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COURT OF APPEALS, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN EUGENE LEMEUR et al.,

Defendants and Appellants.

D060131

(Super. Ct. No. SWF026931)

APPEALS from judgments of the Superior Court of Riverside County, Albert J. Wojcik, Judge. Affirmed.

A jury found Steven Eugene Lemeur and Timothy Aaron True (collectively, defendants) guilty of a gang-related attempted murder and other crimes, and the trial court sentenced them to prison. Defendants challenge their convictions on grounds of improper refusal to discharge a juror for cause and various erroneous evidentiary rulings,

and True challenges the imposition and execution of a weapon use enhancement as part of his sentence. We reject defendants' challenges and affirm the judgments.

I.

FACTUAL BACKGROUND

We here present only a brief summary of the facts to provide context. We shall discuss additional facts later as necessary to resolve defendants' various claims of error.

Cory Smith and Lisha Blakley were injecting themselves with heroin in the bathroom of the apartment of Aaron King when Lemeur and True burst in and attacked Smith. During the attack, True stabbed Smith several times. Smith lost a great deal of blood and was treated at a hospital for five life-threatening stab wounds to the chest.

Until approximately two months before the stabbing, Smith had been a member of a White supremacist gang. Before the stabbing, Smith also had met members of another White supremacist gang, the COORS¹ Family Skins (CFS), through Blakley; he socialized with them, but declined an invitation to join the gang. Smith later learned the CFS "felt disrespected" by his declination of the invitation, and he "got[] in fights with skinheads" over the matter. Some CFS members also accused Smith of being a "rat" or a "snitch" in connection with the police investigation of certain theft offenses that occurred at a house where Smith was residing.

Takashi Nishida, a police officer, also testified about the CFS at trial. Nishida had been assigned to a gang task force for approximately four years before the trial, during

¹ COORS is an acronym for "comrades of our racial struggle."

which time he participated in the investigation of crimes involving criminal street gangs. Nishida testified the CFS operates throughout Riverside County and in other areas, and was documented as a criminal street gang in 2006. According to Nishida, the primary activities of the CFS include murder, attempted murder, assault with a deadly weapon, burglary, vehicle thefts and other theft offenses. Lemeur and True were listed as members of the CFS on a gang roster seized during a search of a known CFS member's residence. When presented with a hypothetical situation based on the facts of this case, Nishida explained that the stabbing would benefit the CFS by elevating the perpetrators' status within the gang and by giving the gang notoriety within the community for retaliatory violence against those who cooperate with law enforcement in the investigation of CFS members.

II.

PROCEDURAL BACKGROUND

The People charged defendants with the willful, deliberate and premeditated attempted murder of Smith (Pen. Code, §§ 187, subd. (a), 189, 664; undesignated section references are to this code); burglary (§ 459); and active participation in a criminal street gang (§ 186.22, subd. (a)).

With respect to the attempted murder and burglary charges, the People alleged defendants committed those offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist criminal conduct by gang members. (§186.22, subd. (b).)

The People alleged True personally used a deadly and dangerous weapon (a knife) in the commission of the attempted murder (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury on Smith in the commission of the attempted murder and the burglary (§ 12022.7, subd. (a)).

As part of the burglary charge, the People alleged that at the time of the offense, a person other than an accomplice was present in the residence. (§ 667.5, subd. (c)(21).)

Finally, the People alleged Lemeur had a prior conviction of arson (§ 451, subd. (b)), for which he had served a prison term (§ 667.5, subd. (b)) and which qualified as a prior serious felony (§ 667, subd. (a)) and a strike under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12).

The jury found defendants guilty of all charges; fixed the degree of burglary as first; and found true all the special allegations against them, except the prior conviction allegations against Lemeur, which the trial court found true in a separate bench trial.

The court sentenced True to prison for an aggregate term of 19 years to life, consisting of 15 years to life for the conviction of gang-related attempted murder (§§ 186.22, subd. (b)(5), 664, subd. (a)), plus consecutive terms of three years for the great bodily injury enhancement (§ 12022.7, subd. (a)) and one year for the weapon use enhancement (§ 12022, subd. (b)(1)). The court also imposed prison terms on True's other convictions and enhancements, but stayed their execution under section 654.

The court sentenced Lemeur to an aggregate prison term of 35 years to life. Because Lemeur raises no claims of error regarding his sentence, we do not discuss its components in detail.

III.

DISCUSSION

Defendants challenge their convictions on multiple grounds. They contend the trial court erroneously refused to discharge a juror who wondered whether defendants or other CFS members might have stolen her truck. They further complain the trial court erroneously admitted speculative, irrelevant and hearsay testimony concerning threats and accusations made against Smith and Blakley and concerning King's fear of testifying. True also challenges his sentence on the ground that the court improperly refused to stay execution of the weapon use enhancement imposed on his attempted murder conviction. We shall address these contentions in turn.

