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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAMON BOTELLO and JESUS BOTELLO, Defendants and Appellants.	B212183 (Los Angeles County Super. Ct. No. TA094458)

APPEAL from judgments of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Affirmed in part and Reversed in part and Remanded.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Ramon Botello.

Marilee Marshall & Associates, Inc. and Marilee Marshall for Defendant and Appellant Jesus Botello.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I.A., I.C., II, III, IV, V and VI of the DISCUSSION.

Bilderback II and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Ramon Botello and Jesus Botello of two counts of attempted willful, deliberate, and premeditated murder (Pen. Code, § 664/187, subd. (a)),[1] finding that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and also convicted them of one count of shooting at an inhabited dwelling (§ 246). The jury found, among other firearm enhancements (§ 12022.53, subds. (b) and (c), 12022.5), that in each crime both defendants personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced both defendants to state prison for a term of 80 years to life.

In their appeals from their respective judgments of conviction, defendants contend:[2] (1) the evidence was insufficient to support the convictions, the firearm enhancement findings, and the gang enhancement finding; (2) the trial court violated their due process rights by disallowing the testimony of a defense witness who remained in the courtroom in violation of a witness exclusion order; (3) the court abused its discretion in imposing consecutive sentences on the attempted murder counts, believing it had no discretion to sentence concurrently, and erred in not staying the sentence on the shooting at an inhabited-dwelling count; and (4) trial counsel was ineffective for failing to object to expert testimony concerning the Mexican Mafia.

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[1] All undesignated section references are to the Penal Code.

[2] Defendants join in each other's contentions. Rather than identify which defendant actually makes each contention, we simply attribute the contentions to both.

In the published portion of the opinion, we hold that the evidence was insufficient to support the charged firearm enhancements. We also reject respondent's contention that the firearm findings under section 12022.53, subdivisions (b), (c), and (d) can be saved by applying, for the first time on appeal, the uncharged provision of section 12022.53, subdivision (e)(1). Rather, under the reasoning of *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) and *People v. Arias* (2010) 182 Cal.App.4th 1009 (*Arias*), we conclude that applying section 12022.53, subdivision (e)(1), which was not charged, would violate the language of that subdivision (which requires that it be pled) and the notice requirement of due process. We also conclude that by its failure to plead subdivision (e)(1), failure to ensure jury findings under that subdivision, failure to raise the provision at sentencing, and obtaining a sentence that in fact violated subdivision (e)(1), the prosecution forfeited its right to rely on that subdivision.

In the unpublished portion of the opinion, we conclude that the court erroneously believed that it had no discretion to sentence concurrently on the attempted murder counts. We therefore remand for resentencing. We disagree with defendants' remaining contentions and affirm the judgment as modified.

BACKGROUND

Prosecution Evidence

1. *The Crime*

On November 10, 2007, around 8:45 p.m., Steven Guzman, a T-Flats gang member, was standing on the sidewalk of Arthur Avenue in the city of Paramount drinking beer with another T-Flats gang member, Fernando Hernandez. Guzman grew up in the same neighborhood as defendants, who were identical twins. In April 2007, defendants had admitted to Los Angeles County Deputy Sheriff

Pasqual Delgadillo that they belonged to the Paramount Locos gang. Also, other evidence (discussed below) tied them to the gang.

That evening Guzman saw defendants in a car that pulled into a driveway that led to several houses, including the home where Kevin Deanda and his mother Bertha lived. Defendants joined a group of about 10 to 15 Hispanic teenagers gathered near the Deanda home. Kevin Deanda identified defendants as being among the group. To Bertha Deanda, the group looked like "gangsters," and she yelled at them to leave.

The group left in three cars. As the first car to leave passed Guzman and Hernandez, one of the occupants, a Paramount Locos gang member known as Smokey, raised his middle finger at Hernandez. Hernandez returned the gesture, and he and Guzman exchanged gang signs with Smokey. The second car left, followed by the third car.

In the third car were several people. Guzman recognized defendants seated in the driver's and front passenger seats.[3] Because defendants were identical twins, Guzman could not distinguish between them. Hernandez flashed the T-Flats gang sign at the car. The car passed in front of Guzman and Hernandez and stopped just past a truck parked at the curb. Guzman saw the front passenger (one of the defendants, but Guzman could not distinguish which) pull out a rifle and begin shooting. Guzman heard about five or six shots, and was pulled to the ground by Hernandez. Hernandez yelled that he had been shot. The car drove off.

The Deanda's neighbor, Laura Ramon, heard two or three gunshots and the sound of breaking glass. Two bullets passed through the window next to which

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[3] At the preliminary hearing, Guzman testified that he did not see the shooter and denied having identified defendants. At trial, he testified that he lied at the preliminary hearing because he was trying not to be a snitch.

she was standing and struck a wall inside. One bullet passed through the wall and struck her child's bunk bed.

Hernandez suffered a bullet wound in the right hip. He was taken to the hospital.

2. *Gang Evidence*

According to Los Angeles County Sheriff's Sergeant Stacy Morgan, she was assigned to monitor the Paramount Locos gang. She first learned of the gang in April 2007, when deputies were called to a trailer park regarding a juvenile disturbance call. Since then, she had had in-depth conversations with approximately 10 Paramount Locos gang members, had served search warrants on Paramount Locos locations, and had had various conversations with patrol deputies regarding their contact with Paramount Locos members.

Based on interviews, she learned that the gang was formed by young skateboarders who used the skate parks in the city and had been victimized by other gangs. The skaters formed the Paramount Locos gang to protect themselves. It has 20 to 25 members and identifies itself with a hand sign forming the letters "PLC." The gang was attempting to affiliate itself with "La Ema." Latino gangs in California are generally divided into the "North Siders" north of Fresno and the "South Siders," or "Surenos," south of Fresno. The Surenos are controlled by La Ema, which collects taxes from its affiliated gangs. When smaller gangs are accepted by La Ema, they become associated with the number 13, which symbolizes the letter "M," the 13th letter of the alphabet. To earn "13 status," the gang commits crimes in a particular area so as to exert its control.

The Paramount Locos gang became noticed because it began targeting several more established gangs in the city of Paramount, committing "shootings

and assaults of that type." Seeking to control Paramount, the Paramount Locos gang was a rival of all larger gangs in the area, including T-Flats.

Asked about the primary activities of the Paramount Locos, Deputy Morgan testified: "Well most of the crimes, starting off when the gangs were immature, do [*sic*] smaller crimes: petty theft, vehicle theft, those are typical smaller crimes gangs commit. But it quickly matured to crimes such as assault with a deadly weapon and murder."

