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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW JONES et al.,

Defendants and Appellants.

C062720

(Super. Ct. No.
08F06292)

Defendants Matthew Jones and Joshua Nickerson were convicted by a jury of attempted murder (Pen. Code, §§ 664/187; unspecified section references that follow are to this code) and two counts each of dissuading a witness (§ 136.1). The jury also found each offense had been committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)), and a principal discharged a firearm and caused great bodily injury in connection with the attempted murder (§ 12022.53, subds. (d) & (e)).

Defendants appeal, contending the evidence is insufficient to support the attempted murder conviction, the firearm enhancement, and the gang enhancement. They also contend the trial court improperly instructed the jury on the firearm enhancement and the prosecutor committed misconduct during closing arguments. We find no prejudicial error and affirm the judgments. However, we find an error in Nickerson's abstract of judgment and order that it be corrected.

FACTS AND PROCEEDINGS

The attempted murder occurred on July 25, 2008, at an apartment complex in the northern part of Sacramento, an area "infested with Crips" that had become "hot" for gang-related crimes. At the time, defendants were living in the apartment complex and were members of the Crips gang.

Also living in the apartment complex at the time was Alisha S. Alisha, her sister, Ieisha S., their children, and Alisha's boyfriend, Mauryea A. shared an apartment. Alisha was friends with defendants.

On the night of July 25, 2008, Alisha, Mauryea, and two of Alisha's friends, Felicia T. and Melissa B., were at Alisha's apartment. A little before 10:00 p.m., they heard a knock at the door and Alisha answered it. Outside were defendants and a third individual, Cassell Meadors, who was also a Crips member. Defendants entered the apartment, but Meadors remained outside. Nickerson walked into the kitchen and Jones stayed in the living room area with Mauryea.

While conversing with Jones, Mauryea said something about "cuz" or "blood," and that upset Jones. An argument ensued between them. Alisha later reported to police that Mauryea said something like, "Blood, can you get out of my girlfriend's house? She gets an attitude every time you come over here, and she takes that out on everybody when you come over here." According to the prosecution's gang expert, calling a Crip gang member a Blood is considered a challenge. Mauryea reported to police that defendants had been talking about "guns and things" and he thought this was disrespectful to the house. He told them so and that he wanted them to leave.

Meadors entered the apartment, got in Mauryea's face and started yelling at him. Meadors said, "Don't talk to my motherfucking brother like that." Alisha yelled to them from the kitchen to take their argument outside. Nickerson emerged from the kitchen and the four men walked outside the apartment. Alisha closed and locked the door behind them.

When Mauryea walked outside, he found the other three standing in a semi-circle facing him. Defendants were "posturing like they [had] guns." They continued to argue with Mauryea. At one point, Alisha stepped outside and tried to get Mauryea to come back inside, but he refused. Meadors told Mauryea he was going to shoot him and was making hand signs. Although Mauryea was not being aggressive toward the other three, he also refused to be intimidated by them. Mauryea heard someone say that they were the "Trigga Mob." Meadors said to Mauryea he would "bust [him] out right now" and would "shoot

this whole house up." Meadors also brandished a handgun. When he saw the gun, Mauryea asked, "Are you going to shoot me?"

At some point during all of this, Mauryea apologized and offered to shake hands with Jones and "squash it." Jones responded that, "We're cool," but he refused to shake Mauryea's hand.

Mauryea eventually walked past the other three and, when he turned back toward them, found Jones "dead in [his] face." Mauryea saw that Jones held one hand behind the back of his leg. Jones made an overhand motion with that arm and struck Mauryea in the eye with what Mauryea believed to be the butt of a gun. Mauryea immediately lost sight in that eye.

Mauryea grabbed Jones and the two wrestled around. Mauryea got Jones in a headlock. Nickerson and Meadors shouted encouragement to Jones and assisted him by hitting Mauryea in the back and the back of the head. As they wrestled, Mauryea could see a gun being handed off from one to another of the assailants. Mauryea then heard a shot and felt a burn on his shoulder.

Mauryea immediately released his hold on Jones and fell down on "all fours." He heard Nickerson say something to him like, "I told you," and then saw the three walk away together. He also saw one of them pass a gun to Nickerson.

Mauryea struggled to his feet and returned to the apartment, where he told the others he had been shot.

Mauryea was taken to the hospital and examined. He had injuries to his eye, the back of his head, and his shoulder.

There were multiple fractures to the orbit around his eye and he suffered vision loss due to damage to the optic nerve. There were scratch marks on his shoulder and two penetrating wounds consistent with gunshots. X-rays also revealed metallic fragments near the shoulder blade, which were not removed by medical personnel.

Defendants and Meadors were later arrested. On August 6, 2008, Ieisha received a call on her cell phone while she was walking her daughter to school. The caller identified himself as John John, but she recognized the voice as that of Jones. Jones said, "My boy's in jail. You guys got him in trouble. Come outside." He also said, "[H]i bitch. Nigga, my homeboy's in jail and you guys are snitches." He also said, "I'm gonna shoot your fucking house. I'm in front your [sic] apartment. Come out now." Ieisha immediately reported this to the police.

That same day, Alisha called the police and reported she had received a threatening call from Nickerson on August 4. Alisha reported that Nickerson said to her, "You're going to get it. I'm 29th Street, Cuz. You're gonna get it. You better watch your backs." Alisha also heard from "this dude named Sean" that "the word on the street was that these guys, if [she] snitched, were going to kidnap and torture [her] kids." Alisha also heard on the street that defendants thought she had been identifying them as the perpetrators. She told police in a later interview that she was told if she snitched something would happen to her children and "they" were going to shoot up

her house. Alisha later visited Nickerson in jail to tell him she was not snitching on him.