A. *The Court Did Not Err by Refusing to Discharge a Juror Who Wondered Whether She Might Have Been the Victim of a Theft Offense Committed by Defendants*

Defendants argue they were deprived of a fair trial because the trial court refused to discharge a juror whose vehicle had been stolen and who wondered whether defendants or other members of the CFS might have stolen it. After setting forth additional factual background, we shall analyze this contention and conclude it has no merit.

1. *Additional Pertinent Facts*

After the jury was sworn and opening statements had been made, a juror approached the courtroom deputy; stated her "vehicle was stolen and torched"; and asked, "Who's to say these guys didn't do it?" The deputy reported this exchange to the trial court, which then called the juror and counsel into chambers to discuss the matter.

The juror reported that several months before the trial, her expensive customized truck had been stolen, "stripped and burned beyond recognition." The juror said she "[doesn't] know who it was, the police don't know who it was"; but the thieves "were White, five feet eight inches to six feet tall, and had a green car." The juror further stated that she had not "made any assumptions" about who stole her truck. But, when it was mentioned in opening statements that CFS members steal vehicles, "it just struck a nerve" "really hard," and the juror began "thinking, well, maybe it was gang related. And those guys steal cars. Well, what if it was them?"

The trial court then explained to the juror that there was nothing to link the CFS to the theft of her vehicle and asked whether she could "divorce this incident from what [she was] doing during this trial." The juror responded, "I think I can divorce that."

Next, defendants' attorneys and the prosecutor questioned the juror about the theft of her vehicle and its effect on her ability to be impartial. Lemeur's attorney asked whether the juror could separate her feelings about the vehicle theft from the evidence introduced at trial, and she responded: "Historically speaking, knowing me, I can put it aside." When Lemeur's attorney then suggested that, in light of the assertion in opening statements that defendants were associated with a gang that steals vehicles, "maybe this case is not the right case for you," the juror stated: "Well, the two fellas sitting in the chairs didn't do anything to me. They haven't been accused of what happened to me. Whether it was a co-gang member that did it — they never hurt me. They never — unless it was those two guys that actually stole my truck. But I think I can separate that."

Next, True's attorney reminded the juror the "most important thing" was that the defendants "get as fair a shake as possible" and suggested "this may be just a little too close." The juror answered: "Could be, because as much as I want to say that I'm not gonna hold it against them because they, to my knowledge, didn't have anything to do with it — but there's always that doubt. I mean, I didn't know it would trigger such a gnarly nerve with me, either. . . . So, it's like, maybe I won't be able to, because I'll always be thinking."

The prosecutor then asked the juror whether she would "listen to the evidence and be fair and impartial" and not let the theft of her truck "cause [her] to be a biased juror." The juror answered: "Right, because it wouldn't be fair to those fellas if I were to harbor those feelings."

When the attorneys finished questioning the juror, the court told her it did not want her to respond "I can,' or 'I think' or 'maybe,'" and then asked: "Can you put those emotions aside and evaluate the case on the basis of the evidence without the emotions impacting your ability to do so and applying the law that I give you?" The juror responded: "I will do so."

After the juror exited chambers, defendants' attorneys expressed concern that, based on the theft of her truck, the juror could not be fair and impartial and asked the court to discharge her. The court denied the request:

"Okay. We've heard a couple songs from her. She says, 'I think I can separate them' at one point. To me, that's a lot different than, 'I think I cannot separate them.' She indicated that she can divorce this incident, but then later said, 'Well, maybe.' And that might give one some pause to consider that.

"But the bottom line is she said she could put the emotions aside, could evaluate the case on the basis of the evidence — not on that — applying the law I provide by way of the jury instructions.

"And what's my opinion regarding her demeanor and her response? I don't know if she was emotional. She seemed more excited than emotional in describing this. Maybe a little irritated. But she seemed to give this a great deal of thought in chambers. To me she seemed to be very sincere, very honest. When I put the ultimate question to her, she did not equivocate in her response saying she can do it.

"So as far as cause, I can't find cause to excuse her. I can't find it. I'm not going to excuse her. She is going to be kept."

Lemur's attorney then asked the court whether it "would consider granting [defendants] leave to reopen to exercise a peremptory challenge." The court responded in the negative.

2. *Analysis*

When "a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty," the court may discharge the juror and replace her with an alternate. (§ 1089.) A juror's bias or inability to be impartial renders her unable to perform her duty and subject to discharge. (*People v. Ayala* (2000) 24 Cal.4th 243, 271-272; *People v. Keenan* (1988) 46 Cal.3d 478, 532.) A decision whether to discharge a juror for cause and substitute an alternate lies within the broad discretion of the trial court and is rarely disturbed on appeal. (*People v. Lomax* (2010) 49 Cal.4th 530, 565 (*Lomax*); *People v. Smith* (2005) 35 Cal.4th 334, 348.) ""Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a

seated juror should be discharged for good cause under section 1089 if supported by substantial evidence."'" (*People v. Martinez* (2010) 47 Cal.4th 911, 943.)

