

Irving Marcelo Reyes v. California
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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

IRVING MARCELO REYES,

Defendant and Appellant.

H041053

(Santa Clara County

Super. Ct. No. C1227390)

I. INTRODUCTION

Defendant Irving Marcelo Reyes appeals after a jury convicted him of attempted murder (Pen. Code, §§ 664, subd. (a), 187)¹ and found true allegations that he committed the offense for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1203, subd. (e)(3)), and personally and intentionally discharged a firearm, which proximately caused great bodily injury (§ 12022.53, subd. (d)). The trial court found true an allegation that defendant had served a prior prison term. (§ 667.5, subd. (b).) Defendant was sentenced to a seven-year determinate term for the attempted murder, with a consecutive 10-year term for the gang enhancement and a consecutive term of 25 years to life for the section 12022.53, subdivision (d) allegation.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Defendant contends the trial court committed instructional errors with respect to specific intent, attempted murder and attempted voluntary manslaughter, defense of others, voluntary intoxication evidence, and the limited purpose of hearsay. Defendant also contends that the trial court erred by admitting into evidence a codefendant's statement and hearsay related by the gang expert. Defendant contends his trial counsel was ineffective for failing to use video evidence in his defense, failing to object to admission of defendant's booking statement, failing to preclude the gang expert from rendering certain opinions, and failing to object to prosecutorial misconduct. Defendant claims the cumulative effect of the above errors denied him a fair trial. Additionally, defendant contends there was insufficient evidence to support the gang allegation, and he claims the trial court abused its discretion at sentencing with respect to imposition of the gang enhancement. Finally, defendant seeks a limited remand for the purpose of making a record of factors relevant to his eventual parole suitability under section 3051.

For the reasons stated below, we find no merit to defendant's claims of trial court error with respect to instructions and evidence, nor to his claims of ineffective assistance of counsel, insufficiency of the evidence, and sentencing error. We will therefore affirm the judgment. However, we will order a limited remand in order for the trial court to determine whether defendant had an adequate opportunity to make an accurate record of his circumstances and characteristics at the time of his offense, in anticipation of a future youth offender parole hearing.²

² Defendant's appellate counsel has filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. We have disposed of the habeas petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

II. BACKGROUND

A. *The Shooting*

On March 2, 2012, at about 8:30 p.m., Luis Estrada was working as a security guard at the Bar Tarasco in San Jose. His job duties included checking identifications to make sure no minors came in, and checking for weapons by pat searching patrons. Estrada was working alone, but his brother Cristoval Estrada was visiting him.³

The bar had surveillance cameras that recorded actions taking place on the sidewalk just outside the bar; recordings from the surveillance cameras were played at trial.

When defendant and two companions—Luis Urbina and Oscar Jimenez—attempted to enter the bar, Estrada requested their identification. Urbina provided identification, but defendant said he did not have any identification. Defendant then gave Estrada someone else’s identification, but Estrada handed it back and refused to let him go inside the bar.

Meanwhile, Urbina and Jimenez entered the bar. They soon exited the bar along with Marco Soto, who told Estrada that they were going in because they “belong to a really huge gang called Clanton.” Soto’s statement did not mean anything to Estrada, although he was worried that the three individuals “could be a gang or something.”

Soto began pushing Estrada and making threatening statements, saying, “[W]e’re from Clanton. We’re gonna fuck you up, and we’re Sureños.” Estrada said he did not want any trouble and that he was just doing his job, and he told Soto not to touch him. At that point, Soto was grabbing Estrada and putting his arm around Estrada’s neck.

Estrada pushed Soto back, and an older man intervened, holding Soto back. Urbina then ran up and tried to hit Estrada, who had just taken out his baton. The older

³ Since Luis and Cristoval Estrada share the last name, we refer to Cristoval by his first name for clarity.

man again intervened by holding Urbina back. Urbina broke free and ran towards Estrada, swinging his arms in a punching motion. Estrada tried to retreat, backing up and saying he did not want any trouble, while using the baton to defend himself against Urbina. Soto and defendant moved towards Estrada at the same time, with defendant moving in a skipping motion as Estrada continued to move backward.

While moving forward, defendant took out a gun, pointed it at Estrada, and shot it. According to Cristoval, defendant was about 20 to 25 feet away from Estrada when he shot the gun. Estrada felt himself get shot in the chest.

Cristoval ran towards defendant and took the gun from him. Someone hit Cristoval in the face, and he used the gun to hit the person. Cristoval saw defendant and his companions run and get into a car. He shot twice at the car as it drove away, then threw the gun into a nearby garden. He later retrieved the gun and gave it to the police.⁴

After the shooting, Estrada was transported to a hospital, where he had surgery. He remained in the hospital for two or three weeks. At the time of trial, he was still suffering from physical and psychological problems as a result of the shooting.

B. Gang Expert Testimony

At trial, Detective Jesse Ashe testified as the prosecution's first witness, giving general background information about criminal street gangs. Detective Ashe also testified at the end of the prosecution's case, providing testimony about his investigation of this case as well as additional testimony about gangs.

1. Initial Testimony

Detective Ashe began working as an officer with the San Jose Police Department in 2006. As a patrol officer, he investigated gang cases regularly. In 2011, he began a specialized assignment as a gang detective. He had testified as a gang expert on at least seven prior occasions. He had been the primary investigator on over 50 gang cases and

⁴ Cristoval testified under a grant of immunity.

had worked on hundreds of gang cases in some capacity. In addition to responding to gang-related incidents, Detective Ashe would speak to gang members to learn more about the gangs. He had also taken numerous training courses regarding gangs.

Detective Ashe explained that “jumping in” is a common way to get into a gang, but that a person could also be allowed to join a gang by “putting in work,” meaning committing crimes, or by associating with other gang members. Gang members want power and respect, so they can engage in illegal activities and protect their claimed territory. Gang members use violence to show they are powerful and strong. A gang member or associate who does not back up fellow gang members can be disciplined physically or required to pay a fine. Gang members are often expected to carry weapons so they are prepared if they run into a rival. During crimes, gang members will call out their gang subset or gang moniker in order to intimidate witnesses. Witnesses will often refuse to provide information about a gang crime out of fear that the gang will retaliate.

Some gang members have tattoos, although some do not. A gang member may not get tattoos in order to avoid being identified as a gang member. Some gang tattoos must be earned. Typical Sureño tattoos include three dots or the word Sureño. Common Sureño symbols include the number 13, the color blue, the letters SUR, and the letter S. A gang member may also have a tattoo of his subset’s name.

The Mexican Mafia, a prison gang, is the “father gang” of Sureño street gangs. Their rival is the Nuestra Familia prison gang, which is aligned with the Norteño street gang. In San Jose, there are more than 10 subsets of the Sureño gang. Some Sureño gang members do not belong to a subset. All of the Sureño subsets “show their allegiance” to the “[u]mbrella” Sureño gang and share common signs and symbols.

At the time of the shooting, the primary activities of San Jose area Sureño gangs were property crimes such as vehicle theft, selling narcotics, and violent crimes such as assaults with deadly weapons, attempted murders, and murder.

2. Subsequent Testimony

Detective Ashe was the investigating officer for the shooting in this case. Within a few days of the shooting, Detective Ashe viewed video of the incident taken from a security system.

Detective Ashe believed defendant was a Sureño gang member. His opinion was based in part on the facts of this case, since defendant was in the company of other documented Sureño gang members, he participated in the offense, a firearm was used, and gang slogans were yelled during the offense. In addition, defendant and his companions had arrived in a stolen vehicle, which is a common way in which gang members try to avoid being caught.

Detective Ashe's opinion about defendant's gang membership was also based on defendant's prior associations with documented Sureño gang members: (1) a December 2010 incident in which defendant was in a vehicle with Soto, who was a documented Sureño gang member; (2) an August 2010 incident in which defendant was in a vehicle with Juan Casas, who was a documented Sureño gang member; (3) a December 2008 incident in which defendant was in a stolen vehicle with three documented Sureño gang members (Oscar Valdez, Sergio Hernandez, and Alberto Villa-Solorio); (4) an October 2008 incident in which defendant and Jesse Irango, a documented Sureño gang member, were detained during a burglary investigation; and (5) an October 2008 incident in which defendant was in a stolen vehicle with three documented Sureño gang members (Valdez, Hernandez, and Fernando Valencia).

Further, Detective Ashe had spoken with Soto after he was arrested in this case. Soto said that defendant affiliates with Varrio Mexicanos Locos (VML), a Sureño gang subset.⁵

⁵ The jury was instructed that this testimony was not offered for the truth but for purposes of assessing the expert's opinions.

Detective Ashe also believed Urbina was a Sureño gang member and a member of the VML subset. Urbina had a “VML” tattoo on his back. He had prior police contacts while associating with documented Sureño gang members, including a September 2010 incident when he was associating with Jaime Alvarez. Also, when Detective Ashe interviewed Urbina in jail, Urbina wore a lime green jumpsuit, which only active Sureño gang members wear. In addition, the facts of this case supported his opinion that Urbina was a Sureño gang member.

Detective Ashe believed that Jimenez was a Sureño gang member and a member of the Varrio Peligrosos Lokos subset. Jimenez had “ES” and “408” tattoos, both of which are common San Jose Sureño gang symbols. He also had tattoos reading “VPL,” “Varrio Peligrosos Lokos,” and “NK,” for Norteño killer. Additionally, Jimenez had a tattoo of a star with a broken tip, which Detective Ashe believed was intended to show disrespect for Norteños. Jimenez had a police contact in 2011 following a gang-related stabbing incident, during which he admitted he was a Sureño. Jimenez also had a police contact in April 2010 following a robbery investigation, during which he was in the presence of other suspected gang members. Jimenez was subsequently convicted of the robbery. In 2008, Jimenez was in a group that approached and stabbed someone, and he was also among a group that had brandished a weapon after asking the victim “if he banged.”

Detective Ashe believed that Soto was a Sureño gang member and a member of the West Side Clanton subset. Soto had “WSC” tattoos on his neck, knee, and chest. He also had three dots on his wrist. When Soto was arrested in this case, he was affiliating with a documented Sureño associate. In July 2010, Soto was associating with a documented Varrios Locos Mexicanos gang member. In 2007, Soto was in a documented Sureño gang area. During a 2004 sexual assault investigation, Soto admitted being a gang member and said that females were often initiated into gangs through violent sex acts. In 2003, Soto admitted to being “from West Side Clanton” and said he

had been jumped in by three gang members. At the time of one prior incident, Soto was wearing common Sureño gang clothing: a blue shirt and black Nike Cortez shoes.

Detective Ashe testified about three prior offenses to show that the Sureño gang had engaged in a pattern of criminal gang activity. (See § 186.22, subds. (a), (e).)

First, Edgar Loya was convicted of committing a November 2011 assault with a deadly weapon, with a gang allegation and an arming allegation. Loya had been the passenger in a vehicle that was driving in a Sureño gang area. Loya got out of the vehicle and issued a gang challenge to the victim, who had some gang tattoos. Loya attempted to stab the victim with a knife. As he fled, Loya yelled out “sur trece,” which is a common Sureño saying. In Detective Ashe’s opinion, Loya was a Sureño gang member at the time. His opinion was based on the facts of the incident, Loya’s prior documented police contacts, and his admissions about gang membership during those contacts.

Second, Eduardo Arciniega was convicted of committing assault with a deadly weapon, vandalism, and assault, with a gang allegation. In May 2010, Arciniega and a second person had approached the victim, and begun punching him. Arciniega had later used a bat to smash the window of a vehicle the victim was riding in, striking the vehicle driver in the arm. His companion had vandalized the vehicle, attempted to stab the victim, and yelled gang slogans. In Detective Ashe’s opinion, Arciniega was a Sureño gang member at the time. His opinion was based on the facts of the incident and Arciniega’s prior contacts with police, during which he had been associating with documented gang members.

Third, Carlos Herrera was convicted of a November 2007 attempted murder, with enhancements for great bodily injury and discharging a handgun proximately causing great bodily injury, and a gang allegation. Herrera and a companion had driven up to the victim and confronted him about his gang affiliation. Herrera had then shot the victim. In Detective Ashe’s opinion, Herrera was a Sureño gang member at the time. His

opinion was based on the facts of the case, Herrera's prior association with documented Sureño gang members, and Herrera's gang-related tattoos.

Given a hypothetical situation mirroring the facts of the instant case, Detective Ashe opined that the shooting would have been committed for the benefit of and in association with the Sureño gang. One factor in his opinion was that someone said, "[W]e are Sureños," and, "[W]e are from Clanton," because in gang assaults, the perpetrators will often yell gang slogans or announce their gang. Another factor was that a stolen car was involved, since gang members often use vehicles that cannot be tracked back to them and stealing vehicles is one of the primary activities of Sureño gang members. It was also significant that the four individuals participating in the crime were Sureño gang members. However, even if the shooter was not a Sureño gang member, his opinion would not change, because a person can benefit a gang without being a gang member. It was not significant that the victim was not a gang member, because his actions could have been perceived as disrespectful, "and disrespect is not tolerated by gang members." Gang members cannot allow anyone to disrespect them, or they and their gang will be perceived as weak. Gang members will resort to violence if intimidation does not work. Gang members are expected to "back up" other gang members, and thus another factor in Detective Ashe's opinion was the fact that the shooter had not been engaged in the argument.

On cross-examination, Detective Ashe acknowledged that he had attempted to gather evidence of defendant's gang membership, but that he had not found that defendant possessed any gang clothing. Police had gathered some gang indicia from defendant's residence such as writings and drawings, but Detective Ashe acknowledged that defendant's brother, a gang member, might also have lived at the residence.

C. Defense Evidence

Defendant's mother, Amelia Marcelo, testified that two of her sons—defendant's younger brothers—were gang members. One of them had even been violent to her. The

other son had gang tattoos and wore gang clothing. Defendant, by contrast, did not wear anything gang-related and had no tattoos. Marcelo did not believe defendant had ever been in a fight. Defendant had never gotten into trouble at school and had never disrespected anyone, although he had gotten into trouble for breaking into cars. She initially testified that it was out of character for defendant to have committed a violent act. However, after viewing the video of the shooting incident for the first time during trial, Marcelo testified that defendant had not told her the truth and that she thought “differently about him.”