Defendants and Meadors were charged with attempted murder (§§ 664/187), with an enhancement for discharging a firearm and causing great bodily injury (§ 12022.53, subds. (d) & (e)). Defendants were also charged with attempting to dissuade by use of force or threat of force (§ 136.1, subds. (a)(2) & (c)(1)), a victim or witness from testifying and attempting to dissuade by use of force or threat of force (§ 136.1, subds. (b)(2) & (c)(1)), a victim or witness from causing a complaint, indictment, information, or probation or parole violation to be sought and prosecuted, or assisting in the prosecution thereof. As to each of these offenses, the three were also charged with gang enhancements. (§ 186.22, subd. (b)(1).) Jones was further charged with making a criminal threat (§ 422), but that charge was later dismissed by the prosecution.

Defendants and Meadors were tried together, with a separate jury for Meadors. Meadors was convicted as charged, and his conviction was later affirmed by this court. (*People v. Meadors* (Jun. 20, 2011, C063060) [nonpub. opn].) Defendants were convicted as charged and all enhancements were found true. On the attempted murder charge, Jones received a determinate middle term of seven years plus an enhancement of 25 years to life for the firearm enhancement. He also received a consecutive term of life with a minimum parole eligibility of seven years on one dissuading charge, and sentence on the other dissuading charge and the gang enhancement was stayed pursuant to section 654.

Nickerson received a similar sentence, but with the lower term of five years on the attempted murder and the life term on the dissuading charge to run concurrently. He also received a concurrent middle term of two years on an unrelated drug charge.

DISCUSSION

I

Sufficiency of Evidence--Attempted Murder

Defendants contend their convictions for attempted murder must be reversed, because there is insufficient evidence they intended to kill Mauryea, a necessary element of attempted murder (see *People v. Bland* (2002) 28 Cal.4th 313, 327-328). Defendants point out that, after Mauryea was shot in the shoulder and went down on all fours, they immediately walked away rather than finishing the job. They argue: "If they had an intent to kill [Mauryea], further shots would have been fired to effectuate his death" Defendants further argue that, because they walked away as soon as Mauryea released his headlock on Jones, their obvious intent was simply to break up the fight between them.

In reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Reversal on the basis of insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient

substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting from *People v. Reilly* (1970) 3 Cal.3d 421, 425.)

In *People v. Lashley* (1991) 1 Cal.App.4th 938 (*Lashley*), the defendant, while standing on a second-story balcony, yelled obscenities and racial epithets at a group of blacks who were fishing nearby. The defendant departed and later returned with a .22-caliber rifle, which he aimed at the group. As the blacks attempted to move out of range, the defendant discharged the firearm, hitting one of them in the arm and piercing his lung. (*Id.* at pp. 942-943.) The defendant was convicted of attempted murder and appealed, arguing there was insufficient evidence of intent to kill. (*Id.* at pp. 944-945.)

The Court of Appeal affirmed. Like defendants here, the defendant in *Lashley* argued that, if he had intended to kill the victim, "he would have fired more than one shot at his target or taken some other action to insure the accuracy of his aim." (*Lashley, supra*, 1 Cal.App.4th at p. 945.) The Court of Appeal rejected his argument, explaining: "The only possible reason for reaching a different result here rests on the untenable theory that an unsuccessful killing constitutes conclusive evidence of lack of intent. There is nothing inherently illogical or absurd in a finding that a person who unsuccessfully attempted to kill another did so with the intent

to kill. The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." (*Id.* at p. 945.)

Defendants contend *Lashley* is readily distinguishable from the instant matter. They argue "*Lashley* stands for the unremarkable proposition that if you shout racist threats and insults at someone and then shoot them in the lung, a jury could reasonably conclude that you had an intent to kill."

Defendants' attempt to restrict *Lashley* to its specific facts is unavailing. There is nothing in that case to suggest the fact the defendant first racially taunted the victim and his friends and then shot the victim in the lung was determinative. In upholding the conviction, the court noted: "The very act of firing a .22-caliber rifle toward the victim at a range and in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill under the circumstances presented here." (*Lashley, supra*, 1 Cal.App.4th at p. 945.) In other words, substantial evidence to support the conviction came from the fact the defendant shot directly at the victim at a range and in a manner that *could have* killed him had the shooter's aim been better. Because there is seldom direct evidence of intent, it is often

necessary to resort to the circumstances of the shooting to infer intent.

Defendants argue the facts here are distinguishable from *Lashley* in that here, it was Mauryea who called the others outside, the initial fighting was hand-to-hand between Jones and Mauryea, the shot was fired only when Mauryea got Jones in a headlock, and as soon as the shot was fired and Mauryea let go, they departed. However, the fact defendants did not finish the job does not distinguish this matter from *Lashley*. Likewise, in *Lashley*, there was evidence the victim had gotten the upper hand on the defendant's friend by pulling a knife on him and the defendant retaliated with the rifle. Finally, defendants rely on a one-sided version of the events the night of the shooting. While there was evidence Mauryea called the others outside and the fight began between Jones and Mauryea alone, there is also evidence the others were grouped together facing Mauryea before the fight began, Jones hit and severely injured Mauryea's eye with a handgun, and then a brawl ensued in which all three were hitting Mauryea repeatedly until the shot rang out.

Defendants further argue the absence of intent to kill is demonstrated by the fact "Meadors aimed carefully so as not to shoot [Jones] and wounded [Mauryea] in the shoulder." However, while it might reasonably be inferred Meadors tried not to shoot Jones, there is no evidence he intended only to wound Mauryea. The evidence showed that, during a scuffle in which things were happening fast and the parties were moving around, Meadors took a shot in the direction of Mauryea's back from close range. On

this evidence alone, a reasonable jury could conclude Meadors intended to kill Mauryea with that shot. As in *Lashley*, this intent is not ameliorated by the fact defendants immediately ceased their attack. Substantial evidence supports defendants' attempted murder convictions.