Substantial evidence supports the trial court's decision not to discharge the juror for wondering whether defendants might have stolen her truck. As detailed in part III.A.1., *ante*, the juror acknowledged there was no evidence defendants had stolen her truck, and she repeatedly told counsel and the court in chambers that she believed she could separate her feelings about the theft of her truck from the evidence to be introduced at trial. Indeed, when asked directly by the court whether she could "put those emotions aside and evaluate the case on the basis of the evidence without the emotions impacting [her] ability to do so and applying the law that [the court would] give [her]," she responded unequivocally, "I will do so." To be sure, other statements by the juror suggested she might not be able to set aside her feelings about the stolen truck (e.g., her statement that "maybe" she could not be impartial because she would "'always' be wondering" about defendants' possible involvement in the theft). But the trial court considered these conflicting statements and concluded the juror could be impartial. Where, as here, "'a juror's responses are conflicting or equivocal, the trial court's ruling is binding on us.'" (*Lomax, supra*, 49 Cal.4th at p. 567; accord, *People v. Bittaker* (1989) 48 Cal.3d 1046, 1089.)

Furthermore, the trial court's comments regarding the juror's demeanor support its decision not to discharge her. The court noted the juror "seemed to give this a great deal of thought in chambers" and "seemed to be very sincere, very honest." The court also noted that when it "put the ultimate question to her, she did not equivocate in her

response saying she can do it." Because the trial court had the opportunity to watch and listen to the juror while she was questioned about her ability to be impartial, an opportunity we did not have, we must defer to the court's observations regarding the juror's demeanor and its evaluation of her competence to serve. (*Lomax, supra*, 49 Cal.4th at pp. 567, 569; *People v. Cain* (1995) 10 Cal.4th 1, 60.)

Defendants also contend the juror "withheld information about her extensive law enforcement contacts"; and "by omitting such clearly relevant information, the juror deprived [them] of [their] right to exercise a peremptory challenge." (See Code Civ. Proc., § 231, subd. (a) [authorizing peremptory challenges by defendants in criminal cases].) Defendants, however, have cited nothing in the record that supports these contentions; and they did not include in the record on appeal either a copy of the juror's questionnaire responses or a transcript of her voir dire examination. On the record before us, we cannot determine whether the juror withheld relevant information during voir dire and therefore deem this contention forfeited. (See Cal. Rules of Court, rules 8.204(a)(1)(C), 8.360(a) [factual assertion in brief must be supported by citation to record]; *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 [failure to support argument with record citations forfeits argument].)

B. *The Court Did Not Err in Admitting Certain Testimony About Threats and Accusations Made Against Smith and Blakley*

Defendants complain the trial court erroneously admitted irrelevant, speculative, and hearsay testimony from Smith, Blakley and Nishida regarding various threats and accusations made against Smith and Blakley. Defendants also claim their trial attorneys

were ineffective for failing to raise certain objections to some of Smith's testimony. We shall summarize the challenged portions of the witnesses' testimony before analyzing, and ultimately rejecting, defendants' claims of error.

1. *Additional Pertinent Facts*

a. *The "Green Light" on Smith*

Before trial commenced, defendants' attorneys moved to preclude "any evidence being elicited from [Nishida] or from any of the prosecution's witnesses that they heard through the grapevine, or rumors, or the word on the street that there was a green light on [i.e., an authorization to kill] the victim." The prosecutor stated he did not intend to ask witnesses "what was the word on the street about why this happened and elicit inadmissible hearsay," but he might "ask questions of witnesses to determine if they know those things personally." The trial court granted the motion as to "testimony from a witness that says, 'The word on the street is,' or, 'I heard,' or, 'I know,' you know, 'I overheard that they're out to get him.'" The court cautioned, however, that "there might be evidence, witnesses who might have some detailed information firsthand, and that would be different." At the request of Lemeur's counsel, the court also agreed that if the prosecutor wanted to question witnesses about their knowledge of the "green light" issue, the questioning would be done outside the presence of the jury to allow the court to determine its admissibility.

Despite these pretrial rulings, during the direct examination of Smith the prosecutor asked: "Were you ever told there was a green light on you?" Smith responded: "Yeah, I heard that rumor." Lemeur's attorney objected and moved to strike

the response on grounds of speculation and hearsay. When the prosecutor stated Smith's testimony was "not offered for the truth of the matter," the court "let it in on that basis."