Defendants belonged to the Paramount Locos, and went by the monikers "Nesio" and "Vago." From their residence in Bakersfield, several items, including binders and a hardcover journal, were recovered that contained Paramount Locos graffiti. The binder referred to the twins, contained a gang pledge to "South Side" and referred to "one nation under 13." Seized photographs showed defendants and other Paramount Locos gang members making gang hand signs. Defendant Ramon Botello had a "P" tattoo on his right bicep signifying the Paramount Locos. Also, material seized from the residence of another Paramount Loco member, Frank Anguiano ("Sharky") had a roster of Paramount Locos members that listed defendants.

Detective Morgan testified that defendants committed the shooting for the benefit of the Paramount Locos gang. Because Hernandez was a member of a rival gang, the shooting would enhance the Paramount Locos' reputation and help the gang earn its "13" status.

Defense Evidence

1. *Jesus Botello*

Defendant's father, Ramon Rodriguez Botello ("Ramon Sr."), testified that he and his family lived in Paramount from 1984 to 2004. After brief stays in

Norwalk and Long Beach, they moved to Bakersfield in 2006. On the day of the shooting (November 10, 2007) he and defendants worked on a house in Bakersfield that was being remodeled (Ramon Sr. was a construction worker) and returned home sometime around 4:00 or 5:00 p.m. Ramon Sr. owned only one car – an Expedition – and did not allow defendants to drive it. Defendants left the house briefly, but returned to eat dinner with the family at 6:30 or 7:00 p.m. When he went to bed at 10:00 p.m., Ramon Sr. believed his sons were still in the house.

Although he testified that he remembered the events of November 10, 2007 from an entry in a journal, the journal entry for that date actually stated: "No work. Bill didn't show up. He didn't call me. He is not answering the messages. We have absolutely nothing. Bill don't answer the phone." Ramon Sr. explained that by that entry, he meant that he had not been paid that day; the remodeling job had been paid in advance.

Naomi Henriquez, a junior high school student in Bakersfield, knew defendants and was able to distinguish between defendants' voices. Around 5:30 or 6:00 p.m. on the night of the shooting, she called defendants' home to invite their sister to a birthday party. Ramon told her to call back. Around 10:00 a.m. the next morning, Henriquez went to defendants' home, and both defendants were there. Henriquez argued with Ramon because he had not let her talk to his sister.

2. *Ramon*

Fernando Hernandez denied that he belonged to the T-Flats gang. He testified that four Black men drove up and asked him where he was from. Hernandez said that he was not a gang member. The men told him to empty his pockets. When he refused, one of the men said, "Get the burner," which

Hernandez understood to refer to a gun. Hernandez pushed Guzman and was shot as he ran away. Defendants did not participate in the shooting.

Rebuttal

Hernandez testified that when he was interviewed after the shooting by a deputy sheriff, he told the deputy that he was shot by Black men. However, according to Deputy Esqueda, who interviewed Hernandez at the hospital, Hernandez refused to identify the suspects and did not mention being shot by Black men. Rather, Hernandez said that he would not be a snitch or a rat.

DISCUSSION

I. *Sufficiency of the Evidence*

A. *The Convictions*

Defendants contend that the evidence is insufficient to support their convictions. In particular, they assert that Guzman's inability to distinguish between which of them was the passenger-shooter and which was the driver renders the evidence of their guilt speculative. We disagree. We review the entire record in the light most favorable to the judgment and presume every reasonable factual inference in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Here, it may reasonably be inferred from Guzman's testimony that after an exchange of rival gang signs with Hernandez, the driver stopped the car to allow the passenger to shoot Hernandez and Guzman. Thus, the driver was guilty as an aider and abettor and the passenger as the actual perpetrator. It matters not that Guzman could not say which defendant played which role. Both defendants were involved – either as aider and abettor or actual perpetrator – and thus were both guilty of the charged crimes.

Defendants contend that Guzman's identification testimony, fairly construed, showed that he only saw one defendant – the passenger -- in the third car as it left the driveway, not both defendants. Defendants' characterization of Guzman's testimony is inaccurate.

On direct examination, Guzman testified that he saw two people in the third car as it pulled out of the driveway, one in the driver's seat and the other in the passenger's seat. He testified that he "recognize[d] both. One . . . but they both look the same." Asked which one he recognized, he testified that he recognized "[t]he one that pulled the strap on us," the passenger. Asked to identify the shooter in court, he testified that it was "[o]ne of the two [in court]. I don't know. They both look the same." The prosecutor asked what Guzman meant when he said that the driver and passenger looked alike. Guzman responded, "They look the same. . . . But they look kind of different right now [in court]. But it was in the nighttime too, you know. I mean, you seen the strap and bullets flying."

Later, Guzman clarified his testimony:

"Q. [By the prosecutor]: So just to be clear, what you remember is one of the twins, you're not sure which one was shooting at you?

"A. Yes.

"Q. And then there was a driver who looked the same as the one shooting at you?

"A. Yes.

"Q. Was the driver one of the twins, as well?

"A. Yes."

Finally, the prosecutor asked Guzman whether he had seen defendants before the third car exited the driveway. Guzman testified that he saw defendants

in the car "[w]hen they pulled up into the back," referring to when they travelled down the driveway toward Kevin Deanda's house.

Thus, Guzman's testimony on direct examination showed that he saw defendants in the car when they first arrived, and that he saw them again when they drove out of the driveway. On appeal, defendants assert that subsequent testimony by Guzman fatally undermines this conclusion. They are mistaken.

Jesus' attorney questioned Guzman concerning whether he was looking at faces when the he saw the passenger holding a gun. Guzman testified that he was looking at the gun. When Jesus' attorney stated that the point he was trying to make was that Guzman did not look at defendants' faces, Guzman responded, "I seen faces when he [the passenger] came out." Later, Jesus' attorney asked "Your testimony is on that evening you saw one of them driving a car; is that correct?" Guzman answered, "Yes." Thus, this testimony – Guzman saw defendants' "faces" and saw one defendant driving the car -- tends to reinforce the identification testimony he gave on direct examination.

Under redirect examination, Guzman reiterated that he saw defendants in the car when they first arrived and drove down the driveway heading toward Kevin Deanda's house. The prosecutor then questioned Guzman concerning his observations when the third car departed:

"Q. And you had stated earlier that the twins were in the third car; is that correct?

"A. Yeah.

"Q. Were they still on the driveway when you first saw them –

"A. What do you mean?

"Q. -- as the twins.

"A. *They were pulling out.*

"Q. *They were pulling out of the driveway?*

"A. *Yes*." (Italics added.)

The prosecutor then indicated a point marked on People's Exhibit No. 1, a photograph depicting the driveway leading to Kevin Deanda's house. The following exchange occurred:

"Q. [By the prosecutor]: Did you see the twins in that black vehicle *on the driveway*?

"A. I couldn't see the driver of that, but I seen one of them.

