**PEOPLE v. MEJIA**

[Email](https://www.leagle.com/decision/incaco20100930041)| [Print](https://www.leagle.com/decision/incaco20100930041)| [Comments (0)](https://www.leagle.com/decision/incaco20100930041)

No. B213993.

* [**View Case**](https://www.leagle.com/decision/incaco20100930041)
* [Cited Cases](https://www.leagle.com/decision/citedcases/incaco20100930041)

*THE PEOPLE, Plaintiff and Respondent, v. IVAN MEJIA, Defendant and Appellant.*

Court of Appeals of California, Second District, Division Three.

Filed September 30, 2010.

***Attorney(s) appearing for the Case***

*Nancy Mazza for Defendant and Appellant.*

*Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.*

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

Defendant and appellant Ivan Mejia appeals from the judgment entered following a jury trial that resulted in his conviction for first degree murder, committed for the benefit of a criminal street gang. Mejia was sentenced to a prison term of 60 years to life.

Mejia contends: (1) the evidence was insufficient to support his murder conviction; (2) the trial court abused its discretion by denying his motion for a continuance of the sentencing hearing; (3) imposition of a Penal Code section 186.22[1](https://www.leagle.com/decision/incaco20100930041#fid1) gang enhancement, and a section 12022.53 firearm use enhancement, constituted cruel and unusual punishment; and (4) the matter must be remanded for resentencing because the trial court failed to exercise its discretion to strike the gang enhancement. Discerning no error, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

**1. *Facts.***

**a. *People's evidence.***

**(i) *The murder.***

On October 10, 2003, 13-year-old Josue Zavaleta, 21-year-old Jermaine Lavan, Freddie Saravia, Manny Vega, and others were "hanging out" together on Orchard Avenue in Los Angeles. Lavan and most of the others were members of a "tagging crew" known as "S4M," which stood for "`Sex For Money.'" Zavaleta was not a gang member. The spot where the group was relaxing was within the territory of the "Easy Riders" criminal street gang. The Easy Riders and the Harpys gang were bitter enemies. Nearby, Jose Guardado was standing in front of his Orchard Avenue apartment building, socializing with friends. Several young children were in Guardado's group.

A gray Toyota Camry drove slowly southbound down Orchard, with appellant Mejia and other persons inside. Mejia was a member of the Harpys gang, with the moniker "Chilo." The Camry stopped alongside Zavaleta's group. Mejia, who was seated in the back passenger seat, held a gun out the window and fired numerous shots at the youths on the street. He yelled, "`Fuck Cheesy Riders,'" a derogatory term for the Easy Riders gang. One of the shots hit Zavaleta in the back of the head, fatally wounding him. Lavan found bullet holes in his shirt, but was unharmed.

After Mejia shot at Zavaleta's group, the Camry drove forward and Mejia shot at Guardado's group, fortunately hitting no one.

Zavaleta's murder remained unsolved for several years.

**(ii) *Lavan's testimony.***

Lavan had observed Mejia commit the shooting and recognized him immediately. He had seen Mejia at his high school and around the neighborhood. Lavan was a former member of a criminal street gang, and refused to talk to the police in 2003 for fear of being labeled a "snitch" and suffering gang retaliation.

In 2006, Freddie Saravia was killed on Orchard Avenue. Police questioned Lavan about Saravia's murder, as well as about the 2006 murder of another man, Steven Amayo. Lavan told police "[t]he only murder . . . I know about was Josue Zavaleta." Lavan identified Mejia as Zavaleta's killer in a photographic lineup. On the identification form he wrote, "`Number 5 is Chilo from Harpys gang, shooter, from back seat, of my friend, Josue.'" Lavan also positively identified Mejia at trial. Lavan decided to provide information to police in 2006 in part because Zavaleta's mother had come to Lavan's mother in tears, distraught that her son's murderer had not been brought to justice. Lavan's mother urged him to "`do the right thing.'"