The prosecutor also inquired about the "green light" on Smith during the direct examination of Nishida. The prosecutor asked: "Did Mr. Smith tell you that there was a green light on him?" Nishida responded, "Yes," and Lemeur's attorney objected on grounds of hearsay and lack of foundation. The trial court overruled the objections: "Well, it might go toward his state of mind. Whether or not it's true, we can't tell by the testimony. But if a statement were made, I'll let the response stand."

b. *Other Threats and Accusations Made Against Smith and Blakley*

The prosecutor asked Smith on direct examination about certain statements CFS members had made to or about him. For example, the prosecutor asked Smith whether any CFS member ever said, "You're either with us or against us." After Smith responded in the negative, the prosecutor asked whether Smith "ever told anybody that the [CFS] told [him], 'You're either with us or against us.'" This question drew a hearsay objection from Lemeur's attorney, which the court overruled. Smith then answered: "No. Not that I remember."

The prosecutor later asked Smith about his refusal to join the CFS. The prosecutor asked Smith whether he had told Nishida he had "'a problem with these dudes, like, the [CFS] because they want me to join part of their clique.'" Smith testified: "Yeah. That's what someone told me, that they felt disrespected that I wouldn't join. But when it was brought up to my attention by that person, it was casual I never felt forced or

anything But a few people were telling me that they felt disrespected."² Lemeur's attorney objected and moved to strike the response on the ground of hearsay. The trial court agreed Smith's answer was hearsay, but admitted it when the prosecutor stated it was not offered for its truth. In response to further questioning from the prosecutor about Smith's refusal to join the CFS, as to which no objections were made, Smith testified that he told a CFS member he did not want to join the gang, and that he had "gotten in fights with skinheads" over his refusal to join.

The prosecutor also asked Smith several questions about accusations that he had "ratted" or "snitched" on CFS members. The prosecutor asked whether "anybody from [the CFS] accuse[d] [Smith] of being a rat or a snitch," and Smith answered: "Yeah, I was — I was told that." Lemeur's attorney objected the answer was hearsay, and the court sustained the objection and struck the response. The prosecutor again asked Smith whether "anybody made that accusation to [him]," and Smith again responded in the affirmative. When Lemeur's attorney again asserted a hearsay objection, the prosecutor said the testimony pertained to Smith's "state of mind . . . with regard to his relationships with [the CFS]. Whether it's true or not is a different story." The court allowed the testimony "not for the fact that the statement is true, but that it was made."

² Smith earlier testified there would "probably" be "repercussions" if someone "disrespected" a White supremacist gang. Nishida later explained that when a person "disrespects" a criminal street gang, gang members ordinarily retaliate with violence against the person to try to regain the lost "respect."

In response to further questions from the prosecutor on the issue of whether Smith was a "rat," Smith stated two CFS members asked him whether he "did tell on somebody," and he "told them no, [he] didn't." Smith also stated that although "[s]everal people" had "accused [him] of being a rat," it was "all bulls**t; that's not the type of person I am." The prosecutor then asked Smith whether, in connection with a particular incident in which he and others had been arrested, Smith told Nishida that "certain people thought [he] ratted on them." After Smith answered, "Yeah," Lemeur's attorney made a hearsay objection, which the court overruled.

Smith then elaborated that property had been stolen from a house in which he was residing; and because he was residing there, two CFS members thought Smith "gave up information" and "point[ed] people out" to the police. Smith also testified that in gang culture "if someone's a snitch, there's repercussions." Defendants' attorneys did not object to this portion of Smith's testimony.

Near the end of direct examination, the prosecutor asked Smith several questions about his willingness to testify. When asked whether he wanted to testify, Smith answered: "No. I really don't. I mean, I was subpoenaed." Smith stated that he would not have testified had he not been served with a subpoena because his testimony could have "repercussions," and that he believed he had been stabbed because he was thought to be a "snitch." No objections were made to this line of questioning.

The prosecutor also questioned Blakley about accusations that Smith had reported CFS members to the police. During direct examination, he asked her: "[D]o you know through personal knowledge if anybody had accused Mr. Smith of being a snitch or a

rat?" Blakley responded: "I had heard that around town a few times from different people." Lemeur's attorney objected and moved to strike on grounds of hearsay and lack of foundation. The trial court overruled the objections: "[T]he issue is not whether he is a rat, whether it's true or not, but whether the statement was made. I'll let the response stand." The prosecutor then asked Blakley whether she had reported to Nishida that CFS members "were looking for Mr. Smith because they thought he ratted on David Darnell," another CFS member. Lemeur's attorney asserted a hearsay objection, which the trial court overruled. Blakley answered, "Okay."

