as a whole were neither misleading nor erroneous. The balance of the challenged instruction correctly informed the jury—not once, but twice—they could only convict Sawyer of the crimes *if* they found the crimes *were*

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[21] Italics added.

[22] Citing *People v. Ramirez* (1997) 55 Cal.App.4th 47, 59.

[23] *People v. Prettyman, supra*, 14 Cal.4th 248, 272.

natural and probable consequences of the target crimes.[24] These other portions of the same instruction had the effect of neutralizing the error by immediately supplying the correct standard to be applied. As our Supreme Court has recognized, "'The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.'"[25]

In these circumstances it is possible members of the jury may have thought they simply misheard when the court orally delivered the instructions from the bench.[26] This

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[24] CALJIC No. 3.02 appears as follows in the reporter's transcript:

"One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, or those crimes, but is also guilty of any other crime committed by a principal which is *not* a natural and probable consequence of the crimes originally aided and abetted.

"In order to find the defendant guilty of the crimes of attempted murder, assault with a semiautomatic pistol, and shooting into a house as charged in Counts 1 through 5, you must be satisfied beyond a reasonable doubt that[:] [¶][¶][¶]

"4. The crimes of attempted murder, assault with a semiautomatic pistol and shooting into a house *were* a natural and probable consequence of the commission of the other crimes of attempted murder, assault with a semiautomatic pistol, and shooting into a house.

"In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not only on what the defendant actually intended, but upon what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. [A] 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen.

"You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that a defendant aided and abetted the commission of an identified and defined target crime and that the crime of attempted murder, assault with a semiautomatic pistol, and shooting into a house *was* a natural and probable consequence of the commission of that target crime." (Italics added.)

[25] *People v. Castillo* (1997) 16 Cal.4th 1009, 1016, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 539.

[26] The People posit it is questionable whether the jury even noticed the erroneous "not" because multiple, experienced counsel made no comment and did not object, either

scenario is likely because the jury had copies of the written instructions for their use during deliberations. The written jury instruction for CALJIC No. 3.02 is correct in every respect. Sawyer does not argue otherwise. If the jury consulted the written instructions this would have eliminated any doubt about the correct legal theory to be applied in deciding whether a crime was a natural and probable consequence of the target crime or crimes.

However, when an error consists of a failure to instruct on an element of a charge, or amounts to an instruction of a legally incorrect theory, the judgment must be reversed unless the People prove beyond a reasonable doubt the error did not contribute to the verdict. The People may meet this burden by showing the jury necessarily found all the elements required to convict under a proper theory.[27]

The evidence Macklin used a semiautomatic firearm in the assault was undisputed. There was similarly no dispute Macklin shot Scrivens as Scrivens stood in front of his inhabited dwelling. By their guilty verdicts the jury necessarily found shooting at an inhabited dwelling was a natural and probable consequence of firing a semiautomatic firearm at a person standing only a few feet from his home.

Because there was no conflict in the evidence regarding these offenses there is no reasonable likelihood the jury applied the challenged instruction in a way which violated the constitution.[28] Accordingly, we conclude the instructional error in this case was harmless beyond a reasonable doubt.[29]

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during the instructions or after. The People alternatively argue the reporter likely made an error in transcription.

[27] *People v. Lewis* (2006) 139 Cal.App.4th 874, 884, citing *Chapman v. California* (1967) 386 U.S. 18.

[28] *Estelle v. McGuire* (1991) 502 U.S. 62, 72.

[29] *Chapman v. California, supra,* 386 U.S. 18.

III. THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT SUA SPONTE ON LESSER AND NECESSARILY INCLUDED OFFENSES OF SHOOTING AT AN INHABITED DWELLING.

The court and counsel discussed jury instructions at several hearings over multiple days. On a few of these occasions the trial court informed counsel it was having difficulty finding applicable lesser included offenses on which to instruct. The court asked defense counsel for their input. The court directed counsel to ponder the issue prior to their next discussion. Counsel ultimately suggested a few potential lesser offenses to the attempted murder charge but none to the section 246 offense.