**(iii) *Guardado's testimony.***

On the evening of October 10, 2003, Guardado observed Mejia's vehicle drive down Orchard. He knew Mejia because he was "friends of friends," and had seen him at Manual Arts High School, where both youths were enrolled. Guardado observed Mejia fire four or five shots at Lavan's group. The car then moved forward and Mejia fired two shots at Guardado's group.

When Guardado saw Mejia at school the following Monday, he recognized him as the shooter with 100 percent certainty. Guardado did not inform police in 2003 that Mejia was the shooter because he was afraid of retaliation. In 2007, police contacted Guardado and he informed them that Mejia had shot Zavaleta. Guardado identified Mejia in a photographic lineup, circling Mejia's photo and writing, "`Recognized suspect No. 5, which looks like shooter on day of incident. He appeared to be holding a brownish-colored gun. Shots were fired and recoil was seen. The car appeared to be of a light-brownish color. I believe he was from Harpys at the time, and his nickname is Chilo.'"

**(iv) *Medina's testimony.***

Cindy Medina was Mejia's girlfriend in 2003, when she was a high school sophomore. They broke up in 2007, when she was pregnant with their child. In 2006, Medina's friend Steven Amayo was killed within a block of where the Zavaleta and Saravia murders took place. In March 2007, Police questioned Medina about Amayo's murder. During her conversation with a detective, Medina revealed that Mejia had told her he committed the Zavaleta murder. He said he had traveled into S4M territory with his friends "Bongs" and "Grifo," and shot a person known as "`Sniper'" or "`Snapper'" who had a brother who attended Manual Arts High School. Medina identified Mejia in a photographic lineup and wrote a statement explaining that she had confronted Mejia about the Zavaleta murder and he admitted the shooting. Medina repudiated her statements at trial, and testified to a variety of factors that could have cast doubt on the veracity of her account.

**(v) *Gang expert testimony.***

Los Angeles Police Department Officer Rene Gonzalez, a gang expert, testified that Mejia was a member of the Harpys, a violent criminal street gang with approximately 300 members. The Harpys were rivals of the Easy Riders and S4M gangs and related tagging crews. The gang's claimed territory was bounded by Figueroa, Normandie, Washington, and Jefferson streets. Gang members must prove their loyalty and commitment to the gang, often by committing crimes. If a Harpys gang member yelled "`Fuck Cheesy Riders'" just prior to shooting into a crowd of people in rival gang territory, Gonzalez would consider the shooting to be committed for the benefit of the Harpys gang. Gang members do not tolerate persons who cooperate with the police in reporting or prosecuting gang crimes. Such persons are labeled "snitches" and can be the victims of violent gang retaliation, along with their families.

**b. *Defense evidence.***

Mejia testified in his own behalf, as follows. He had been a Harpys gang member since the age of 14. His nickname was "Chilo."

On the date of the Zavaleta murder, he was almost 15 years old. He spent the evening socializing with friends on 20th Street. During the evening, Officer Gonzalez drove by in a police car and warned the group to be careful because there had been a shooting on Orchard. After the killing, there were neighborhood rumors that Mejia was the shooter. He spoke to Zavaleta's brother and denied being the killer. He also swore to Lavan and others that he was not the shooter.

When he was incarcerated in April 2007, he provided information to detectives about Zavaleta's murder despite the danger he faced in being labeled a "snitch." In 2006 he worked for Homeboy Industries and began having his tattoos removed.

He never told Medina he shot Zavaleta; to the contrary, when she asked about the shooting, he denied it. Mejia cheated on Medina during 2006 and 2007. He admitted being convicted of false imprisonment as a result of an incident with Medina. Medina also testified for the defense. She stated that a week after her interview with the detective, she told him her previous statements about Mejia's confession were not true.

**2. *Procedure.***

Trial was by jury. Mejia was convicted of first degree murder (§ 187, subd. (a)). The jury found Mejia personally and intentionally discharged a firearm, proximately causing death (§ 12022.53, subd. (d)), and that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b).) The trial court sentenced Mejia to a term of 60 years to life in prison, comprised of 25 years to life for the murder, a 25 years to life section 12022.53, subdivision (d) firearm enhancement, and a 10-year section 186.22, subdivision (b) gang enhancement. It imposed a restitution fine.