The prosecutor next questioned Blakley about several other statements she had made to police. For example, the prosecutor asked whether she reported to Nishida that Smith had told her that "he didn't know the people [who attacked him] but he's seen them around." Blakley answered she did not remember. Lemeur's attorney asserted a hearsay objection, which the trial court sustained. When the prosecutor offered the answer as impeachment of Smith, the court admitted the testimony for that purpose. The prosecutor then asked Blakley whether she had told Nishida two CFS members "had blamed [Smith] for their arrests . . . and thought he was a rat." Lemeur's attorney objected on grounds of relevance, hearsay and lack of foundation, but the court overruled the objections. Blakley again responded she did not remember making the statement.

Later, in redirect examination, the prosecutor asked Blakley whether anyone had threatened to stab her for testifying at trial. Lemeur's attorney objected on grounds of hearsay, Evidence Code section 352 and exceeding the scope of cross-examination. The trial court stated the testimony was admissible as to bias and overruled the objections.

Upon further questioning by the prosecutor, Blakley testified she "was told" that "someone" was threatening to stab her because she was a "rat." The court overruled the hearsay objections asserted by both defendants' attorneys.

2. *Analysis*

Defendants argue Smith's and Nishida's testimony that the CFS had placed a "green light" on Smith lacked foundation, was speculative, constituted unreliable hearsay and was more prejudicial than probative. According to defendants, their trial attorneys were ineffective for failing to object to the testimony on these grounds. Defendants further contend Smith's testimony that the CFS felt "disrespected" by his refusal to join the gang and that CFS members had accused him of being a "rat" or a "snitch" constituted irrelevant hearsay. Defendants make the same contention regarding Blakley's testimony that members of the CFS were looking for Smith because he was a "rat" and that "someone" had threatened to stab her for being a "rat." Defendants complain all of this testimony was inadmissible and so prejudicial that its admission deprived them of their due process right to a fair trial. They further contend these evidentiary errors require reversal of their attempted murder convictions, or at least of the jury's true findings on the allegations that the attempted murder of Smith was willful, deliberate and premeditated. We are not persuaded.

We reject defendants' threshold argument that the challenged testimony concerning the "green light" on Smith and the other threats and accusations against Smith and Blakley was inadmissible because it was irrelevant. Evidence pertaining to the credibility of a witness is relevant and admissible unless otherwise provided by statute.

(Evid. Code, §§ 210, 351; *People v. Lavergne* (1971) 4 Cal.3d 735, 742.) Testimony a witness was threatened bears on credibility because it is circumstantial evidence of the witness's bias, interest, motive or attitude toward testifying. (Evid. Code, § 780, subs. (f) & (j); *People v. Brooks* (1979) 88 Cal.App.3d 180, 187 & fn. 3, disapproved on other grounds by *People v. Mendoza* (2011) 52 Cal.4th 1056, 1086, fn. 19 (*Mendoza*); *People v. Manson* (1976) 61 Cal.App.3d 102, 145.) Here, (1) Smith's and Nishida's testimony about a "green light" having been placed on Smith; (2) Smith's testimony about CFS members feeling "disrespected" by his refusal to join the gang and the associated "repercussions"; (3) Smith's and Blakley's testimony about accusations by CFS members that Smith was a "rat" or a "snitch" and the associated "repercussions"; and (4) Blakley's testimony that she had been threatened with stabbing for being a "rat," all concerned threats made against Smith or Blakley and were thus relevant, and presumptively admissible, on the issues of their state of mind and credibility.³

We also disagree with defendants' contentions that the hearsay rule precluded admission of the testimony about the threats and accusations made against Smith and Blakley. Generally, hearsay, i.e., an out-of-court statement offered for the truth of the matter stated, is not admissible. (Evid. Code, § 1200, subs. (a) & (b).) Evidence of out-of-court statements is not hearsay when it is offered to prove the effects of the statements on those who heard them, but not the truth of the statements. (*People v. Livingston*

³ To the extent this testimony explained the basis for Smith's admitted fear of testifying, it was also relevant to the issue of his credibility. (See pt. III.C.2., *post.*)

(2012) 53 Cal.4th 1145, 1162 (*Livingston*); *People v. Duran* (1976) 16 Cal.3d 282, 295 & fn. 14; *People v. Marsh* (1962) 58 Cal.2d 732, 737-738.) In particular, evidence of out-of-court threats made against a witness is not hearsay when it is offered to explain differences between the witness's current testimony and prior statements. (*People v. Burgener* (2003) 29 Cal.4th 833, 869 (*Burgener*)). Thus, the hearsay rule did not preclude admission of the testimony that Smith and Blakley heard about threats and accusations against them because it was not admitted to prove the truth of the threats or accusations. The testimony was admitted instead (1) to show the effects the threats and accusations had on Smith's and Blakley's states of mind with regard to testifying and their credibility, and (2) to explain inconsistencies between their trial testimony and prior statements. Further, to the extent Smith and Blakley at trial denied or claimed they could not remember hearing about the threats or accusations they reported to Nishida, the hearsay rule did not bar Nishida's testimony about what they reported. "[A] witness's deliberate evasion of questioning can constitute an implied denial that amounts to inconsistency, rendering a prior statement admissible under Evidence Code section 1235.^[4] [Citations.] Normally, the question of evasiveness arises when a witness claims

⁴ Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 in turn provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

memory loss about the subject of the questioning." (*People v. Cowan* (2010) 50 Cal.4th 401, 463 (*Cowan*)). We therefore reject defendants' arguments the challenged testimony should have been excluded as hearsay.

