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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL CHONG

and CHARLIE WI WANG,

Defendants and Appellants.

B237494

(Los Angeles County

Super. Ct. No. KA089924

consolidated with No. GA078128)

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL CHONG,

Defendant and Appellant.

(Los Angeles County

Super. Ct. No. KA089924

consolidated with No. GA078076

and No. GA078128)

APPEALS from judgments of the Superior Court of Los Angeles County. Charles E. Horan and Robert M. Martinez, Judges. Affirmed as to Chong. Affirmed in part and reversed in part as to Wang.

Joseph F. Walsh for Defendant and Appellant Chong.

Wallin & Klarich and Stephen D. Klarich for Defendant and Appellant Wang.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

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Defendants Daniel Chong and Charlie Wi Wang appeal from the judgments entered following separate jury trials in which Wang was convicted of attempted murder and assault with a deadly weapon, with gang findings, and Chong was convicted of attempted murder, three counts of assault with a deadly weapon, and two counts of robbery, with gang findings as to the attempted murder and one of the assault charges. Chong contends the evidence was insufficient to support his attempted murder conviction, the trial court erred by consolidating the attempted murder charge with the remaining charges and by denying his motion to sever the attempted murder charge, and the trial court violated his confrontation and due process rights by precluding him from cross-examining the gang expert regarding his interviews with codefendants and witnesses. Wang contends the evidence was insufficient to support his attempted murder conviction and the gang enhancement findings, and the trial court erred by admitting a photograph of the injury suffered by the attempted murder victim. We agree with respect to Wang's gang enhancement findings, but otherwise affirm.

## BACKGROUND

### Chong's trial

#### 1. Attempted murder of Daniel M.

About 5:00 p.m. on March 23, 2009, Daniel M., his brother Brian, his friend Joshua M., and two other friends were walking in El Monte. (Undesignated date references pertain to 2009.) Daniel, who was 17 or 18 years old, was a member of the El Monte Flores (EMF) gang, but he testified none of his companions were gang members. As they walked past a tea shop called E-Cup, Joshua said that someone inside E-Cup was staring at them. Joshua began walking toward E-Cup and his companions followed. Daniel stopped about 30 feet from E-Cup, but his brother Brian walked up and spat on the window of E-Cup. Instantly, a group of about seven young Asian men came out of E-Cup and angrily confronted Daniel's group in the parking lot. The two groups exchanged words and argued. Joshua loudly proclaimed his desire to fight Wang, who was standing in the doorway of E-Cup staring at Daniel's group. No physical fighting ensued at that time, and Daniel's group walked away toward a friend's house a few blocks away.

As Daniel's group walked down Strozier Avenue, four cars, including a white Lexus and a black Acura, rapidly approached them, stopped abruptly, and parked. A total of 10 to 12 young Asian men emerged from the four cars and rapidly approached Daniel's group. They appeared to be angry and ready to fight. Two of the young Asian men loudly yelled, "Wah Ching," which was the name of an Asian gang. Everyone began fighting, with two or three of the Asian men fighting every member of Daniel's group. Wang and Hung Le were punching Daniel with closed fists. Daniel was defending himself by punching back. As far as Daniel knew, no one in either group had any weapons, so he anticipated only a fistfight. Suddenly another Asian man ran toward Daniel and plunged a knife into his stomach. Daniel took a couple of steps, was struck again with the knife on the back of his head, and fell to the ground. Daniel's friends picked him up, put him in a car, and drove him to a hospital. In the car, Daniel lifted his shirt and saw his "guts hanging out" of his knife wound, which went all the way across

his body. His wounds required surgery and a week-long hospital stay. He had a foot-long scar from the knife wound and still suffered pain and physical disabilities from his wound at the time of trial in September of 2011.

Daniel testified that Chong was not one of the people he was fighting with or the person who stabbed him. Daniel did not remember seeing Chong at the fight on Strozier Avenue. Daniel denied that the fight had anything to do with gangs; it was instead “a private fight.” Sheriff’s Detective Tom Yu, who investigated the crime and served as the prosecution’s gang expert, testified on cross-examination that during his investigation he learned that Hung Le and Wang were the people who fought with Daniel, Hung Duong was the person who stabbed Daniel, and Duong went to the crime scene in the black Acura, while Chong went there in the white Lexus with Danny Liu and Evan Dou. Yu had no information that anyone in the white Lexus had a knife, and Daniel never told Yu that Chong was present.

Yu recorded an interview with Chong at Chong’s home on August 8, and the recording was played for the jury. In the interview, Chong said he had driven to E-Cup in his dark gray Scion TC. He was playing poker with Wang and Hung Le when they saw “a group of EMF guys” approaching, making the EMF gang hand sign. The EMF group spat on the windows and walls of E-Cup, and members of the Asian Krazy Boys gang (AKB) who were in E-Cup ran out and “went after” the EMF group. Chong denied belonging to any gang, but he said he hung out with some AKB members and Wah Ching members Wang, Danny Liu, and Evan Dou. Chong, Wang, Liu, and Dou followed the AKB members in Dou’s white Lexus. Chong initially said that “AKB get [*sic*] there first” and “fucked them up,” but “it was over” before Chong arrived, and Chong “didn’t do shit.” Chong then said he got out of the car and saw “a rumble,” but “didn’t swing at all.” Chong then admitted he and a “short guy from AKB” had tried to chase “[s]ome guy with a truck,” but “[t]hen he threw a hammer.” Chong described the man who threw the hammer as “some old guy. He looked like some OG [original gangster]” “from EMF.”

Chong said the “old guy” “threw it at me and then it—it missed and it hit someone’s car.” Chong ran back to the Lexus and his group left.

On cross-examination, Yu testified that Daniel had told him that after the stabbing, Daniel’s brother threw a hammer to protect Daniel from further injuries. Other suspects told Yu that everyone fled after the hammer was thrown.

Yu testified as an expert on Asian gangs, including Wah Ching and AKB, which are allied, meaning that “[t]hey are on good terms and they operate together. They sell drugs together. They traffic guns.” They “go on missions together” and “will back each other up.” The primary activities of the Wah Ching gang include murders, attempted murders, drive-by shootings, assaults, drug trafficking, robberies, thefts, and weapons violations. The E-Cup and the site of the attempted murder on Strozier Avenue are within territory claimed by the EMF gang, with which the Wah Ching gang does not get along.