**DISCUSSION**

**1. *The evidence was sufficient to support the murder conviction.***

Mejia argues that there was insufficient evidence identifying him as the shooter. He urges that "significant factors" rendered Lavan's and Guardado's identifications of him unreliable, and posits that Medina's testimony about his statements had no probative value. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) [30 Cal.4th 43](https://www.leagle.com/cite/30%20Cal.4th%2043), 66; *People v. Carrington* (2009) [47 Cal.4th 145](https://www.leagle.com/cite/47%20Cal.4th%20145), 186-187; *People v. Halvorsen* (2007) [42 Cal.4th 379](https://www.leagle.com/cite/42%20Cal.4th%20379), 419.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) [46 Cal.4th 913](https://www.leagle.com/cite/46%20Cal.4th%20913), 919.) Reversal is not warranted unless it appears "`that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) [18 Cal.4th 297](https://www.leagle.com/cite/18%20Cal.4th%20297), 331; *People v. Zamudio* (2008) [43 Cal.4th 327](https://www.leagle.com/cite/43%20Cal.4th%20327), 357.)

The evidence was clearly sufficient to prove Mejia was the shooter. Lavan, who observed the shooting, unequivocally identified Mejia in a photographic lineup and at trial. He knew Mejia from "around the neighborhood," recognized him immediately, and noted his distinctive, long hair. Guardado was also present at the shooting and unequivocally identified Mejia in a photographic lineup and at trial. Guardado, too, was familiar with Mejia because they went to the same high school. He was "100 percent sure" Mejia was the shooter. The testimony of the eyewitnesses was bolstered by Medina's statements to police that Mejia admitted to the shooting.

Mejia's insufficiency argument is based entirely upon his view that the witnesses were not credible. He points to a variety of factors he contends undercut the value of the eyewitness identifications, including, inter alia, that the shooting happened quickly; neither witness had a good opportunity to see the shooter; both men were no doubt "scared and stressed," and would have focused on the gun; the car and the other passengers were not identified; Lavan's identification was motivated by self-interest; Lavan was biased, in that his tagging crew and Mejia's gang were rivals; neighborhood rumors may have tainted the identifications; Lavan doubtless felt pressured by police to make an identification; when shown the photographic lineup, Guardado was initially unsure of his identification; and both men waited years to identify Mejia as the shooter. Likewise, Mejia points to evidence that he contends requires rejection of Medina's statements to police, including that Medina had a motive to falsely accuse Mejia, having recently discovered his unfaithfulness to her and having suffered his physical abuse in the past; her grandmother had recently died; she was using methamphetamine, and had ingested some of the drug before speaking with a detective; she had been taking medication after being diagnosed as schizophrenic, and had been hearing voices; she was afraid of Mejia; and at trial, she repudiated her statements that Mejia had confessed to her.

Accepting for purposes of argument the accuracy of Mejia's characterization of the evidence, his argument is not persuasive. The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to establish a fact and support a conviction. (§ 411; *People v. Young* (2005) [34 Cal.4th 1149](https://www.leagle.com/cite/34%20Cal.4th%201149), 1181; *People v. Hampton* (1999) [73 Cal.App.4th 710](https://www.leagle.com/cite/73%20Cal.App.4th%20710), 722.) "In the instant case, `there is in the record the inescapable fact of in-court eyewitness identification. That alone is sufficient to sustain the conviction.' [Citation.]" (*In re Gustavo M.* (1989) [214 Cal.App.3d 1485](https://www.leagle.com/cite/214%20Cal.App.3d%201485), 1497.) As our Supreme Court has repeatedly and consistently explained: "`"`Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.]'"'" (*People v. Mejia* (2007) [155 Cal.App.4th 86](https://www.leagle.com/cite/155%20Cal.App.4th%2086), 98; *People v. Friend* (2009) [47 Cal.4th 1](https://www.leagle.com/cite/47%20Cal.4th%201), 41.)