Next, defendants contend the testimony about the various threats and accusations made against Smith and Blakley was speculative and lacked foundation because it was not based on personal knowledge. We disagree. Because the testimony was admitted only to show the effects of the threats and accusations on Smith and Blakley, not to prove the truth of the content of any of the threats or accusations, all that was needed was competent evidence that Smith and Blakley heard, or otherwise learned of, the threats and accusations. As recounted above (see pt. III.B.1., *ante*), Smith and Blakley testified they heard certain threats and accusations had been made against them; and Nishida similarly testified to what they reported to him they had heard. That testimony was sufficient to establish that Smith and Blakley personally knew threats and accusations had been made against them. (See Evid. Code, § 702 [witness must have personal knowledge of matter about which he testifies, and such knowledge may be shown by witness's own testimony]; *People v. Lewis* (2001) 26 Cal.4th 334, 358 [witness may testify to sounds he heard]; *People v. Alpine* (1927) 81 Cal.App. 456, 464 [witness may testify to threats he overheard even though he was not party to conversation in which they were made].)⁵

⁵ Further, because an objection based on lack of personal knowledge could not correctly have been sustained, defendants' trial counsel did not provide ineffective assistance for not making the objection. "Counsel is not required to proffer futile objections." (*People v. Anderson* (2001) 25 Cal.4th 543, 587 (*Anderson*)); see also *People v. Constancio* (1974) 42 Cal.App.3d 533, 546 ["It is not incumbent upon trial counsel to

Finally, we are not persuaded by defendants' argument that the testimony about a "green light" having been placed on Smith was inadmissible because "its probative value [was] substantially outweighed by the probability that its admission . . . create[d] substantial danger of undue prejudice." (Evid. Code, § 352.) As we have explained, the testimony was admitted to establish the state of mind and credibility of Smith and Blakley, both eyewitnesses to the stabbing whose trial testimony differed in significant respects from their prior statements to police. "For this purpose it was highly relevant." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

The probative value of the "green light" testimony was not substantially outweighed by the probability the jury improperly considered it as evidence that "the assault upon Smith was a premeditated and deliberate attempt to kill him." Defendants correctly point out that the prosecutor did not assert a specific nonhearsay purpose for Smith's testimony, and the trial court did not "place any limitation on the jury's use of this testimony." But, neither did the prosecutor offer the "green light" testimony as evidence of premeditation; indeed, the prosecutor never mentioned the testimony at all in his closing argument. Moreover, the trial court stated (although not so clearly or so fully as to constitute a limiting instruction) that it was admitting the testimony not for the truth of the matter asserted (i.e., as proof that a "green light" had been placed on Smith), but for its relevance to Smith's state of mind.

advance meritless arguments or to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel."].)

On this record, we conclude the trial court acted within its discretion under Evidence Code section 352 in admitting the "green light" testimony. (See, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1289 [Evid. Code, § 352 did not require exclusion of testimony about threat to witness when trial court cautioned jury somewhat ambiguously that testimony was admitted to show witness's state of mind and not to prove truth of threat]; *Olguin, supra*, 31 Cal.App.4th at p. 1368 [same when there "was never an argument, never even a suggestion," that threat evidence "reflected consciousness of guilt"; and such evidence was "strictly limited" to establishing witness's state of mind].) Defendants' trial attorneys therefore were not ineffective for failing to object on the basis of that statute. (*Anderson, supra*, 25 Cal.4th at p. 587; fn. 5, *ante*.)

Although we have rejected defendants' challenges to the admissibility of the testimony concerning the various threats and accusations made against Smith and Blakley, we do agree with defendants that there was a potential for the jury improperly to have considered that testimony as proof that the CFS had in fact put a "green light" on Smith and otherwise threatened him with violence, and to have found that the attempted murder was therefore premeditated. As Lemeur puts it, admission of the challenged testimony without specific limitations on its use could have "planted in the minds of the jurors the fearsome specter of nefarious and unnamed gang members not only making threatening statements, but actually acting on those statements." An instruction expressly limiting the purposes for which the jury could consider the testimony to the state of mind and credibility of Smith and Blakley would accordingly have been appropriate.

Nevertheless, because defendants did not request a limiting instruction at trial, they may

not complain about its absence on appeal. (*People v. Thomas* (2012) 53 Cal.4th 771, 810 (*Thomas*); *People v. Clark* (2011) 52 Cal.4th 856, 942 (*Clark*).