"Q. Okay. That was the passenger that we talked about before?

"A. Right." (Italics added.)

Although this final exchange is somewhat ambiguous, we do not interpret it as contradicting Guzman's earlier testimony that he saw both defendants in the third car as it was "pulling out" of the driveway immediately before the shooting. Rather, in context, Guzman was simply stating that while the car was "on the driveway" at the point on People's Exhibit No. 1 indicated by the prosecutor, he could see only the passenger. In short, viewed as a whole, Guzman's testimony constitutes substantial evidence proving that defendants were in the third car – one as the driver, the other as the passenger – when that car drove out of the driveway.

Finally, defendants challenge Guzman's credibility at trial, noting that his trial testimony contradicted his testimony at the preliminary hearing that he did not see the shooting or identify defendants. They also recite defendants' alibi evidence. Of course, credibility questions – whether Guzman was credible, whether defendants' alibi was credible – were for the jury, not for this court on appeal.

B. *Firearm Enhancements*

1. *Background*

The information alleged that in the commission of the charged crimes, "defendants Jesus Botello and Ramon Botello personally and intentionally discharged a firearm, a rifle, which proximately caused great bodily injury and death to Steven Guzman [and] Fernando Hernandez within the meaning of Penal Code section 12022.53, subdivision (d)." It also alleged that both defendants "personally and intentionally discharged a firearm" under section 12022.53, subdivision (c), and that both "personally used a firearm" under section 12022.53, subdivision (b), and section 12022.5. In addition, the information alleged as to the two attempted murder counts that the crimes were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C).

The trial court instructed the jury on the charged firearm and gang enhancements. Also, although it was not alleged in the information, the trial court instructed on an uncharged provision, section 12022.53, subdivision (e)(1), which provides: "(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following *are pled and proved*: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." (Italics added.)

The jury was provided with verdict forms on the charged firearm and gang enhancements, and returned true findings on those enhancements. The jury was not provided with verdict forms on the uncharged provision of section 12022.53, subdivision (e)(1), and returned no findings under that provision.

As part of each defendant's sentence, the trial court imposed consecutive terms of 25 years to life on the two attempted murder counts under the charged

enhancement of section 12022.53, subdivision (d), stayed the remaining charged firearm enhancements (§ 12022.53, subds. (b) & (c); § 12022.5), and imposed a consecutive term of 15 years to life for the gang enhancement under section 186.22, subdivision (b)(1). The court did not purport to sentence under section 12022.53, subdivision (e)(1).

2. *Insufficient Evidence of the Charged Firearm Enhancements*

Defendants contend that the evidence was insufficient to support the charged firearm enhancements under subdivisions (b), (c), and (d) of section 12022.53 and section 12022.5, because Guzman could not say which defendant fired. Respondent concedes that the evidence was insufficient to prove that defendants personally used or discharged a firearm, and that, therefore, the evidence does not support the firearm enhancements as charged. We agree with this concession.

3. *Inapplicability of Section 12022.53, Subdivision (e)(1)*

Respondent argues, however, that the firearm enhancements under section 12022.53, subdivisions (b), (c), and (d) can be upheld by applying, for the first time on appeal, the uncharged provision of section 12022.53, subdivision (e)(1). Respondent argues, in substance, that section 12022.53, subdivision (e)(1) applies because both defendants were principals (one the shooter, the other an aider and abettor), because the jury found the gang enhancement under section 186.22, subdivision (b) to be true, and because one principal, by firing a gun and wounding Hernandez, committed an act specified in section 12022.53, subdivisions (b), (c), and (d).

We conclude that two decisions -- *People v. Mancebo, supra,* 27 Cal.4th 735 and *People v. Arias, supra,* 182 Cal.App.4th 1009 -- demonstrate that the

application of section 12022.53, subdivision (e)(1), which was not charged, would violate the statutory language of subdivision (e)(1) and the notice requirement of due process.

Mancebo dealt with the interplay of the firearm use enhancement of section 12022.5 on the one hand, and the One Strike law, section 667.61, on the other. Section 12022.5 provides a fixed term enhancement for a defendant's personal use of a firearm. The One Strike law provides an alternative sentencing scheme for certain sex crimes committed under specified circumstances. (*Mancebo, supra*, 27 Cal.4th at p. 738.)

As relevant to *Mancebo,* section 667.61, subdivision (e), lists certain specified circumstances for invoking the One Strike sentencing scheme. The circumstances include that the defendant kidnapped the victim, personally used a firearm in violation of section 12022.5, has been convicted in the present case of committing a qualifying crime against more than one victim, and tied or bound the victim. (§ 667.61, subds. (e)(1), (e)(4), (e)(5), & (e)(6).) If at least two of these circumstances apply to the current offenses, subdivision (a) provides a One Strike sentence of 25 years to life.

In *Mancebo,* the defendant was charged with various sex crimes against two victims. To obtain a 25-year-to-life sentence for one qualifying crime against each victim, the prosecution alleged two specified circumstances under section 667.61, subdivision (e): for one victim, the prosecution alleged defendant's personal use of a firearm under section 12022.5 and his kidnapping the victim (§ 667.61, subds. (e)(1) & (e)(4)); for the other victim, the prosecution alleged defendant's personal use of a firearm under section 12022.5 and his tying or binding the victim (§ 667.61, subds. (e)(4) & (e)(6)). (*Mancebo, supra*, 27 Cal.4th at pp. 738, 742.)

As a separate enhancement in each crime, the prosecution also alleged personal use of a firearm under section 12022.5. (*Id.* at p. 738.)

The jury found the alleged One Strike circumstances and the alleged firearm use enhancements to be true. In sentencing on each of the two qualifying convictions, the trial court imposed a One Strike term of 25 years to life, plus a separate term of 10 years for the section 12022.5 firearm use. The trial court accomplished this result by manipulating the One Strike circumstances. That is, to make the separate firearm use enhancement under section 12022.5 available for an additional term, while at the same time maintaining the necessary two circumstances under the One Strike law for a 25-year-to-life sentence, the court substituted the uncharged One Strike circumstance of multiple victims (§ 667.61, subd. (e)(5)) for the charged circumstance of firearm use.

The California Supreme Court held that the "pleading and proof" requirement of section 667.61 precluded the trial court from using the uncharged multiple victim circumstance to impose a One Strike sentence. Former subdivision (i) of section 667.61 (now subd. (j)) provides that "[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision . . . (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Because the information did not "allege[] a multiple victim circumstance under subdivision (e)(5)," the Supreme Court held that "[s]ubstitution of that unpleaded circumstance for the first time at sentencing as a basis for imposing the indeterminate terms violated the explicit pleading provisions of the One Strike law." (*Mancebo, supra*, 27 Cal.4th at p. 743.)