Mejia has failed to make such a showing. The purported weaknesses in the evidence did not make the witnesses' testimony impossible to believe or obviously false, but "merely presented the jury with a credibility determination that is not reviewable on appeal." (*People v. Mejia, supra,* 155 Cal.App.4th at p. 99.) Mejia's arguments "involve simple conflicts in the evidence that were for the jury to resolve. [Citation.] Of course, `it is not a proper appellate function to reassess the credibility of the witnesses.' [Citation.]" (*People v. Friend, supra,* 47 Cal.4th at p. 41.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) [30 Cal.4th 342](https://www.leagle.com/cite/30%20Cal.4th%20342), 403; *People v. Mejia, supra,* at p. 98.) The evidence was sufficient.

**2. *Issues related to sentencing.***

**a. *Denial of request for a continuance.***

**(i) *Additional facts.***

The jury rendered its guilty verdict on October 8, 2008. On that date, a defense attorney stood in for appellant's retained counsel. The trial court ordered transcripts prepared and set the sentencing hearing for December 15, 2008. The court reporter confirmed transcripts would be available in approximately one month. The prosecutor asked about the possibility of a new trial motion, and confirmed with the court that any such motion would be filed prior to the date set for sentencing.

At the scheduled December 15, 2008 sentencing hearing, eight members of the victim's family were present in court. Mejia's trial counsel appeared, as did Mejia's current appellate counsel, Nancy Mazza. Attorney Mazza sought to substitute in for purposes of preparing and arguing a new trial motion, and sought a continuance of the sentencing hearing for that purpose. She represented that once she obtained the trial transcripts, she would be prepared to file the motion within 30 days. The trial court indicated it had spoken to counsel in an unreported bench conference to "get some sense of whether there was any basis" for the proposed motion. Mazza indicated she intended to raise the issues of a denial of a pretrial continuance, and "juror misconduct." Mejia's trial counsel indicated that during trial, one of the defendant's friends had spoken to a juror in the hallway and over the phone. The conversations "favored the defendant and trashed . . . one of the prosecution witnesses." Retained counsel ceased his investigation when Mejia's family decided to hire new counsel. Atty. Mazza also stated that "[p]erhaps," after reading through the trial transcripts, she "would find other issues."

The prosecutor opposed the continuance. She argued that the defense had failed to state any reasonable basis upon which a new trial motion might be granted. Further, she explained: "We have 8 people sitting here who have a dead relative because of the defendant. They should not be inconvenienced because the defendant is going off on speculative tangents."

The trial court expressed its preference to "proceed expeditiously" and denied the motion for a continuance. It observed that the trial had been largely uneventful, nothing suggested Mejia received less than a fair trial, and it appeared the motion was brought solely for purposes of delay.

**(ii) *Discussion.***

A continuance of a criminal trial may be granted only for good cause, and the trial court has broad discretion to determine whether good cause exists. (§ 1050, subd. (e); *People v. Alexander* (2010) [49 Cal.4th 846](https://www.leagle.com/cite/49%20Cal.4th%20846), 934; *People v. Mungia* (2008) [44 Cal.4th 1101](https://www.leagle.com/cite/44%20Cal.4th%201101), 1118; *People v. Frye* (1998) 18 Cal.4th 894, 1012-1013, disapproved on another point in *People v. Doolin* (2009) [45 Cal.4th 390](https://www.leagle.com/cite/45%20Cal.4th%20390), 421, fn. 22.) "`"A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence." [Citation.]'" (*People v. Alexander, supra,* at p. 934.) "`[O]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.' [Citations.]" (*Id.* at pp. 934-935.) We review the trial court's denial of a motion for a continuance for abuse of discretion. (*People v. Mungia, supra,* at p. 1118.) "`There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*Id.* at p. 1118.) "In reviewing the decision to deny a continuance, `[o]ne factor to consider is whether a continuance would be useful. [Citation.]" (*Ibid.; People v. Frye, supra,* at p. 1013.)