On appeal, Sawyer and Macklin argue the trial court erred in failing to instruct sua sponte with section 246.3 and with Pomona Municipal Code section 34-81 as lesser and necessarily included offenses of section 246, shooting at an inhabited dwelling. They claim the error was prejudicial, requiring reversal of their convictions of count 5.

"There are two tests to determine whether a lesser offense is necessarily included in the charged offense: the 'elements' test and the 'accusatory pleading' test. 'The elements test is satisfied when "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]" [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.]' (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) The accusatory pleading test is satisfied when, '"'the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.' [Citation.]" [Citations.]' (*Id*. at pp. 288-289.)"[30]

Section 246.3 is a "wobbler" offense. This section states: "Any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense. . . . " The Court of Appeal in *People v.*

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[30] *People v. Overman, supra,* 126 Cal.App.4th 1344, 1360.

Overman[31] held section 246.3 is a lesser included offense of section 246 under the statutory elements test. The court found both crimes involved the intentional discharge of a firearm in a grossly negligent manner presenting a significant risk of personal injury or death. The only difference between the statutes, the court found, was section 246 required a specific target "be in the defendant's firing range."[32]

We will assume without deciding Pomona Municipal Code section 34-81 is a lesser included offense of section 246 under the accusatory pleading test. This ordinance provides: "Any person who discharges, causes, permits, or allows to be discharged any firearm, . . . is guilty of a misdemeanor." The information in this case alleged the offense of shooting at an inhabited dwelling had been committed "at 2369 Academy, Pomona, CA."[33]

The issue is whether the trial court prejudicially erred in failing to instruct on these two offenses sua sponte, as Sawyer and Macklin allege.

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. . . . [¶] As our [Supreme Court's] decisions explain, the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. ([*People v.*] *Flannel*, [(1979)] 25 Cal.3d 668, 684, fn. 12, original italics; see also *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127; *People v. Ramos* (1982) 30 Cal.3d 553, 582.) 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons]

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[31] *People v. Overman, supra*, 126 Cal.App.4th 1344.

[32] *People v. Overman, supra*, 126 Cal.App.4th 1344, 1362.

[33] Compare, *People v. Moore* (1983) 143 Cal.App.3d 1059, 1066-1067 [similar ordinance prohibiting the discharge of firearms within the City of Oakland was not a lesser included offense of section 246 under the accusatory pleading test because the information did not allege the shooting took place in Oakland].

could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]"[34]

In *People v. Overman* the facts were such the Court of Appeal found prejudicial error in the court's failure to instruct on section 246.3 as a lesser included offense of section 246. One of the assault victims testified he did not see where the defendant was pointing his rifle when he fired it. No other witnesses saw where the defendant was pointing his rifle at the time he fired it. In addition, a complete examination of the buildings and other objects on the company's property found no bullet holes or any points of impact. There was also testimony the defendant was an excellent marksman and that bullets fired from an SKS rifle travel in a straight-line trajectory for over 300 yards, suggesting the defendant would have hit anything he was aiming at. On these facts, the Court of Appeal found the jury had a basis for inferring the defendant had actually fired his rifle away from the general vicinity or range of the occupied office building.[35]

In this case by contrast, there are no facts to suggest Macklin did anything other than shoot his firearm directly at Scrivens as he stood a few feet from the front door of his house. Macklin emptied the magazine of his semiautomatic. The magazine alone held eight bullets. Seven or eight shots hit Scrivens. One of the bullets left a graze wound on Powell as he came to Scrivens' rescue and one of the bullets made a hole in the inner door jamb of the front door of the house. Officers collected the physical evidence of the bullets, casings and bullet fragments primarily from the front lawn and driveway, suggesting all shots were directed at Scrivens where he stood in front of his house. In other words, there was no evidence to suggest Macklin may have only fired into the air, or to suggest he may have fired *away* from the house.

In this case, the only evidence presented left no room for a reasonable juror to find the crime committed was anything less than the section 246 violation charged of shooting at an inhabited dwelling. The evidence overwhelmingly showed Macklin had fired all

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[34] *People v. Breverman* (1998) 19 Cal.4th 142, 162.