The Supreme Court also concluded that imposing separate gun-use enhancements under section 12022.5 violated subdivision (f) of section 667.61.

That subdivision provides, in substance, that when the prosecution has "pled and proved" only two circumstances in support of a 25-year-to-life sentence under subdivision (a), then "those circumstances shall be used as the basis for imposing the term provided in subdivision (a) . . . rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty." In *Mancebo*, the prosecution pled and proved only the "minimum number of circumstances" as to each qualifying crime, one of which was firearm use under section 12022.5. That circumstance, however, did not provide a greater penalty, and thus could not be the basis for a separate enhancement. "Accordingly, imposition of section 12022.5(a) gun-use enhancements . . . violated the plain language and express provisions of section 667.61, subdivision (f)." (*Mancebo, supra*, 27 Cal.4th at p. 744.)

The respondent in *Mancebo* argued that the multiple victim circumstance under section 667.61, subdivision (e)(5) was sufficiently charged, even though it was not expressly mentioned, because the defendant was charged with committing qualifying crimes against more than one victim. (*Id*. at p. 744.) Based on the statutory "pleading and proof" language, the Supreme Court rejected the argument. The Supreme Court reasoned, in substance, that the One Strike law requires not simply that the prosecution allege "the existence of any *fact*" underlying the subdivision (e) circumstances (see former subd. (i), now (j), italics added), but also that the prosecution plead and prove the "*circumstances* specified in subdivision . . . (e)." (§ 667.61, subd. (f), italics added; see *Mancebo, supra*, 27 Cal.4th at pp. 744-745 ["the One Strike law clearly applies only if the information alleges facts, and also the 'circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) [are] *pled and proved*.'" (Original italics)].)

Thus, the inadequacy of pleading identified by the Supreme Court was not the failure to plead facts that would support the multiple victim circumstance, but rather the failure to plead the circumstance itself. As stated by the court: "[N]o factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a). Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) *and* use the circumstance of gun use to secure additional enhancements under section 12022.5(a)." (*Mancebo, supra*, 27 Cal.4th at p. 745.)

The court did not purport to "hold that the specific numerical subdivision of a qualifying One Strike circumstance under section 667.61, subdivision (e), necessarily must be pled. We simply find that the express pleading requirements of section 667.61, subdivisions (f) and (i) [now (j)], read together, require that an information afford a One Strike defendant fair notice of the qualifying statutory circumstance or circumstances that are being pled, proved, and invoked in support of One Strike sentencing. *Adequate notice can be conveyed by a reference to the description of the qualifying circumstance (e.g., kidnapping, tying or binding, gun use) in conjunction with a reference to section 667.61 or, more specifically, 667.61, subdivision (e), or by reference to its specific numerical designation under subdivision (e), or some combination thereof. We do not purport to choose among them.*" (*Mancebo, supra*, 27 Cal.4th at pp. 753-754, italics added.) The court also observed that the pleading requirement in enhancement statutes is not simply a statutory imperative: "[I]n addition to the statutory requirements that enhancement

provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Id*. at p. 747.)

After discussing various other issues, the Supreme Court "conclude[d] the trial court erred at sentencing when it purported to substitute the unpled multiple victim circumstances for the properly pleaded and proved gun-use circumstances in support of the One Strike terms. . . . The gun-use enhancements were then improperly imposed under those counts in contravention of the provisions of section 667.61, subdivision (f)." (*Mancebo, supra*, 27 Cal.4th at p. 754.)

Recently, in *People v. Arias, supra*, 182 Cal.App.4th 1009, the Court of Appeal relied on *Mancebo* to vacate jury findings of "first degree attempted murder" and the indeterminate life sentences imposed on those verdicts. Section 664, subdivision (a), provides a sentence of life with the possibility of parole for attempted willful, deliberate, and premeditated murder. It further provides: "The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact."

In *Arias*, the information charged the defendant with two counts of attempted murder, but did not allege that the attempted murders were willful, deliberate, and premeditated. (182 Cal.App.4th 1009.) Nonetheless, the trial court instructed the jury that it must make a separate finding whether the attempted murders were willful, deliberate, and premeditated. The guilty verdicts returned by the jury did not contain such a special finding, but did find the defendant guilty of "first degree attempted murder." (*Id.* at p. __.) Based on these verdicts, the trial

court sentenced the defendant to life terms for the attempted murders under section 664, subdivision (a).

The Court of Appeal reversed the sentence. After summarizing *Mancebo* and noting the similarity between the pleading and proof requirements of section 664, subdivision (a) and the One Strike law, the *Arias* court reasoned by analogy from *Mancebo* that "neither the information nor any pleading gave defendant notice that he was potentially subject to the enhanced punishment provision for attempted murder under section 664, subdivision (a)." (*Arias, supra*, at p. __.)

We find that the reasoning of *Mancebo* and *Arias* compel the conclusion that section 12022.53, subdivision (e)(1), cannot be used for the first time on appeal to save the imposed firearm enhancement under subdivision (d), or the stayed enhancements under subdivisions (b) and (c). Like the One Strike law in *Mancebo* and the attempted murder statute in *Arias*, section 12022.53, subdivision (e)(1), has a specific pleading and proof requirement: "The enhancements provided in this section [meaning the enhancements of subds. (b), (c), and (d)] shall apply to any person who is a principal in the commission of an offense if both of the following are *pled and proved*: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." (Italics added.)

Also as in *Mancebo* and *Arias*, there was a failure to comply with the pleading requirement. Discussing the necessity of pleading the required circumstance under the One Strike law, *Mancebo* held that "[a]dequate notice can be conveyed by a reference to the description of the qualifying circumstance . . . in conjunction with a [statutory reference] or some combination thereof." (*Mancebo, supra*, 27 Cal.4th at p. 754.) Here, the information charged each defendant with personally committing acts specified in the firearm enhancements of section

12022.53, subdivisions (b) through (d), but did not mention the applicability of those enhancements through subdivision (e)(1), either by designation of that provision or by description of the required circumstances, i.e., that defendants were subject to the enhancements of subdivisions (b) through (d) because they violated section 186.22, subdivision (b) *and* because a principal committed an act described in section 12022.53, subdivisions (b) through (d). Thus, "no factual allegation in the information or pleading in the statutory language informed defendant[s] that if [they were] convicted of the underlying charged offenses," they would be subject to the firearm enhancements of section 12022.53, subdivisions (b) through (d) by virtue of the circumstances listed in subdivision (e)(1). (*Mancebo, supra*, 27 Cal.4th at p. 745.)

In short, to apply section 12022.53, subdivision (e)(1) for the first time on appeal would violate the express pleading requirement of that provision, and defendants' due process right to notice that subdivision (e)(1) would be used to increase their sentences.