Defendant testified on his own behalf. He had not seen the video of the shooting before his trial. He knew Soto and Urbina from his neighborhood. He knew Soto was in a gang because of his tattoos, and he admitted having friends and relatives in gangs, including the people he had been with during the prior police contacts. Defendant denied being in a gang, however. He did not have any tattoos and did not wear gang clothing.

Defendant explained that when he was booked into jail after the shooting, he said “I run with the South-Siders” because he did not want to go into the general population, where he might be confused with one of his family members and be harmed. When he had previously gone to prison for taking a vehicle, he was placed in the general population.

On the day of the shooting, defendant and Urbina had begun drinking beer in the afternoon, at around 2:00 or 3:00 p.m. At around 5:00 or 6:00 p.m., they went out, and defendant broke into some cars. He stole a stereo system and a gun. Defendant intended to sell both items.

Soto later called defendant and invited him to the El Tarasco bar, saying he was already there. Defendant and Urbina went to the bar. On the way, they picked up Jimenez, who was a friend of Urbina’s and who defendant had not previously met. They continued to drink alcohol in the car on the way. Defendant was drunk.

When defendant arrived at the bar, he had the gun in his waistband, but he had left his wallet (containing his identification) in the truck he had been driving earlier, which belonged to his mother. Defendant wanted to go into the bar to tell Soto that he had forgotten his identification. He admitted trying to gain entry into the bar by showing Estrada someone else's identification.

Defendant did not hear Soto say anything about gangs or "Clanton" during the confrontation between Soto and Estrada. When defendant saw Estrada pull "something black" out and start "whipping" it, defendant took out his gun and fired once. Even though defendant was not close to Estrada at the time, he thought Estrada was going to hit him.

When defendant shot the gun, he was not aiming at Estrada and initially did not think the shot had hit him. It was defendant's first time shooting a gun. He was not intending to help out the gang by shooting the gun. At the time, the alcohol defendant had consumed "kind of blacked [him] out."

Defendant dropped the gun when somebody jumped on him, and he ran. Defendant saw Soto getting into a car, so he got in also. Jimenez and Urbina also got into the car. Someone shot at the car twice as they drove away.

Defendant testified that he arrived and left the bar in two different stolen cars. After his arrest, he lied to the police about what had happened. Defendant admitted that he was in possession of a stolen identification and credit card at the time of his arrest. Defendant was on parole at the time of the shooting and knew that he was prohibited from possessing a gun or ammunition.

D. Prosecution Rebuttal

San Jose Police Officer Anthony Kilmer arrested defendant on March 8, 2012 and transported him to jail. At booking, defendant was asked what, if any, gang affiliation he had. Defendant replied that he was "a South-Sider," which is another term for a Sureño. Defendant confirmed that he was active and in good standing with the gang.

E. Charges, Trial, and Sentencing

Defendant was charged with attempted murder. (§§ 664, subd. (a), 187.) The information alleged that defendant committed the offense for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1203, subd. (e)(3)), and personally and intentionally discharged a firearm, which proximately caused great bodily injury (§ 12022.53, subd. (d)). The information further alleged that defendant had served a prior prison term (§ 667.5, subd. (b)).

At trial, defendant argued that he did not intend to kill Estrada and that he was not acting to benefit the Sureño gang. The jury was instructed on attempted voluntary manslaughter as a lesser included offense of attempted murder. The jury was also instructed on voluntary intoxication. The jury found defendant guilty of attempted murder, and it found true the gang, great bodily injury, and firearm allegations. The trial court found true the prior prison term allegation.

At sentencing, the trial court imposed a seven-year term for the attempted murder, a consecutive 10-year term for the gang enhancement, and a consecutive indeterminate term of 25 years to life for the section 12022.53, subdivision (d) allegation.

III. DISCUSSION

A. Sufficiency of the Evidence: Gang Allegation

Defendant contends there was insufficient evidence to support the gang allegation under *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), because the prosecution did not prove that members of the same “ongoing organization, association, or group” (§ 186.22, subd. (f)) committed the predicate offenses and the charged offense, and that the same gang benefitted from the charged offense.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is

reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*).) We presume the “existence of every fact that the trier of fact could reasonably deduce from the evidence” to support the judgment. (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Section 186.22, subdivision (f) defines a criminal street gang as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [certain enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

In *Prunty*, the Supreme Court addressed “what type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets.” (*Prunty, supra*, 62 Cal.4th at p. 67.) The court reviewed the definition of “criminal street gang” in section 186.22, subdivision (f) and determined that “where the prosecution’s case positing the existence of a single ‘criminal street gang’ . . . turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets.” (*Prunty, supra*, at p. 71.) The court decided that the statute’s reference to an “ ‘ongoing organization, association, or group’ ” is a “distinct requirement” and cannot be satisfied merely by showing “shared colors, names, and other symbols.” (*Id.* at pp. 74-75, quoting § 186.22, subd. (f).)

The *Prunty* court presented an expressly non-exclusive list of methods prosecutors can use to establish that “the ‘gang’ that the defendant sought to benefit, and the ‘gang’ that the prosecution proves to exist, are one and the same.” (*Prunty, supra*, 62 Cal.4th at p. 75.) Prosecutors might provide evidence that multiple subsets are connected by some form of hierarchy. Examples of that sort of proof include evidence that multiple subsets

each have a “ ‘ “shot caller” ’ ” who answers to a higher authority within the chain of command; engage in independent activities that benefit the same higher ranking individual or group; are governed by the same bylaws; act to protect the same territory; or conduct “independent, but harmonious, criminal operations within a discrete geographical area” (*Id.* at pp. 77-78.) Absent evidence of a hierarchy, prosecutors might provide evidence of “collaboration, unity of purpose, and shared activity” sufficient to support a finding of a single organization, association, or group. (*Id.* at p. 78.) Examples of that sort of proof includes evidence that multiple subsets: work in concert to commit a crime; profess or exhibit loyalty to one another; have fluid or shared membership among subsets; or have a “ ‘liaison’ ” who coordinates relations between subsets. (*Ibid.*) “Even evidence of more informal associations, such as proof that members of two gang subsets ‘hang out together’ and ‘back up each other,’ can help demonstrate that the subsets’ members have exchanged strategic information or otherwise taken part in the kinds of common activities that imply the existence of a genuinely shared venture. [Citations.]” (*Ibid.*) Finally, prosecutors can demonstrate that multiple subsets “manifest specific behavior” that suggests a shared identification with a single group. (*Id.* at p. 79.) Examples of that sort of proof include evidence that: “a certain Norteño subset retaliates against a Sureño gang for affronts that gang has committed against other Norteño subsets;” or multiple subsets within a geographic area require prospective members to perform the same initiation activities. (*Ibid.*)

In *Prunty* itself, the evidence showed that the defendant identified as a Norteño and claimed membership in a Norteño subset, the Detroit Boulevard Norteños. (*Prunty*, *supra*, 62 Cal.4th at pp. 67-68.) Accompanied by a member of a different subset, the Varrio Franklin Boulevard Norteños, the defendant shot at a suspected Sureño gang member. (*Id.* at p. 68.) At trial, the prosecutor sought to prove that the defendant committed the charged crimes to benefit the Norteño gang. (*Id.* at p. 69.) A gang expert testified that the Norteños were a Hispanic street gang that shared common symbols and

was associated with the Nuestra Familia prison gang, and that their rivals were the Sureños. (*Ibid.*) The gang expert testified about predicate offenses committed by members of two subsets: the Varrio Gardenland Norteños and the Varrio Centro Norteños. (*Ibid.*) One predicate offense involved a confrontation between two Norteño subsets, and the other involved the shooting of a former Norteño gang member. (*Ibid.*) The prosecution did not introduce specific evidence that either of the two the subsets identified with a larger Norteño group, nor any evidence that those subsets shared a connection with each other or with any other Norteño-identified subset. (*Ibid.*) Since the evidence failed to prove any organizational connection between the Norteño gang and the subsets whose members had committed the predicate offenses, there was insufficient evidence to support the gang enhancement. (*Id.* at p. 81.)

In contrast to *Prunty*, here the prosecution presented three predicate offenses committed by Sureño gang members, not members of particular subsets. The prosecution's theory was that the shooting was committed in association with and for the benefit of the Sureño gang. The gang expert testified that defendant was a Sureño gang member. He testified that Urbina was a Sureño gang member *and* a member of the VML subset, that that Jimenez was a Sureño gang member *and* a member of the Varrio Peligrosos Lokos subset, and that Soto was a Sureño gang member *and* a member of the West Side Clanton subset. The gang expert testified that all San Jose area Sureño subsets "show their allegiance" to the "[u]mbrella" Sureño gang and share common signs and symbols. He testified that San Jose area Sureño gangs engaged in the same primary activities. He testified that members of San Jose area Sureño subsets are "Sureños first and then subset second." Thus, the evidence in this case did not turn on a finding of an organizational connection between the Sureño gang and any subsets. Further, even though there was evidence that defendant associated with a particular subset and evidence that Urbina, Jimenez, and Soto were (in addition to being Sureño gang members) members of three different subsets, the evidence established there was "collaboration,

unity of purpose, and shared activity” among those subsets sufficient to support a finding of a single organization, association, or group. The charged offense showed that members of those subsets worked in concert to commit a crime, exhibited loyalty to one another, hung out together, and backed up each other. (See *Prunty, supra*, 62 Cal.4th at p. 78.)

In sum, after reviewing the entire record in the light most favorable to the judgment, we conclude there is substantial evidence to support the jury’s finding that the Sureño gang met the definition of criminal street gang in section 186.22, subdivision (f).

B. Specific Intent Instruction

Defendant contends that when the trial court instructed the jury on specific intent pursuant to CALCRIM No. 251, it made modifications that rendered the instruction confusing and contradictory, violating his rights under the Sixth and Fourteenth Amendments to the federal Constitution.

As given, CALCRIM No. 251 provided: “The crime charged in Count 1, attempted murder, and the lesser included offense of attempted voluntary manslaughter require proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of these crimes[,] that person must not only commit the prohibited acts but must do so with wrongful intent. *A person acts with wrongful intent when he or she intentionally does a prohibited act. However, it is not required that he or she intend to break the law.* The act required is explained in the instruction for that crime. [¶] The specific intent required for the crime of attempted murder and attempted voluntary manslaughter is the intent to kill.” (Italics added.)

Defendant claims the above instruction was erroneous in three respects. First, the italicized language above was taken from the general intent instruction, CALCRIM No. 250. Second, the trial court failed to include the following language from the standard CALCRIM No. 251 instruction: “The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime [or allegation].”

Third, the instruction did not include a reference to the gang allegation, which requires “the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

When an appellate court reviews a potentially misleading or confusing instruction for federal constitutional error, the relevant inquiry is “ ‘whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.’ [Citations.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1202 (*Young*).) “ ‘ ‘ ‘ “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” ’ ’ ’ [Citations.]” (*Ibid.*) Counsel’s arguments are also relevant to the determination. (*People v. Garceau* (1993) 6 Cal.4th 140, 189, disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) We must also assume that jurors are intelligent people who are capable of understanding, correlating, and following all instructions. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095.)

As the Attorney General acknowledges, there was “no reason” for the trial court to import language from the general intent instruction into CALCRIM No. 251, since attempted murder and attempted voluntary manslaughter are both specific intent crimes. Thus, as given, the modified instruction was potentially confusing. However, any confusion was cleared up by that instruction’s express statement that the specific intent required for both crimes was “the intent to kill.” Moreover, there is no reasonable likelihood that the jury would be misled into believing that it could convict defendant of those crimes without finding he had the specific intent to kill Estrada, because the instructions defining both crimes told the jury that both crimes required an intent to kill. (See CALCRIM Nos. 600, 604.)⁶ Further, the prosecutor told the jury that in order to

⁶ CALCRIM No. 600 told the jury that one element of attempted murder is “the defendant intended to kill [the victim].” CALCRIM No. 604 told the jury that in order to (continued)

convict defendant of attempted murder, it had to find that defendant “intended to kill.” He also argued that an element of attempted voluntary manslaughter was that “[h]e intended to kill when he acted.” Defendant’s trial counsel identified the primary issue that the jury had to decide as whether defendant intended to kill Estrada, and she told the jury that if defendant did not intend to kill, he should be found not guilty. Thus, when the instructions are “taken as a whole and in context,” they adequately informed the jury that it had to find defendant had the specific intent to kill in order to convict defendant of attempted murder or attempted voluntary manslaughter. (See *People v. Smithey* (1999) 20 Cal.4th 936, 964.)

Contrary to defendant’s claim, the trial court’s failure to reference the gang allegation in CALCRIM No. 251 did not permit the jury to find that allegation true without finding that defendant had “the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) The jury was instructed on the gang allegation pursuant to CALCRIM No. 1401, which told the jury that a true finding required the prosecution to prove that “the defendant intended to assist, further, or promote criminal conduct by gang members.” None of the instructions permitted the jury to find the gang allegation true without a finding that defendant had the required specific intent. Defendant’s reliance on *People v. Nunez and Satele* (2013) 57 Cal.4th 1 is therefore misplaced, because in that case, the trial court erroneously instructed the jury on “the elements of the gang *crime* (§ 186.22, subd. (a)),” which did not require a finding of specific intent, when the defendants were actually charged with “the gang *enhancement* (§ 186.22(b)(1)).” (*Id.* at p. 36.) Further, in our case, the prosecutor argued that defendant acted with the “intent to assist, further, or promote conduct by gang members”

find that the defendant acted in self-defense, such that he was guilty of attempted voluntary manslaughter instead of attempted murder, the jury had to find five elements, which included “[t]he defendant intended to kill when he acted.”

and defendant's trial counsel specified that in determining whether the gang allegation was true, the jury had to determine whether defendant "intend[ed] to promote the gang."

In light of all the instructions given and the arguments of counsel, there was no " 'reasonable likelihood that the jury misunderstood and misapplied' " the modified specific intent instruction. (*Young, supra*, 34 Cal.4th at p. 1202.)

C. Attempted Murder and Attempted Voluntary Manslaughter Instructions

Defendant contends the trial court made "four interrelated errors" when instructing the jury on attempted murder pursuant to CALCRIM No. 600, on attempted voluntary manslaughter pursuant to CALCRIM No. 604, and on the order of deliberations. Defendant contends that if any of his claims were forfeited by his trial counsel's failure to correct the instructions below, he received ineffective assistance of counsel.