We discern no abuse of the trial court's broad discretion here. Defendant had two months between the conclusion of trial and the sentencing hearing in which to begin to prepare his new trial motion. During that period, he did not seek a continuance. Instead, he unjustifiably waited until the date set aside by the court, the prosecutor, and the victim's family for sentencing. Under these circumstances, it cannot be said the trial court unreasonably insisted on expeditiousness. The court's ruling did not deprive Mejia of a reasonable opportunity to prepare, and therefore did not violate his right to counsel. (See *People v. Snow, supra,* 30 Cal.4th at p. 70.)

Even more significant, the defense failed to show a continuance would have been useful. Counsel failed to articulate any grounds upon which a new trial might have been granted. Counsel's explanation of the potential bases for the new trial motion was largely speculative. Counsel's desire to peruse the record in hopes of finding an issue to raise cannot justify a continuance on the facts presented here. Although counsel mentioned that she intended to challenge a pretrial denial of a motion for a continuance, she failed to explain the nature of the claim or shed light on how the denial had prejudiced Mejia. As to the juror misconduct issue, although the defense apparently knew about the purported misconduct shortly after trial, the defense had not diligently pursued the issue. In any event, it was highly unlikely a new trial motion based on the purported juror misconduct would have been successful. As described by the defense, one of Mejia's friends denigrated the People's witnesses when speaking to a juror. If such conduct actually occurred, it was likely to be detrimental to the People's case, not the defense. Moreover, it is doubtful whether "a convicted person can ever overturn the verdict on grounds that persons acting in his behalf deliberately sought to influence the jury. Certainly no such claim could ever be valid where the accused himself had instigated the incident; a party cannot profit by his or her own wrongdoing. But even where, as here, there is no evidence petitioner was directly involved, recognition of such a claim suggests tempting opportunities for accuseds' allies to manufacture challenges against subsequent convictions." (*In re Hamilton* (1999) [20 Cal.4th 273](https://www.leagle.com/cite/20%20Cal.4th%20273), 305, italics omitted.) Finally, we note that on appeal, Mejia has not raised any issues related to juror misconduct or the denial of a pretrial continuance, strongly suggesting these claims were baseless.

Balanced against the defense's failure to articulate a basis for the new trial motion was the fact that eight of the victim's family members were present to address the court. (See § 1191.1 [providing that certain immediate family members of the victim have the right to attend all sentencing proceedings, shall be given adequate notice, and may appear and reasonably express their views]; Cal. Const., art. I, § 28, subds. (b)(7) & (9).) Mejia minimizes this fact, stating that the inconvenience to the family witnesses was insignificant, given that they probably lived in the area, had already waited five years for the verdict, and could have made arrangements to return for a later sentencing date. We do not believe the inconvenience to the family members of a murdered child should be swept away so lightly where, as here, the defense exercised no diligence to prepare the motion in question and failed to articulate any grounds upon which it might have been granted. There was no abuse of discretion and no apparent prejudice.

**b. *Cruel and unusual punishment.***

Mejia next contends that imposition of the 25-years-to-life section 12022.53, subdivision (d) firearm enhancement and the 10-year gang enhancement, on top of his 25-years-to-life sentence for murder, constituted cruel and unusual punishment in violation of the California Constitution. We disagree.

Whether a punishment is cruel or unusual is a question of law, but we review the underlying facts in the light most favorable to the judgment. (See *People v. Em* (2009) [171 Cal.App.4th 964](https://www.leagle.com/cite/171%20Cal.App.4th%20964), 971; *People v. Mantanez* (2002) [98 Cal.App.4th 354](https://www.leagle.com/cite/98%20Cal.App.4th%20354), 358.) A punishment violates the California Constitution if, "although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) [8 Cal.3d 410](https://www.leagle.com/cite/8%20Cal.3d%20410), 424, fn. omitted; *People v. Em, supra,* at p. 972.) In making this determination, we (1) examine the nature of the offense and the offender; (2) compare the punishment with that meted out for more serious crimes in California; and (3) compare the punishment with that given for the same offense in other jurisdictions. (*In re Lynch, supra,* at pp. 425-427; *People v. Em, supra,* at p. 972; *People v. Martinez* (1999) [71 Cal.App.4th 1502](https://www.leagle.com/cite/71%20Cal.App.4th%201502), 1510.) A defendant must overcome a considerable burden to show the sentence is disproportionate to his or her level of culpability, and findings of disproportionality have occurred "`with exquisite rarity in the case law.'" (*People v. Em, supra,* at p. 972.)