4. *Harmless Error*

Respondent argues, in substance, that although section 12022.53, subdivision (e)(1), was not specifically pled in the information, the error was not prejudicial, because "the factual allegations in the information notified appellants that their sentences could be enhanced based on their being principals in the offenses, having violated section 186.22, and a principal having used a firearm in the commission of the offenses." Further, conceding that the verdict forms returned by the jury on the firearm enhancements did not specify that a principal used or discharged a firearm, respondent contends that this error was likewise harmless because, based on the jury instructions and the prosecutor's argument

which referred to the substance of subdivision (e)(1), the jury findings that each defendant personally used a firearm, discharged a firearm, and discharged a firearm causing great bodily injury, necessarily reflected the jury's intent to find these same circumstances of firearm use by a *principal*.

Faced with similar arguments, the courts in *Mancebo* and *Arias* rejected the applicability of harmless error analysis. In *Mancebo*, the court concluded that the prosecution had forfeited the right to rely on the multiple victim circumstance by failing to plead it: "There can be little doubt that the prosecution understood the One Strike law's express pleading requirements and knew how to comply with them. . . . [T]he People's failure to include a multiple-victim-circumstance allegation must be deemed a discretionary charging decision. Not only is this conclusion supported by the record, but respondent does not contend, much less suggest, how the failure to plead the multiple victim circumstance was based on mistake or other excusable neglect. Under these circumstances, the doctrines of waiver and estoppel, rather than harmless error, apply." (*Mancebo, supra*, 27 Cal.4th at p. 749.)

The court disapproved a harmless error analysis, even though the defendant had, in fact, been convicted of qualifying crimes against more than one victim. The court reasoned in part: "We acknowledge that where a defendant is charged with and convicted of qualifying sex crimes against two or more victims, it may be difficult to meaningfully contest the truth of a multiple victim qualifying circumstance, whether or not that circumstance has been properly pled so as to afford the defendant fair notice it is being invoked in support of One Strike sentencing. But section 667.61 makes no special exception for the multiple victim qualifying circumstance -- the statute's pleading and proof requirements apply to *all* of the qualifying circumstances enumerated in subdivisions (d) and (e). In

many instances, the fair notice afforded by that pleading requirement may be critical to the defendant's ability to contest the factual bases and truth of the qualifying circumstances invoked by the prosecution in support of One Strike sentencing." (*Mancebo, supra*, 27 Cal.4th at p. 752.)

Similarly, in *Arias*, the court rejected the respondent's contention that the failure of pleading was a mere defect of form subject to harmless error analysis: "This was no mere formal defect in the information. Rather, defendant was not given notice of the special sentencing enhancement that would be used to increase his punishment [for attempted murder] from a maximum of nine years to a life term. Nor is this error reviewable under the abuse of discretion or harmless error analysis applicable to situations in which the information was amended during trial. Defendant's charging document was never amended. Accordingly, this is not the kind of error that can be cured by resort to a harmless error analysis as to whether the jury must have found the two attempted murders were committed willfully and with deliberation and premeditation." (*Id*. at p. __.)

We conclude, as did the courts in *Mancebo* and *Arias* with respect to the statutes there at issue, that a harmless error analysis does not apply to the failure to meet the pleading requirement of section 12022.53, subdivision (e)(1). Rather, under the circumstances presented here, the prosecution's failure to comply with the pleading requirements of subdivision (e)(1) constitutes a forfeiture of the right to rely on subdivision (e)(1) for the first time on appeal. Not only did the prosecution never seek to amend the information to allege subdivision (e)(1), it did not propose verdict forms referring to the subdivision, and did not argue that defendants should be sentenced under the subdivision. To the contrary, the prosecution's sentencing memorandum urged the court to sentence separately on the firearm enhancements of section 12022.53 *and* on the gang enhancement under

section 186.22, subdivision (b). This sentencing argument excludes reliance on subdivision (e)(1) because, as respondent concedes on appeal, when section 12022.53 firearm enhancements are imposed under subdivision (e)(1), a separate gang enhancement under section 186.22, subdivision (b), cannot be imposed. (§ 12022.53, subd. (e)(2); *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282.) Moreover, when the trial court sentenced, it did not purport to sentence under subdivision (e)(1). Rather, it adopted the prosecution's sentencing argument and sentenced on both the section 12022.53 and 186.22, subdivision (b) enhancements. On this record, where the prosecution failed to plead subdivision (e)(1), failed to ensure jury findings under that provision, failed to raise the provision at sentencing, and obtained a sentence from the trial court that violated subdivision (e)(1), we conclude that the prosecution has forfeited the right to rely on subdivision (e)(1) for the first time on appeal.

5. *Conclusion*

Because insufficient evidence supports the jury's findings under sections 12022.53, subdivisions (b), (c), and (d) and under section 12022.5, we vacate those findings. The stayed and unstayed sentences imposed on the basis of those findings are also vacated. And because application of section 12022.53, subdivision (e)(1) would violate the express statutory language and defendants' due process rights, and because the prosecution has forfeited the right to rely on subdivision (e)(1), we cannot uphold the imposed 25-year-to-life enhancements under subdivision (d) of section 12022.53 or the stayed enhancements under subdivisions (b) and (c). We therefore order those enhancements stricken.

C. *The Gang Enhancement*

Defendants' contend that the evidence is insufficient to support the gang enhancement under section 186.22, subdivision (b)(1). They are mistaken.

The gang enhancement requires, inter alia, that the defendant committed the charged felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Relying on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, defendants contend that the prosecution did not meet this burden, because the enhancement requires proof that they intended to promote criminal gang activity *other than the charged offenses in the present case*. As have other state appellate courts, we disagree with the Ninth Circuit's interpretation of the gang enhancement's intent requirement. (See, e.g., *People v. Vasquez* (2009) 178 Cal.App.4th 347, 354 (*Vasquez*) ["There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing"].) The statute merely "'requires a showing of specific intent to promote, further, or assist in "any criminal conduct by gang members," rather than other criminal conduct. [Citation.]' Thus, if substantial evidence establishes that the defendant is a gang member who intended to commit the charged felony in association with other gang members, the jury may fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members." (*Vasquez, supra,* 178 Cal.App.4th at pp. 353-354.) Here, the expert gang testimony of Deputy Morgan clearly met this requirement. She testified that defendants committed the shooting for the benefit of the Paramount Locos gang. Because Hernandez was a member of a rival gang,

the shooting would enhance the Paramount Locos' reputation and help the gang earn its "13" status.