As given, CALCRIM No. 600 provided: "The defendant is charged in Count 1 with attempted murder. To prove that the defendant is guilty of attempted murder the People must prove that, number one, the defendant took at least one direct but ineffective step towards killing another person and, two, the defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill as [*sic*]. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so the plan would have been completed if some circumstances outside the plan had not interrupted that attempt."

As given, CALCRIM No. 604 provided: "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill a person because he acted in imperfect self-defense. If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. [¶] The difference between complete self-defense

and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable. The defendant acted in imperfect self-defense if, number one, the defendant took at least one direct but ineffective step toward killing a person. Number two. The defendant intended to kill when he acted. Three. The defendant believed that he was in imminent danger of being killed or suffering great bodily injury. And, four, the defendant believed that the immediate use of deadly force was necessary to defend against that danger, but, five, at least one of the defendant's beliefs was unreasonable. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. Belief in future harm is not sufficient no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of death or great bodily injury to himself. In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder."

Just before deliberations, the trial court gave the jury instructions regarding the verdict forms. The jury was instructed that it should "only get to" the lesser included offense of attempted voluntary manslaughter if it found defendant not guilty of attempted murder.

1. Failure to Include Imperfect Self-Defense in CALCRIM No. 600

Defendant first contends the trial court erroneously failed to tell the jury that "the absence of imperfect self-defense was an element of attempted murder." Although defendant now argues that CALCRIM No. 600 presented an "incomplete set of elements" of attempted murder, defendant did not object to CALCRIM No. 600 as given. " 'A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an

otherwise correct instruction forfeits the claim of error for purposes of appeal. . . .’ [Citation.]” (*People v. Jackson* (2016) 1 Cal.5th 269, 336 (*Jackson*)). As the elements of attempted murder do not include the absence of imperfect self-defense (see *People v. Martinez* (2003) 31 Cal.4th 673, 685), CALCRIM No. 600 correctly stated the elements of that offense, and trial counsel had a duty to request that instruction be clarified in order for defendant to raise this claim on appeal.

Defendant also fails to establish that his trial counsel was ineffective for failing to request a clarification of the instruction. To establish ineffectiveness, defendant must show his counsel’s representation fell below an objective standard of reasonableness and a reasonable probability that, but for counsel’s deficient performance, the result of the trial would have been different. (See *Strickland v. Washington* (1984) 466 U.S. 668, 686-687 (*Strickland*)). Defendant has cited no case supporting his claim that the trial court should have included language about imperfect self-defense in CALCRIM No. 600, in addition to instructing the jury on imperfect self-defense pursuant to CALCRIM No. 604. Particularly since the trial court told the jury to “[p]ay careful attention to all of these instructions and consider them together,” a modification to CALCRIM No. 600 was not necessary in order for the jury to understand that imperfect self-defense would reduce an attempted murder to attempted voluntary manslaughter. Thus, defendant has shown neither deficient performance nor prejudice.

2. Acquittal-First Instruction

Defendant’s second claim is that the trial court erroneously told the jury it could not consider attempted voluntary manslaughter unless it first acquitted defendant of attempted murder. Defendant contends that by telling the jury it should “only get to” attempted voluntary manslaughter if it found defendant not guilty of attempted murder, the trial court violated the rule set forth in *People v. Kurtzman* (1988) 46 Cal.3d 322 (*Kurtzman*). In *Kurtzman*, the court reaffirmed that when a jury has been instructed on a lesser included offense, it must acquit a defendant of the greater offense before returning

a verdict on the lesser offense. (*Id.* at p. 330.) The court also explained that the trial court should not instruct a jury “not to deliberate on” or “consider” a lesser included offense before returning a verdict on a greater offense. (*Id.* at p. 335.)

Contrary to defendant’s claim, the trial court’s instructions in this case did not violate *Kurtzman*. The jury was expressly told to “[p]ay careful attention to all of these instructions and consider them together” (CALCRIM No. 200), and nothing in the instructions prohibited the jury from deliberating on or considering attempted voluntary manslaughter before deciding what verdict to return on the attempted murder charge. By telling the jury it should not “get to” attempted voluntary manslaughter unless it found defendant not guilty of attempted murder, the trial court only precluded the jury from returning a verdict on the lesser offense before returning a verdict on the greater offense. This was proper under *Kurtzman*.

3. Failure to Instruct on Imperfect Defense of Another

Defendant’s third claim is that the trial court erroneously failed to tell the jury that imperfect defense of another could reduce attempted murder to attempted voluntary manslaughter.

“[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence.” (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*)). This standard is not met by “the existence of ‘any evidence, no matter how weak.’ ” (*Ibid.*) Rather, “such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.]” (*Ibid.*) The trial court’s duty to instruct on all lesser included offense theories supported by substantial evidence exists even when a particular theory does not “conform to the defense actually presented.” (*Id.* at pp. 161-162.)

To merit an instruction on imperfect defense of others as a theory of attempted voluntary manslaughter, there must be substantial evidence that the defendant acted “in

the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury.” (See *People v. Randle* (2005) 35 Cal.4th 987, 997, overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

Here, the evidence established that Soto initiated the physical confrontation with Estrada, who pushed back. When Urbina joined Soto in hitting Estrada, Estrada took out his baton. Defendant testified that he shot at Estrada after he saw Estrada pull “something black” out and start “whipping” it. Based on this evidence, we will assume that a reasonable jury could conclude that defendant shot Estrada in the actual but unreasonable belief that he had to defend Soto and/or Urbina from imminent danger of great bodily injury. (See *Breverman, supra*, 19 Cal.4th at p. 162.) Thus, we will assume the trial court erred by failing to instruct the jury on unreasonable defense of others as an alternative theory of attempted voluntary manslaughter.

However, the error was harmless. Failure to instruct on a theory of a lesser included offense does not require reversal “unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. [Citations.]” (*Breverman, supra*, 19 Cal.4th at p. 165; see *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) There was no direct evidence that defendant subjectively believed either Soto or Urbina was in imminent danger of death or great bodily injury. In fact, defendant’s own testimony negated the possibility of such a defense: defendant testified that he believed *he* was in danger of being hit and that he was not intending to help out the gang by shooting the gun. Moreover, the circumstantial evidence supporting imperfect defense of others was weak, consisting only of the fact that defendant shot Estrada while Estrada was defending himself against Soto and Urbina. There was much stronger evidence that defendant shot at Estrada for a gang-related purpose. Soto initiated the assault on Estrada while referencing the fact that the group was Sureños, and even though Estrada said he did not want any trouble, Urbina began assaulting Estrada. Defendant shot as Estrada was trying to retreat, and defendant and the others then fled in a stolen car. On this

record, there is no reasonable probability that defendant would have obtained a more favorable result had the trial court included imperfect defense of others in the instruction on attempted voluntary manslaughter. (See *Breverman, supra*, 19 Cal.4th at p. 165; *Watson, supra*, 46 Cal.2d at p. 836.)

4. Failure to Define Reasonable/Unreasonable Belief

Defendant's final claim with respect to the attempted murder and attempted voluntary manslaughter instructions is that the trial court failed to explain how the jury was to determine whether defendant had a "reasonable" or "unreasonable" belief for purposes of CALCRIM No. 604, the instruction on attempted voluntary manslaughter. He claims the trial court should have instructed the jury with a portion of the perfect self-defense instruction, which would have told the jury: "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed." (CALCRIM No. 505.)

Defendant's failure to request this revision to the attempted voluntary manslaughter instruction forfeits the issue for appeal (see *Jackson, supra*, 1 Cal.5th at p. 336) and defendant fails to establish that his trial counsel was ineffective for failing to request such a revision to the standard instruction. The terms "reasonable" and "unreasonable" are commonly understood terms with no technical legal meaning. "[A] trial court is not required to instruct on the meaning of a commonly understood term and does not err in refusing a requested instruction which attempts to define such a word or phrase. [Citation.]" (*People v. Forbes* (1996) 42 Cal.App.4th 599, 606.)

D. Defense of Others Instruction

Defendant contends the trial court erred by failing to give the jury an instruction on perfect defense of others. He argues the trial court had a sua sponte duty to give such an instruction because there was substantial evidence that defendant acted in defense of

another and that defense was not inconsistent with his theory of the case. (See *Breverman, supra*, 19 Cal.4th at p. 157.) Defendant alternatively contends that his trial counsel was ineffective for not requesting such an instruction.

For perfect defense of others, the defendant must actually and *reasonably* believe that someone else is in imminent danger of being killed or suffering great bodily injury and that the immediate use of deadly force is necessary to defend against that danger. The defendant must also use no more force than was reasonably necessary to defend against that danger. (See CALCRIM No. 505.) Here, there was no substantial evidence to support such an instruction, because at the time of the shooting, defendant could not have held a reasonable belief in the need to defend Soto or Urbina from a danger of death or great bodily injury. Soto had initiated the assault on Estrada, and even though Estrada said he did not want any trouble, Urbina had jumped in and continued the assault. Defendant shot at Estrada when Estrada was trying to retreat from Urbina. On this record, any subjective belief in the need to use deadly force against Estrada was not reasonable. Thus, the trial court did not err by failing to give a perfect defense of others instruction, and defendant's trial counsel was not ineffective for failing to request such an instruction.

E. Ineffective Assistance of Counsel: Failure to Use Video Evidence

Defendant contends his trial counsel was ineffective by failing to introduce certain exculpatory evidence shown in the surveillance video and use the video to prepare the defense case.

As noted above, to establish ineffectiveness, defendant must show his counsel's representation fell below an objective standard of reasonableness and a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (See *Strickland, supra*, 466 U.S. at pp. 686-687.)

Defendant first contends that effective counsel would have used the video to impeach Estrada's testimony, "They're"—meaning more than one person—"beating me

up,” and, likewise, to impeach Detective Ashe’s testimony that Estrada had been attacked by “multiple individuals.” As defendant points out, the video shows that Soto and Urbina did not hit Estrada at the same time. However, neither Estrada nor Detective Ashe expressly testified that Soto and Urbina hit Estrada at the same time. Moreover, the jurors were shown the surveillance video and were well-equipped to determine what, exactly, occurred prior to the shooting. Even played at normal speed, the video clearly shows that Soto and Urbina did not hit Estrada at the same time. Defendant has not shown deficient performance by his trial counsel for failing to use the video to impeach either witness on this specific point.

Defendant next contends that effective counsel would have used the video to refresh defendant’s own recollection prior to and during trial, and to prepare defendant’s mother prior to trial. “In the usual case, where counsel’s trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel’s acts or omissions. [Citations.]” (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) Here, as the Attorney General suggests, there were conceivable reasons for defendant’s trial counsel to have not reviewed the video with defendant or his mother prior to trial. As to defendant, the record indicates that defendant’s trial counsel decided to focus defendant’s testimony on what he recalled and what he was thinking at the time of the shooting, rather than on the video, because his own recollection better supported the defenses of voluntary intoxication and imperfect self-defense. During closing argument, the prosecutor even emphasized this strategy to the jury, reminding the jurors that she had asked defendant only to testify about what he remembered, and to not “worry about what’s on the video.” As to defendant’s mother, trial counsel could reasonably have decided that she might decline to be a character witness if she had seen the video prior to trial.

Defendant also contends that effective trial counsel would have used the video as the basis for requesting instructions on defense of others and also during argument to the jury, to assert that defendant stepped forward to shoot Estrada in response to seeing Estrada hit Urbina with the baton. However, the record strongly suggests a tactical reason for trial counsel's failure to make such arguments to the trial court or the jury: the evidence that defendant shot Estrada in a belief he needed to defend Urbina against imminent bodily injury was weak and contradicted by defendant's own testimony. Since defendant himself had testified only that he believed *he* was in danger of being hit, not that he believed Urbina was in danger, trial counsel could reasonably conclude an argument about imperfect defense of others was inconsistent with the evidence.

Finally, defendant contends that effective trial counsel would have used the video to show that some members of defendant's group had "made movements to leave" before the altercation, that defendant showed signs of being intoxicated, and that although defendant had forgotten certain facts (such as the presence of Cristoval), those facts were helpful to his case. But the fact that some members of defendant's group appeared ready to leave before the altercation had little if any relevance to defendant's subsequent decision to take out his gun and shoot Estrada. Defendant fails to explain how the video shows that he or anyone else was intoxicated, and after reviewing the video, we see nothing to confirm defendant's claim of intoxication. And although defendant was unable to recall some minor facts when he testified, as we have already explained, his trial counsel appears to have made a reasonable tactical choice to focus defendant's testimony on what he recalled and what he was thinking at the time of the shooting.

In sum, defendant has not established his trial counsel was ineffective for failing to make better use of the surveillance video.

F. Voluntary Intoxication Instruction

Defendant contends the trial court erred by instructing the jury that evidence of voluntary intoxication could only be considered in determining whether he had an intent

to kill. Defendant contends the jury should have been instructed it could also consider evidence of voluntary intoxication in determining whether he acted with an actual belief in the need to use force in self-defense or defense of another, and in determining whether he had the specific intent necessary for the gang allegation. In addition to claiming that the trial court had a sua sponte duty to expand the instruction on voluntary intoxication, defendant contends his trial counsel was ineffective for not requesting a more comprehensive instruction.

The jury was instructed on voluntary intoxication pursuant to CALCRIM No. 625 as follows: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill. A person is []voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect. You may not consider evidence of voluntary intoxication for any other purpose.”

1. Forfeiture

The Attorney General contends defendant forfeited this claim by failing to object to CALCRIM No. 625 in the trial court. The Attorney General cites to *People v. Verdugo* (2010) 50 Cal.4th 263 (*Verdugo*), where the court found it was “well settled that ‘[a]n instruction on the significance of voluntary intoxication is a “pinpoint” instruction that the trial court is not required to give unless requested by the defendant.’ [Citations.]” (*Id.* at p. 295.) Defendant asserts that no objection was needed because his claim is that the instruction, as given, was legally incorrect. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1015 (*Castillo*) [“Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly.”].)