In response to a hypothetical question based upon the prosecution’s evidence regarding the events of March 23, Yu opined that the crime was committed for the benefit of, and in association with, the Wah Ching gang. He explained that spitting toward other gang members was “the ultimate disrespect” and required that the offended gang members either retaliate or suffer damage to both the gang’s reputation and their personal reputations within the gang. It did not matter whether “the actual spitter” or some other member of his group was attacked. Yu further opined that it would be important to bring enough gang members and weapons to win the fight. He testified that gang members carry weapons when they go into the territory of a rival gang to carry out a mission because their rivals are likely armed and a failure to carry arms would leave them unprepared and vulnerable. The presence and participation of the “backup members” of the group—those who did not actually stab the victim—was critical because it provided numerical superiority and ensured that “the stabbing actually happen[ed].” Yu testified that his opinion was based upon his “overall training and experience, especially [his] experience as a gang detective in the field of Asian gangs, specifically Wah Ching.”

Yu testified that he had had contact with Chong about six times. Yu opined that Chong was a member of the Wah Ching gang. He based his opinion on Chong's admission that he was an active member of the gang when Yu spoke to Chong at a hospital. On cross-examination, Yu testified that during prior contacts with Chong, Chong had told him he was an active member of AKB. At the August 8 interview with Chong, Yu filled out a field identification card for Chong on which Yu noted Chong was a "suspected" member of Wah Ching. Chong stated during his October 2 booking that he was a member of the Wah Ching gang.

## **2. Assault with a deadly weapon on Joshua G.**

Sometime in September, 15-year-old Joshua G. accidentally bumped shoulders with Wang, whom Joshua knew as "Chicken," in the hallway at Arcadia High School. Wang asked Joshua where he was from. Joshua recognized this as a gang challenge and replied, "I don't bang. I'm not from nowhere." Wang responded by saying, "Wah Ching gang" and pushing Joshua. Joshua pushed Wang back and called him "a little bitch." Joshua and Wang then went to their classes. Thereafter, Wang stared at Joshua whenever they passed one another at school.

About 2:45 p.m. on October 2, Joshua, David Z., Clifford C., and Adam I. were walking from school toward Adam's apartment in Arcadia when Joshua and David saw Wang in the parking lot of an El Pollo Loco. Joshua and his friends continued walking past the restaurant and to Adam's apartment, where they waited in the carport for another friend's mother to pick them up and take them to the beach. Adam went up to his apartment, while Joshua, David, and Clifford sat on a sofa in the carport.

About five minutes after they saw Wang outside El Pollo Loco, Wang and Danny Liu quickly and aggressively entered the carport and approached the sofa on which Joshua, David, and Clifford sat. Joshua testified that two additional young Asian men accompanied Wang and Liu. David testified that Liu said, "I heard you got beef with Wah Ching," whereas Clifford and Joshua testified that Liu and Wang yelled, "Wah Ching gang." All of the young Asian men then "jumped on" Joshua and began hitting

him hard with closed fists and kicking him. Joshua put his arms over his head to block the blows, but never got off the couch. Clifford and David ran away during the attack.

Joshua testified that he pursued Wang when his attackers ran out of the garage, but stopped when Wang ran behind Liu, who pointed a knife at Joshua and said, “Wah Ching.” Liu, Wang, and the other two attackers then ran to a gray car parked in the alley, got in, and left. Joshua thought the car was a “Zion.” He identified the car in a photograph at trial.

David returned after the attack and helped Joshua to the El Pollo Loco, where a friend with a car drove them to a hospital. Joshua suffered injuries to his head, neck, and arms. He had lacerations on his left hand, left elbow, right arm, forehead, face, and right ear. The injuries required sutures and left scars. Joshua spent one night in the hospital. Although Joshua did not testify that he was cut with a knife or scissors, photographic exhibits showing Joshua in the hospital depicted numerous long, thin, relatively straight cuts on his face, neck, and left arm and gaping cuts on his left hand, in addition to other wounds.

On cross-examination, Joshua testified that Chong was one of the four men who attacked him. Clifford did not know whether Chong was one of the men who attacked Joshua, but David testified that Chong was not one of the attackers.

Detective John Bonomo interviewed Chong at the police station along with Officer Fowler about 10:00 p.m. on October 2. A recording of the interview was played at trial. During the interview, Chong said he was “[n]ot really” involved in a gang; he “used to roll with AKB,” but since he was shot, he “just kick it with Arcadia people now.” Bonomo asked about a photograph on Chong’s phone of Chong “throwing up the Dub-C with the circled money.” Chong said the phone was not his, then said he had purchased it from a friend. Bonomo asked Chong what happened with the fight in Arcadia. Chong initially denied knowing about a fight. Bonomo said he knew Chong drove, but was not involved in the fight. Chong said, “Yeah.” He then said the fight occurred because “that guy punched ‘Chicken’ in the face in school before.” Chong agreed with Bonomo’s

assertion that the other participants were “Kevin, Danny, and ‘Chicken.’” Chong admitted that before the “rumble” in Arcadia, he gave Danny Liu his folding knife. Chong “told him to like yeah, don’t do anything just, yeah-yeah.” Liu gave the knife back to Chong when they came back to the car.

In response to a hypothetical question based upon the prosecution’s evidence regarding the attack on Joshua, Yu opined that the crime was committed for the benefit of, and in association with, the Wah Ching gang. He explained that respect was critical to the gang and its members, and gang members “earn[] their stripes” by committing violent acts in the presence of their fellow gang members. Yu testified that his opinion was based upon his training and experience in the field of Asian gangs.

### **3. Robberies and assaults with a deadly weapon at Kohl’s**

About 4:00 p.m. on October 2, loss prevention officers Patricio Sanchez and Erik Pelaez saw Chong enter a Kohl’s department store in Monrovia with three young Asian men. Pelaez thought they looked like gang members. Sanchez and Pelaez watched the four young men move around the store. One of the men tried on a jacket, took it off, and handed it to Chong. Chong tried on the jacket, took it off, then put it back on. The group wandered through the store, then walked out. Chong was still wearing the jacket when he left, but did not pay for it. At trial, the prosecutor played a video recording from the store’s surveillance camera in the shoe department, showing Chong wearing the jacket in issue.

Sanchez and Pelaez pursued the group and caught up with them in a parking lot. Pelaez got in front of Chong, identified himself as a Kohl’s loss prevention officer, and asked Chong to return to the store. Chong bumped Sanchez and swung his arm at Pelaez. Pelaez grabbed Chong’s arm, but Chong slipped out of the jacket. Sanchez grabbed Chong and asked him to return to the store. Chong removed a knife from his trouser pocket and swung it toward Sanchez’s face three times. Sanchez released Chong. Chong swung the knife at Pelaez. Sanchez and Pelaez stepped back, and Chong and his group ran away.