II

Sufficiency of the Evidence--Firearm Enhancement

Section 12022.53 provides for an enhancement in the event a designated offense, including attempted murder (§ 12022.53, subd. (a)(1) & (a)(18)), is committed with the use of a firearm. If the defendant personally *used* a firearm in the commission of the offense, the enhancement is 10 years. (§ 12022.53, subd. (b).) If the defendant personally and intentionally *discharged* the firearm, the enhancement is 20 years. (§ 12022.53, subd. (c).) If the defendant personally and intentionally *discharged* the firearm and *caused* great bodily injury, the enhancement is an indeterminate term of 25 years to life. (§ 12022.53, subd. (d).) Finally, if the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), any principal in the offense is subject to the same enhancement as the person who used or discharged the firearm. (§ 12022.53, subd. (e).)

Defendants were sentenced to an enhancement of 25 years to life based on findings by the jury that they were principals in the attempted murder, the offense was committed for the benefit of a criminal street gang, and a principal discharged a firearm

and caused great bodily injury. Defendants contend there is insufficient evidence to support this enhancement. They argue the enhancement is necessarily based on a finding that the discharge of a firearm cause great bodily injury. However, they argue, the evidence is conflicting as to whether there even was a discharge in this instance. They further argue the evidence showed Mauryea's shoulder injury was only "'superficial.'" Defendants rely in part on section 243, subdivision (f)(4), which defines "serious bodily injury" in connection with a battery as "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." Defendants argue no rational trier of fact could have found Mauryea's "'superficial'" wound to be great bodily injury. We disagree.

First, we reject defendant's assertion the evidence is conflicting as to whether Mauryea was shot in the shoulder. Mauryea testified he was shot in the shoulder just before defendants departed. He further testified his skin burned and he could smell burnt flesh after the shot. Several witnesses either testified or gave statements to the police or investigators that they heard at least one gunshot during the skirmish. When Mauryea came back to the apartment after the incident, he announced he had been shot. In the ambulance on the way to the hospital, Mauryea told an attending officer he

heard a shot and felt pain. The attending emergency room physician testified Mauryea had two wounds in his shoulder consistent with gunshots. He also testified there were metal fragments in Mauryea's shoulder. Even defendants' medical expert acknowledged that one of the wounds on Mauryea's back was from a gunshot. Furthermore, even if there was conflicting evidence on the issue, this was a matter for the jury to sort out. Here, there was clearly substantial evidence to support the jury's determination a firearm had been discharged.

As to whether there was substantial evidence of great bodily injury, the definition of that term found in section 243, subdivision (f)(4), does not control this matter. Section 12022.53 requires an enhancement of 25 years to life where there was a firearm discharge that caused great bodily injury "as defined in Section 12022.7." (§ 12022.53, subd. (d).) Section 12022.7, subdivision (f), defines great bodily injury as "a significant or substantial physical injury."

Defendants cite *People v. Martinez* (1985) 171 Cal.App.3d 727, in which the court found no substantial evidence of great bodily injury where the victim, Jaime, had been stabbed in the back but suffered only a minor injury. *Martinez* is inapposite. There, one witness testified the defendant "'picked [sic] or cut Jaime in his back a little bit'" but because Jaime was wearing a jacket, sweater and shirt, "he was okay." (*Id.* at p. 735.) An officer who examined Jaime "observed 'a minor laceration-type injury in the middle of his back.'" (*Ibid.*) Jaime was not taken to the hospital. The prosecutor in fact asked that the

enhancement be stricken, asserting that, when they went to trial, he thought the injury had been greater than what was revealed in the trial testimony. (*Id.* at pp. 735-736.)

"[D]etermining whether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description." [Citations.] Where to draw that line is for the jury to decide." (*People v. Cross* (2008) 45 Cal.4th 58, 64.) Thus, the question is not whether there is substantial evidence to support a jury finding that the injury meets some legally defined standard of great bodily injury. The question is whether there is substantial evidence to support the jury's determination, in a particular instance, that the injury suffered amounts to great bodily injury, i.e., significant or substantial injury.

In *People v. Wolcott* (1983) 34 Cal.3d 92, the defendant shot the victim in the leg and the bullet shattered, with fragments cutting the victim's arms and legs and six or seven fragments lodging in his arms. Most were left in place to work their way out naturally. No sutures were used and the victim was released from the hospital after treatment. He suffered no permanent disability but felt pain near the unremoved bullet fragments. (*Id.* at p. 107.) Based on this evidence, the high court found substantial evidence to support the jury's finding of great bodily injury. (*Id.* at p. 108.) According to the

court, the victim's "penetrating wounds cannot be described as 'superficial,' and in as much as some fragments remain in his body the injury is not a 'short-lived' or 'transitory' one." (*Ibid.*)

In *People v. Lopez* (1986) 176 Cal.App.3d 460, one victim was shot in the "right cheek of the hip," "heard a ringing in his ear and fell to the ground, screaming." (*Id.* at p. 462.) A second victim, who came to the first victim's aid, was then shot in the leg. She felt a "fire" in her leg but was able to drag the first victim to safety. (*Ibid.*) The court found true two allegations of infliction of great bodily injury within the meaning of section 12022.7. (*Id.* at p. 461.) On appeal, the defendant argued the great bodily injury findings were not supported by substantial evidence because the injuries were "superficial, transitory, and short-lived." (*Id.* at p. 463.) The Court of Appeal disagreed. Relying in part on *Wolcott*, the court explained: "[T]he penetrating wounds suffered by Clevenger and Marasino cannot be considered superficial. Clevenger immediately fell to the ground upon being shot, was disoriented, and screamed. Marasino felt 'fire' when shot in the thigh. . . . [A]llthough no bullet fragments remained inside the victims' bodies to work their way out, as in *Wolcott*, the distinction is insufficient to overturn the court's finding." (*Id.* at p. 465.)