Defendants next contend that the evidence was insufficient to establish that the Paramount Locos is a criminal street gang under section 186.22, subdivision (e). "'[T]he "criminal street gang" component of a gang enhancement requires proof of three essential elements: (1) that there be an "ongoing" association involving three or more participants, having a "common name or common identifying sign or symbol"; (2) that the group has as one of its "primary activities" the commission of one or more specified crimes; and (3) the group's members either separately or as a group "have engaged in a pattern of criminal gang activity." [Citation.]' [Citation.]" (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611 (*Alexander L.*))

Here, defendants contend that the prosecution failed to prove that the primary activity of the Paramount Locos is the commission one or more of the specified crimes. We disagree.

Deputy Morgan testified that the Paramount Locos gang became noticed because it began targeting several more established gangs in the city of Paramount, committing "shootings and assaults of that type." Asked about the primary activities of the Paramount Locos, Deputy Morgan testified: "Well most of the crimes, starting off when the gangs were immature, do [*sic*] smaller crimes: petty theft, vehicle theft, those are typical smaller crimes gangs commit. But it quickly matured to crimes such as assault with a deadly weapon and murder." Although Detective Morgan's phrasing was somewhat awkward, it is clear in context that she was testifying that the primary activity of the Paramount Locos included the commission of the crimes of vehicle theft, assault with a deadly weapon, and murder, all of which are qualifying crimes specified section 186.22, subdivision

(e). (§ 186.22, subds. (e)(1), (e)(10), and (e)(25).) Thus, Detective Morgan's testimony constituted sufficient evidence to prove that the primary activity of the Paramount Locos was the commission of at least one of the enumerated crimes.

Defendants' reliance on *Alexander L., supra,* 149 Cal.App.4th 605, is misplaced. There, "the [gang] expert never specifically testified about the primary activities of the gang. He merely stated 'he "kn[e]w" that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang's] primary activities.' [Citation.]" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330 (*Martinez*) [distinguishing *Alexander L.*].) Here, by contrast, Deputy Morgan specifically testified about the primary activity of the Paramount Locos. Her personal conversations with gang members and study of the gang qualified her to testify to such an opinion. (*Martinez, supra,* 158 Cal.App.4th at p. 1330; see also *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107 [distinguishing *Alexander L.* as a case in which the gang expert "equivocated on direct examination and contradicted himself on cross-examination"]; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 [distinguishing *Alexander L.* because the gang expert failed to provide any foundation for his knowledge that the gang had been involved in qualifying crimes].)

II. *Exclusion of Defense Witness Elizabeth Botello*

After Naomi Henriquez and Ramon Botello Sr. testified, counsel for defendant Jesus asked to call defendants' 14-year-old sister Elizabeth Botello as a witness. The court observed that Elizabeth had been in the courtroom during the testimony of the other two defense witnesses. In a lengthy colloquy with the court at side bar, Jesus' counsel explained, in substance, that he thought that a girl who was waiting in the hall outside the courtroom was the witness, and did not realize

that the girl sitting in court was the witness. He admitted that "looking back, I probably should have called her [name]," and he described the mistake as an "error in judgment on my part." He asked the court to exercise its discretion to allow Elizabeth to testify: "I think there is no hard and fast rule per se and the purpose of the trial is to have no inequitable justice. The court has the discretion to allow her to . . . testify only on the one issue concerning the birthday party and to fill in a few details that were not filled in by the other witnesses. So the important concept here is doing justice and fairness. I know we violated the technical rules but I ask for relief from that rule and that she be allowed to testify for no longer than ten minutes." Counsel for Jesus also stated that Elizabeth "was not allowed to go to the party [mentioned by Naomi Henriquez in her testimony]. That was the issue. She was there [apparently referring to the Botello home]. Ramon and Jesus were there."

Counsel for defendant Ramon argued that the witness' young age made it unlikely that she would be influenced, and that because her testimony "relate[s] to somewhat of a peripheral issue, important though, . . . I would hope that the court would allow that testimony." The prosecutor objected that he would be hampered in his ability to cross-examine, because Elizabeth had heard the other witnesses testify concerning their activities on the day of the shooting, including the topics on which he would likely cross-examine her.

The trial court precluded Elizabeth from testifying. The court reasoned that defense counsel had seen the witness in court and should have had her excluded, and that to allow her to testify after hearing the other witnesses would hamper the prosecution's ability to cross-examine. The court stated in part: "It is somewhat striking to the court this young lady has been in the court basically all morning and counsel has seen her. I am also somewhat dismayed and . . . shocked that at this

time she would be called. It would seem to the court that if, in fact, there was an issue with respect to this particular witness, the time to have called her would have been right after the first young lady testified rather than after Mr. Botello has been on the witness stand. Also, it just begs the question that it is [the prosecutor's] responsibility to engage in a very skillful, aggressive cross-examination to basically absolve the defense of its sins [in] allowing the witness to remain in the courtroom."

We find no abuse of discretion. When a witness' violation of an exclusion order is the fault of the party calling the witness, the trial court has discretion to preclude the witness from testifying. (*People v. Valdez* (1986) 177 Cal.App.3d 680, 691; cf. *People v. Redondo* (1988) 203 Cal.App.3d 647, 654 ["The courts of this state have consistently held that the violation of a witness exclusion order (§ 867; Evid. Code, § 777) does not render the witness incompetent to testify, and does not furnish grounds to refuse permission to testify, *at least where the party who seeks to offer the testimony was not 'at fault' in causing the witness's violation of the exclusion order*" (italics added).]) Here, because he did not ascertain the true identity of the witness and did not call out Elizabeth's name to ensure that she was not present in court, Jesus' attorney was at fault in permitting Elizabeth to remain in the courtroom despite the exclusion order. The court thus had discretion to preclude her testimony.

The court did not abuse its discretion in doing so. The court could reasonably conclude that the prosecution's right to cross-examine the witness had been substantially compromised. The witness was only 14 years old. Any aggressive cross-examination of such a young witness probing whether she was shading her testimony to help her brothers in light of the testimony she had heard while in court might well have been poorly received by the jury. Moreover,

neither Jesus' nor Ramon's attorney portrayed Elizabeth's proposed testimony as critical. To the contrary, Jesus' attorney represented that the witness would testify for only ten minutes "on the one issue concerning the birthday party and to fill in a few details that were not filled in by the other witnesses." He also stated that Elizabeth "was there [apparently referring to the Botello home]. Ramon and Jesus were there." He did not state, however, that Elizabeth's proposed ten minutes of testimony would somehow provide an alibi for defendants, and he did not provide any details concerning how the proposed testimony might bolster the testimony of Naomi Henriquez and Ramon Sr. Counsel for Ramon described Elizabeth's proposed testimony as relating to "somewhat of a peripheral issue, important though." But he, too, failed to provide any details.

On this record, where the prosecution's ability to effectively cross-examine was likely compromised, where precluding the witness did not deprive defendants of crucial testimony, and where defense counsel provided no specific offer of proof as to how the witness might bolster the defense, we find no abuse of discretion in the trial court's ruling precluding the witness from testifying.