[35] *People v. Overman, supra,* 126 Cal.App.4th 1344, 1362-1363.

shots at, or in the general vicinity or range of, the target dwelling.[36] Accordingly, in the absence of substantial evidence to support the giving of lesser included offense instructions we find the trial court did not err in failing to instruct sua sponte on the offense of section 246.3 and Pomona Municipal Code section 34-81 as lesser included offenses of section 246.

IV. SENTENCING ISSUES.

A. The Gang Enhancement Attached to Count 4 Need Not be Reversed As To Sawyer On The Ground a Mistrial Was Declared on the Same Enhancement In Count 4 As To Macklin.

The jury convicted both Macklin and Sawyer of the crime alleged in count 4 of assault with a semiautomatic firearm on Powell. As regards Sawyer, the jury also found true the allegation the offense was committed for the benefit of a criminal street gang.[37] The jury was unable to reach a unanimous finding on the gang enhancement on count 4 regarding Macklin and the trial court declared a mistrial on the enhancement.

On appeal, Sawyer contends the gang enhancement finding on count 4 makes his conviction more serious than Macklin's, and, he claims, because an aider and abettor cannot be found guilty of a more serious offense than the actual perpetrator, the gang enhancement must be reversed.[38]

Although not directly on point, in resolving this issue we are guided by the principles announced in the Supreme Court's decision in *People v. Garcia*.[39] In *Garcia* a rival gang member was shot and killed in a drive-by shooting. The defendant who

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[36] *People v. Overman, supra*, 126 Cal.App.4th 1344, 1361.

[37] Section 186.22, subdivision (b)(1)(A).

[38] Citing *People v. Williams* (1977) 75 Cal.App.3d 731, 737 ["an aider and abettor cannot be guilty of a greater offense than the principal offender."].

[39] *People v. Garcia* (2002) 28 Cal.4th 1166.

apparently drove the car was jointly charged with the alleged shooter with the murder. The information alleged criminal street gang enhancements and firearm enhancements, including a firearm discharge allegation under section 12022.53, subdivision (d). The person accused of being the actual shooter was acquitted of all charges. In a bench trial the defendant was convicted of second degree murder and the trial court found true the gang and section 12022.53 firearm discharge allegations. As a result, he received an additional sentence of 25 years to life. On appeal, the defendant argued because the shooter was acquitted, and there was no evidence he was the shooter, the enhanced sentence under section 12022.53 was inappropriate because no one was convicted of the charges and thus the requirement of vicarious liability as an aider and abettor was not met.[40] The Court of Appeal agreed with the defendant and reversed the punishment imposed under section 12022.53.

The Supreme Court reversed the judgment of the Court of Appeal. The *Garcia* Court concluded the prosecution did not need to plead and prove the conviction of the offense by the principal who intentionally and personally discharged the firearm in order for the enhancement under section 12022.53, subdivision (d) to apply to an aider and abettor who is convicted of the underlying offense.[41] The *Garcia* Court held it is sufficient for the prosecution to prove (1) a qualifying offense under section 12022.53, subdivision (a), section 246, or section 12034, subdivision (c) or (d); (2) a principal intentionally and personally discharged a firearm proximately causing great bodily injury or death to a person other than an accomplice; (3) the aider and abettor was a principal in the offense; and (4) the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1) and (4) and 12022.53, subdivision (e)(1).[42] In rejecting the Court of Appeal's contrary analysis, the *Garcia* Court commented the "'fact that certain defendants may escape conviction for their

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[40] *People v. Garcia, supra*, 28 Cal.4th 1166, 1170.

[41] *People v. Garcia, supra*, 28 Cal.4th 1166, 1174.

[42] *People v. Garcia, supra*, 28 Cal.4th 1166, 1174.

crimes is not any legal or logical reason why another defendant, where substantial evidence has been introduced to sustain his conviction, should be exonerated for his crime. . . . "'[43]

In the present case the jury convicted both Sawyer as a principal and Macklin as the actual shooter of the offense of assault with a semiautomatic firearm on Powell. Under the rationale of *Garcia*, here, where Sawyer was convicted as a principal in this offense, and where substantial evidence supports the conviction, the jury's true finding the offense was committed for the benefit of a criminal street gang may stand.