In *People v. Mendias* (1993) 17 Cal.App.4th 195, the victim was shot in the upper thigh and "'hunched over'" without falling. He testified the wound burned but he was able to run

from the scene with his girlfriend. He was later admitted to the hospital and treated. The bullet was not removed. (*Id.* at p. 201.) The defendant was convicted of assault with a firearm and found to have inflicted great bodily injury. On appeal, the court rejected the defendant's argument the great bodily injury finding was not supported by substantial evidence. The court found the injuries suffered by the victim comparable to those in *Wolcott* and *Lopez*. (*Id.* at pp. 205-206.)

The wound suffered by Mauryea in the instant matter is comparable to those suffered by the victims in the foregoing cases. The gunshot penetrated Mauryea's back in the area of the shoulder and left what appeared to be a bullet fragment that treating physicians left in place. The bullet strike to the back was sufficiently severe to drive Mauryea to his knees and to force him to release his hold on Jones. Mauryea felt pain and a burning sensation. Under these circumstances, we cannot say no reasonable jury could have concluded the victim suffered great bodily injury within the meaning of section 12022.7.

III

Instruction on Firearm Enhancement

Defendants contend the jury was not properly instructed on the firearm enhancement. Mauryea received two primary injuries, one when he was struck in the eye with the butt of a gun and one when he was shot in the back. Defendants argue: "The evidence that [Mauryea] was pistol whipped was quite strong but the evidence that he was actually shot was very much in dispute."

Defendants argue the instructions and verdict forms failed to require the jury to specify which of these acts caused great bodily injury. And because the pistol whipping is only a use of the firearm not a *discharge*, it cannot support the 25-years-to-life enhancement.

The jury was instructed pursuant to CALCRIM No. 1402 in relevant part as follows:

"If you find the defendant guilty of the crime charged in Count 1, and you find that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang with intent to promote, further, assist in any criminal conduct by gang members, you must then decide whether the People have proved the additional allegation that one of the principals personally used and intentionally discharged a firearm during that crime and caused great bodily injury. You must decide whether the People have proved that allegation and return a separate finding for each crime.

"To prove this allegation, the People must prove that:

"1. *Someone who was a principal in the crime personally used and discharged a firearm during the commission of the Attempted Murder;*

"2. That person intend [*sic*] to discharge that firearm;

"And

"3. That person's act caused great bodily injury to another person who was not an accomplice to the crime. [¶]

. . . [¶]

"A *principal personally uses a firearm if he intentionally does any of the following:*

"1. *Displays the firearm in a menacing manner;*

"2. *Hits someone with the firearm;*

"Or

"3. *Fires the firearm.*

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] . . . [¶]

"The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."
(Italics added.)

In the original CALCRIM version of the instruction, the first italicized portion above reads: "[1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the _____<insert appropriate crime listed in Penal Code section 12022.53(a)(./;)" (CALCRIM No. 1402.) The Bench Notes to the instruction state: "In this instruction, the court **must** select the appropriate options based on whether the prosecution alleges that the principal used the firearm, intentionally discharged the firearm, and/or intentionally discharged the firearm causing great bodily injury or death." (Bench Note to CALCRIM No. 1402, p. 1161.)

The Bench Notes also direct that the second italicized portion of the instruction given by the court, describing

personal use of the firearm, should be given "only if the prosecution specifically alleges that the principal 'personally used' the firearm." (Bench Note to CALCRIM No. 1402, p. 1161.) However, it further instructs that the language not be included "if the prosecution alleges intentional discharge or intentional discharge causing great bodily injury or death." (*Ibid.*)

In the present matter, the prosecution charged both use *and* discharge of the firearm causing great bodily injury. The verdict forms also asked the jury to determine if the defendants "used and discharged" the firearm. The Bench Notes provide no guidance as to whether the description of personal use should be included in the instruction where the prosecution alleges both use and discharge.

The present matter involved both use and discharge. The jury could reasonably have found Jones used the firearm when he struck Mauryea in the eye with the butt of the gun. It could also have found Meadors discharged the firearm, and defendants are responsible for that discharge as principals in a gang offense. Thus, the instruction given by the trial court may well be correct.

In any event, defendants failed to object to the instruction. Failure to object to instructional error forfeits any claim of error on appeal unless the defendants' substantial rights are affected. (§ 1259; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) "Substantial rights" are equated with error resulting in a miscarriage of justice under *People v. Watson* (1956) 46

Cal.2d 818. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

Defendants argue their substantial rights were adversely affected by the instruction. If the instruction permitted imposition of a 25-years-to-life enhancement on a finding that "use" of a firearm caused great bodily injury, where use alone qualifies only for a 10-year enhancement, defendants' substantial rights may have been adversely affected. Failure to object will not forfeit such a claim. (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

Defendants contend the instruction and verdict forms allowed the jury to determine if there was a use and a discharge of the firearm. Based on the jury's true finding, it must be assumed it found both in this instance. Of course, if the jury found discharge, it also necessarily found use, since discharge is one form of use. The problem with the instruction and verdict forms, defendants argue, is that they did not require the jury to find the great bodily injury was caused by the discharge rather than the use. In other words, the jury could well have found the alleged enhancement true based on a finding that the firearm was both used and discharged and great bodily injury was caused by the use, i.e., the pistol whipping that severely injured Mauryea's eye. Thus, they argue, it cannot be determined on this record whether the jury found the firearm discharge caused great bodily injury, as required for an enhancement of 25 years to life.

The People argue the instruction did not include the ambiguity asserted by defendants. According to the People, the instruction "clearly instructed the jury that only the act that occurred during the attempted murder could be considered." The instruction states that if the jury determines the defendant is guilty of attempted murder it must decide "whether the People have proved the additional allegation that one of the principals personally used and intentionally discharged a firearm *during that crime* and caused great bodily injury." (Italics added.) The instruction further required a finding that someone "personally used and discharged a firearm *during the commission of the Attempted Murder.*" (Italics added.) Since the only act alleged to be an attempted murder was the discharge of the firearm into Mauryea's back, the jury had to conclude the discharge caused the great bodily injury.