We agree with defendant that his claim was not forfeited. Defendant’s claim is similar to the claim made in *Castillo*: that the instruction given to the jury improperly

limited the issues on which the jury could consider evidence of voluntary intoxication. *Verdugo* involved the trial court's failure to give *any* instruction on voluntary intoxication. Moreover, we would need to consider the merits of the instructional issue in addressing defendant's alternative claim that his trial counsel was ineffective for failing to object.

2. Analysis

In his opening brief, defendant relies on *People v. Cameron* (1994) 30 Cal.App.4th 591 (*Cameron*) for the proposition that evidence of voluntary intoxication may support imperfect self-defense. In *Cameron*, the court noted that voluntary intoxication may "provid[e] a reason to account for the defendant's objectively unreasonable belief." (*Id.* at p. 601.)

The Attorney General notes that *Cameron* relied on *People v. Whitfield* (1994) 7 Cal.4th 437 (*Whitfield*), which had held that voluntary intoxication can negate both express and implied malice. *Whitfield* had based its holding on former section 22, which was amended in response to *Whitfield*. (See Stats. 1995, ch. 793, § 1.) After the amendment to former section 22 (now section 29.4), evidence of voluntary intoxication is no longer admissible on the issue of implied malice.⁷ (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1126 (*Mendoza*); Stats. 2012, ch. 162, § 119.)

In *People v. Soto* (2016) 248 Cal.App.4th 884, review granted Oct. 12, 2016, S236164, a different panel of this court held that CALCRIM No. 625 improperly precluded the jury from considering voluntary intoxication with respect to the defendant's claim of imperfect self-defense. The California Supreme Court has granted review to consider that issue.

⁷ Section 29.4, subdivision (b) provides: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."

We will assume, *arguendo*, the trial court should have instructed the jury that evidence of defendant's voluntary intoxication could be considered when assessing whether he actually but unreasonably believed in the need to use deadly force to defend against an imminent danger of being killed or suffering great bodily injury, and when assessing whether he acted in imperfect defense of others. We proceed to consider whether the assumed error was prejudicial.

Defendant contends the assumed error violated his Sixth Amendment right to present a complete defense and his Fourteenth Amendment right to due process. However, the California Supreme Court has held that an instructional error that limits the jury's consideration of voluntary intoxication evidence "is thus subject to the usual standard for state law error," under which " 'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' [Citation.]" (*Mendoza, supra*, 18 Cal.4th at pp. 1134-1135; see also *Watson, supra*, 46 Cal.2d at p. 836.)

On this record, we find no reasonable probability that defendant would have obtained a more favorable result had the voluntary intoxication instruction permitted the jury to consider evidence of voluntary intoxication when determining whether defendant acted in imperfect self-defense or defense of others. (See *Watson, supra*, 46 Cal.2d at p. 836.) The evidence that defendant shot Estrada in defense of others was very weak, and it was contradicted by defendant's own testimony that he believed *he* was in danger of being hit and that he was not intending to help out the gang by shooting the gun. The evidence that defendant acted in self-defense was also weak, consisting only of defendant's own testimony that he thought Estrada was going to hit him. That testimony was not credible because at the time of the shooting defendant was not close to Estrada and Estrada was backing away as he was being attacked by Soto and Urbina. Moreover, defendant's assertion about acting in self-defense was contradicted by his testimony that the alcohol he had consumed "kind of blacked [him] out." Defendant's testimony was

further contradictory in that he claimed he shot Estrada because he believed he was going to be hit, but he also claimed he was not aiming at Estrada. By admitting he was not aiming at Estrada, defendant undermined any claim that he subjectively believed he needed to use force against Estrada to prevent against an imminent assault or to prevent Estrada from causing death or great bodily injury to one of the coparticipants. Additionally, as explained above, there was very strong evidence that defendant shot Estrada for gang purposes, rather than because he believed he needed to shoot in self-defense or defense of another. Thus, any error was harmless.

G. Admission of Soto's "Clanton" Statements

Defendant contends the trial court erred by admitting Soto's statements: "We're from Clanton," "We're Surenos," and "We're going to fuck you up." Defendant contends the statements were hearsay and that the trial court erroneously admitted them under the hearsay exceptions for coconspirator statements and adoptive admissions.

1. Proceedings Below

Defendant's motions in limine included a motion to "[e]xclude all statements by co-defendants present at the incident that they were gang members or associated with a gang (ie. 'Surenos' or 'from Clanton')." Defendant specified that the grounds for his motion included hearsay and Evidence Code section 352.

During the hearing on motions in limine, the prosecutor argued that the statements were admissible under three hearsay exceptions: co-conspirator statements (Evid. Code, § 1223);⁸ contemporaneous statements (Evid. Code, § 1241);⁹ and existing mental state (Evid. Code, § 1250).¹⁰

⁸ Evidence Code section 1223 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the

The trial court provisionally found that the requirements for the co-conspirator exception were met but indicated that it would reconsider the issue if the defense objected when the statements were introduced.

When Estrada testified about Soto's statements, defendant raised a hearsay objection. The prosecutor reiterated his prior arguments that the statements were admissible as co-conspirator statements or as contemporaneous statements, and he further argued the statements qualified as adoptive admissions (See Evid. Code, § 1221).¹¹ The trial court found that the requirements for the co-conspirator exception had been met and overruled defendant's objection.

The prosecutor referenced Soto's statements during Detective Ashe's testimony, noting that no other participant had "spoke[n] up and said no, we are not Sureños. No, we are not Clanton." The prosecutor asked Detective Ashe whether that lack of response affected his opinion and conclusion about defendant's gang membership. Detective Ashe noted that he had never seen a gang case where a coparticipant said, "[N]o, no, but I'm from something else." The fact that Soto had claimed a specific Sureño gang subset

facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

⁹ Evidence Code section 1241 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and [¶] (b) Was made while the declarant was engaged in such conduct."

¹⁰ Evidence Code section 1250, subdivision (a) specifies that if made under circumstances indicating trustworthiness, "evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

¹¹ Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

before the assault helped him conclude that defendant was a Sureño gang member. It was not common for a gang member to “anoint others as members of the same gang without it being true or accurate.”

Over defendant’s objection, the trial court instructed the jury on adoptive admissions (CALCRIM No. 357),¹² uncharged conspiracy (CALCRIM No. 416),¹³ and co-conspirator statements (CALCRIM No. 418).¹⁴

During argument to the jury, the prosecutor reminded the jury about Soto’s statements and asserted that defendant, Jimenez, and Urbina were “all there” when the statements were made. The prosecutor argued, “[H]e’s claiming his gang membership for himself and his associates.” The prosecutor referenced the instruction on adoptive admissions and told the jury, “[T]he law says that you can consider that as an adoptive admission if you didn’t get up and say excuse me, sir, no you’re wrong. . . .” The prosecutor also argued that the jury could consider Soto’s statements because they were made during a conspiracy, even though no conspiracy was charged.

¹² CALCRIM No. 357 explained that the jury could find defendant had admitted a statement was true if (1) the statement was made to the defendant or made in his presence, (2) defendant heard and understood the statement, (3) defendant would “under all of the circumstances naturally have denied the statement if he thought it was not true,” and (4) defendant “could have denied it but did not.” The instruction explained that the jury could not consider the statement if it found that any of the requirements had not been met.

¹³ CALCRIM No. 416 explained the elements of a conspiracy, identified assault as the target crime of the uncharged conspiracy, and identified the overt acts as “[m]aking statements to Luis Estrada, grabbing Luis Estrada, pointing to Luis Estrada, and kicking and punching Luis Estrada.”

¹⁴ CALCRIM No. 418 told the jury it could not consider any out-of-court statement made by Soto unless (1) there was other evidence establishing a conspiracy; (2) the statement was made while Soto, Urbina, Jimenez, and defendant were members of and participating in the conspiracy; (3) Soto made the statement in order to further the goal of the conspiracy; and (4) the statement was made before or during the time that defendant was participating in the conspiracy.

2. Analysis

On appeal, we review the trial court's rulings on the admissibility of evidence under the deferential abuse of discretion standard of review. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725 (*Waidla*).)

The Attorney General first asserts that Soto's statements were admissible to show Soto's state of mind pursuant to Evidence Code section 1250. However, "an essential requirement of Evidence Code section 1250" is that "the declarant's mental state be factually relevant; that is, that [the declarant's mental state] be, in the words of the statute, 'itself an issue in the action.' " (*People v. Noguera* (1992) 4 Cal.4th 599, 621.) The Attorney General does not explain how Soto's state of mind was relevant to the issues at defendant's trial.

The Attorney General next argues that Soto's statements were admissible under both the coconspirator exception (Evid. Code, § 1223) and as adoptive admissions (Evid. Code, § 1221). We begin by considering whether the trial court could find that Soto's statements were adoptive admissions.

"In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence sufficient to sustain a finding that: (a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 535 (*Davis*).)

In arguing that Soto's statements did not qualify as adoptive admissions, defendant relies heavily on Detective Ashe's testimony. As noted above, Detective Ashe testified that he had never seen a gang case where, after one person made a statement claiming the group belonged to a certain gang, a coparticipant had said, "[N]o, no, but I'm from something else." According to defendant, since "no one would deny such a statement," the statement did not qualify as an adoptive admission.

Defendant's reliance on Detective Ashe's testimony is misplaced, for several reasons. First, Detective Ashe did not testify that "no one would deny such a statement." He testified only that he had not encountered a gang case in which someone had disclaimed gang membership after a coparticipant claimed the group was from a particular gang. Second, Detective Ashe gave the cited testimony in the context of questions aimed at eliciting an opinion about whether defendant was a gang member; he was not giving an opinion about whether the requirements of Evidence Code section 1221 were met, and no expert testimony was necessary for the trial court to determine the admissibility of Soto's statements. Third, Detective Ashe had not yet given the cited testimony at the time the trial court ruled on the admissibility of Soto's statements, and we "review the correctness of the trial court's ruling at the time it was made, . . . not by reference to evidence produced at a later date. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 739.)

Defendant also asserts there were "stark inconsistencies" about whether Soto made the gang statements, and if so, whether the statements were loud enough for defendant to hear. He points out that Cristoval denied hearing anyone threaten Estrada. However, Estrada testified that Soto was "yelling things", and the video makes it clear that defendant was well within earshot when Soto made the statements.

We find no abuse of discretion in the trial court's determination that Soto's statements qualified as adoptive admissions under Evidence Code section 1221. Based on the evidence presented at the time Soto's statements were admitted, the trial court could reasonably find that defendant had "heard and understood the statement[s] under circumstances that normally would call for a response" and that he "adopted the statement[s] as true" (*Davis, supra*, 36 Cal.4th at p. 535) because "the circumstances offered him the opportunity to deny responsibility or otherwise dissociate himself from the crime," but he did not do so (*id.* at p. 539). Defendant could have left the scene when Soto made the statements. Defendant could have denied that he was in a gang or

attempted to calm Soto down. Because defendant instead remained with the group and said nothing after Soto claimed they were Sureño gang members “from Clanton”, the trial court reasonably determined that defendant adopted those statements as true.¹⁵

H. Ineffective Assistance of Counsel: Failure to Object to Booking Statement

Defendant contends his trial counsel was ineffective for failing to seek exclusion of his booking statement (in which he admitted being a gang member) for all purposes. Although his trial counsel successfully argued that the booking statement should not be admitted during the prosecution’s case-in-chief, she elicited the booking statement during defendant’s testimony, and one of the gang expert witnesses later testified about the booking statement.

1. Proceedings Below

Defendant’s motions in limine included a motion to “[e]xclude defendant’s statement to correctional deputies during the booking process that he is an active ‘southsider’ and is still in good standing.” Defendant’s trial counsel informed the trial court that defendant had not been given the *Miranda* warnings¹⁶ and that under a recent appellate case, defendant’s statement was inadmissible in the prosecution’s case in chief. The prosecutor indicated he was not going to introduce defendant’s statement during his case-in-chief.

As noted above, defendant’s trial counsel elicited his booking statements during the defense case: defendant testified that when he was booked into jail, he claimed to

¹⁵ Because we have concluded the trial court did not err by admitting Soto’s statements as adoptive admissions, we need not reach defendant’s arguments that (1) the statements were not admissible as statements of a coconspirator; (2) the prosecutor committed misconduct by telling the jury that it could consider Soto’s statements as adoptive admissions; and (3) the prosecution’s efforts to admit the Soto statements resulted in a due process violation.

¹⁶ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

“run with the South-Siders” because he did not want to go into the general population. The prosecution’s rebuttal witness, Officer Kilmer, then testified about defendant’s statement, adding that defendant had confirmed he was active and in good standing with the gang.

2. Analysis

In *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), an opinion issued after defendant’s trial, the California Supreme Court held that classification interviews that take place while a defendant is booked into jail constitute custodial interrogation for purposes of *Miranda*. (*Elizalde, supra*, at pp. 527, 530-540.) The court further held that a defendant’s un-*Mirandized* responses to questions about gang affiliation during a classification interview are not within the public safety exception to the definition of custodial interrogation under *Miranda*. (*Elizalde, supra*, at pp. 540-541.) Thus, a defendant’s answers to “unadmonished gang questions” posed during the booking process are inadmissible in the prosecution’s case-in-chief. (*Id.* at p. 541.) The *Elizalde* court specifically declined to consider “under what circumstances such statements might be used to impeach a testifying defendant” and expressed “no views on that matter.” (*Id.* at p. 532, fn. 6; see *Harris v. New York* (1971) 401 U.S. 222, 226 [defendant’s credibility “was appropriately impeached” by use of statements given without *Miranda* warnings].)

Defendant contends his trial counsel was ineffective for failing to argue that the booking statement was involuntary and thus inadmissible for all purposes, including impeachment. (See *Michigan v. Harvey* (1990) 494 U.S. 344, 351 [involuntary statements are inadmissible “for *all* purposes”].) Defendant contends his booking statement was rendered involuntary because he faced a “threat of physical harm from remaining silent,” in that he would be hurt by other jail inmates if he was not properly classified.