B. The Record Reflects The Trial Court Was Aware of Its Discretion to Strike the Gang Enhancements.

Sawyer and Macklin contend their sentences must be vacated and the cause remanded for resentencing because the trial court was not aware of its discretion to strike the gang enhancements. We disagree.

The trial court sentenced Sawyer and Macklin on the same day. Macklin's sentencing hearing occurred first. At counsel's request the trial court explained its proposed sentence. The court stated it felt "fairly well boxed in" regarding the sentences for counts 1 and 5 because sentences for the attempted murder and shooting at an inhabited dwelling offenses were dictated by the mandatory provisions of section 186.22, subdivision (b)(4) in light of the jury's findings on the gun discharge and gang elements.

Macklin's counsel requested the court to strike the punishment on the gang enhancements. Counsel asserted the court had inherent power in unusual cases to exercise its discretion to strike the additional punishment on the gang enhancements and pointed to the provision in section 186.22 which specifically authorizes a trial court to do

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[43] *People v. Garcia, supra*, 28 Cal.4th 1166, 1178, quoting *People v. Palmer* (2001) 24 Cal.4th 856, 861.

so.[44] In response, the trial court asked counsel to articulate the factors counsel believed made this such an unusual case the court should exercise its discretion to strike the additional punishment for the gang enhancements. Macklin's counsel mentioned Macklin's young age of 15, the peer pressure to which he was subject, the fact all the crimes comprised but a single incident, Macklin's respectable school record, his fundamentally good and positive character, the deaths of his father and uncle, and the fact he was already subject to a lengthy and mandatory sentence under section 12022.53, subdivision (d) for having intentionally and personally used a firearm causing great bodily injury, among other factors.

Macklin's grandmother addressed the court and requested the court to show mercy, and not to sentence Macklin to a life term. The trial court asked Macklin's grandmother if she had been listening to the proceedings because counsel had been discussing the fact the law required the court to impose "a life sentence of one type or another[.]" The court told Macklin's grandmother it had no discretion regarding a life term.

Prior to sentencing Macklin the court acknowledged counsel was correct section 12022.53, subdivision (d) required the court to impose the punishment for the firearm discharge, and to impose the punishment consecutively to the punishment imposed for the underlying offenses. The court then stated "for the record, even if I did have 1385 power over the 12022.53(d) section, I would decline to exercise that power on these particular facts. The defendants called out the victim. The defendants were walking away from the victim. They turned suddenly and shot multiple times in an unsuspecting, almost lying-in-wait situation with the victim. And of course, inflicted a great deal of

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[44] Section 186.22, subdivision (g) provides: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

bodily injury. I'm amazed at how many hits Mr. Macklin was able to get on Mr. Scrivens and still not kill him."

The court held Sawyer's sentencing hearing a few minutes after Macklin's hearing concluded. Sawyer's counsel requested the trial court to exercise its discretion to impose concurrent and mid-term sentences only. Sawyer's counsel acknowledged the Legislature had obviously gotten "very fed up" with criminal street gangs and had enacted some very harsh penalties for their criminal activities. Sawyer's counsel nevertheless asked the court to "do something with that 25-years-to-life sentence so my client can come up for parole in seven years." Counsel pointed out Sawyer was only 15 years old, was immature, and was practically compelled to associate with gang members because all the youth in his neighborhood were gang members.

The trial court was not persuaded. Prior to imposing sentence, the court explained its view of the case, "Now in our case we have what appears to be a cold, callus [sic] shooting at an old friend, who was called out of the safety of his own house by two people who were walking [a]way, pulled a gun, turned, shot unexpectedly. Many, many hits on the victim Mr. Scrivens, and one hit on Mr. Powell. It was clearly gang-related. Mr. Scrivens told us that Mr. Sawyer said, you're a snitch, or, you've been snitching. [¶] Macklin's response was, huh.

"Then we go on with the, want to buy it? Gun in the stomach. Mr. Scrivens told us that both voices were calling, Corey, come outside. And then Angel said, your friends are outside, according to my notes.