Chong called no witnesses in his defense.

#### **4. Verdicts and sentence**

The jury convicted Chong of attempted murder, three counts of assault with a deadly weapon (Joshua, Sanchez, Pelaez), and two counts of robbery. The jury found that the attempted murder and assault with a deadly weapon on Joshua were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. The jury acquitted Chong of burglary and found not true allegations that he personally used a knife in the robberies. The court sentenced Chong to prison for 12 years, consisting of 9 years for attempted murder, 1 year for assault with a deadly weapon on Joshua, and 1 year for each robbery charge. The trial court struck the gang enhancement with respect to the attempted murder charge and stayed it with respect to the assault with a deadly weapon charge.

#### **Wang's trial**

##### **1. Attempted murder of Daniel M.**

Daniel's testimony at Wang's trial was consistent with his testimony at Chong's trial, with minor differences. Daniel testified that about 10 young Asian men came out of E-Cup and confronted Daniel's group in the parking lot. He testified that 10 to 13 young Asian men "rushed" his group on Strozier Avenue. He did not know how many of the attackers yelled "Wah Ching." Daniel testified that after he was cut across the abdomen, he felt and saw his intestines protruding and held them in his hands until he collapsed. He identified Wang in the courtroom as one of the two young men who was punching him and testified regarding his prior identification of Wang's photograph in an array shown to him by police. The most significant difference in Daniel's testimony was his description of how he suffered the knife wound across his abdomen. On direct examination, he described the knife as having a blade six to seven inches long. On cross-examination, he testified that the knife went into his right side, then he turned, "[a]nd that's why I brought

the whole knife, like, this way (indicating).” Daniel agreed that he turned “to the right and then it went across from right to left on [his] stomach.”

Yu testified that he interviewed Wang on June 25. A recording of this interview was played for the jury. Wang admitted he belonged to the Wah Ching gang and that he socialized with members of the AKB gang at E-Cup. Wang told Yu he was at E-Cup when a group spat on the window, “threw up the Flores sign,” and yelled “El Monte Flores.” “One of the guys” went outside and asked the group why they were “destroying the place.” Then someone known as “CVS” went outside, but “the Mexicans didn’t want to do anything.” They just cursed Asians, then left. Wang and others who had been in E-Cup went in four cars looking for them. Wang was in the black Acura with Hung Le. He “basically” “went there to back them up.” The four cars drove around for about five minutes before they found the offending group. When they got out of the cars, someone loudly yelled, “Wah Ching.” Then, “We just fought.” Wang also told Yu that the fight was “basically over” when he arrived and that he “didn’t rush anyone.” Wang knew that members of AKB carried knives and agreed he was there to “back them up.”

In his role as an expert on Asian gangs, Yu testified that Wah Ching and AKB are Asian gangs in the San Gabriel Valley that are “allied” and “back each other up.” Members of the Wah Ching gang rise within the gang by selling drugs and committing violent crimes, such as stabbings and drive-by shootings, in the presence of their fellow gang members. The EMF gang is one of the Wah Ching gang’s rivals. The E-Cup and the site of the attempted murder on Strozier Avenue are within territory claimed by the EMF gang. Yu opined that when members of the Wah Ching gang go on a mission, some of them will be armed to ensure the success of the mission.

The prosecutor introduced evidence that Wah Ching gang member David Do was convicted of a December 1, 2006 murder and attempted murder and that on August 2, 2007, Wah Ching gang member James Chang pleaded guilty to two counts of assault with a firearm.

In response to a hypothetical question based upon the prosecution's evidence regarding the events of March 23, Yu opined that the crime was committed for the benefit of, and in association with, the Wah Ching gang. He explained that spitting was "the ultimate sign of disrespect," which required the Wah Ching gang members present to retaliate to avoid tarnishing the gang's reputation.

Yu opined that Wang was a member of the Wah Ching gang. He based his opinion on past contacts with Wang and Wang's admission of membership to Yu. Yu also testified that when he interviewed Wang on June 25, Wang was wearing a red hat with a "W," a red belt with a "W," and red shoes with red laces, all of which signified his loyalty to the Wah Ching gang, which identified with red and the letter "W."

Wang testified that he had never been a gang member, but some of his friends were members of the Wah Ching gang. He explained that he only told Yu he was a Wah Ching gang member because he was trying to impress three friends who were present during the interview, which took place outside Tapioca Restaurant. Wang explained that the "W" on his hat and belt represented his initial. Although he told Bonomo, "I'm not even involve [*sic*] in Dubs [Wah Ching] anymore," he was never involved.

Wang testified that on March 23 he was hanging out at E-Cup with his friends, including Chong, when four or five Hispanic young men approached through the parking lot. One of that group spat on E-Cup's window. A couple of the young Asian men inside E-Cup went outside and confronted the group. Wang stayed inside, but stood near the door and watched. He did not stare at anyone. The two groups appeared to talk for a few minutes, then the Hispanic group walked away and the Asian men who had gone outside reentered E-Cup. Wang and Chong talked about what had happened for about 15 minutes. Hung Le was about to leave and agreed to drive Wang home to Arcadia. Wang got into a black Acura, which Hung Duong drove. Wang did not notice anyone else leaving E-Cup or see any cars from E-Cup driving with them. After a couple of minutes, Duong stopped the Acura. Wang saw people fighting. He got out of the car to get a better view, but stayed right by the car door and did not join the fight. After a while,

people stopped fighting and ran to cars. Wang got back in the black Acura. Duong drove to a parking lot. Wang asked Le what happened. After about 15 minutes, Le took Wang home.

Wang testified that he told Yu he was at the fight as “back up” because Yu kept asking him the same questions and he just wanted to go home. Wang explained that he was just making a “random comment” when he told Yu that the Wah Ching and AKB gangs were “cool.”

## **2. Assault with a deadly weapon on Joshua G.**

Joshua, David Z., and Clifford C. provided testimony at Wang’s trial that was consistent with their testimony at Chong’s trial, except that Joshua testified that three of his four assailants said, “Wah Ching,” and he identified the car in which the assailants fled as a “Scion.” David and Joshua identified Wang at trial as the person with whom Joshua had an incident at school and as one of the men who came into the garage and “jumped” Joshua. David testified he had previously identified Wang from a photographic array. Joshua testified that at the preliminary hearing he was afraid, and thus falsely denied seeing Wang in the courtroom. Clifford testified that he could not recall who he selected in a photographic array and did not see the person he selected in the courtroom. He admitted he was afraid.