“The test for determining whether a confession is voluntary is whether the defendant’s ‘will was overborne at the time he confessed.’ [Citation.]” (*People v. Maury*

(2003) 30 Cal.4th 342, 404.) “A statement is involuntary when ‘among other circumstances, it “was ‘ “extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight” ’ ” [Citations.]’ ” (*People v. Jablonski* (2006) 37 Cal.4th 774, 813-814.) “ ‘Coercive police activity is a necessary predicate’ ” of involuntariness and must be “ ‘the “proximate cause” of the statement in question.” ’ ” (*Id.* at p. 814.)

Here, nothing in the record shows that defendant’s booking statement was extracted by any threats or obtained by any promises. No coercive police activity was the proximate cause of the statement. Thus, defendant’s statement was not involuntary, and his trial counsel was not ineffective for failing to seek its exclusion for all purposes.

I. Ineffective Assistance of Counsel: Failure to Object to Gang Expert Opinion

Defendant contends his trial counsel was ineffective for failing to object to the gang expert’s opinions about the elements of the gang enhancement and to the expert’s opinion that defendant had attempted to shoot multiple times, because these were matters that did not require expert opinion.

1. Gang Opinions

The prosecution’s motions in limine included a motion arguing that the gang expert should be permitted to give certain opinions, including an opinion about whether the offense was committed for the benefit of, at the direction of, or in association with a gang.

Defendant filed a motion to exclude or limit gang expert testimony. In that motion, he argued that the gang expert should not be permitted to render an opinion about defendant’s knowledge or specific intent.

When Detective Ashe was testifying, the prosecution asked him to explain how defendant’s conduct during the incident helped lead to his conclusion that defendant was a Sureño gang member. Detective Ashe explained that the incident involved “an

overwhelming show of force” by “multiple individuals” against one victim, who all moved towards the victim in a “very calm, cool, and collected” manner. Also, defendant concealed his weapon, consistent with how gang members typically carry weapons. The trial court sustained a defense objection to the prosecutor’s question and Detective Ashe’s response, ordering the jury to disregard both.

Detective Ashe later gave a number of opinions in response to a hypothetical scenario that mirrored the facts of this case. He opined that the hypothetical shooting would have been committed “for the benefit of and in association with a criminal street gang known as Sureños.” In explaining that opinion, Detective Ashe noted that the perpetrators of “gang motivated assaults” often yell gang slogans or announce their gang before or after the assault, which creates intimidation and fear.

Detective Ashe opined, based on the same hypothetical scenario, that the shooting would have promoted, furthered, and assisted “criminal violence by Sureño Street Gang Members.”

During Detective Ashe’s testimony, the jury was shown a slide presentation. The final slide was entitled, “Expert Opinion” and was followed by three bullet points stating: (1) “Committed by members of the criminal street gangs known as ‘Sureno San Jose’;” (2) “Committed for the benefit of and in association with, ‘Sureno San Jose’;” (3) “With the specific intent to promote, further, or assist in criminal conduct by Sureno gang members.”

Defendant argues that his trial counsel should have objected when Detective Ashe testified that the offense was a “gang motivated assault,” that it was “committed for the benefit of and in association with” the Sureño gang, and that it was “committed to promote, further, or assist in any criminal conduct by Sureño Gang Members.”

As defendant acknowledges, it is settled that an expert may express an opinion that “particular criminal conduct benefitted a gang” in response to hypothetical questions. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*).) The main limitation on such

hypothetical questions is that they “ ‘must be rooted in facts shown by the evidence.’ ” (*Id.* at p. 1045.) Although an expert may not express an opinion on a specific defendant’s guilt because the jury is as competent as an expert to weigh the evidence and determine guilt, an expert can “express an opinion, based on hypothetical questions that tracked the evidence, whether the [charged crime], if the jury found it in fact occurred, would have been for a gang purpose.” (*Id.* at p. 1048.) Once that opinion is rendered, the “jury still plays a critical role” by deciding whether to credit the expert’s opinion at all and by determining “whether the facts stated in the hypothetical questions are the actual facts” (assessing whether any differences between the hypothetical facts and the actual facts are significant). (*Id.* at p. 1050.)

Citing *People v. Spence* (2012) 212 Cal.App.4th 478 (*Spence*), defendant argues that in this case Detective Ashe’s testimony was “unduly directive to the jury” and the issues were not “complicated” enough to warrant expert testimony (*id.* at p. 509). *Spence* does not help defendant. In *Spence*, a sexual assault case, the prosecutor asked a medical expert the following question: “ ‘[I]f someone by the name of [D.] says that she is sexually assaulted by someone by the name of James Spence, is there any evidence that you tested in this case that contradicts that story?’ ” (*Id.* at p. 507.) The *Spence* court acknowledged that the question was not “mainly hypothetical in nature,” since the medical expert “arguably was asked to testify directly about the guilt of Spence, since the question posed named him and essentially asked whether he had any meritorious defense in the evidence, or was guilty. [Citation.]” (*Id.* at p. 510.) Thus, the question “tended to interfere with the jury’s ability to decide the ultimate issues” (*Ibid.*)

The *Spence* court contrasted *People v. Valdez* (1997) 58 Cal.App.4th 494 (*Valdez*), in which this court upheld the admission of expert opinion testimony about “whether the individual participants acted for the benefit of a street gang” (*id.* at p. 505), as “a complicated gang enhancement case” (*Spence, supra*, 212 Cal.App.4th at pp. 508-509). In *Valdez*, the defendant shot the victim, who was sitting in his vehicle in a school

parking lot with a female companion, later claiming he thought the victim was a Sureño gang member. (*Valdez, supra*, at pp. 499, 501.) The defendant's companions included members of seven different Norteño gangs. (*Id.* at p. 503.) The gang expert opined that the gang members all had "a common purpose: to look for and fight Sureños" and that "each member was there to support and back up the others." (*Id.* at p. 504.) This court held that it was "far beyond the common experience of the jury" to understand how members of the various gangs and how each of them could have been acting for the benefit of a street gang. (*Id.* at p. 509.)

Detective Ashe's responses to the hypothetical questions in the instant case fell squarely within the bounds of permissible expert testimony set forth in *Vang* and *Valdez*. Detective Ashe "properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault . . . would have been for a gang purpose." (*Vang, supra*, 52 Cal.4th at p. 1048.) It was also "far beyond the common experience of the jury" to understand how the shooting in this case would have benefitted a criminal street gang. (*Valdez, supra*, 58 Cal.App.4th at p. 509.) Thus, defendant's trial counsel was not ineffective for failing to object.

2. Opinion on Number of Shots

On cross-examination, defendant's trial counsel asked Detective Ashe if the video showed defendant shooting towards Estrada "one time." Detective Ashe replied that he was "not clear" about the number of shots "based on the video." He knew that Estrada had been hit one time, and he had seen one flash on the video, but defendant's actions made him think there were "multiple shots taken." This opinion was based on his "training and experience" with firearms and his review of "the way the gun was cocking back and the way [defendant's] arm was jerking forward."

Defendant's trial counsel responded by asking Detective Ashe to reaffirm that he had seen only one muzzle flash on the video and by impeaching him with his preliminary hearing testimony, in which he stated that after reviewing the video, he understood that

defendant had fired one shot. Defendant's trial counsel also impeached Detective Ashe by asking him if he had changed his mind following Cristoval's testimony about seeing two shots, "because it sounds better."

On redirect examination, Detective Ashe testified that he had "always felt that there was an attempt for multiple trigger pulls." Defendant's trial counsel objected that this was "[s]peculation," but the trial court overruled the objection.

Defendant argues that his trial counsel should have made a different objection when Detective Ashe expressed the opinion that "possible multiple trigger pulls" were seen on the surveillance video. According to defendant, an objection that the testimony was beyond the scope of expert testimony would have been meritorious.

The case upon which defendant primarily relies, *U.S. v. Vera* (9th Cir. 2014) 770 F.3d 1232 (*Vera*), is distinguishable. In *Vera*, a case agent testified as an expert on "drug jargon" used during intercepted telephone calls. (*Id.* at p. 1235.) The agent ultimately testified not just about commonly used drug terms, but also "terminology he encountered for the first time in this investigation and noncoded words (such as 'that' or 'one') used in particular contexts." (*Id.* at p. 1244.) However, the trial court failed to tell the jury how to evaluate the expert opinion testimony and failed to explain that the case agent was testifying both as an expert and as a layperson. (*Id.* at p. 1246.) The Ninth Circuit found the instructional errors prejudicial. Since many of the intercepted conversations were "well within the understanding of an ordinary juror," the jury may have relied on the case agent's opinions "instead of listening to the calls and reaching an independent judgment." (*Ibid.*, fn. omitted.)

In this case, the jury was properly instructed on how to evaluate expert witness testimony.¹⁷ Moreover, it is not reasonably likely that an objection would have been

¹⁷ Pursuant to CALCRIM No. 332, the jury was instructed: "A witness was allowed to testify as an expert and did give opinions. You must consider any such opinions, but you are not required to accept them as true or correct. The meaning and

successful, since the trial court reasonably could have found that Detective Ashe was qualified to give an expert opinion based on his training and experience with firearms. (See *In re Branden O.* (2009) 174 Cal.App.4th 637, 640, 644 [officer could give expert opinion on stun gun's capability based on his "training and experience with tasers issued by the police department that have similar capabilities"].) Further, defendant's trial counsel may have made a tactical decision to cast doubt on Detective Ashe's opinion through cross-examination about his prior testimony.

Finally, defendant has not explained how he was prejudiced by Detective Ashe's opinion about the number of shots fired—i.e., how, but for his trial counsel's allegedly deficient performance, the result of the trial would have been different. (See *Strickland*, *supra*, 466 U.S. at pp. 686-687.) In fact, during closing argument, the prosecutor argued that defendant showed an intent to kill even though "there was only one shot." The prosecutor denied that he wanted the jury to believe that defendant "shot more than once," asserting, "[I]t doesn't matter. The one shot is enough." Ultimately, because Detective Ashe's opinion about the number of shots was not significant to the prosecution's case, defendant's trial counsel was not ineffective for failing to argue that the opinion was beyond the scope of his expertise.

importance of any opinion are for you to decide. In evaluating the believability of an expert witness[,], follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether the information on which the expert relied is true or accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence. [¶] An expert witness may be asked a hypothetical question. A hypothetical question asked the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

J. Admission of Hearsay Through Gang Expert

Defendant contends the trial court erroneously permitted “a vast quantity of unreliable and overly-inflammatory hearsay” through the gang expert and the PowerPoint slides. Defendant contends that some of the erroneously admitted evidence constituted testimonial hearsay, such that its admission violated his confrontation and due process rights under the federal constitution. Further, defendant contends that the trial court failed to give a proper limiting instruction on the hearsay evidence. Finally, defendant contends that if any of these claims was forfeited by his trial counsel’s failure to object, he received ineffective assistance of counsel.

1. Proceedings Below

The prosecution filed a motion in limine seeking to admit expert testimony about defendant’s gang membership and numerous other gang-related issues. The prosecution argued that in rendering opinions, the gang expert should be permitted to “describe reliable hearsay evidence upon which his opinion is based.”

Defendant’s motions in limine included a motion to preclude the gang expert from testifying about the primary activities of the gang or the pattern of criminal gang activity unless his testimony was supported by reliable evidence. Defendant further argued that the gang expert should not be permitted to rely on “irrelevant, unreliable, and prejudicial” hearsay evidence and that it would be ineffective to give a limiting instruction telling the jury that such evidence was not offered for its truth.

At the hearing on motions in limine, defendant’s trial counsel acknowledged that the gang expert could testify about defendant “being arrested with gang members or alleged gang members.” She specified that her objection was to “bringing in the convictions or sustained petition[s]” during the prosecution’s case-in-chief. The prosecutor explained that the gang expert would not be talking about convictions or sustained petitions, but rather “the underlying facts” of defendant’s police contacts.

Before opening statements, defendant objected to some of the PowerPoint slides that prosecutor intended to show the jury. Defendant argued that the slides had “nothing to do with this case” and were “highly inflammatory,” while the prosecutor argued that the slides were “just demonstrative aids to assist the trier of fact with the expert’s testimony.” The trial court ordered the prosecution to delete some of the slides, finding them unduly prejudicial, but overruled the defense objections to other slides.

The prosecutor showed the jury 28 PowerPoint slides during opening statement. The slides included a photograph of the Bar Tarasco, still shots from the surveillance video, the statutory definition of criminal street gang, photos of Sureño gang symbols and tattoos, and a slide about the Mexican Mafia. The slides also included photos of the coparticipants with text identifying them as Sureño gang members. Photos of Urbina and Jimenez’s gang tattoos were included on those slides, and Soto’s gang tattoos were listed.

The prosecutor showed 29 PowerPoint slides during Detective Ashe’s initial testimony and 32 additional slides during his subsequent testimony. Those slides included some of the same slides shown previously. Additional slides shown during Detective Ashe’s initial testimony contained Ashe’s curriculum vitae; gang terminology; and explanations of the role of violence, weapons, respect, notoriety, profiling, discipline, tattoos, and graffiti in gang life. Additional slides shown during Detective Ashe’s subsequent testimony contained details of defendant’s prior gang contacts, details of the coparticipants’ prior gang contacts, and Detective Ashe’s opinions that defendant and the coparticipants were “active Sureno criminal street gang member[s].” The final slide was titled, “Expert Opinion” and it contained three bullet points: (1) “Committed by members of the criminal street gangs known as ‘Sureno San Jose’;” (2) “Committed for the benefit of and in association with, ‘Sureno San Jose’;” (3) “With the specific intent to promote, further, or assist in criminal conduct by Sureno gang members.”

2. Basis Evidence

Defendant identifies 37 facts that “were never proven by admissible evidence and should not have been considered for the truth of the matter stated.” He contends that without these facts, the evidence would not have shown that he was a gang member and would not have found him guilty of attempted murder or found true the gang allegation.

The facts defendant identifies as inadmissible hearsay include: the coparticipants used a stolen vehicle (item 1); gang indicia was found at defendant’s home (item 2); Soto stated that defendant affiliates with VML (item 3); defendant, Urbina, and Jimenez were members of Sureño subsets (items 4-6); Urbina, Jimenez, and Soto had gang tattoos (items 7-9); Urbina, Jimenez, and Soto had prior gang contacts, prior admissions to being gang members, and had been previously investigated for prior criminal conduct or had prior criminal convictions (items 10-27); and Loya, Ramirez, Herrera, and Casas were gang members who had committed prior gang-related offenses (items 28-37).