Defendants contend that the exclusion of the witness violated their federal constitutional due process right to present a defense. They are incorrect, for two reasons. First, application of standard evidence rules does not ordinarily rise to the level of a federal constitutional violation. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 (*Fudge*).) Here, because the court did not abuse its discretion in precluding the witness, there is no error on which to base a federal constitutional challenge to the ruling. (See *People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2.)

Second, "[a]lthough completely excluding evidence of an accused's defense theoretically could rise to [the] level [of a federal constitutional violation], excluding defense evidence on a minor or subsidiary point does not impair an

accused's due process right to present a defense." (*Fudge, supra,* 7 Cal.4th at p. 1103.) Here, defendants presented three witnesses – Ramon Sr. and Naomi Henriquez in an attempt to show that it was unlikely defendants were present at the time of the shooting, and Hernandez to show that the assailants were Black. Thus, defendants mounted a full defense. Moreover, as we have observed, Elizabeth was not a crucial defense witness. At best, she would have merely "fill[ed] in a few details that were not filled in by" Ramon Sr. and Naomi Henriquez. There was no due process violation.

In the alternative, any error in precluding Elizabeth's testimony was harmless, whether viewed under the state (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)) or federal (*Chapman v. California* (1967) 386 U.S. 18, 23 (*Chapman*)) constitutional standard. Under the state test, it is not reasonably probable that had the testimony from defendants' sister on a few, unspecified details not covered by other witnesses been allowed, a different judgment would have been reached. (*Watson, supra*; see *People v. Richardson* (2008) 43 Cal.4th 959, 1001 ["'appellate court may not reverse a judgment because of the erroneous exclusion of evidence unless the "substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means."' [Citations.]"])[4] Similarly, given the defense evidence that was presented, it is clear beyond a reasonable doubt the exclusion of

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[4] For the same reason, defendants' contention that counsel was ineffective fails. Even assuming counsel were deficient in not ensuring that the witness was excluded from the courtroom, it is not reasonably probable that a different result would have been reached if the witness had testified. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [test for ineffective assistance of counsel requires not simply deficient performance, but a reasonable probability that but for counsel's errors, the result of the proceeding would have been different].)

subsidiary, unspecified testimony from Elizabeth did not contribute to the verdict. (*Chapman, supra*.)

III. *Ineffective Assistance of Counsel for Failure to Object to Testimony About the Mexican Mafia*

Defendants' contend that their attorneys were ineffective for failing to object to Detective Morgan's testimony concerning the "Mexican Mafia." The claim is meritless.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

We note at the outset that Detective Morgan never used the words "Mexican Mafia." Rather, she referred to Latino gangs south of Fresno as "South Siders" or

"Surenos," and to "La Ema" as the organization that oversees and taxes such gangs. Defendants thus mischaracterize her testimony.

In any event, defendants have failed to prove that their attorneys were ineffective in failing to object to Detective Morgan's testimony concerning La Ema. That testimony was admissible to prove the gang enhancement, in particular to prove that: (1) defendants committed the instant crimes "with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1)); and (2) that one of the Paramount Locos' primary activities was the commission of one or more qualifying crimes (§ 186.22, subd. (f)).

Detective Morgan testified that the Paramount Locos is a newly formed gang attempting to affiliate itself with "La Ema." She explained that Latino gangs in California are generally divided into the "North Siders" north of Fresno and the "South Siders," or "Surenos," south of Fresno. The Surenos are controlled by La Ema, which collects taxes from its affiliated gangs. When smaller gangs are accepted by La Ema, they become associated with the number 13, which symbolizes the letter "M," the 13th letter of the alphabet. To earn "13 status," the gang commits crimes in a particular area so as to exert its control. The Paramount Locos gang became noticed because it began targeting several more established gangs in the city of Paramount, committing "shootings and assaults of that type." Seeking to control Paramount, the Paramount Locos gang was a rival of all larger gangs in the area, including T-Flats.

Clearly, this testimony was extremely relevant to prove that in order to attain "13 status" with La Ema, the Paramount Locos' had as one of its primary activities the commission of crimes included among the statutory list of qualifying crimes. The testimony was also relevant to prove that defendants committed the instant crimes to help the gang achieve "13 status" and to confront a rival gang, T-Flats.

Indeed, among the gang-related writings seized from defendants' home was the pledge, "one nation under 13." Also seized were items referring to "South Side." Moreover, this testimony was not inflammatory, and was in line with the type of testimony concerning gang culture and habits typically admitted to prove the gang enhancement. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) In short, defense counsels' performance was not deficient, because there was no legitimate basis on which they could have objected. And their failure to object was not prejudicial, because any objection undoubtedly would have been overruled. Defendants have thus failed to prove ineffective assistance of counsel.

IV. *The Trial Court's Comments During Guzman's Testimony*

Defendants contend that during the testimony of Steven Guzman the trial court made certain comments that the jury might have interpreted as showing a bias in Guzman's favor. The contention is meritless.

First, defendants failed to object to the court's comments, and have thus forfeited any objection on appeal. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110.) To the extent defendants contend that any objection would have been futile, they point to nothing in the record to support the contention. The conduct complained of did not, as defendants assert, "permeate[] the trial," but rather occurred at isolated points during Guzman's testimony, and *only* during Guzman's testimony. The court displayed no reluctance to sustain properly-made defense objections, and displayed no hostility to defense counsel. Further, any misunderstanding concerning the court's comments (defendants concede that the court was not attempting to display bias in Guzman's favor) could easily have been cured by timely objection. We conclude that defendants have forfeited any right to

challenge the court's comments. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1053.)

In any event, we have reviewed all the cited comments and find them, at worst, innocuous. All were directed (and would be understood as being directed) to ensuring that Guzman answered counsels' questions, to allaying Guzman's impatience as a witness, and to thanking him at the end of his testimony, something the court did with the defense witnesses as well. No reasonable jury or reasonable trial counsel would have interpreted the court's comments as displaying bias.

V. *Consecutive Sentences on the Attempted Murders*

Defendants contend that the trial court abused its discretion in imposing consecutive sentences on the attempted murder counts. The crux of the argument is that the trial court mistakenly believed that it had no discretion to do otherwise. We agree that the court's comments at the sentencing hearing, viewed in their entirety, demonstrate that the court erroneously believed that it had no discretion but to sentence consecutively on the attempted murder convictions. We therefore remand for resentencing.