Bonomo testified that he recorded interviews he had with Wang, first at school and then at Wang’s house, on October 5. The recordings were played for Wang’s jury. In the first interview, Wang admitted fighting with Joshua, but said, “No one stabbed him. Just gave him internal bleeding.” During the second interview, Wang admitted that he had used scissors from his backpack on Joshua, but said he “only slash[ed] him a few times.” He said the scissors were in Chong’s car. He also told Bonomo that Joshua got under a van and “tried to crawl in but we kept looking for him.” Wang did not tell Bonomo that he used the scissors to defend himself against Joshua. Bonomo searched Chong’s car and found a pair of scissors in a cup holder in the back seat. The parties stipulated that Joshua’s blood was on the scissors.

In response to a hypothetical question based upon most of the prosecution's evidence regarding the attack on Joshua, not including the incident at school, Yu opined that the crime was committed for the benefit of, and in association with, the Wah Ching gang because it would boost the gang's reputation.

Wang testified that after he and Joshua bumped into one another at school in September, Joshua pushed him, laughed at him, and called him "bitch." Wang just walked away with his head down and without saying anything. Over the next month, Joshua repeatedly laughed at Wang and called him names. Wang was frustrated by this, but not angry.

Wang testified that Chong was giving him a ride home after school on October 2. Danny Liu, whom Wang knew was a member of the Wah Ching gang, and Kevin were also in the car. As Chong drove away from the school, Wang saw Joshua and said, "That's the guy that's been picking on me at school." Liu said, "I'll talk to him for you." Chong parked the car, and Wang, Liu, and Kevin got out. Wang and Liu walked into the carport where Daniel was seated with two other young men. Liu asked Daniel, "You got a problem with my friend?" Daniel arose and began fighting with Liu. They fought for about 30 seconds, then Daniel "rushed" Wang. Wang stepped back and pulled a pair of scissors from the side pocket of his backpack. Acting in self-defense, Wang swung the scissors "randomly" at Daniel. Daniel still wanted to fight, so Wang ran away. Daniel chased Wang, who ran toward his friends. One of his friends pulled out a knife and told Daniel to stop. Wang and his friends got into Chong's car and left.

### **3. Verdicts and sentence**

The jury convicted Wang of attempted murder and assault with a deadly weapon. The jury found that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. The court sentenced Wang to prison for 10 years, consisting of 9 years for attempted murder and 1 year for assault with a deadly weapon. The trial court stayed the gang enhancements.

## DISCUSSION

### 1. Sufficiency of evidence to support Chong's attempted murder conviction

Chong's liability for the attempted murder of Daniel was based upon the theory that he aided and abetted an assault with a deadly weapon or assault by means of force likely to produce great bodily injury, a natural and probable consequence of which was an attempted murder. Chong contends that the evidence was insufficient to support his attempted murder conviction because he "simply got out of the car and chased after an older member a [*sic*] the EMF gang. [Chong] had no weapon. [He] did not approach or threaten Daniel . . . . He was merely present at the scene and did not even know that [Daniel] had been stabbed." Chong also seemingly argues that his conviction was predicated solely upon his gang membership.

One who knows another's unlawful purpose and intentionally aids, promotes, encourages, or instigates the crime is guilty as an aider and abettor. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*)). Although neither mere presence at the scene of a crime nor failure to prevent a crime is sufficient to constitute aiding and abetting (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90), the jury may consider facts such as presence at the scene of the crime and companionship and conduct before and after the offense, including flight, in deciding whether a defendant knew of the perpetrator's intentions and intended to facilitate or encourage the crime. (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 330.)

An aider and abettor is guilty not only of the offense he or she intended to facilitate or encourage (the target crime), but also of any other crime committed by the person he aids and abets that is the natural and probable consequence of the target crime. (*Prettyman, supra*, 14 Cal.4th at p. 261.) An aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed, and need not have any specific intent that is an element of the offense committed. (*Ibid.*) A particular criminal act is a natural and probable consequence of another criminal act if, under all of the circumstances presented, a reasonable person in the defendant's position would or should

have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. (*People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*)). “But ‘to be reasonably foreseeable “[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .’” (*Ibid.*) “The precise consequence need not have been foreseen.” (*Id.* at p. 927.)

Viewing the record in the light most favorable to the judgment, substantial evidence supports Chong’s attempted murder conviction. After the verbal confrontation with Daniel’s group—whom Chong characterized as “a group of EMF guys” who were making gang hand signs before spitting on the window at E-Cup—Chong could have remained in the tea shop or driven his own car home or to some other destination. He did neither. By his own admission, he left E-Cup at the same time as the AKB gang members who “went after” Daniel’s group; got into Evan Dou’s car with Dou, Wang, and Danny Liu, whom he knew were Wah Ching gang members; and went in a caravan of four cars of AKB and Wah Ching gang members. In light of Yu’s expert testimony, the jury could infer that the Wah Ching and AKB members “went after” Daniel’s group because they intended to retaliate for the perceived disrespect Daniel’s group had shown by spitting on the window at E-Cup. When the four-car caravan caught up with Daniel’s group on Strozier Avenue, three or four people got out of each car, ran straight toward the members of Daniel’s group, and began punching the members of Daniel’s group, with two or three people from Chong’s group fighting each member of Daniel’s group. Two people shouted “Wah Ching.” Chong admittedly got out of Dou’s car and chased someone—perhaps Daniel’s brother Bryan—whom Chong thought looked like a higher ranking member of the EMF gang. Chong desisted only when the person he was chasing threw a hammer at him, and he then fled with Dou, Wang, and Liu. Chong’s companionship with the nine to eleven other co-perpetrators before the attack, his action in concert with them to leave E-Cup and locate and attack Daniel’s group, and the inference of a gang-related motive supported by Yu’s expert testimony and Daniel’s testimony about the shouting of

“Wah Ching” at the outset of the attack constituted substantial evidence supporting reasonable inferences that Chong both knew his companions intended to assault Daniel’s group and intentionally aided that assault by directly participating in it. In addition, according to Yu’s testimony, Chong’s participation aided the assault by contributing to the numerical superiority of the AKB-Wah Ching group over Daniel’s group, thereby assuring the success of the “mission.” Thus, Chong was not merely present at the scene of the crime, and his conviction was not premised solely upon his gang membership.