"As I mentioned earlier, I have no idea in the world how Mr. Scrivens was able to live through this fuselage of shots and hits. He told us it was 15 times, 17 total with 15 hits, at one point in time during his discussions. That was contradicted by the officers who thought there were only nine. But that's still a lot of holes in a human being. And clearly gang-related. [¶] There's no doubt in the court's mind that the aggravating circumstances outweigh any mitigating circumstances relating to age."

A trial court has the discretion to strike the additional punishment otherwise authorized on findings the underlying crimes were for the benefit of, at the direction of,

or in association with, a criminal street gang.[45] However, a trial court may only exercise this discretion in an unusual case where the interests of justice would be served.

From the foregoing exchanges with counsel the record reflects the trial court was well aware of its sentencing discretion in this regard. Counsel expressly requested the court to exercise its discretion to strike the punishment on the gang enhancements in the interest of justice under section 186.22, subdivision (g). In response, the trial court requested counsel to explain the grounds showing how or why this case was the "unusual" case in which a court would be warranted in striking the gang punishment.

It is true the trial court did not expressly state it did not find this case to be such an "unusual" case, and did not expressly state it would refuse to exercise its discretion to strike the additional punishment on the jury's gang findings. However, the fair import of the court's comments at both sentencing hearings was there were insufficient mitigating circumstances to make this an unusual case and for this reason the court would not exercise its discretion to strike the additional punishment. The court's actual comments make clear it found the gang findings supported by the evidence, and additional punishment warranted and appropriate, based on the facts of the underlying crimes.

The fact the court chose not to strike the additional punishment for the gang findings is not the same as saying the court failed to recognize it had the discretion to do so. In this case the record makes clear the trial court was aware of its discretion, the legislative source of that discretion, but was not persuaded this was the unusual case in which to exercise its discretion to strike the additional punishment. Accordingly, we find no error.

The People assert the trial court had no discretion to strike the punishment imposed under section 186.22, subdivision (b)(4).[46] They point out this subdivision is a

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[45] Section 186.22, subdivision (g) (see footnote 44, above); *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903.

[46] Section 186.22, subdivision (b)(4) provides in pertinent part: "Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to

mandatory "alternative penalty provision," as distinguished from an "enhancement," punishment for which a trial court may in its discretion strike under subdivision (g) in a proper case.[47] Macklin and Sawyer counter section 186.22, subdivision (g) gives the trial court the discretion to strike the punishment on any gang related finding.

Neither side directs this court to any authority either applying or explaining the extent of a court's discretion under section 186.22, subdivision (g). There is no need in this case to explore the parameters of a court's discretionary authority under section 186.22, subdivision (g) because, as earlier explained, the trial court in this case unequivocally rejected all of counsels' entreaties to exercise its discretion to strike any of the punishment on any of the gang related findings in any event.

C. Section 654 Does Not Apply To Stay Sawyer's Sentence On His Assault with a Firearm Conviction in Count 4 Or To Stay Macklin's Sentence On Count 5 For Shooting At An Inhabited Dwelling.

The trial court imposed punishment on both Sawyer and Macklin for their convictions in count 5 for shooting at an inhabited dwelling. In Macklin's case, the court decided to stay punishment on count 4 under section 654.

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promote, further, or assist in any criminal conduct by gang members, *shall*, upon conviction of that felony, be sentenced to an indeterminate term of *life imprisonment* . . . ." (Italics added.)

[47] See *People v. Briceno* (2004) 34 Cal.4th 451, 460, footnote 7 ["Section 186.22, subdivision (b)(4) is an alternate penalty provision that provides for an indeterminate life sentence for certain underlying felony offenses that are gang related."]; *Robert L. v. Superior Court, supra*, 30 Cal.4th 894, 900, footnote 6 [section 186.22, subdivision (b)(4) is an alternate penalty provision "because it, too, 'sets forth an *alternative* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.' ([*People v.*] *Jefferson* [(1999)] 21 Cal.4th [86] at p. 101.) In *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327, [the Supreme Court] referred to current section 186.22, subdivision (b)(4) as a 'criminal street gang enhancement [that] *increases* the punishment for the offense.' But the issue in that case was not whether this provision was a sentence enhancement rather than an alternate penalty provision, . . . "'].