Here, because Mejia does not address the second or third prongs of the *Lynch* analysis, we confine our discussion to the nature of the offense and the offender. We consider the seriousness of the crime in the abstract and the totality of the circumstances surrounding its commission, including motive, manner of commission, the extent of the defendant's involvement, and the consequences of his acts. (*People v. Em, supra,* 171 Cal.App.4th at p. 972.)

Considering the crime in the abstract, we discern no disproportionality. "There can be no dispute that murder is a serious crime . . . ." (*People v. Em, supra,* 171 Cal.App.4th at p. 972.) Further, "the use of a gun by a gang member in the commission of a crime present[s] a significant degree of danger to society." (*Ibid.*) *Em* observed that "[l]ife sentences pass constitutional muster for those convicted of aiding and abetting murder, and for those guilty of felony murder who did not intend to kill. [Citations.] Additionally, a sentence enhancement of 25 years to life is not disproportionate to a violation of . . . section 12022.53; the Legislature has determined that a significant increase in punishment is necessary and appropriate to protect citizens and deter violent crime." (*People v. Em, supra,* at pp. 972-973; see also *People v. Gonzales* (2001) [87 Cal.App.4th 1](https://www.leagle.com/cite/87%20Cal.App.4th%201), 16; *People v. Zepeda* (2001) [87 Cal.App.4th 1183](https://www.leagle.com/cite/87%20Cal.App.4th%201183), 1212-1216; *People v. Martinez* (1999) [76 Cal.App.4th 489](https://www.leagle.com/cite/76%20Cal.App.4th%20489), 493-495.)

The totality of the circumstances of the crime also show no disproportionality. Mejia was a gang member, and the crime was committed for the most trivial and absurd of reasons: to further mindless gang violence. (See *People v. Zepeda, supra,* 87 Cal.App.4th at p. 1215 [section 12022.53 enhancement was not cruel or unusual where the defendant committed an unprovoked, planned drive-by shooting murder for the apparent purpose of establishing himself with a gang, and to establish the gang's strength in the community].) There was no apparent motive for the shooting, other than the desire to prove loyalty to the gang and inflict injury on rival gang members. Mejia was the actual shooter. He shot indiscriminately into a group of youths who were relaxing after a game of football. His victim was a 13-year-old boy who was not a gang member. As Zavaleta lay convulsing on the sidewalk, Mejia continued his shooting rampage, firing indiscriminately into another, nearby group of people. The fact that the second group included small children did not deter Mejia from continuing to shoot. It was simply fortuitous that Mejia's actions did not result in more deaths and serious injuries. In sum, the motive was mindless, the shooting was committed with exceptional callousness, the defendant was not just "involved" in the crime, but was the primary perpetrator, and the consequences were extreme: the death of a non-gang-member youth. Examination of the nature of the offense demonstrates the sentence is not disproportionate to the crime.

As to the nature of the offender, Mejia points to his age—one month shy of 15 years old at the time of the crime—and his immaturity. Mejia argues that he has matured, as demonstrated by the facts he has earned his General Education Degree, left the gang life, and had become "a father." The record contains no indication Mejia has ceased to be a gang member. As is all too readily apparent in today's society, one does not have to be mature or responsible to become a parent. During the few years between the crimes and his apprehension, Mejia perpetrated domestic violence on his girlfriend, the mother of his child, for which he was convicted of false imprisonment. In 2007, while still a juvenile, he was charged with robbery and placed home on probation. At the time the probation report was prepared, he was "very involved" in gang activity with the Harpys gang. Further, according to the probation report, after the shooting Mejia "bragged and laughed about the shooting to others."