We note that Chong does not challenge the sufficiency of evidence to show an aggravated assault, as opposed to a simple assault, or to show that attempted murder was a natural and probable consequence of the target crime. Nor does he challenge the sufficiency of the evidence to establish that Duong specifically intended to kill Daniel when he plunged the knife into him and sliced open Daniel’s abdomen. We briefly note that kicking or striking a victim with one’s hand may be sufficient to constitute an assault by means of force likely to produce great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) In addition, although “prior knowledge that a fellow gang member is armed is not necessary to support a defendant’s murder conviction as an aider and abettor” (*Medina, supra*, 46 Cal.4th at p. 921), the jury could reasonably infer, based upon Daniel’s testimony that all members of Chong’s group immediately attacked Daniel’s group, evidence of Chong’s gang membership, and Yu’s testimony that gang members carry weapons when they go into the territory of a rival gang on a “mission,” that Chong knew that one or more people in the group of 10 to 12 AKB and Wah Ching gang members would be armed as they carried out their mission to retaliate against the “group of EMF guys” within EMF’s own territory.

## **2. Consolidation of charges against Chong**

Separate cases were filed against Chong for the crimes at Kohl’s (No. GA078076), the aggravated assault on Joshua (No. GA078128), and the attempted murder of Daniel (Case No. KA089924). Three additional codefendants were charged in the aggravated assault case and five additional codefendants were charged in the attempted murder case.

The prosecutor filed a written motion to consolidate the three cases, arguing that Chong was involved in all three cases and Liu and Wang were involved in the aggravated assault on Joshua and the attempted murder of Daniel, all named defendants were members of Wah Ching and AKB gangs or acting in association with those gangs, gang enhancements were alleged in regard to the aggravated assault on Joshua and the attempted murder of Daniel, the crimes against Joshua and Daniel were committed in a similar manner and with use of stabbing instruments, and the crimes were committed “close in time and space.” The prosecutor also argued that a joint trial of the charges “would greatly reduce Defendants Liu, Chong and Wang’s time and expense in defending these charges” and “reduce the burden on jurors, judges, and court personnel.” The prosecutor further represented that “the crimes in each case will be proven with similar evidence and much of the evidence is cross-admissible. . . . The gang evidence is cross-admissible with respect to all the defendants to prove the gang allegations. Additionally, evidence of the substantive crimes is cross-admissible with respect to Defendants Liu, Chong and Wang to prove intent, motive, and common plan or scheme.”

Chong opposed the consolidation motion, arguing he would suffer prejudice from joinder. In particular, he argued that codefendants Liu, Wang, and Kevin Choi were percipient witnesses that he intended to call to support his claim of self-defense in relation to the Kohl’s charges, but if the cases were joined, their attorneys would prevent them from testifying to avoid exposing them to cross-examination on the charges against them in the other two cases. He also argued that he might want to testify as to one of the charges but not the others. Chong further argued that the jury might use evidence of one crime to infer Chong had a criminal disposition, or it might “aggregate all of the evidence . . . and convict on both [*sic*] charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both [*sic*] charges. Joinder in this case will make it difficult not to view the evidence cumulatively.” He further argued that joinder would not result in any significant public benefit.

The trial court granted the motion to consolidate without prejudice to future motions to sever, stating, “The cases are classically joinable in the sense they are the same class of crime. They have elements of substantial importance and commonality, i.e., gang membership, some very discrete gangs, and some gang activity undertaken jointly by various individuals. And the manner of inflicting injury seems to be fairly consistent.” The court found Chong’s argument about calling some codefendants as witnesses in a separate trial speculative and unconvincing. The court also stated it had not “heard anything specific in terms of a particular piece of type of evidence that would come in that is likely to inflame the jury specifically against . . . any defendant.”

The prosecutor subsequently elected to try the case two defendants at a time. Chong and Liu were tried together using separate juries. Just before selection of Chong’s jury commenced, Chong moved to sever trial of the attempted murder charge from the remaining charges. He argued that in the trials of the three codefendants that had already occurred, Hung Duong and Evan Dou, who had faced only the attempted murder charge, had been acquitted, while Wang, who was charged with both the attempted murder of Daniel M. and the assault with a deadly weapon on Joshua, had been convicted. Chong argued that this demonstrated that joining other charges with the attempted murder charge was prejudicial, and the Kohl’s charges in his case put him in an even worse position. He further argued that “our case is also very thin on count 1 [attempted murder]” and that the jury might get confused and believe the same knife was used in all of the crimes.

The prosecutor noted that the evidence as to each defendant was different and argued that it was speculative to conclude that joinder of the attempted murder and assault with a deadly weapon charges was the cause of Wang’s conviction. He further argued that the gang evidence was cross-admissible in the attempted murder and the assault on Joshua, the same knife was used in the crimes at Kohl’s and the assault on Joshua, and all three incidents involved assaultive behavior and the use of a weapon.

The court denied Chong’s motion to sever. It noted that Wang’s unconvincing testimony was “another significant factor” that differentiated his case from that of his

codefendants, all of the crimes except the burglary were crimes against a person, Chong's involvement in the attempted murder was as an aider and abettor and thus "relatively minor," and the court did not believe that a consolidated trial of the various charges would result in any prejudice to Chong.

Chong contends that the trial court erred by granting the prosecution's motion to consolidate and denying his motion to sever. He concedes all of the charges were of the same class of crimes, but argues his case was prejudiced by the joinder because the attempted murder and the assault with a deadly weapon on Joshua were weak cases, while the Kohl's case was strong, and the jury must have convicted him on the basis that the evidence of his conduct at Kohl's showed his bad character. He contends that the consolidated trial violated due process.

Offenses that are of the same class of crime or are connected in their commission may, in the trial court's discretion, be charged and tried together. (Pen. Code, § 954; undesignated references are to the Penal Code.) Cross-admissibility of evidence is not required. (§ 954.1.) But severance may be required if joinder would be so prejudicial that it would make the trial unfair. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243–1244 (*Musselwhite*)). The first consideration is whether some of the evidence would be cross-admissible in separate trials. (*People v. Soper* (2009) 45 Cal.4th 759, 774 (*Soper*)). Cross-admissibility pertains to the admissibility of evidence tending to prove a disputed fact of consequence, not the cross-admissibility of another charged offense. (*People v. Geier* (2007) 41 Cal.4th 555, 576.) Cross-admissibility is "normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Soper*, at p. 775.) Full cross-admissibility is not required. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221 (*Alcala*)).