Defendants argue the People's contention is unavailing, because the pistol whipping itself was an attempted murder. According to defendants, "the devastating blow to [Mauryea's] eye could quite easily be considered life threatening." However, that is a theory not pursued at trial. The prosecution argued to the jury that it must determine if the shot to Mauryea's back caused great bodily injury. Counsel for Jones argued that, with respect to the firearm enhancement, "every medical person that testified referred to the wound as superficial." This was a clear reference to the wound on Mauryea's back. According to Jones's counsel, there was no evidence Mauryea suffered any impairment of his arm and "[t]he

issue was with the eye, not his arm." Counsel for Jones further argued: "[T]he way this firearm enhancement works, you can't look at the eye injury and can't mix those up. We're just talking about what the people are saying is a bullet wound and it was superficial." Counsel for Nickerson did not mention the enhancement, concentrating instead on a theory that Nickerson was an innocent bystander during the fight and the firearm discharge was accidental.

We agree with the People the instruction would not have misled a reasonable jury. "It is well established in California that the 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."

(*People v. Burgener* (1986) 41 Cal.3d 505, 538-539.) The alleged attempted murder in this instance was the discharge of a firearm in the back of Mauryea's shoulder, not the use of the firearm to bludgeon Mauryea's eye. The jury was instructed to decide whether a principal used and discharged a firearm during the commission of the attempted murder. Thus, only a use and discharge in connection with the attempted murder, not a use and discharge during the assault that preceded the attempted murder, would suffice. Absent a contrary indication in the record, we assume the jury followed the instructions as given by the court. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

IV

Sufficiency of the Evidence--Gang Enhancement

Defendants contend there is insufficient evidence to support the gang enhancements. They argue the prosecution failed to prove the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang and that they had the specific intent to promote, further or assist a criminal street gang.

Section 186.22, subdivision (b)(1), provides: "[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished" by a term of two, five or 10 years, depending on the nature of the offense. Section 186.22 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 the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), 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." (§ 186.22, subd. (f).) The

term "pattern of criminal gang activity" requires "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, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [33 offenses identified]." (§ 186.22, subd. (e).)

Defendants contend the prosecution failed to prove they are members of a criminal street gang. They do not dispute they are members of the Crips and that the Crips are an ongoing organization, association, or group of three or more persons. However, they argue the prosecution's gang expert, Detective Robert Quinn, provided only conclusory testimony about the primary activities of the Crips. They point to Detective Quinn's testimony that the "[p]rimary activities of the Crip gangs would be murder, attempted murder, assault with a deadly weapon, robbery, auto theft, narcotics sales, [and] burglary." Defendants acknowledge Detective Quinn also testified about two predicate gang crimes, an assault with a firearm in 2004 and a shooting death in 2007. Defendants contend the foregoing evidence was insufficient to satisfy the primary activities element of a criminal street gang, inasmuch as Quinn "gave no specifics as to the circumstances of any of those criminal activities related to the generic Crips gang or where, when, or how he knew about them." According to defendants, Quinn's

knowledge about the primary activities "may have been based on reliable sources, such as court records, or on entirely unreliable hearsay."

Defendants cite as support *In re Nathaniel C.* (1991) 228 Cal.App.3d 990 (*Nathaniel C.*), where the court found the evidence insufficient to prove a primary activity of the gang at issue--the Family--was committing crimes enumerated in section 186.22. The gang expert in that case testified a primary activity of the Family was to commit crimes, and enumerated the crimes he had in mind. However, only one of those crimes qualified for the gang enhancement. According to the court: "[T]he evidence is insufficient to show that a primary activity of the Family is commission of one or more of the eight specified offenses, as required by section 186.22, subdivision (f). This is not to say that the evidence failed to show that criminal conduct is a primary activity of the Family. But the statute's focus is much narrower than general criminal conduct; evidence must establish that a primary activity of the gang is one or more of the listed offenses." (*Id.* at p. 1004, fn. omitted.) The court went on to explain the gang expert admitted the Family was based in an area of the state other than the expert's jurisdiction. Thus, the expert's opinion about primary activities "did not relate specifically to the Family and its activities." (*Id.* at p. 1005.)

Defendants also rely on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*), another decision in which the court found insufficient evidence that a primary activity of the

gang in question was committing one or more of the enumerated crimes. In that case, the gang expert provided the following testimony on the issue of primary activities: "I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) However, there was no testimony on the basis for the expert's knowledge. (*Id.* at pp. 611-612.) On cross-examination, the expert acknowledged the vast majority of cases with which he was familiar involved graffiti. (*Id.* at p. 612.)

Defendants argue the present matter is comparable to the foregoing cases and that "Quinn's testimony based on alleged conversations with unknown gang members or review of reports or conversations with officers should be accorded no weight; it was not shown to be reliable."

We are not persuaded. Unlike the expert in *Nathaniel C.*, Detective Quinn testified he specializes in African-American gangs in the north half of Sacramento, which encompasses the Crips subsets to which defendants belonged. Quinn had in fact come in contact with defendants approximately one week before the incident at the apartment complex in connection with his gang suppression work. And unlike the expert in *Alexander L.*, Quinn explained his opinion about primary activities of the gang came from his "ten years on the department where [he has] contacted and arrested Crip gang members for those crimes," his work as a gang detective reviewing reports of gang crimes, and

"speaking with gang members themselves who have either been arrested or convicted of crimes." As the basis for his knowledge about the two predicate offenses, Quinn testified he reviewed reports and spoke to the lead detectives and others who were present in those cases.

It is undisputed an expert may give opinion testimony based on hearsay. (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinion." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) The information on which Quinn relied in this matter is the type commonly and reasonably relied upon by law enforcement in studying and developing gang expertise. (*Id.* at pp. 611-612, 620.) In our view, the prosecution satisfied its burden of proof regarding primary activities of the gang.

Defendants also contend the prosecution failed to prove the crimes were committed for the benefit of, at the direction of, or in association with the Crips gang. They point to a number of cases where the appellate courts found such evidence lacking.