In short, consideration of the nature of the offender prong reveals that nothing other than Mejia's age supports his argument. However, "[m]any California cases since [*People v.*]*Dillon* [(1983) [34 Cal.3d 441](https://www.leagle.com/cite/34%20Cal.3d%20441)] have upheld life sentences, with and without the possibility of parole, for defendants under 18 years of age, against constitutional challenges." (*People v. Em, supra,* 171 Cal.App.4th at p. 975; see also *People v. Demirdjian* (2006) [144 Cal.App.4th 10](https://www.leagle.com/cite/144%20Cal.App.4th%2010), 12-16 [upholding sentence of two consecutive 25-years-to-life terms for defendant who was 15 years old when the crimes were committed].) Imposition of the 25-years-to-life enhancement imposed pursuant to section 12022.53, subdivision (d), has been found not to constitute cruel or unusual punishment when imposed on minors. (See *People v. Em, supra,* at p. 976 [imposition of section 12022.53, subdivision (d) enhancement on defendant who was 15 years old at the time of the crime did not amount to cruel or unusual punishment]; *People v. Gonzalez, supra,* 87 Cal.App.4th at pp. 16-17 [50 years to life sentence imposed on 16-year-olds who aided and abetted a murder was not cruel or unusual].) As explained by the *Em* court: "When considering whether a sentence is cruel or unusual punishment, the defendant's age matters. [Citation.] It is also manifestly true, however, that murder matters." (*People v. Em, supra,* 171 Cal.App.4th at p. 976; see also *People v. Demirdjian, supra,* 144 Cal.App.4th at p. 16; cf. *People v. Guinn* (1994) [28 Cal.App.4th 1130](https://www.leagle.com/cite/28%20Cal.App.4th%201130), 1147.)

*People v. Dillon, supra,* [34 Cal.3d 441](https://www.leagle.com/cite/34%20Cal.3d%20441), upon which Mejia relies, does not assist him. In *Dillon,* an unusually immature 17-year-old high school student and his friends attempted to rob a marijuana farm. While there, Dillon heard shotgun blasts and feared two of his friends had been shot by an armed man guarding the crop. The guard approached Dillon, who was unable to retreat or hide, and it appeared to Dillon that he pointed a shotgun at him. Believing he was about to be shot, Dillon panicked and fatally shot the guard. Dillon had no prior record. The jury expressed reluctance and unease at finding him guilty of first degree felony murder, and the trial court opined that the evidence did not support a first degree murder conviction outside the felony murder context. (*Id.* at pp. 482-486, 488.) The trial court stated that Dillon was not a dangerous person likely to cause future harm. Dillon's companions all received "petty chastisements" for their roles in the incident. (*Id.* at pp. 482-486, 488.) The California Supreme Court found the punishment unconstitutionally cruel and unusual, and ordered that Dillon be punished as a second degree murderer. (*Id.* at pp. 488-489.)

Mejia is not comparable to the *Dillon* defendant. Except for the fact Mejia was a minor when the crime was committed, the two crimes have little in common. Unlike Dillon, Mejia was not faced with a shotgun-toting man guarding an illicit marijuana crop. Mejia's crimes were not the result of panic, but were the culmination of an obviously planned and intentional excursion into rival gang territory, with the goal of killing rival gang members. Contrary to Mejia's contention, nothing in the record establishes he was unusually immature. The facts in *Dillon* "contrast dramatically" with the unprovoked ambush murder of an innocent, young teen simply socializing with his friends in a residential area. (See *People v. Em, supra,* 171 Cal.App.4th at p. 973.)