At the sentencing hearing, the trial court commended defendants' father for his efforts in parenting and expressed frustration with the attraction of the gang lifestyle. The court also stated in part: "And so . . . now we're left with another . . . stupid, painful frustrating experience of having to sentence kids to jail for life because they want to be involved in a gang culture. And the court's hands are tied. There's nothing the court can do. . . . The court takes no pleasure. . . . It's just the fact that my hands are tied just like I got handcuffs on, a straight jacket in basically pronouncing sentence." Immediately before imposing sentence, the court

apologized to defendants: "You have to pay the consequences. And so the court has no choice but to do so. And as I indicated, I apologize to you. But that's the best [the court] can do. And which is what I am going to do."

The court then sentenced defendants to consecutive sentences on the attempted murder counts and a concurrent sentence on the shooting at an inhabited dwelling count. The court gave no rationale for imposing consecutive sentences. It summarized: "So essentially what we're left with [is] in count[] 1, 15 years to life [for the § 186.22, subd. (b) gang enhancement] plus 25 years to life for the [§ 12022.53, subd. (d)] enhancement. And count 2, 15 years to life plus 25 years to life with enhancements. Those will run consecutive. Everything else will run concurrent."

Counsel for Jesus then asked to speak. He stated: "Count 1 and count 2 [the attempted murder counts] occurred at the very same moment. One shell that was directed . . . in that area. I think it bounced off the ground, hit the man [Hernandez] as he was running away. So I have essentially one criminal act, two people there. Where the bullet was aimed, I don't know. Then there were some shots that were fired back into the house. . . . So I would ask the court to think about imposing a concurrent time on those two acts. Because they were really one, only one man took the bullet. . . . I think we have one act of criminality here . . . although it was charged with two people, it was just one act."

The court asked if the prosecutor wished to be heard. Interpreting defense counsel's remarks as referring to the firearm enhancement under section 12022.53, subdivision (d), (discharge causing great bodily injury), the prosecutor responded that consecutive sentences were mandatory. The prosecutor stated: "This exact issue . . . counsel has presented, the 654 issue with respect to applying consecutive sentences to . . . 12022.53 and its subsection. Basically what it says is if you shoot

into a group of five people and you get five attempt murders and only one is hit, you get 25 to life gun enhancement[s] as to each of the five attempt[ed] murders. And they must all run consecutive and the court does not have any ability to stay that. It's simply a matter of statute. This must run consecutive whether that's what the court would want to do or not."

Jesus' attorney stated that he did not understand the argument: "If I shoot into a group of people and there are five people there, I can get five consecutive life sentences? . . . And the court does not have discretion even though there was one bullet fired and only one person is shot?"

The court responded: "That's my understanding of the law. And I might indicate to you, if I had the discretion I would exercise it, okay. I would consider that and try to fashion a sentence, I think [that] is pretty much consistent with the law, [and] consistent with the facts of this particular case. But as I indicated at the beginning, there's very little I can do. . . . This is the law. It's basically . . . encased in concrete. We don't have any discretion. It's automatic as . . . tomorrow is Friday. And so I can't. If I could, I would. And basically I did some research and I was able to find out that I could basically run count 3 [shooting at an inhabited dwelling] concurrent and also stay the enhancements as to count 3, which is what I did. So if I could do something like that and it was legal, I would do it. I just can't do it."

At the end of the sentencing hearing, the court again addressed defendants: "Again, I apologize . . . I could do no more . . . the law basically is pretty much . . . in concrete. I don't have any discretion. And as I indicated, if I could I would have exercised more discretion on your behalf. . . . Just the fact that my hands are tied. When certain crimes are committed I have to impose certain sentences. That's why I have to do this."

Respondent contends that by failing to object to consecutive sentences defendants have forfeited the claim that the court erred. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [when the trial court fails to make or properly articulate a discretionary sentencing choice, the defendant must object in order to preserve the claim on appeal].) We disagree. Jesus attorney argued for concurrent sentences. The court articulated its basis for consecutive sentences: that it believed it had no discretion to do otherwise. The issue whether the court "abused" its discretion in the sense that it failed to exercise it at all has been preserved. Moreover, although it is true that Ramon's counsel did not expressly request concurrent sentences, the arguments made by Jesus' counsel applied equally to Ramon. Any further objections by Ramon's counsel would have been futile. (See *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [objection generally not forfeited if objection would have been futile].)

As respondent concedes, section 669 gave the court discretion to sentence concurrently on the attempted murder counts. (See generally *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.) Respondent argues that the court's comments that it had no discretion referred only to the firearm enhancements. But the entirety of the record defeats that contention. While the prosecutor argued that the court had no discretion to sentence concurrently on the firearm enhancements, the court's conception of its lack of discretion encompassed the attempted murder convictions themselves. When Jesus' attorney expressed disbelief that five attempted murder convictions necessarily must result, without discretion, in five consecutive life sentences even though only person is shot, the court replied that such a result was compelled by the law, and that if the court had discretion, it would sentence differently. The court also referred to its belief that it could sentence concurrently on the conviction on count 3 for shooting at an inhabited

dwelling and stay the enhancements, but that it could not do the same on the attempted murder counts: "So if I could do something like that and it was legal, I would do it. I just can't do it." The court also expressed the belief that it was imposing the most lenient sentence it could under the law. The court told defendants: "I don't have any discretion. And as I indicated, if I could I would have exercised more discretion on your behalf. . . . Just the fact that my hands are tied. When certain crimes are committed I have to impose certain sentences. That's why I have to do this." We also note that other than repeatedly referring to its lack of discretion the court never provided a rationale for imposing consecutive sentences based on the facts of the case.

The record leaves no doubt that the court believed that it had no discretion to sentence defendants concurrently on the attempted murder counts. Because it did have such discretion, we must remand the matter for resentencing. In doing so, we express no opinion on how the court should exercise that discretion.

VI. *Separate Sentence on Shooting at an Inhabited Dwelling*

Defendants contend that section 654 precluded a separate sentence on the conviction for shooting at an inhabited dwelling. The victim of that crime was not one of the attempted murder victims, but another person, Laura Ramon, who was the occupant of the house that was shot. Under the so-called multiple victim exception to section 654, a separate sentence was not precluded for the conviction of shooting at an inhabited dwelling. "There is a multiple victim exception to Penal Code section 654 which allows separate punishment for each crime of violence against a different victim, even though all crimes are part of an indivisible course of conduct with a single principal objective. [Citation.] An assailant's greater culpability for intending or risking harm to more than one person precludes

application of section 654." (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1630-1631 [approving separate sentences for attempted murder and shooting at an inhabited dwelling where attempted murder victim's house guests were victims of the shooting at a dwelling].) On remand, the court may impose a separate sentence for defendants' convictions of shooting at an inhabited dwelling.

DISPOSITION

The true findings on the section 12022.53 and 12022.5 enhancements are reversed and the sentences on those enhancements are vacated. The case is remanded for resentencing. The judgment is otherwise affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.