In *People v. Martinez* (2004) 116 Cal.App.4th 753, the court found insufficient evidence an auto burglary was gang related. The available evidence showed the defendant committed the crime with an accomplice who was not an identified gang member and there was nothing in the record to suggest the crime "was directed by, associated with, or benefited [the defendant's]

criminal street gang" rather than a crime intended to benefit the defendant personally. (*Id.* at p. 762.) However, that case had been resolved by plea and, therefore, no expert testimony had been presented on the issue. (*Id.* at p. 762, fn. 8.)

In *People v. Albarran* (2007) 149 Cal.App.4th 214, the Court of Appeal concluded the trial court erred in admitting gang evidence, inasmuch as the evidence was insufficient to show the crime was committed to benefit a gang and was otherwise unduly prejudicial. (*Id.* at pp. 228, 232.) The crime at issue was a shooting during a party by a known gang member. The prosecution argued the motive for the shooting was to gain respect for the gang and the shooter within the gang. The court concluded the evidence did not bear this out, explaining: "The motive for the underlying crimes, in particular the shooting at Bacelis's house, was not apparent from the circumstances of the crime. The shooting occurred at a private birthday party for Bacelis's cousin. Although according to Deputy Gillis, Bacelis was a member of the Pierce Boys Gang, Bacelis's gang did not have any known or relevant gang rivalries. Deputy Gillis testified that gang members commit crimes to gain respect and enhance their status within the gang. He noted a gang member gains such respect if his identity (or the identity of his gang) becomes known to the victim(s), within the gang community and/or the neighborhood. Yet this shooting presented no signs of gang members' efforts in that regard—there was no evidence the shooters announced their presence or purpose—before, during or after the shooting. There was no evidence presented that any

gang members had 'bragged' about their involvement or created graffiti and took credit for it. In fact, . . . Deputy Gillis conceded he did not know the reason for the shooting, though he had 'heard' that gang members were present at the party. There is nothing inherent in the facts of the shooting to suggest any specific gang motive. In the final analysis, the only evidence to support the respect motive is the fact of Albarran's gang affiliation." (*Id.* at p. 227, fn. omitted.)

In *In re Frank S.* (2006) 141 Cal.App.4th 1192, the court found insufficient evidence the crime of carrying a concealed dirk or dagger was for the benefit of a criminal street gang. (*Id.* at p. 1199.) The prosecution's expert testified about gangs in general and that possession of the knife benefited the gang by providing protection in the event of an assault by rival gang members. However, the prosecution presented no evidence "that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Ibid.*)

In *People v. Ramon* (2009) 175 Cal.App.4th 843, the defendant was convicted of receiving a stolen vehicle and two firearm possession offenses with gang enhancements. (*Id.* at p. 848.) The Court of Appeal reversed the gang enhancements for lack of sufficient evidence. (*Id.* at p. 853.) The gang expert had testified the offense was committed for the benefit of a criminal street gang based on two facts: (1) both defendants were members of the gang, and (2) they were found in possession of the vehicle and gun in territory claimed by the gang. The

expert explained that because the gun and the stolen vehicle could be used to commit crimes and the gang commits crimes, the two must have been acting on behalf of the gang. (*Id.* at p. 849.)

In reversing the enhancements, the court pointed out: "There were no facts from which the expert could discern whether Ramon and Martinez were acting on their own behalf the night they were arrested or were acting on behalf of the [gang]." (*People v. Ramon, supra*, 175 Cal.App.4th at p. 851.) However, the court pointed out its analysis "might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang." But no such evidence had been presented. (*Id.* at p. 853.)

Defendants argue it is not enough in the present matter that they were gang members or had committed gang offenses in the past. They argue: "[I]t is clear that the fight between the defendants and [the victim] was male bravado about who had [the] right to be in an apartment that belonged to a woman who was [Mauryea's] girlfriend and the defendants's [*sic*] friend. [Mauryea], who was not a gang member, was the one who provoked the argument and who first used words used by gangs. There was nothing to show that this personal argument benefitted the gang in any manner. Fighting over personal disrespect does not always become fighting over disrespect of the gang merely because gang members may be involved."

Defendants' argument is based on a self-serving recitation of the facts that leaves out critical evidence supporting the

gang enhancement. As noted earlier, we view the evidence in the light most favorable to the judgment. Based on that standard, the evidence here is readily distinguishable from the cases cited by defendants. The evidence revealed the argument began when Mauryea used the terms "blood" or "cuz," or both, in addressing Jones, and Jones took offense. The prosecution's expert, Detective Quinn, testified: "If you are a Blood gang member and I'm a Crip gang member, and I say what's up, Cuz, and you respond, what's up, Blood, that's a pure challenge. I have disrespected you, in turn you disrespected me, and we will meet that with violence." Meadors then got involved, asserting Jones was his brother and saying, "Don't talk to my motherfucking brother like that." Quinn testified that if one gang member gets into an argument or a fight with someone, other gang members nearby are expected to jump in and lend assistance. Otherwise, they would lose respect in the gang.

At that point, Alisha directed them to take their argument outside. Upon stepping outside, Mauryea found the three gang members arrayed in a semi-circle in front of him and they continued to argue. Meadors threw up gang signs to Mauryea and threatened to shoot him, while defendants postured as if they possessed guns. Meadors said, he would "bust" Mauryea and "shoot this whole house up," all while he held his hand near his waistline. Mauryea also heard someone say "Trigga Mob." At some point during this posturing, Mauryea offered to shake hands with Jones to diffuse the situation, but Jones refused to shake his hand.

Eventually, during the argument, Jones hit Mauryea in the eye with the butt of a handgun. A struggle ensued in which Mauryea held Jones in a headlock while the other two beat Mauryea from behind. This ended when Meadors shot Mauryea in the back of the shoulder and Mauryea released his hold on Jones and dropped to the ground. As the three gang members walked away together, Nickerson said something to Mauryea like, "I told you."