The trial court sentenced Sawyer for his convictions on both counts 4 and 5. Sawyer complains the trial court should have stayed punishment on count 4 in his case as well, if, as in Macklin's case, the court found section 654 applied to preclude punishment for both counts 4 and 5. Sawyer argues if the court found section 654 applied to preclude punishment for both offenses for his codefendant then the court should have applied its reasoning to his case as well.

Macklin argues the trial court should have stayed punishment on his conviction in count 5 for shooting at an inhabited dwelling. He claims this is so because his act of shooting at the victim standing in front of his home constituted but a single act, committed with a single intention, within the meaning of section 654.

Section 654 provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

However, section 654 does not preclude separate punishment for crimes of violence committed against separate victims. This is true even where a defendant is convicted of multiple crimes incident to a single criminal intent and objective.[48]

Powell was a victim of both counts 4 and 5. However, he was not the only victim of the offense in count 5 of shooting at an inhabited dwelling. The evidence showed at least Brandon and Angel were both then in the house and exposed to great bodily injury or death if any of the bullets penetrated the house. They too were victims of count 5.

Because each crime involved at least one other victim, no violation of section 654 appears.[49] Thus, the fact Macklin received an undeservedly lenient sentence provides no legal basis for modifying Sawyer's sentence.

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[48] *People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781; *People v. Cruz, supra,* 38 Cal.App.4th 427, 434.

[49] See *People v. Garcia, supra,* 32 Cal.App.4th 1756, 1785 ["defendant was properly punished both for the crime of shooting at an occupied motor vehicle, the victims of

D. Macklin Properly Received Multiple Enhancements Based on A Single Injury Under Section 12022.53, Subdivision (d).

Macklin argues the injury Scrivens suffered in the attempted murder in count 1 is the same injury Scrivens suffered in the offense of shooting at an inhabited dwelling in count 5. Accordingly, Macklin asserts the trial court should have stayed punishment on the duplicate enhancement imposed under section 12022.53, subdivision (d) on count 5.

The Supreme Court in *People v. Oates*[50] addressed and rejected this precise argument. In *Oates* the defendant fired two shots at a group of five people and hit and injured one. The defendant was convicted of five counts of attempted murder.[51] The Supreme Court held multiple enhancements under section 12022.53, subdivision (d) were proper and section 654's prohibition on multiple punishment was inapplicable.

The *Oates* Court thought it significant the Legislature expressly included in section 12022.53 specific limitations on imposing multiple enhancements, but did not limit imposition of subdivision (d) enhancements based on the number of qualifying injuries. Subdivision (f) of section 12022.53 directs "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime." Subdivision (f) then specifies additional enhancements which cannot be imposed in addition to an enhancement imposed under section 12022.53, subdivision (d). The *Oates* Court explained the significance of subdivision (f) as follows: "The enactment of this subdivision shows that the Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed only 'for each crime,' not for each transaction or occurrence and *not based on the number of qualifying injuries*."[52]

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which were Verdin and three others, and for the assault on Verdin, because each crime involved at least one different victim."].

[50] *People v. Oates* (2004) 32 Cal.4th 1048.

[51] *People v. Oates, supra*, 32 Cal.4th 1048, 1052.

[52] *People v. Oates, supra*, 32 Cal.4th 1048, 1057, italics added.

Because the jury convicted Macklin of these two *crimes* and found true the qualifying circumstances specified in section 12022.53, subdivision (d), the trial court properly imposed multiple section 12022.53, subdivision (d) enhancements based on the same injury in accordance with the decision in *Oates*.

We accordingly find no error.

E. The Trial Court Erred When It Sentenced Sawyer To the Upper Term Not Based On Facts Found Beyond A Reasonable Doubt By The Jury.