Mejia's reliance on *Roper v. Simmons* (2005) [543 U.S. 551](https://www.leagle.com/cite/543%20U.S.%20551), also is unavailing. *Roper* held that the Eighth Amendment to the United States Constitution prohibits imposition of the death penalty for crimes committed when the offender was under 18. (*Id.* at p. 568.) The court concluded juvenile offenders could not reliably be classified among the worst offenders because they are less mature and responsible than adults and act more recklessly; they are more susceptible to negative influences and pressures; and a juvenile's character is not as well formed as an adult's. (*Id.* at pp. 569-570.) However, the reasoning of *Roper* is inapplicable here. This is not a death penalty case; California does not allow the death penalty for juveniles. (§ 190.5, subd. (a).) While Mejia's sentence is undoubtedly severe, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." (*Gregg v. Georgia* (1976) [428 U.S. 153](https://www.leagle.com/cite/428%20U.S.%20153), 188; see also *People v. Demirdjian, supra,* 144 Cal.App.4th at p. 14.) *Roper* does not stand for the proposition that a sentence of 60 years to life is unconstitutionally disproportionate when applied to a juvenile.

In sum, Mejia's sentence is not disproportionate to the crime, and therefore does not constitute cruel or unusual punishment under the California Constitution.

**c. *Court's exercise of its sentencing discretion.***

After ruling on appellant's new trial motion, the trial court proceeded to sentencing. It queried whether Mejia would waive arraignment for judgment. After counsel answered affirmatively, the court stated: "This is all statutorily mandated, as far as the sentence is concerned." The court then heard statements from members of Zavaleta's family. The court followed up by asking whether defense counsel or Mejia wished to add anything; they did not. The trial court then proceeded to sentence appellant, observing: "All too often . . . I am called upon to pronounce sentence under circumstances such as these where these inexplicable acts have occurred. And—obviously, there is just no excuse or justification for what you did, Mr. Mejia. And—we see it all too often in the news. Unfortunately, there are all too many people in the community at large who are vulnerable to the predatory practices of people like you. [¶] And—obviously, there is no consolation that I could ever give to the family that is suffering so much. But, at least, as a society, we will all have the satisfaction of making sure at least one predator is placed in a position where he will not be able to make victims out there in the community." The court sentenced Mejia as discussed *ante,* including the consecutive term of 10 years for the section 186.22, subdivision (b) gang enhancement.

Mejia argues the matter must be remanded for resentencing "[b]ecause the court failed to exercise its discretion" to strike the section 186.22, subdivision (b) gang enhancement. (See § 186.22, subd. (g) ["Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . 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"].)

Mejia is incorrect. "Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to `sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.] [¶] Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. [Citations.] Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.] `"[A] trial court is presumed to have been aware of and followed the applicable law." [Citations.]' [Citation.]" (*People v. Brown* (2007) [147 Cal.App.4th 1213](https://www.leagle.com/cite/147%20Cal.App.4th%201213), 1228-1229.)

Here, nothing in the record indicates the trial court was unaware of section 186.22, subdivision (g). The defense did not ask the court to strike the gang enhancement. The trial court did not indicate it lacked authority to do so. (Contrast *People v. Miller* (2006) [145 Cal.App.4th 206](https://www.leagle.com/cite/145%20Cal.App.4th%20206), 214, 218 [matter remanded for resentencing where trial court indicated it would have imposed a different sentence, but lacked authority].) The court's comments at sentencing in no way suggested it was inclined to strike the gang enhancement. Nothing remotely suggested the court viewed the case as unusual one in which the interests of justice would have been served by striking the enhancement; to the contrary, the court described Mejia as a "predator" and indicated its view that the sentence should be sufficient to prevent him from further victimizing the community. The sole basis for Mejia's contention that the trial court was unaware of its discretion was the court's comment, made earlier during the sentencing hearing, that "This is all statutorily mandated, as far as the sentence is concerned." Viewing the comment in context, we do not believe it can fairly be understood as an indicator the court lacked awareness of its discretion. Remand is not appropriate.

**DISPOSITION**

The judgment is affirmed.

We concur:

KLEIN, P. J.

KITCHING, J.

**FootNotes**

1. All further undesignated statutory references are to the Penal Code.