In *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*), the California Supreme Court considered the sufficiency of the evidence to support street gang enhancements for multiple sex offenses committed in concert. In *Albillar*, three members of the Southside Chiques took turns raping the victim while the others either assisted or stood nearby. (*Id.* at pp. 52-53.) They were convicted of forcible rape in concert and forcible sexual penetration in concert, and were found to have committed the offenses for the benefit of a criminal street gang. (*Id.* at p. 50.)

On the defendants' challenge to gang enhancements, the high court acknowledged that not all crimes committed by gang members are related to the gang. However, in that case, the court found the offenses were gang-related both because they were committed in association with the gang and because they were committed for the benefit of the gang. (*Albillar, supra*, 51 Cal.4th at p. 60.) According to the court: "The record supported a finding that [the] defendants relied on their common gang membership and the apparatus of the gang in committing the sex

offenses against [the victim]." (*Ibid.*) In particular, the court cited expert testimony about how gang members earn respect and status by committing crimes with other members and gang members choose to commit crimes together in order to increase their chances of success and to provide training for younger members. (*Id.* at pp. 60-61.) The court concluded the conduct of the defendants, where each participant assisted the others without a word being spoken, and each could count on the silence of the others and group intimidation of the victim, "exceeded that which was necessary to establish that the offenses were committed in concert." (*Id.* at p. 61.) The court elaborated: "Defendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together. They relied on the gang's internal code to ensure that none of them would cooperate with the police, and on the gang's reputation to ensure that the victim did not contact the police." (*Id.* at pp. 61-62.)

The high court also found sufficient evidence the crimes were committed to benefit the gang. (*Albillar, supra*, 51 Cal.4th at p. 63.) According to the gang expert: "'When three gang members go out and commit a violent brutal attack on a victim, that's elevating their individual status, and they're receiving a benefit. They're putting notches in their reputation. When these members are doing that, the overall entity benefits and strengthens as a result of it.'" Reports of

such conduct 'rais[e] the[] level of fear and intimidation in the community.'" (*Ibid.*) The court explained: "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22[, subd.] (b)(1)." (*Ibid.*)

In the present matter, Detective Quinn explained respect is important for gang members and members earn respect through fear, intimidation and committing acts of violence. According to Quinn, if a gang member is disrespected by something as simple as "shooting bad looks at somebody" to "saying the word Blood to a Crip or saying cuz to a Blood," retaliation is required. A gang member who fails to retaliate will lose respect, both in the community and within the gang.

The crime at issue here, attempted murder, is one of the offenses Quinn identified as a primary activity of the gang. Quinn testified the attempted murder was gang related because: "The argument started over sets, whether it be Blood or Crip. When you say Blood to a Crip gang member, they take offense to that. Whether you are a Blood or not, if you use Blood to the Crip gang member, they're going to take offense to that, that's disrespect. And the argument ensues over the Crip set that we're discussing here. [¶] Argument goes back outside, you hear more with Crip and cuz, and the gang is getting its respect, it's notoriety out of that. It's not about who I am. It's about what gang I'm from. And then to use violence right

after that, whether it be hitting him with a blunt object, be [sic] a gun or fist, or kicking them [sic], or shooting him, that violence is ensued [sic] from that disrespect."

Reasonable jurors could deduce from the foregoing evidence that the attempted murder was for the benefit of the Crips gang. The shooting occurred in known gang territory and followed the victim's perceived disrespect of Jones and his gang. In fact, but for the gang affiliation of defendants and Meadors, there would have been no perceived disrespect and no need for retaliation. It is clear the three attempted to intimidate the victim into submission, but he refused to back down. In effect, he forced their hand. As Quinn testified, retaliation was mandatory in the face of disrespect. The assault also served the purpose of sending a message of the gang's willingness to use violence. Even if the purpose of the violence was not announced to bystanders, it surely was made clear to the victim and his companions, who might reasonably have been dissuaded from further acts of perceived disrespect. Moreover, the violence may have dissuaded them from speaking with law enforcement about further criminal acts by the gang. Thus, there was ample evidence the crime benefited the Crips gang.

Furthermore, section 186.22 does not require evidence that the crime benefited the gang; it is sufficient that the crime was committed "in association with" the gang. (§ 186.22, subd. (b).) The evidence here showed defendants and Meadors owed their allegiance to the Crips gang, knew each other as fellow gang members, and were involved in the assault together from

start to finish. Absent contrary evidence that defendants were engaged in "a frolic and detour unrelated to the gang," a reasonable jury could infer the requisite association from the very fact defendants committed the charged crime along with their fellow gang member. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Defendants also challenge the gang enhancement on the two witness intimidation charges. They argue the only evidence on these charges "was that it was a threaten [*sic*] to an individual to not testify about an individual." They argue there was no evidence to support the expert's opinion these were gang-related threats. Again, we disagree.

Alisha testified that somebody told her the word on the street was that if she snitched, her children would be tortured. At trial, Alisha denied that Nickerson called and threatened her and denied saying that to the police. However, she did acknowledge visiting Nickerson in jail and telling him she was not snitching on him. This was confirmed by Michele Miller, a defense investigator, who testified Alisha told her she heard the word on the street was that Alisha was implicating defendants in the assault and she visited Nickerson in jail to assure him otherwise.

Detective Quinn testified he got a telephone call from Alisha, who said she had received a threatening call from Nickerson. Alisha told Quinn that Nickerson said, "You're going to get it. I'm 29th Street, Cuz. You're gonna get it. You better watch your backs."

Jeisha testified she too got a threatening call and recognized the voice of the caller as that of Jones. The caller said, "My boy's in jail. You guys got him in trouble. Come outside." According to Jeisha, the caller sounded angry and the call was threatening in tone. Detective Quinn testified Jeisha told him the caller was Jones and Jones said, "I'm gonna shoot your fucking house. I'm in front your [sic] apartment. Come out now."