To recall, at the sentencing hearing Sawyer's counsel beseeched the court to exercise its discretion to impose a less severe sentence than was otherwise statutorily authorized or compelled. Sawyer's counsel reminded the court Sawyer was not the shooter, was only 15 years old, and had no intention of involving the second victim or of shooting at an inhabited dwelling. Sawyer's counsel urged the court to impose midterm sentences and concurrent terms to give Sawyer a chance to be released on parole sooner rather than later. Sawyer's counsel argued the lengthy sentence the People proposed was so unfair given that actual murderers convicted of second degree murder or of manslaughter received far shorter prison terms than Sawyer faced.

The trial court nevertheless sentenced Sawyer to the upper term of nine years for his conviction in count 3 for assault with a semiautomatic firearm on Scrivens. Prior to imposing the upper term the court commented: "Now in our case we have what appears to be a cold, callus [sic] shooting at an old friend, who was called out of the safety of his own house by two people who were walking [a]way, pulled a gun, turned, shot unexpectedly. Many, many hits on the victim Mr. Scrivens, and one hit on Mr. Powell. It was clearly gang-related. Mr. Scrivens told us that Mr. Sawyer said, you're a snitch, or, you've been snitching. [¶] Macklin's response was, huh.

"Then we go on with the, want to buy it? Gun in the stomach. Mr. Scrivens told us that both voices were calling, Corey, come outside. And then Angel said, your friends are outside, according to my notes.

"As I mentioned earlier, I have no idea in the world how Mr. Scrivens was able to live through this fuselage of shots and hits. He told us it was 15 times, 17 total with 15 hits, at one point in time during his discussions. That was contradicted by the officers who thought there were only nine. But that's still a lot of holes in a human being. And clearly gang-related. [¶] There's no doubt in the court's mind that the aggravating circumstances outweigh any mitigating circumstances relating to age.

"The defendant is not eligible for parole. [¶] Defendant will be committed to state prison on count 3. The court selects the upper term of nine years, plus ten years enhancement pursuant to section 186.22(b)(1)(C), which the jury found to be true, for a total of 19 years as to count 3. . . . "

Sawyer claims the trial court committed reversible error by imposing the upper term based on its view of the case, and not on facts found beyond a reasonable doubt by the jury as required by the Sixth and Fourteenth Amendments of the United States Constitution and *Cunningham v. California*.[53] The People counter, Sawyer forfeited his claim of error by failing to raise the issue at the sentencing hearing, the court's findings were based on facts the jury necessarily found, and any error was harmless beyond a reasonable doubt. We believe Sawyer has the better argument.

In *Cunningham v. California* the United States Supreme Court overruled the California Supreme Court's decision in *People v. Black*[54] and held imposition of an upper term under California's former determinate sentencing law, based on neither a prior conviction nor facts found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments of the United States Constitution. "California's determinate sentencing law (DSL) assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt.

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[53] *Cunningham v. California, supra,* 549 U.S. ___, 127 S.Ct. 856.

[54] *People v. Black* (2005) 35 Cal.4th 1238.

The question presented is whether the DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does."[55]

The *Cunningham* Court explained the constitutional flaw in the California Supreme Court's analysis in *Black*, upholding the constitutionality of California's former sentencing scheme. "Contrary to the *Black* court's holding, our decisions from *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466] to [*United States v.*] *Booker* [(2005) 543 U.S. 220] point to the middle term specified in California statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent."[56]

As an initial matter, we reject the People's argument Sawyer forfeited his claim of error by failing to raise the issue in the trial court. At the time of his sentencing hearing the California Supreme Court's decision in *Black* was the controlling authority. The trial court was accordingly required to follow and apply *Black's* analysis.[57] The futility exception is a recognized exception to the general rule of forfeiture by failing to object. We believe the exception applies in these circumstances.[58]

The probation report listed eight factors in aggravation, none in mitigation, and recommended a high term sentence.[59] In imposing the upper term the court reviewed the

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[55] *Cunningham v. California, supra*, 549 U.S. ___, 127 S.Ct. 856, 860.

[56] *Cunningham v. California, supra*, 549 U.S. ___, 127 S.Ct. 856, 871.

[57] *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

[58] *People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Hill* (1998) 17 Cal.4th 800, 820-821.