After trial in this case, the California Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In *Sanchez*, the court held that “case-specific statements” related by a gang expert as the basis for the expert’s opinion constituted inadmissible hearsay, and that admission of some of the statements, including facts taken from police reports prepared by other officers, constituted “testimonial” hearsay under the Sixth Amendment. (*Sanchez, supra*, at pp. 670-671; see *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*) [testimonial hearsay is inadmissible unless the witness is unavailable or there was a prior opportunity for cross-examination].) The court explained that “[c]ase-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried” and are distinguished from “generally accepted background information.” (*Sanchez, supra*, at p. 676.) The court clarified that an expert may relate to the jury “case-specific facts asserted in hearsay statements” if the facts are “independently proven by competent evidence or are covered by a hearsay exception.” (*Id.* at p. 686.) The court disapproved its prior opinion in

People v. Gardeley (1996) 14 Cal.4th 605 (*Gardeley*), “to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules.” (*Sanchez, supra*, at p. 686, fn. 13.) The court also noted that because a jury “must consider expert basis testimony for its truth in order to evaluate the expert’s opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth.” (*Id.* at p. 684.)

a. Predicate Offenses

We first discuss defendant’s claim that Detective Ashe related inadmissible hearsay to the jury when testifying about the predicate offenses introduced to show the requisite “pattern of criminal gang activity” (§ 186.22, subds. (a), (e))—i.e., the crimes committed by Loya, Ramirez, and Herrera. Defendant claims Detective Ashe related inadmissible hearsay when he testified that Loya, Ramirez, and Herrera were gang members, and when describing the details of the predicate offenses.

The record does not show that Detective Ashe related any inadmissible hearsay in connection with the predicate offenses. Detective Ashe stated that he was “familiar with” Loya and the facts of his case, and that he had testified at the preliminary hearing in that case, which suggested that Detective Ashe had personal knowledge of the case and was not relying on police reports prepared by others. Detective Ashe was also “familiar with” Arciniega and the facts of his case, and while testifying about those facts, he requested permission to “refer to my report,” again suggesting that he had personal knowledge of the case and was not relying on other officers’ police reports. Likewise, Detective Ashe was “familiar with” Herrera and the facts of his case. Without a “ ‘specific and timely objection” ’ ” to this testimony, we cannot determine whether any of the information Detective Ashe related was hearsay rather than information Detective Ashe personally observed during his investigation, or whether a hearsay exception applied. (*Waidla, supra*, 22 Cal.4th at p. 717.) Defendant also cannot show that his trial counsel was

ineffective for failing to raise any objections: because nothing in the record shows that Detective Ashe related inadmissible hearsay, defendant cannot show that an objection would have been successful.

Moreover, the details of the predicate crimes were not necessary to establish the requisite “pattern of criminal gang activity” (see § 186.22, subds. (e) & (f)), and certified copies of the Loya, Arciniega, and Herrera convictions were introduced into evidence. Those records of conviction were admissible as official records (Evid. Code, § 1280) and were nontestimonial. (See *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [records that are “prepared to document acts and events relating to convictions and imprisonments” are beyond the scope of *Crawford*].) Further, it was not necessary to prove all three predicate offenses. The commission of only two offenses is required to show a “pattern of criminal gang activity.” (§ 186.22, subd. (e).) Moreover, the charged crime can be one of the two predicate offenses (*Gardeley, supra*, 14 Cal.4th at p. 625), and evidence of a predicate offense committed by another gang member on the same occasion can show the requisite pattern. (*People v. Loeun* (1997) 17 Cal.4th 1, 10 (*Loeun*).) The jury could have concluded that Soto and/or Urbina had committed an assault by means of force likely to product great bodily injury on Estrada on the same occasion as the shooting. Thus admission of any testimonial hearsay about the predicate offenses was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

b. Gang Membership of Defendant and Coparticipants

We next address the question of whether Detective Ashe related inadmissible hearsay when testifying that defendant and the coparticipants—Urbina, Jimenez, and Soto—were gang members.

Detective Ashe testified that he based his opinion about defendant’s gang membership primarily on the facts of the current shooting. The relevant facts of the current shooting included the following: the coparticipants were Sureño gang members;

they arrived and fled in a stolen vehicle; gang slogans were mentioned; a firearm was used; multiple gang members approached the victim at the same time; and Soto said that defendant affiliated with a Sureño gang subset. Detective Ashe's opinion also took into consideration defendant's prior associations with documented Sureño gang members, and he related details of five such incidents to the jury. Detective Ashe's opinion about the coparticipants' gang membership was based on their tattoos, prior police contacts, the facts of this case, and Urbina's jail classification.

A number of the facts cited by Detective Ashe did not constitute inadmissible hearsay. As defendant acknowledges, the use of a firearm was a non-hearsay fact supporting Detective Ashe's opinion, and defendant's own testimony established that Soto was a gang member. The gang slogans were admissible under the hearsay exception for adoptive admission, and the fact that defendant's group all moved towards Estrada just before the shooting was not a hearsay fact.

Although defendant now asserts that Detective Ashe related hearsay when he testified that the vehicle in which defendant and the coparticipants arrived and fled was a stolen vehicle, the record does not support this claim. Defendant failed to object below and thus Detective Ashe was not asked how he knew that the vehicle had been stolen. Without a "specific and timely objection," we cannot assess whether Detective Ashe's testimony about the stolen vehicle was, in fact, based on hearsay, or whether any hearsay fell within a hearsay exception. (See *Waidla, supra*, 22 Cal.4th at p. 717.) And because nothing in the record shows whether Detective Ashe's testimony about the stolen vehicle was based on inadmissible hearsay, defendant cannot show that he was prejudiced by his trial counsel's failure to object.

Defendant also now asserts that Detective Ashe related inadmissible hearsay when he testified that gang indicia (writings and drawings) had been found at defendant's home. However, defendant introduced that evidence himself during cross-examination, when his trial counsel asked Detective Ashe about his attempts to gather evidence of

defendant's gang membership. Thus, any error was invited and cannot be the basis for a claim that the evidence should not have been admitted. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 72.) Defendant also cannot show that his trial counsel was ineffective for eliciting the gang indicia testimony. Defendant's trial counsel elicited the testimony while asking Detective Ashe questions designed to support her theory that Detective Ashe went out of his way to try to find evidence to support his "opinion" that defendant was a gang member. Defendant's trial counsel also made a reasonable tactical decision not to object, but rather to immediately elicit testimony suggesting that the gang indicia belonged to defendant's brothers, who were documented gang members.

The record does not support defendant's claim that Detective Ashe related inadmissible hearsay in testifying that Urbina, Jimenez, and Soto had gang tattoos. Detective Ashe testified that he knew Urbina had a VML tattoo on his back, that he was "familiar" with Soto's gang-related tattoos, and that he was "aware of" Soto having gang-related tattoos. The record does not show that Detective Ashe's knowledge came from out-of-court statements rather than from his own personal observation of the tattoos. Again, because defendant failed to make a "specific and timely objection," we cannot determine whether Detective Ashe's testimony about the tattoos was based on hearsay, and if so, whether a hearsay exception applied. (See *Waidla, supra*, 22 Cal.4th at p. 717.) Defendant also cannot show that his trial counsel was ineffective for failing to object because nothing in the record shows that Detective Ashe's testimony about the tattoos related inadmissible hearsay.

We do agree with defendant that Soto's statement to Detective Ashe—that defendant affiliates with VML—was hearsay. When defendant objected to the admission of that statement, the trial court should have excluded the statement rather than instruct the jury not to consider the statement for its truth. (See fn. 5, *ante*; *Sanchez, supra*, 63 Cal.4th at p. 684.)

We also agree with defendant that at least some of the evidence of prior police contacts with defendant and the coparticipants constituted inadmissible hearsay. Detective Ashe referred to the reports prepared by other officers when discussing defendant's prior police contacts, two of Jimenez's prior contacts and a number of Soto's prior police contacts. (See *Sanchez, supra*, 63 Cal.4th at p. 694.)

We turn to the question of whether prejudice resulted from the admission of Soto's statement about defendant's gang affiliation and the evidence of prior police contacts with defendant and his coparticipants. We will assume that these items of evidence constituted testimonial hearsay, such that the appropriate prejudice standard is that set forth in *Chapman, supra*, 386 U.S. 18. The *Chapman* standard of review requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.)

Although the testimony about the coparticipants' prior police contacts should not have been admitted, Detective Ashe's opinions about the coparticipants' gang memberships were based on multiple factors, including their tattoos, the facts of the current case, and Urbina's jail classification. Moreover, Soto's gang membership was established by defendant's own testimony. Considering the admissible evidence of the coparticipants' gang membership and the overwhelming evidence that defendant committed the shooting, there is no " 'reasonable possibility that the evidence complained of might have contributed to the conviction' " or true finding on the gang allegation. (*Chapman, supra*, 386 U.S. at p. 23.)

Similarly, although the trial court should not have admitted Detective Ash's testimony about defendant's own prior police contacts or Soto's statement about defendant's gang affiliation, there was no reasonable possibility that this evidence contributed to defendant's conviction or the true finding on the gang allegation. (See *Chapman, supra*, 386 U.S. at p. 23.) Notably, the prosecution was not required to prove that defendant himself was a gang member. (See *In re Ramon T.* (1997) 57 Cal.App.4th

201, 207 [the gang enhancement provided for by section 186.22, subdivision (b) does not require “either ‘active’ or ‘current, active’ participation in a gang”].) Further, Detective Ashe emphasized that his opinion about defendant’s gang membership was based primarily on the facts of the shooting, most of which were shown by admissible evidence. Thus, the admission of defendant’s prior police contacts and Soto’s statement about defendant’s gang affiliation was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

3. Evidence Code Section 352/Due Process

Defendant claims that the hearsay evidence introduced through Detective Ashe was inflammatory to the point where it violated Evidence Code section 352 or constituted a due process violation.

Under Evidence Code section 352, the trial court has discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Admission of evidence violates due process “ ‘[o]nly if there are no permissible inferences the jury may draw from the evidence’ ” and the evidence is “ ‘ “of such quality as necessarily prevents a fair trial,” ’ ” such that it can be inferred “ ‘that the jury must have used the evidence for an improper purpose.’ [Citation.]” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*).)

As the Attorney General notes, prior cases have found no undue prejudice where the prosecution introduced evidence of numerous prior gang crimes committed by other gang members as predicate offenses (e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1138 [eight]; *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1435 [six]) or introduced numerous prior gang-related incidents (e.g., *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519 [nine]).

Contrary to defendant's claim, the hearsay gang evidence in this case—even considered cumulatively—did not “serve[] to inflame the passions of the jury” or invite the jury to infer that defendant was guilty based on his association with gang members.

The evidence of defendant's prior associations with gang members included two incidents in which defendant was in a vehicle with another gang member, two incidents in which defendant was in a stolen vehicle with three gang members, and an incident in which defendant and another gang member were detained during a burglary investigation. Nothing about that evidence “uniquely tend[ed] to evoke an emotional bias against defendant as an individual.” (*Bolin, supra*, 18 Cal.4th at p. 320.)

The police contacts involving defendant's coparticipants included an incident in which Urbina was associating with another gang member, two incidents in which Jimenez was possibly involved in gang-related stabbings, and an incident in which Soto was contacted during a sexual assault investigation. That evidence was relevant to the issue of whether the coparticipants were gang members and thus whether defendant committed the shooting “in association with” a criminal street gang. (§ 186.22, subd. (b)(1).) The evidence of the coparticipants' prior gang activities also did not “uniquely tend[] to evoke an emotional bias against defendant as an individual.” (*Bolin, supra*, 18 Cal.4th at p. 320.)

The predicate offenses were for an attempted stabbing, an assault and vandalism, and a shooting. Since those convictions were offered to prove the charged gang enhancement, there was no danger that the jury would confuse them with the issues involving defendant. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.)

The PowerPoint slides shown to the jury also were not prejudicial within the meaning of Evidence Code section 352. Many were merely illustrative of Detective Ashe's testimony about common gang signs and symbols. The references to the Mexican Mafia were made in the context of giving background information about the Sureño gang, and there was no danger that the jury would take that testimony as suggesting that

defendant himself was affiliated with the Mexican Mafia. (Cf. *Albarran*, *supra*, 149 Cal.App.4th at p. 220 [prosecutor told jury that defendant’s tattoo showed allegiance to the Mexican Mafia].)

In sum, the admission of the hearsay gang evidence did not violate Evidence Code section 352 or constitute a due process violation.

4. Failure to Give a Limiting Instruction

Defendant contends that the trial court failed to give a proper limiting instruction on the gang-related hearsay evidence. As he acknowledges, the trial court did instruct the jury on expert witness testimony pursuant to CALCRIM No. 332 (see fn. 17, *ante*) and on the limited purpose of gang evidence pursuant to CALCRIM No. 1403.¹⁸ According to defendant, these instructions failed to tell the jury that it could not consider “unproven hearsay” and that “hearsay” is not “competent evidence.” Defendant asserts the trial court was required to give an instruction telling the jury that hearsay evidence admitted through the gang expert should not be considered for its truth.

Defendant acknowledges that as to one item of hearsay evidence—Soto’s statement that defendant affiliated with a Sureño subset—the trial court *did* admonish the jury not to consider whether it was true. But defendant points out that the admonition conflicted with CALCRIM No. 332, which told the jury to “decide whether the information on which the expert relied is true or accurate.”

¹⁸ CALCRIM No. 1403 was given as follows: “You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, or knowledge that are required to prove the gang-related enhancement or the defendant had a motive to commit the crime charged. You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crimes.”

In *Sanchez*, the court found that similar instructions were “confusing[.]” (*Sanchez, supra*, 63 Cal.4th at p. 684.) The court explained that a jury cannot “ ‘decide whether information on which the expert relied was true and accurate,’ ” as directed by CALCRIM No. 332, “[w]ithout independent competent proof of those case-specific facts.” (*Sanchez, supra*, at p. 684.) The court held that because “the jury must consider expert basis testimony for its truth in order to evaluate the expert’s opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth.” (*Ibid.*) And the court disapproved its prior decisions holding that a limiting instruction on hearsay evidence admitted as expert basis testimony cured hearsay problems. (*Id.* at p. 686, fn. 13.) *Sanchez* thus establishes that when a gang expert testifies, it is improper to tell the jury that basis evidence should *not* be considered for its truth. Therefore, the trial court did not err by failing to give such an instruction.