If evidence would not be cross-admissible in separate trials, we consider the following factors to determine "whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses":

whether some of the charges are particularly likely to inflame the jury against the defendant; whether the prosecution has joined a weak case with a strong case or another weak case, “so that the totality of the evidence may alter the outcome as to some or all of the charges;” and whether one of the charges carries the death penalty or their joinder turns the matter into a capital case. (*Soper, supra*, 45 Cal.4th at p. 775.) The party seeking severance must clearly show that a substantial danger of undue prejudice outweighs the benefits of joinder, such as timely disposition of criminal charges and conservation of judicial resources and public funds. (*People v. Bean* (1988) 46 Cal.3d 919, 939–940.)

Denial of a motion to sever is reviewed for abuse of discretion in light of the record before the trial court when it ruled on the motion, not in light of what happened at trial. (*Soper, supra*, 45 Cal.4th at p. 774.) Defendant must make a clear showing of prejudice to establish an abuse of discretion. (*Ibid.*) “[I]n the context of properly joined offenses, ‘a party seeking severance must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.’” (*Alcala, supra*, 43 Cal.4th at p. 1222, fn. 11.) Due to the preference for joinder, the trial court’s discretion is broader in ruling on a motion for severance than in ruling on admissibility of evidence. (*Id.* at p. 1221.)

The mere presentation of evidence of a defendant’s commission of multiple offenses is a “necessary concomitant of joinder” and is insufficient to render joinder unduly prejudicial. (*People v. Hill* (1995) 34 Cal.App.4th 727, 735.) “If it were, joinder could never be permitted.” (*Ibid.*) “[T]he benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried.” (*Soper, supra*, 45 Cal.4th at p. 781.) The danger to be avoided in joinder of offenses is that strong evidence of a lesser, but more inflammatory crime might be used to bolster a weak case on another crime. (*People v. Mason* (1991) 52 Cal.3d 909, 934.) An extreme disparity in strength or inflammatory character is required

in order to demonstrate the potential for a prejudicial spillover. (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1284.)

Even if the trial court's ruling denying severance was correct, reversal is required if a defendant shows that joinder actually resulted in gross unfairness amounting to a denial of due process. (*Soper, supra*, 45 Cal.4th at p. 783.) "The issue is not whether the evidence is sufficient to support the convictions on the joined counts, independent of the evidence on other counts," but whether the error itself substantially influenced the outcome. (*People v. Grant* (2003) 113 Cal.App.4th 579, 587–588.) The defendant must establish a reasonable probability that the joinder affected the jury's verdicts. (*Id.* at p. 588.)

**a. Joinder of attempted murder and aggravated assault on Joshua**

The trial court did not err by consolidating, then refusing to sever, the charges of attempted murder of Daniel and assault with a deadly weapon on Joshua. Gang enhancements were alleged for each of these offenses and the vast majority of the gang evidence for each was identical. The gang evidence was thus cross-admissible, and joinder of these charges promoted both case-specific and systemic efficiency throughout the proceedings, in all levels of the court system. (*Soper, supra*, 45 Cal.4th at pp. 781–782.) With respect to Chong's due process claim, he has not shown a reasonable probability that joinder of these charges affected the jury's verdicts. Neither case was weaker or more inflammatory than the other. Indeed, neither case was weak. Chong admitted some level of participation in each offense in recorded statements that were played for the jury, and Joshua identified him as one of the four men who entered the garage and attacked him.

**b. Joinder of Kohl's counts**

The Kohl's charges were "connected together in their commission" with the assault with a deadly weapon on Joshua because Chong's knife was used in all of these offenses except the burglary. The prosecutor did not raise this point in his motion to consolidate, but he did in his opposition to Chong's motion to sever when he argued that

evidence of the use of the same knife was cross-admissible. Although the use of the same knife ultimately had little or no probative value, we review the ruling at the time it was made, and the purported cross-admissibility supports the trial court's ruling. Although Chong argued that the prosecution's case with respect to the attempted murder and the assault with a deadly weapon charges was weak, none of the cases were weak and the Kohl's charges were relatively minor, when compared to the injuries sustained by Daniel and Joshua. Thus, there was no danger that strong evidence of a lesser but inflammatory crime might be used to bolster a weak case on another crime. Chong has not shown a reasonable probability that joinder of the Kohl's charges with the charges of attempted murder and assault with a deadly weapon on Joshua affected the jury's verdicts.

Chong argues that joinder violated due process because the prosecutor argued that the jury should "use evidence of one crime to convict [Chong] of another crime." For the convenience of one of Chong's two attorneys, the prosecutor gave his opening argument regarding the attempted murder charge first, followed by Chong's argument on that charge. The prosecutor gave his opening argument on the remaining charges the next day. The argument Chong cites in support of this assertion was nothing more than a prefatory listing of the charges against Chong at the outset of the prosecutor's argument regarding the attempted murder: "Let's talk about the charges and allegations in this case. I've listed seven counts that Mr. Chong is charged with, but today we're just going to focus on count 1, which is the attempted murder of Daniel [M]. [¶] Mr. Chong is charged with the following: count 2, assault of Joshua [G.]; count 3, burglary at Kohl's; count 4, assault with a deadly weapon at Kohl's against Patricia [*sic*] Sanchez; count 5, Erik Pelaez; 6, robbery of Mr. Pelaez; and 7, robbery of Mr. Sanchez. And that's the entire list of the charges against Mr. Chong." The prosecutor at no time in his arguments told the jury that it could use the evidence of Chong's commission of one crime to convict him of another crime.

### 3. Limitations on Chong's cross-examination of Yu

Chong contends that the trial court violated his confrontation and due process rights by precluding him from cross-examining Detective Yu about “what he had learned about the case from his interviews of the co-defendants and percipient witnesses to the stabbing of Daniel [M]. Counsel wanted to impeach Yu’s expert opinion that the stabbing was a gang related crime; that [Chong] was a gang member; and that [Chong] was involved in the assault upon the EMF gang members as a gang retaliation for the E-Cup spitting incident. Counsel also wanted to impeach Officer Yu by showing that he was biased against the Asian suspects in this case as evidenced by his harsh interrogation of one of the co-defendants, which included lying to the co-defendant during the interview.”

Neither the right to present a defense nor the right to confront witnesses permits a defendant to introduce irrelevant or marginally relevant evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431].) The confrontation clause simply guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense wishes. (*Delaware v. Van Arsdall*, at p. 679.) Judges retain wide latitude to impose reasonable limits on cross-examination. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) Confrontation rights are not violated unless a defendant shows that the prohibited cross-examination would have produced a significantly different impression of the witness’s credibility. (*Id.*, at pp. 623–624.)