In any event, the admission of the testimony about threats and accusations against Smith and Blakley without a limiting instruction, even if error, is not grounds for reversal of the attempted murder convictions. Defendants contend reversal is required because the evidentiary errors were so serious that they deprived them of their due process right to a fair trial. "But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.] Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*); see *People v. Watson* (1956) 46 Cal.2d 818, 836.) As we shall explain, admission of the testimony about threats and accusations against Smith and Blakley did not render defendants' trial fundamentally unfair; and there is no reasonable probability that had the testimony been excluded, defendants would have obtained a better result.

There was strong and ample evidence — apart from the challenged testimony concerning the "green light" on Smith and the other threats and accusations — that defendants attempted to murder Smith. As described earlier, Smith suffered multiple life-threatening stab wounds during an unprovoked attack after defendants burst in on him and Blakley in King's bathroom. (See pt. I., *ante*.) Although eyewitnesses Smith, Blakley, and King refused to identify defendants at trial as the persons who attacked

Smith, Smith previously told Nishida that Lemeur was one of the attackers; Blakley previously identified Lemeur as one of the attackers and True as the stabber during a police interview and at the preliminary hearing; and King previously identified Lemeur as one of the attackers when Nishida showed him a photographic lineup. The eyewitness' previous statements were corroborated by the testimony of Darrin Thibault, a former member of the CFS. Thibault testified he had a conversation with defendants after Smith was stabbed. During that conversation, True admitted he stabbed Smith in the chest multiple times, and Lemeur admitted he participated in the attack. This evidence clearly indicates defendants attempted to murder Smith by intentionally stabbing him multiple times in the chest. (See, e.g., *People v. Lee* (2003) 31 Cal.4th 613, 623-624 [attempted murder requires specific intent to kill and direct but ineffectual act toward accomplishing intended killing; accomplice who intends to kill and assists direct perpetrator is liable as aider and abettor].)

There was also strong and ample evidence — again apart from the challenged testimony about the "green light" on Smith and the other threats and accusations — that the attempt to murder Smith was willful, deliberate, and premeditated. Smith testified without objection that before the stabbing, two CFS members accused him of providing information to the police about their involvement in the theft of property from a house where Smith resided, and that there are "repercussions" by gangs against police informants. Thibault testified defendants were CFS members; and before the stabbing, he heard from another CFS member that the CFS "wanted to do harm to Smith." King testified that after defendants and the other attackers entered his apartment, they asked:

"Where's Cory at? We know he's here. Where is he at?" King also testified: "[T]hey said, 'Calm down, homeboy, we're not here for you,' and 'You're not gonna be needing this' when they grabbed [his] knife." As noted earlier, defendants then burst into the bathroom and inflicted multiple life-threatening stab wounds on Smith. (See pt. I., *ante*.) Thibault testified that after the stabbing, defendants said that "they got him [i.e., Smith]," "they handled it," and "they took care of it." This evidence, including "preexisting motive, planning activity, and manner of killing," clearly indicates the stabbing "'occurred as the result of preexisting thought and reflection rather than an unconsidered or rash impulse,'" and was therefore a willful, deliberate, and premeditated attempt to murder Smith. (*People v. Jennings* (2010) 50 Cal.4th 616, 645.)

In sum, a substantial amount of evidence strongly incriminated defendants, and that evidence was independent of the challenged testimony concerning the threats and accusations made against Smith and Blakley. The challenged testimony, by contrast, occupies only several of the more than 1,000 pages of transcript from a trial that lasted seven days; and, importantly, the prosecutor never mentioned that testimony as proof of defendants' guilt. We therefore conclude that the admission of the challenged testimony about threats and accusations did not deprive defendants of a fundamentally fair trial in violation of their due process rights. (See, e.g., *Livingston, supra*, 53 Cal.4th at p. 1163 [no due process violation in permitting "brief mention of the out-of-court statement for a limited nonhearsay purpose"]; *Cowan, supra*, 50 Cal.4th at p. 464 [no due process violation when challenged testimony "was only a small part of the prosecution's case" and was consistent with other testimony]; *People v. Covarrubias* (2011) 202 Cal.App.4th

1, 20, 21 [no due process violation when erroneously admitted testimony was "a significant portion of the prosecution's case-in-chief," but "was far from the primary evidence of [the defendant's] guilt," and "in large part, merely corroborated a reasonable inference that the jurors likely would have drawn without such testimony"].)