K. Ineffective Assistance of Counsel: Failure to Object to Prosecutorial Misconduct

Defendant contends there were nine instances of prosecutorial misconduct during his trial. Under state law, a prosecutor commits misconduct if he or she uses “ ‘ “ ‘ “deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” [Citations.]’ [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000 (*Cunningham*)). When a claim of prosecutorial misconduct “is based upon ‘comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]’ [Citations.]” (*Id.* at p. 1001.)

“ ‘[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]’ [Citation.]” (*People v. Tully* (2012) 54 Cal.4th 952, 1010,

fn. omitted.) Because defendant's trial counsel did not object to any of the nine alleged instances of prosecutorial misconduct, he contends his trial counsel was ineffective.

1. Consideration of Attempted Voluntary Manslaughter

Defendant's trial counsel was not ineffective for failing to object when the prosecutor told the jury it could "consider" attempted voluntary manslaughter only if it first found defendant not guilty of attempted murder. The prosecutor made the allegedly improper comment as he was discussing the verdict forms. Thus, in context, the prosecutor was simply reiterating the rule that the jury must first acquit a defendant of a greater offense before returning a verdict on a lesser offense. (See *Kurtzman, supra*, 46 Cal.3d at p. 330; *People v. Speight* (2014) 227 Cal.App.4th 1229, 1242 [in context, prosecutor did not misstate the law when it told the jury it could not consider attempted voluntary manslaughter unless it found defendant not guilty of attempted murder].) Moreover, the trial court expressly told the jury to "[p]lay careful attention to all of these instructions and consider them together," and that the jury was to follow the trial court's instructions as opposed to "the attorneys' comments on the law." (See CALCRIM No. 200.) Defendant's trial counsel could reasonably have decided not to object because any misstatement was thus remedied by the trial court's instructions.

2. Gang Expert Opinion

Defendant's trial counsel was not ineffective for failing to object when the prosecutor elicited the gang expert's opinion about the elements of the gang allegation. As explained above, Detective Ashe's responses to the prosecutor's hypothetical questions about the elements of the gang allegation fell squarely within the bounds of permissible expert testimony set forth in *Vang, supra*, 52 Cal.4th 1038.

3. Gang Allegation – Proof of Specific Intent

Defendant's trial counsel was not ineffective for failing to object when the prosecutor discussed the gang allegation. Defendant asserts that the prosecutor misstated

the elements of the gang allegation and improperly told the jury that the gang expert's opinion was proof defendant had the required specific intent.

The record shows the following. The prosecutor began discussing the gang allegation by referencing the pertinent jury instruction, CALCRIM No. 1401, and stating that the prosecution had to prove that "the defendant committed the charged crime for the benefit of, at the direction of, or in association with a criminal street gang" and that defendant "acted with the . . . intent to assist, further, or promote conduct by gang members." The prosecutor reminded the jury that Detective Ashe had given opinions in response to a hypothetical that mirrored the facts of this case, which was "sworn testimony to you." The prosecutor then asserted that Detective Ashe had given opinions that "this" was "committed for the benefit of and in association with the San Jose Sureño Criminal Street Gang with the specific intent to promote, further, or assist in criminal conduct by a Sureño Gang member." After the prosecutor argued that the shooting was done for the benefit of a criminal street gang because it enhanced the reputation of the gang, he argued that the jury could also find that the shooting was done "in association with a criminal street gang." The prosecutor asserted that Urbina, Jimenez, and Soto were all gang members and that defendant committed the shooting "in association with them." The prosecutor reminded the jury, "You saw the video. They're all there together. He committed the crime in association with criminal street gang members. Simple as that."

In context, we find no " 'reasonable likelihood' " that the jury construed the prosecutor's remarks as urging the jury to rely solely on expert testimony to find that defendant acted with the required specific intent or as urging the jury to find the gang allegation true simply because defendant was with gang members at the time of the shooting. (*Cunningham, supra*, 25 Cal.4th at p. 1001.) The prosecutor's argument made it clear that the expert opinion should be considered along with all of the other evidence, including the facts of the offense. The prosecutor's argument also made it clear that only

the “in association” element of the gang allegation (§ 186.22, subd. (b)(1)) could be met by the evidence that defendant was accompanied by gang members at the time of the shooting.

4. Instruction Conference

Defendant’s trial counsel was not ineffective for failing to object to statements by the prosecutor during the instruction conference. According to defendant, the prosecutor misstated facts in order to obtain a jury instruction on adoptive admissions. The record does not support this claim. During the jury instruction conference, when the trial court indicated it would be giving CALCRIM No. 357, regarding adoptive admissions, defendant’s trial counsel noted that she had objected to Soto’s statements coming in and that she was objecting to the jury instruction as well. The prosecutor made no representations about the facts supporting the adoptive admissions instruction. Defendant’s argument references a later discussion among the parties concerning CALCRIM No. 360, on statements to an expert—an instruction that was not given.¹⁹

5. Law of Adoptive Admissions

Defendant’s trial counsel was not ineffective for failing to object when the prosecutor discussed the law regarding adoptive admissions.²⁰ Defendant references the following portion of the prosecutor’s argument: “The defendant’s standing right there

¹⁹ The trial court asked whether it should give CALCRIM No. 360, noting that Detective Ashe had considered a statement made by Soto. Defendant’s trial counsel noted that the trial court might be referring to Soto’s “we are Clanton” statement, but reminded the trial court that Detective Ashe had testified that “he wouldn’t expect someone to say no, we’re not,” and that the Clanton statement was not part of his expert opinion. The trial court indicated it remembered Detective Ashe having testified that a gang would, in fact, object if he was from a different gang. The prosecutor stated, “And that’s how I recall it too,” but noted that the instruction appeared to be inapplicable. Defendant’s trial counsel agreed.

²⁰ In his opening brief, defendant also argued that the prosecutor committed misconduct by telling the jury that Soto had yelled out a gang slogan twice. In his reply brief, defendant withdrew that argument.

when on two separate occasions Marco Soto says we are Sureños, we are Clanton, and the law says that you can consider that as an adoptive admission if [defendant] didn't get up and say excuse me, sir, no you're wrong. There is no we. It's just I. I'm not a Sureño, and I'm certainly not Clanton, and no I'm not gonna fuck you up. That's what the law says."

According to defendant, the prosecutor's argument "reduced the requirements of an adoptive admission to simply hearing the statement and failing to answer." We find no "reasonable likelihood" that the jury construed the prosecutor's remarks in such a manner. (See *Cunningham, supra*, 25 Cal.4th at p. 1001.) By telling the jury that Soto's statements could only be considered an adoptive admission if defendant failed to deny them, the prosecutor adequately conveyed to the jury the requirement that defendant "by words or other conduct manifested his adoption or his belief in [their] truth." (Evid. Code, § 1221.) Moreover, because the trial court properly instructed the jury on the requirements of adoptive admissions pursuant to CALCRIM No. 357 and told the jury to follow the trial court's instructions as opposed to "the attorneys' comments on the law" pursuant to CALCRIM No. 200, trial counsel could reasonably have chosen not to object.

6. Gang Expert - Hearsay

Defendant's trial counsel was not ineffective for failing to object when the prosecutor repeated certain facts introduced through the gang expert. Defendant asserts the prosecutor "repeated the incompetent hearsay" admitted through Detective Ashe regarding the stolen vehicle and the coparticipants' prior police contacts. As noted above, the record does not show that Detective Ashe's testimony about the stolen vehicle was based on hearsay, and thus defendant cannot establish that his trial counsel was ineffective for failing to object to the prosecutor's argument about that fact. Although the evidence of the coparticipants' prior police contacts was inadmissible hearsay, the law at the time of trial permitted such expert basis testimony. (See *Gardeley, supra*, 14 Cal.4th at p. 620; *People v. Williams* (2009) 170 Cal.App.4th 587, 622.) Thus, there is no

reasonable probability that an objection would have been sustained or that the result of the trial would have been different. (See *Strickland, supra*, 466 U.S. at pp. 686-687.)

7. Gang Motive

Defendant's trial counsel was not ineffective for failing to object when the prosecutor told the jury that "gangs" tended to show defendant was guilty. Defendant references the following portion of the prosecutor's argument: "There's a jury instruction, CALCRIM 370, called Motive. . . . We don't have to prove why somebody did something. But the instruction says, having a motive may be a factor tending to show that the defendant is guilty. [¶] And the motive in this case, ladies and gentlemen, the answer to the question of why did it happen, . . . is gangs. Gangs." We find no "reasonable likelihood" that the jury construed the prosecutor's remarks as distorting the difference between motive and intent. (See *Cunningham, supra*, 25 Cal.4th at p. 1001.) Based on the evidence presented, it was proper for the prosecutor to argue that the shooting had a gang motive. (Cf. *People v. Williams* (1997) 16 Cal.4th 153, 194 [gang evidence properly admitted to show motive]; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437 [same].)

8. Herrera Conviction

Defendant's trial counsel was not ineffective for failing to object when the prosecutor elicited testimony that Carlos Herrera had been convicted of attempted murder with a gang allegation found true. As defendant notes, after eliciting that testimony, the prosecutor introduced into evidence an exhibit containing certified documents from Herrera's case. The exhibit included an information charging Herrera with attempted murder with the above-referenced special allegations as well as three other counts: carrying a loaded firearm (former § 12031, subd. (a)(1)), with a gang allegation; resisting, delaying or obstructing an officer (§ 148, subd. (a)(1)); and discharging a firearm from a motor vehicle (former § 12034, subd. (c)) with an allegation of discharging a handgun proximately causing great bodily injury. The exhibit also included documents showing

that Herrera had pleaded no contest to discharging a firearm from a motor vehicle and admitted the allegation of discharging a handgun proximately causing great bodily injury, and that the other counts—including the attempted murder—had been dismissed.

Defendant points out that a violation of former section 12034, subdivision (c) is not listed as a predicate offense in section 186.22, subdivision (e).²¹ As the Attorney General points out, however, a conviction is not required for a predicate offense under section 186.22, subdivision (e), which defines “ ‘pattern of criminal gang activity’ ” as “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses” Further, a predicate offense need not be “ ‘gang related.’ ” (*Gardeley, supra*, 14 Cal.4th at p. 621.) Detective Ashe’s testimony established that Herrera had committed an attempted murder or an assault with a deadly weapon, which are both predicate offenses. (See § 186.22, subds. (e)(1), (e)(3).) But even assuming that Detective Ashe’s testimony about the circumstances of the Herrera offense should not have been admitted, defendant cannot show prejudice from his trial counsel’s failure to object. The Herrera offense was the third predicate introduced (in addition to those involving Loya and Arciniega); only two were needed under section 186.22, subdivision (e). Moreover, to establish the requisite “pattern of criminal gang activity,” the prosecution may “rely on evidence of the defendant’s commission of the charged offense” as one of the predicate offenses. (*Loeun, supra*, 17 Cal.4th at p. 10.)

9. Defendant’s Behavior

Defendant’s trial counsel was not ineffective for failing to object when the prosecutor told the jury that if defendant was in front of his fellow gang members, he would be “high-fiving” and saying it was “[c]ool” that he had shot someone. The

²¹ The statute does, however, list violations of section 12034, subdivisions (a) and (b). (§ 186.22, subd. (e)(6).)

prosecutor's argument was in response to the defense argument that defendant was "not proud of what he did." The prosecutor asserted that defendant was behaving differently than he would if he was "in front of his fellow gang members" because he wanted to be found not guilty.

In asserting that the prosecutor committed misconduct by giving the jury "an imaginary and wholly speculative picture" of defendant, defendant relies primarily on *People v. Sanchez* (2014) 228 Cal.App.4th 1517. In that case, the prosecutor argued that the defendant hoped that one of the jurors would be " 'gullible enough,' 'naïve enough,' and 'hoodwinked' by the defense arguments" so that the defendant could " 'go home and have a good laugh at [the jury's] expense.' " (*Id.* at p. 1529.) The argument was improper because it "created a risk that a juror would decide the case not based on the evidence or the law, but rather find defendant guilty to avoid being viewed as gullible, naïve, or hoodwinked" (*id.* at p. 1531) and that "if 'just one' of the jurors believed [the] defendant not guilty, [the] defendant would necessarily go free" (*id.* at p. 1532).

In this case, the prosecutor did not suggest that a juror would be gullible or naïve if he or she believed defendant was not guilty, nor did he suggest that defendant would go free if the jury failed to convict him. The prosecutor's argument was responsive to the defense assertion about defendant being remorseful. This case is more analogous to *People v. Edelbacher* (1989) 47 Cal.3d 983, a case in which the defendant was accused of murdering his wife but presented an alibi defense at trial. During closing argument, the prosecutor referred to the defendant as "a 'contract killer,' a 'snake in the jungle,' 'slick,' 'tricky,' a 'pathological liar,' and 'one of the greatest liars in the history of Fresno County.' " (*Id.* at p. 1030.) That court explained why this was not misconduct: "Referring to the testimony and out-of-court statements of a defendant as 'lies' is an acceptable practice so long as the prosecutor argues inferences based on evidence rather than the prosecutor's personal belief resulting from personal experience or from evidence outside the record. [Citations.] Argument may be vigorous and may include opprobrious

epithets reasonably warranted by the evidence. [Citations.] The prosecutor’s comments were based on the evidence and amounted to no more than vigorous but fair argument.” (*Ibid.*) Also similar is *People v. Cummings* (1993) 4 Cal.4th 1233, in which the prosecutor “accused the defense of attempting to hide the truth” and used a metaphor about “ ‘ink from the octopus.’ ” (*Id.* at p. 1302.) The court found no prosecutorial misconduct because “the context was such that the jury certainly would understand it to be nothing more than urging the jury not to be misled by defense evidence.” (*Ibid.*, fn. omitted.)

Here, in context, there is no “reasonable likelihood” that the jury construed the prosecutor’s remarks in an improper manner. (See *Cunningham, supra*, 25 Cal.4th at p. 1001.) Thus, defendant’s trial counsel was not ineffective for failing to object.