Outside the presence of the jury, Chong requested that he be allowed to cross-examine Yu about “outrageous statements” Yu made during his interrogation of codefendant Dou and “how he goes about interrogating people, whether he lies to them, which we can demonstrate that he did, whether he threatens them, which we can demonstrate that he did . . . .” Chong argued that the prosecution’s “entire case” against him on the attempted murder charge was “based on the statements of interviews that were conducted by the two defendants [*sic*].” Chong conceded that his own interview by Yu

was recorded, there was no dispute as to what was said or what took place, and that Yu did not use any purportedly improper techniques on him. Chong nonetheless argued that Yu's purported misconduct with Dou was relevant to demonstrate Yu's "attitude towards the suspects" and allow "the jury to know the whole person." The trial court denied Chong's request but invited him to renew it before completing his cross-examination.

Chong subsequently renewed his request, arguing, "I think we will be able to establish a bias or prejudice on this officer in the fact that [Yu] has an agenda. And I think that because he lies to other people and because he threatens other people when he interviews them or interrogates them I think that—and the way he dresses is also an intimidation factor. I think all of those things make it crucial to be able to fully cross-examine him on the issue of how he conducts these interrogations and how he interviews . . . ." Chong argued that Yu lied to Dou and threatened him, "[a]nd because those kind of—that kind of conduct was countenance[d] and perhaps encouraged by the Sheriff's Department, at least it was allowed, that goes to his qualifications as an expert."

The trial court again denied Chong's request, stating he was free to cross-examine Yu about any techniques Yu used in interrogating Chong, but techniques Yu used in interrogating other suspects were irrelevant. The court also excluded such evidence pursuant to Evidence Code section 352 because it would "involve an explanation to this jury about what happened in the interview with Mr. Dou, and I think that would be an undue consumption of time, involve collateral issues." The court also denied Chong's motion for mistrial.

Chong again renewed his request, saying, "Deputy Yu said that based on interviews that he's had previously, that my client, number one, was a member of the Wah Ching gang. And secondly, that the running away occurred after the stabbing, and this is based on interviews. I would like to be able to go in to these interviews." Chong then clarified he was referring to Dou's interview only, and in particular, portions in which Dou was threatened, "just to show the techniques that [Yu] used to get these statements that he's relying on to say that [Chong] is a member of the Wah Ching. And

secondly, that he—when he ran away, it was after the stabbing.” The court declined to change its ruling on the techniques used in Dou’s interview, but said, “If you can identify that Mr. Dou somehow implicated your client as running away after the stabbing, that would be admissible and proper.” Counsel for Chong said he was unaware of any “statements like that.” Chong did not thereafter attempt to introduce any such statements.

In the trial court, Chong asked to question Yu only about portions of Dou’s interview in which Yu allegedly used improper interrogation techniques. He thus made no offer of proof regarding the broader category addressed in his appellate claim, that is, matters Yu “had learned about the case from his interviews of the co-defendants and percipient witnesses to the” attempted murder. Statements by witnesses and codefendants were likely inadmissible hearsay, and Chong has not suggested any hearsay exception or nonhearsay purpose for the unknown statements.

Nor has Chong shown how statements by witnesses and codefendants would have impeached “Yu’s expert opinion that the stabbing was a gang related crime; that [Chong] was a gang member; and that [Chong] was involved in the assault upon the EMF gang members as a gang retaliation for the E-Cup spitting incident.” Yu never testified that his opinion that the stabbing was a gang related crime was based upon his interviews of codefendants or witnesses. After opining, in response to a hypothetical question, that the attack on Daniel’s group was committed for the benefit of and in association with the Wah Ching gang, Yu testified that his opinion was based upon his “overall training and experience, especially [his] experience as a gang detective in the field of Asian gangs, specifically Wah Ching.” Yu testified that he based his opinion that Chong was a gang member on Chong’s admission to Yu that he was an active member of Wah Ching. Yu did not opine, as Chong contends, that Chong “was involved in the assault upon the EMF gang members as a gang retaliation for the E-Cup spitting incident.” Chong’s involvement was established by his own admission in his recorded interview with Yu, and neither Yu nor anyone else testified regarding Chong’s subjective motivation for participating in the assault.

The record does not support Chong's erroneous representation to the trial court that Yu testified that his opinion that Chong was a member of the Wah Ching gang and his belief that Chong ran away after the stabbing were based upon Yu's interview with Dou. Yu never referred in his testimony to any statements by Dou, much less cited such statements as the basis for any of his testimony.

Chong has also failed to demonstrate how Yu's purportedly "harsh interrogation" of Dou would have shown that "he was biased against the Asian suspects." Officers commonly use a variety of techniques to attempt to get suspects to confess or make admissions, and, on cross-examination, Yu repeatedly explained that he made certain statements to Chong or refrained from challenging him in an effort to create and maintain good rapport so that Chong would continue to talk and provide information. The use of such tactics has no tendency to establish bias against even the recipient of such treatment, much less other suspects. Chong conceded that Yu did not use any of the purportedly "harsh" techniques on him. The use of such techniques on Dou was irrelevant in Chong's case.

Because cross-examination regarding Dou's interrogation would have introduced irrelevant matter that would not have produced a significantly different impression of Yu's credibility, the trial court's rulings did not violate Chong's confrontation right or render his trial unfair.

#### **4. Sufficiency of evidence to support Wang's attempted murder conviction**

Wang challenges the sufficiency of evidence to support his attempted murder conviction on the theory that there was insufficient evidence that Duong intended to kill Daniel. Citing Daniel's testimony that his own turn caused the knife to cut across his abdomen, Wang argues that the evidence supported only an inference that Duong intended to injure Daniel, but the injury was far more serious due to "circumstances beyond his control."

Attempted murder requires the specific intent to kill; implied malice is insufficient. (*People v. Lee* (1987) 43 Cal.3d 666, 670.) To support Wang's conviction as an aider and

abettor in this case, there must have been substantial evidence that the direct perpetrator, Duong, intended to kill Daniel. Because there is rarely direct evidence of such intent, it must usually be shown from the circumstances of the attempt. (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Notwithstanding Daniel's testimony about turning, the jury could reasonably infer Duong's intent to kill from his conduct. Daniel was not fighting with or threatening Duong, and nothing suggests Daniel posed any threat to Wang and Le as they beat him. Duong nevertheless ran up to Daniel and plunged a knife with a six- to seven-inch blade so deeply into Daniel's stomach area that it pierced Daniel's abdominal cavity. Duong thus chose to stab Daniel in the vicinity of vital organs, such as the spleen, liver, stomach, and intestines, damage to which could be life threatening. Then, as Daniel turned, Duong held onto the handle of the knife with sufficient strength to cause the blade to slice open Daniel's abdomen, allowing Daniel's intestines to spill out of the incision. If Duong's intent had been merely to injure Daniel, he could have used his knife to cut or even stab Daniel's arm or leg or another area of the body where the wound would not be life-threatening. Based on Duong's sudden, unnecessary attack on Daniel, the depth to which Duong plunged his knife, the proximity to vital organs of the stab wound, and Duong's continuing grip upon the knife as Daniel turned, the jury could reasonably infer that Duong intended to kill Daniel.