[59] The probation report listed the following factors in aggravation: (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness; (2) the defendant was armed with or used a weapon at the time of the commission of the crime; (3) the victim was particularly vulnerable; (4) the crime involved multiple victims; (5) the planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation; (6) the defendant engaged in a pattern of violent conduct which

facts of the case and in doing so mentioned some of the factors listed in the report such as use of a gun,[60] and the court's opinion the shooting was a cold and callous act.[61]

The probation report contained information Sawyer had sustained a prior juvenile adjudication for a theft crime and was on juvenile probation at the time of the current crimes. However, the trial court did not rely on, or even mention, any factor bearing on recidivism in imposing the upper term. Had the trial court relied on Sawyer's prior juvenile adjudication as the aggravating factor warranting an upper term sentence, then Sawyer's Sixth and Fourteenth Amendment rights would not have been violated under *Cunningham*. Because the court did not do so, and instead apparently relied on the fact a gun was used and the callousness of the crimes—a fact not found by the jury beyond a reasonable doubt—Sawyer's upper term sentence on count 3 constituted error under *Cunningham*.

An appellate court may find harmless the imposition of an upper term based on factors which should have gone to the jury if the court can say beyond a reasonable doubt that had the factor or factors relied on by the trial court been submitted to the jury, the jury would have found them true.[62]

The mere existence of recidivism factors cannot cure the error in this case. Neither the People nor the trial court even mentioned Sawyer's prior juvenile adjudication for a theft crime. Nor did either of them mention the fact Sawyer was then on probation. Because the trial court made no findings regarding these matters, and did not articulate on the record any factor relating to Sawyer's criminal history, we are not

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indicates a serious danger to society; (7) the defendant's prior convictions as an adult or the adjudication of the commission of crimes as a juvenile are numerous or of increasing seriousness; and (8) the defendant was on probation or parole when he committed the crime.

[60] California Rules of Court, rule 4.421 (a)(2).

[61] California Rules of Court, rule 4.421 (a)(1).

[62] *Washington v. Recuenco* (2006) 548 U.S. ___, 126 S.Ct. 2546, 2551-2553 [*Blakely v. Washington* (2004) U.S. 296 error is reviewed under the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. 18].

persuaded by the People's argument the recidivism exception can apply to this case to uphold the upper term.[63]

Nor can we confidently state the jury would necessarily have found the factors relied on by the trial court. The facts showed Sawyer was neither armed with, nor did he use, a weapon in the commission of the offense.[64] Moreover, "gun use," which the court did mention, is not a valid factor to use to impose an upper term for the offense in count 3—assault with a firearm on Scrivens. A fact that is an element of a crime or that is essential to the jury's determination of guilt, may not be used to impose the upper term.[65]

It is possible the jury *could* have concluded Sawyer behaved in a cold and callous fashion in carrying out the crimes. However, we cannot say beyond a reasonable doubt the jury *would* have done so. The evidence showed Sawyer was not the shooter. Apparently unconvinced he intended to kill either Scrivens or Powell the jury did not convict Sawyer of either of the attempted murder charges. In these circumstances it is entirely possible the jury would not have been convinced Sawyer committed the crimes with a high degree of callousness either.[66]

For these reasons we conclude the error was not harmless in this case. Accordingly, the sentence imposed on count 3 must be vacated the matter remanded for resentencing.

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[63] See section 1170, subdivision (b); California Rules of Court, rule 4.406 (a) and (b); rule 4.420 (e) [a trial court must state on the record its reasons for imposing an upper term].

[64] California Rules of Court, rule 4.421 (a)(2).

[65] *Cunningham v. California*, *supra*, 549 U.S. ___, 127 S.Ct. 856, 868; California Rules of Court, rule 4.420(d) ["A fact that is an element of the crime may not be used to impose the upper term."].

[66] California Rules of Court, rule 4.421 (a)(1).

DISPOSITION

The convictions are affirmed. Sawyer's sentence on count 3 is vacated and the cause remanded to the trial court with directions to conduct a new sentencing hearing and to sentence Sawyer on count 3 in accordance with the law.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.