L. Cumulative Prejudice

Defendant contends the cumulative effect of the trial court’s errors and his trial counsel’s ineffective assistance deprived him of a fair trial and the ability to present a defense. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 (*Hill*) [“a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error”].)

In this case, we have found or assumed three errors: (1) the trial court failed to instruct the jury on unreasonable defense of others as an alternative theory of attempted voluntary manslaughter; (2) the trial court should have instructed the jury that evidence of defendant’s voluntary intoxication could be considered when assessing whether he actually but unreasonably believed in the need to use deadly force to defend against an imminent danger of being killed or suffering great bodily injury; and (3) the trial court erred by admitting, through Detective Ashe’s testimony, Soto’s statement about defendant’s gang affiliation and evidence of prior police contacts with defendant and his coparticipants.

The cumulative effect of these errors did not have the “negative synergistic effect” that led to reversal of the judgment in *Hill, supra*, 17 Cal.4th at page 847. In *Hill*, the prosecutor committed “serious, blatant and continuous misconduct at both the guilt and penalty phases of trial.” (*Id.* at p. 844.) The trial court had also erroneously ordered the defendant shackled without making a determination of whether shackling was necessary, allowed a bailiff to testify against the defendant and then remain on duty in the courtroom without instructing the jury to consider his testimony as it would any other witness, and failed to require that the jury find intent to kill when determining the truth of a robbery-murder special circumstance. (*Ibid.*) Together, the effect of these errors was denial of a fair trial. (*Id.* at p. 847.)

In this case, the errors were largely unrelated and we have found each individually harmless. After a careful review of the record, we find that there was no cumulative prejudice. Rather, this trial was “one in which [defendant’s] guilt or innocence was fairly adjudicated.” (*Hill, supra*, 17 Cal.4th at p. 844.)

M. Sentencing: Gang Enhancement

Defendant contends the trial court abused its discretion by declining to strike the 10-year gang enhancement imposed pursuant to section 186.22, subdivision (b)(1)(C). Defendant contends that although the trial court found this was not an “unusual case” warranting the striking of the enhancement under section 186.22, subdivision (g),²² the trial court could have stricken the allegation pursuant to section 1385.²³ He contends we

²² Section 186.22, subdivision (g) provides: “Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.”

²³ Section 1385, subdivision (a) provides in pertinent part: “The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.”

should remand this case for resentencing so the trial court can consider exercising its discretion under section 1385.

1. Proceedings Below

Defendant submitted a sentencing brief to the trial court in which he requested the trial court strike the gang allegation pursuant to section 186.22, subdivision (g). In his brief, defendant reviewed his personal history, claiming he had avoided becoming a gang member despite living in a gang area. Defendant alleged there were “unusual circumstances” favoring dismissal of the gang allegation: his “minimal” prior record of criminal conduct “consisting solely of property crimes;” the fact that he attempted to resolve his case before trial but was not offered anything less than a life sentence; and the fact that his performance on parole had been “satisfactory” prior to his arrest in this case.

The prosecution filed a response opposing the striking of the gang allegation, arguing that this was not an unusual case. The prosecution argued that defendant waited for a “clear shot” at Estrada before firing his gun, that defendant arrived at the scene in a stolen car with gang members and a loaded gun, that defendant was on parole at the time of the shooting, and that defendant had minimized his conduct instead of taking responsibility for it.

The probation report reflected that defendant had three prior felony convictions and one prior misdemeanor conviction. The probation officer found no mitigating factors and recommended an “extensive prison term” including a 10-year term for the gang allegation.

At the sentencing hearing, the trial court first explained why it was choosing the seven-year midterm for the attempted murder. There were two aggravating circumstances: defendant’s criminal record and the fact that he was on parole at the time of the offense. There was one mitigating circumstance: the fact that defendant was 21 years old at the time of the offense.

The trial court next imposed a consecutive term of 25 years to life for the allegation under section 12022.53, subdivision (d).

The trial court then identified the question of whether to impose the gang allegation as “the hardest issue in the case.” The trial court indicated it had a “hard time seeing how adding 10 years to a sentence that is already 32 years to life would serve any justice.” However, the court noted, in order to strike the allegation pursuant to section 186.22, subdivision (g), it had to find that this was “an unusual case such that the interest[s] of justice would best be served by striking the punishment.” The trial court recited some of the points made in the parties’ briefs, including facts about defendant’s personal history. The court noted that before “weighing the interest[s] of justice,” it had to find “this is an unusual case.” The trial court then referenced the video of the shooting, which showed “the gun was pulled out, fired, and directly hit the intended target,” and found it could not consider this case to be unusual. Thus, the trial court found that “pursuant to law,” it was required to impose the gang enhancement.

Next, the trial court struck the one-year term for the prior prison term allegation pursuant to section 1385, finding that “the interest of justice would not be served by enhancing [defendant’s sentence] for another year.” The trial court also stayed the three-year term for the great bodily injury allegation (§ 12022.7, subd. (a)) because it was already imposing punishment for great bodily injury by imposing the section 12022.53, subdivision (d) enhancement.

2. Analysis

Defendant first argues that the trial court misinterpreted section 186.22, subdivision (g) as requiring it to find an unusual case, based on the facts of the crime only, before considering whether the interests of justice would be served by striking the punishment for the offense.

Contrary to defendant’s claim, the trial court’s comments do not reflect that it focused solely on the circumstances of the crime when determining whether this was

“an unusual case where the interests of justice would best be served” by striking the punishment for the gang allegation. (§ 186.22, subd. (g).) The trial court referenced the parties’ sentencing briefs, which included facts about defendant’s background, before making its finding. Moreover, the circumstances of the crime *were* a relevant consideration. Although section 186.22, subdivision (g) does not specify the criteria to be considered when a court determines if a case is “an unusual case where the interests of justice would best be served” by striking the punishment, the same phrase *has* been defined in a similar context. (See *People v. Etheridge* (2015) 241 Cal.App.4th 800, 806 [intended meaning of a statutory phrase may be determined by definition of same phrase in a statute dealing with the same subject matter].) Section 1203, subdivision (e) prohibits the granting of probation under certain enumerated circumstances, except in “unusual cases where the interests of justice would best be served,” and the criteria to be considered in that context include the circumstances of the offense and factors lessening the defendant’s culpability, including the fact that the defendant is youthful and has no significant prior criminal record. (See Cal. Rules of Court, rule 4.413(b) & (c).) Here, the trial court properly considered the circumstances of defendant’s offense when deciding that this was not “an unusual case where the interests of justice would best be served” by striking the punishment for the gang allegation. (§ 186.22, subd. (g).)

Defendant’s second argument is that the trial court failed to exercise its discretion to strike the gang allegation under section 1385. In *People v. Fuentes* (2016) 1 Cal.5th 218 (*Fuentes*), the California Supreme Court recently held that section 186.22, subdivision (g), which permits the trial court to strike the *punishment* for a gang allegation, does not eliminate a trial court’s discretion under section 1385 to dismiss a gang allegation “altogether.” (*Fuentes, supra*, at p. 222.) Here, however, there is nothing in the record indicating the trial court believed that it lacked the authority to strike the gang enhancement under section 1385. Under the circumstances, there is no need to remand this matter to give the trial court another opportunity to exercise that discretion.

(See *People v. Fuhrman* (1997) 16 Cal.4th 930, 945 [remand unnecessary “in the absence of any affirmative indication in the record” that the trial court erroneously believed it lacked discretion to strike a prior conviction under section 1385].)

N. Limited Remand - Section 3051

Defendant seeks a limited remand for the purpose of making a record of factors relevant to his eventual “youth offender” parole suitability under section 3051.

Section 3051 was enacted in 2013. (Stats. 2013, ch. 312, § 4.) Initially, section 3051 applied to offenders who were under 18 years of age at the time of their controlling offense, which was defined as “the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.” (Former § 3051, subd. (a)(2)(B); see Stats. 2013, ch. 312, § 4.) In 2015, the Legislature amended section 3051 to extend its application to offenders who were under 23 years of age at the time of their controlling offense. (Stats. 2015, ch. 471, § 1.)

Section 3051 requires the Board of Parole Hearings to conduct youth offender parole hearings for such offenders, and makes such offenders eligible for release on parole by at least the 25th year of incarceration. (§ 3051, subds. (a)(1), (b)(3).) The statute specifies that the Board of Parole hearings is to assess a youthful offender’s “growth and maturity” in determining whether or not to grant parole. (*Id.*, subd. (f)(1).)

Defendant, who was age 21 at the time of his offense, was sentenced on May 15, 2014, before the amendment to section 3051. Defendant’s “longest term of imprisonment” was imposed for the section 12022.53, subdivision (d) enhancement; therefore, pursuant to section 3051, subdivision (b)(3), he will be eligible for release on parole during his 25th year of incarceration.

Defendant contends that under section 3051, a trial court must “creat[e] . . . a time capsule at sentencing for future reference” by the Board of Parole. He acknowledges that in his case, the parties did discuss some youth-related factors in the sentencing briefs and during the sentencing hearing, but he contends that neither of the parties “endeavor[ed] to

make the record” now required. He asserts that there is “undoubtedly” additional evidence that could have been presented, had his trial counsel known that such evidence would become relevant to a youth offender parole hearing.

The California Supreme Court ordered a limited remand in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). In *Franklin*, the court explained that the new statutory parole scheme for youthful offenders “contemplate[s] that information regarding the juvenile offender’s characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board’s consideration.” (*Id.* at p. 283.) The court noted that section 3051, subdivision (f)(2) provides that “ ‘[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board’ ” and that “[a]ssembling such statements . . . is typically a task more easily done at or near the time of the juvenile’s offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away.” (*Franklin, supra*, at pp. 283-284.) The court found it was “not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing.” (*Id.* at p. 284.) Thus, the court remanded the matter to the trial court “for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.” (*Ibid.*) The *Franklin* court specified that if the trial court later determined “that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence.” (*Ibid.*)

A number of cases have followed *Franklin* in concluding that a limited remand was appropriate for a youthful offender whose sentencing hearing predated the enactment

of section 3051 or the 2015 amendment. (E.g., *People v. Garrett* (2017) 7 Cal.App.5th 871, 884-885; *People v. Scott* (2016) 3 Cal.App.5th 1265, 1283; *People v. Perez* (2016) 3 Cal.App.5th 612, 619.)

The Attorney General agrees that a limited remand is appropriate in this case. Thus, we will order a limited remand in order for the trial court to determine whether defendant had an adequate opportunity to make an accurate record of his circumstances and characteristics at the time of his offense, in anticipation of a future youth offender parole hearing.

IV. DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of determining whether defendant was afforded an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings in a future parole eligibility hearing held pursuant to Penal Code section 3051, and, if not, to allow defendant and the People an adequate opportunity to make such a record.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

People v. Reyes
H041053

Modification to Opinion made on 6/26/2017

Filed 6/26/17

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

IRVING MARCELO REYES,

Defendant and Appellant.

H041053

(Santa Clara County
Super. Ct. No. C1227390)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on June 1, 2017, be modified in the following particulars:

1. On page 7, line 8 of the third paragraph, change the phrase “violent sex acts,” to “violence,” so the sentence reads as follows: During a 2004 sexual assault investigation, Soto admitted being a gang member and said that females were often initiated into gangs through violence.

2. On page 10, line 4 of the first full paragraph, the phrase “including the people he had been with during the prior police contacts” is replaced with the phrase “but he claimed that at the time of his prior police contacts, he did not know he was associating with gang members” so that the sentence reads as follows: He knew Soto was in a gang

because of his tattoos, and he admitted having friends and relatives in gangs, but he claimed that at the time of his prior police contacts, he did not know he was associating with gang members.

3. On page 23, line 2 of the first full paragraph, change the phrase “Urbina joined Soto in hitting Estrada” to “Urbina began hitting Estrada,” so the sentence reads as follows: When Urbina began hitting Estrada, Estrada took out his baton.

4. On page 23, line 11 of the second full paragraph, change the phrase “Soto and Urbina” to “Urbina,” so the sentence reads as follows: Moreover, the circumstantial evidence supporting imperfect defense of others was weak, consisting only of the fact that defendant shot Estrada while Estrada was defending himself against Urbina.

5. On page 30, line 11 of the third paragraph, change the phrase “Soto and Urbina” to “Urbina,” so the sentence reads as follows: That testimony was not credible because at the time of the shooting defendant was not close to Estrada and Estrada was backing away as he was being attacked by Urbina.

6. On page 54, add a footnote immediately after the first sentence of the third paragraph providing as follows: The trial court instructed the jury: “So what the officer may testify to is a statement that was made out of court by this individual. And at this point he’s testifying as an expert, and so what you need to focus on exclusively is the extent to which this statement supports the expert’s conclusions and opinions. You are not to assess the statement whether it’s true or not, whether it’s evidence or not. You are to only assess whether it supports or doesn’t support the conclusions and opinions of the expert. So it’s a little bit of a distinction, but you don’t take it for the truth. You take it on whether or not it supports the conclusions.”

7. On page 55, add the following paragraph under the first full paragraph: Defendant also contends that because the trial court instructed the jury on hearsay as to the Soto statement, it was also required to define the term “hearsay.” However, the trial court’s admonition concerning the Soto statement did not contain the term “hearsay.”

Moreover, by failing to request such a clarifying instruction in the trial court, defendant has forfeited this claim on appeal. (See *People v. Dennis* (1998) 17 Cal.4th 468, 514.)

There is no change in the judgment.

The petition for rehearing is denied.

BAMATTRE-MANOUKIAN, J.

ELIA, ACTING P.J.

MIHARA, J.

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

SIXTH APPELLATE DISTRICT

FILED

JUN 1 - 2017

DANIEL P. POTTER, Clerk

By

DEPUTY

In re IRVING MARCELO REYES,
on Habeas Corpus.

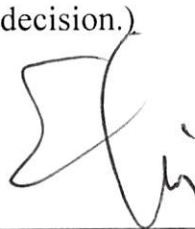
H043123
(Santa Clara County
Super. Ct. No. C1227390)

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Elia, Acting P.J., Bamattre-Manoukian, J., and Mihara, J.,
participated in this decision.)

Dated JUN 1 - 2017



Acting P.J.