Detective Quinn testified gang members typically use intimidation and fear to keep witnesses from testifying against them. In his experience, witnesses to gang crimes will not report them for fear of retaliation. Quinn testified the telephone calls to Alisha and Jeisha were for the benefit of the gang. Nickerson in fact identified himself to Alisha as "29th Street" to show he was speaking for the gang. Quinn explained: "It's not just threatening a witness. It's not saying you know, don't say anything. You're going to get it, whatever. It moves into throwing the gang out, throwing the cuz out. If you throw out a gang and you say on 29th Street that backs up the words that you are saying with the whole 29th Street gang, it shows that I'm a gang member. You know what I'm capable of, and you're going to get it. That shows exactly the type of mentality that gang members have and the violence that they'll bring."

Based on the totality of the circumstances, we find substantial evidence to support the jury's finding that the

witness intimidations were for the benefit of or in association with the gang.

Defendants nevertheless contend there is insufficient evidence the crimes "furthered some *other* criminal conduct by the Crips." (Italics added.) They cite two Ninth Circuit opinions which, they argue, require such a showing. (See *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1079; *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1102-1104.) However, this argument was specifically rejected by the California Supreme Court in *Albillar*. The high court concluded the scienter required for the gang enhancement is "the specific intent to promote, further, or assist in *any* criminal conduct by gang members--including the current offenses--and not merely *other* criminal conduct by gang members." (*Albillar, supra*, 51 Cal.4th at p. 65; see also *id.* at pp. 64-65.) The court further indicated "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Id.* at p. 68; see also *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Morales, supra*, 112 Cal.App.4th at pp. 1198-1199.)

V

Prosecutorial Misconduct

Defendants contend the prosecutor committed misconduct during argument by misstating the law regarding the standard for

finding provocation sufficient to reduce the crime from attempted murder to attempted voluntary manslaughter. They cite the following argument:

"The lesser included offense essentially says, yeah, there was attempted murder that took place, but there was a justification for that that the person who committed that attempted murder was acting under the heat of passion. And so because of that, we're not going to call it attempted murder, we're going to call it attempted voluntary manslaughter.

"However, in order for that to happen, you have to act under the direct and immediate influence of the provocation. And it would have to be the type of provocation that would cause a reasonable person, for instance like all of you, to have attempted to kill somebody under these circumstances.

"It's not a defendant who gets to set up their own circumstances and say, well, I was provoked. I was, you know, acting under the heat of passion because he insulted and got to do that. No, it's a reasonable person under the same circumstances, they would have felt so compelled to attempt to kill this person because of what had taken place? And that clearly will not apply."

Defendants contend the prosecutor misstated the law in suggesting the provocation must be sufficient to have caused a reasonable person to attempt to kill. They argue that, while it is appropriate to use an objective standard, the requirement is merely that the heat of passion be sufficient to cause a reasonable person to act under the influence of that passion

rather than his judgment. The jury need not also find the provocation was such as would have caused a reasonable person to act in a specific way, i.e., to attempt to kill.

Defendants acknowledge their counsel failed to object to the prosecutor's argument. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) However, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the misconduct.'" [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Defendants do not contend a timely objection or request for admonition would have been futile under the circumstances presented. Instead, they contend counsel's failure to object amounted to ineffective assistance of counsel. They argue a recent Court of Appeal decision, *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), held a similar prosecution argument was improper, and their counsel should have been aware of that decision.

Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance

of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] Were it otherwise, appellate courts would be required to engage in the "perilous process" of second-guessing counsel's trial strategy. [Citation.] Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*Ibid.*) "[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.)

Assuming the prosecutor misstated the applicable law and an objection and request for admonition would not have been futile, the question is whether counsel's failure to object was ineffective assistance or a matter of trial tactics. Defendants argue "there is no tactical purpose for counsel to have failed to object to the prosecutorial misconduct." However, beyond declaring it to be so, defendants provide no argument or citation to authority. The argument is therefore forfeited. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

At any rate, to prevail on their ineffective assistance claim, defendants must show prejudice. Defendants argue there was "compelling evidence" in the record that they acted "rashly after adequate provocation by [Mauryea] who called them names, challenged them to a fight and got [Jones] in a headlock." However, the only name the victim called defendants was either "blood" or "cuz," neither of which would have provoked a reasonable person to act rashly. In *Najera*, the court concluded the defendant was not prejudiced by the prosecutor's argument

where the victim had called the defendant a "'faggot.'" (Najera, supra, 138 Cal.App.4th at p. 226.) The court explained: "That taunt would not drive any ordinary person to act rashly or without due deliberation and reflection. "'A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter.'" (Ibid.; quoting from *People v. Wells* (1938) 10 Cal.2d 610, 623.)

Although there is evidence in the record that it was Mauryea who invited the others to take their argument outside, there is no evidence he challenged them to a fight. On the contrary, Mauryea tried to defuse the situation. And while Mauryea did have Jones in a headlock, this occurred only *after* Jones initiated the assault by striking Mauryea in the eye with the butt of a handgun. Furthermore, the trial court correctly instructed the jury on the applicable standard for provocation and to follow the court's instructions if they conflict with the attorneys' comments on the law. We presume the jury followed that instruction. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) We therefore conclude defendants failed to establish any prejudice from the prosecutor's argument. Absent prejudice, defendants' ineffective assistance claim dissolves.

VI

Cumulative Error

Defendants contend the cumulative impact of error in this case warrants reversal. However, having found no error, we have no occasion to consider cumulative impact.

VII

Correction of Abstract

In our review of the record, we discovered an error in Nickerson's abstract of judgment. The trial court imposed on Nickerson a term of life with a minimum parole eligibility of seven years on count five, one of the dissuading a witness charges. The court further directed that such term run concurrently. However, the abstract of judgment indicates that term is to run consecutively. This must be corrected.

DISPOSITION

The judgments are affirmed. The matter is remanded to the trial court to prepare an amended abstract of judgment for Nickerson to reflect a concurrent term on count five and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.