##### **5. Sufficiency of evidence to support gang enhancement finding against Wang**

An essential element of a gang enhancement allegation under section 186.22, subdivision (b), is proof that the purported gang has "as one of its primary activities the commission of one or more of the criminal acts enumerated in . . . subdivision (e)" of the statute. (§ 186.22, subd. (f).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) "Sufficient proof of the gang's primary

activities might consist of evidence that the group's members *consistently and repeatedly* have committed" one or more of the enumerated crimes. (*Id.* at p. 324.) Evidence of both past criminal acts and the circumstances of the charged offenses are relevant to establish this, but such evidence generally will not establish a consistent and repeated commission of any of the enumerated crimes. (*Id.* at pp. 323–324.)

Wang contends there was no evidence of the primary activities of the Wah Ching gang. We agree. Neither Yu nor any other witness testified regarding the gang's primary activities. This appears to have been an oversight, perhaps caused by having Yu testify separately before Dou's jury, then Wang's jury.

The Attorney General attempts to piece together the following bits of testimony by Yu and label it as evidence of the Wah Ching gang's primary activities. Yu testified that members of the gang "get ahead" in the gang, or "earn their stripes by committing mostly violent crimes, violent acts, and that's usually committed in the presence of other gang members." The prosecutor asked Yu again "how a Wah Ching gang member would earn his stripes, earn his bones." Yu replied, "By committing violent crimes, stabbing, drive-by shooting, hurting other individuals, doing them, like I said, in the presence of other gang members." The prosecutor then asked, "Are there different levels of membership within the Wah Ching gang?" Yu responded, "Sure," then explained, "You have the lowest one on the food chain is your wannabes, your hangouts. We call them associates. Those individuals would know the gang's politics. They know the rivals. They know the people they hang out with are gang members. They're not jumped in yet but they would like to be someday. [¶] The next level is the actual fully jumped-in active members. They're the active members of a gang. They're kind of—they're troops. The guys are just out there every day doing their primary activities. They're committing their crimes. [¶] And then above that is [*sic*] the leaders. The leaders to the gang are the ones who calls [*sic*] the shots, the shot callers; and they control the politics. They control the drug buys, the weapons trafficking, who to stab, who to shoot, who to go rip off the drugs. They control that." The prosecutor again asked how gang members got ahead in the

gang. Yu responded, “They get ahead primarily by committing crimes. They can get ahead by selling drugs for the gang, traffic drugs. They can get ahead mostly committing violent crimes, that is the most common and fastest and efficient way to come up, to earn their stripes and promote their own reputation within their—the gang.”

In the quoted testimony, Yu addressed only the activities of individuals in the gang, whether the “troops” or the “shot callers,” and how members rose within the ranks of the gang. Neither the ability of a member to rise within the gang’s hierarchy by selling drugs, committing a drive-by shooting, or stabbing someone, nor a leader’s control over “drug buys, the weapons trafficking, who to stab, who to shoot, who to go rip off the drugs” establishes that the commission of one or more of the statutorily enumerated crimes was one of the Wah Ching gang’s primary, chief, or principal occupations. Yu’s testimony did not show consistent and repeated commission of even the activities he identified, as opposed to occasional acts. Yu’s statement, “The guys are just out there every day doing their primary activities” was insufficient because it addressed the primary activities of individual members, not of the gang, and did not identify any of the statutorily enumerated crimes as constituting the members’ primary activities. Nor is Yu’s testimony sufficient when considered with the charged offenses and the evidence of prior offenses of two Wah Ching gang members. The three prior offenses of two other Wah Ching gang members occurred, as far as the record reveals, in 2006 and 2007. The charged offenses occurred in 2009. These offenses demonstrate occasional commission of crimes by members of the group, not repeated and consistent commission of any of the enumerated crimes. Accordingly, the jury’s true findings on the gang enhancement allegations as to each count against Wang must be reversed and may not be retried. This will not affect Wang’s sentence because the trial court stayed the gang enhancements.

#### **6. Admission in Wang’s trial of photograph of Daniel’s injuries**

Wang joined in codefendant Dou’s request to exclude pursuant to Evidence Code section 352 a photograph of Daniel’s abdominal wound that showed his intestines protruding. Dou argued that “the prejudicial nature of that scar [*sic*] outweighs any

probative value.” The trial court found “that the probative value, which is evidence of express malice, . . . substantially outweighs any prejudicial effect.” The court stated it would adhere to the policy developed in Duong’s trial of permitting the photograph to be projected, but not sending it into the jury room. The photograph was introduced during Daniel’s testimony, and he testified, “That’s exactly what was hanging out of my stomach.” The court later noted for the record that the photograph in issue “was presented on the digital display for approximately 15 to 20 seconds, and has not been displayed to the jury again nor does the court perceive any necessity for its republication.”

Wang contends the trial court erred by permitting the jury to view the photograph and by refusing to grant his motion for a new trial on this ground. He argues that the photograph was not relevant to Duong’s intent to kill Daniel because Daniel caused the slicing injury by turning his body.

A trial court has broad discretion to admit purportedly gruesome or inflammatory photographs of a victim, and the court’s decision will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*People v. Mills* (2010) 48 Cal.4th 158, 191.)

The photograph in question was relevant to demonstrate the nature, location, and severity of Daniel’s injury, which were relevant to show Duong’s intent to kill. Wang expressly contested the sufficiency of the prosecutor’s proof of Duong’s intent in the trial court, as he has on appeal. We have reviewed the original photograph and conclude that, while it is unpleasant, it is not unduly gruesome or inflammatory. In comparison with the heinous nature of the crime presented to the jury through Daniel’s testimony regarding his own observations of his injury, the photograph is not exceptionally gruesome. We further note that the trial court limited the duration of the jury’s exposure to the photograph, and thus attempted to reduce any potential for prejudice to Wang. Accordingly, we conclude that the trial court did not abuse its discretion.

**DISPOSITION**

With respect to Wang, the true findings on the gang enhancement allegations are reversed as to both counts and may not be retried. Wang's judgment is otherwise affirmed. With respect to Chong, the judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.