For similar reasons, we conclude that even if the trial court erred in admitting the testimony about which defendants complain, it is not "reasonably probable the verdict would have been more favorable to the defendant[s] absent the error." (*Partida, supra*, 37 Cal.4th at p. 439; see, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 673 (*McKinnon*) [any error in admitting hearsay evidence of threat was harmless when eyewitness testimony "substantially incriminated defendant" and hearsay "was cumulative and of minor value"]; *People v. Houston* (2005) 130 Cal.App.4th 279, 301 [any admission of hearsay was harmless when "other evidence of appellant's guilt was overwhelming," and hearsay was "cumulative" and "tangential"].) Defendants are therefore not entitled to reversal of their convictions of attempted willful, deliberate, and premeditated murder. (Cal. Const., art. VI, § 13; *Watson, supra*, 46 Cal.2d at p. 836.)

C. *The Court Did Not Err in Admitting Testimony of King Regarding His Fear of Testifying*

Defendants argue "the trial court erred in allowing the prosecutor to question Aaron King about his fear of testifying in [their] trial." We shall set forth the testimony to which defendants object and then explain why the trial court properly overruled defendants' objections to that testimony.

1. *Additional Pertinent Facts*

The People subpoenaed King to testify at trial. At the beginning of King's direct examination, the prosecutor asked King whether he had "some concerns about being here today." When King responded in the affirmative, the prosecutor asked him to explain his "concern[s] about being here today and testifying." Lemeur's counsel objected on relevance grounds, but the court overruled the objection. King then testified he "fear[ed] for [his] safety." When the prosecutor asked King to explain why he feared for his safety, Lemeur's counsel objected on grounds of relevance and Evidence Code section 352. King answered: "Just what happened in general. Just the fact that I was there puts me in danger, I guess."

The prosecutor then asked King whether he had expressed concern for his safety to law enforcement. King answered in the affirmative, and Lemeur's counsel objected on grounds of hearsay. The trial court overruled the objection.

The prosecutor next asked King several questions about whether he had been threatened with regard to testifying at defendants' trial. Lemeur's counsel interposed several objections on grounds of relevance, Evidence Code section 352 and hearsay, which the trial court overruled. King testified that "a couple people," including Blakley, told him to "get out of town." King also testified Blakley warned him "it might not be safe" to testify because the stabbing occurred at his apartment.

The prosecutor returned to the issue of King's fear of testifying during redirect examination. The prosecutor asked King whether he had told an investigator in the prosecutor's office that the CFS had put a "green light" on King because he had talked to

the police. After the trial court overruled a hearsay objection by Lemeur's counsel, King answered: "They said if I talked to the police, they were going to put a green light on me. That's what someone had told me." The prosecutor also asked King whether he had "been told that people from [the CFS] have been looking for [him]." Lemeur's counsel objected on grounds of hearsay, the trial court overruled the objection, and King responded in the affirmative.

2. *Analysis*

In arguing the trial court erred in allowing King to testify about his fear of testifying at trial, defendants first assert the testimony was not relevant to any disputed fact at trial. Defendants concede that "[i]t can be true that if a witness experiences fear while on the witness stand or is otherwise afraid to testify it may be relevant to the jury's determination of credibility and admissib[ility]," but they insist that "threats to a witness that are not connected to the defendant in some manner are irrelevant." Defendants claim King's testimony was inadmissible because "there was no evidence presented that [defendants], [their] friends, associates, or family threatened Aaron King, or that he was in any manner in danger of 'retaliation,' as implied by the prosecutor." We disagree.

Our Supreme Court has repeatedly, and very recently, rejected defendants' argument: "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court [to admit]." (*Burgener, supra*, 29 Cal.4th at p. 869; accord, *People v. Valdez* (2012) 55 Cal.4th 82, 135 (*Valdez*); *McKinnon, supra*,

52 Cal.4th at p. 668; *People v. Guerra* (2006) 37 Cal.4th 1067, 1141-1142.) Further, "[f]or such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant." (*Guerra*, at p. 1142; accord, *Valdez*, at p. 135; *McKinnon*, at p. 668.) Accordingly, evidence linking defendants to the threats against King was not required as a condition of his testimony regarding fear of testifying.

Defendants next argue King's testimony about his fear of testifying was not "properly admitted to explain inconsistencies or apparent fabrications in his testimony," because there "was no question about King's credibility to impeach or explain." This argument fails on the facts and the law. Factually, King's credibility was very much at issue because at trial King testified he could not remember the information he had given law enforcement before trial about the individuals who attacked Smith in King's bathroom, including identification of Lemeur as one of the attackers in photographic lineups. (See *Valdez, supra*, 55 Cal.4th at p. 136 [witness's credibility was at issue when she "testified she could not remember details she had earlier given police"].) Legally, our Supreme Court has held that "evidence that a witness testifies despite fear is important to fully evaluating his or her credibility. [Citation.] *The logic of this rationale does not hinge on whether the witness gave prior inconsistent testimony.*" (*Mendoza, supra*, 52 Cal.4th at p. 1086, italics added; accord, *Valdez*, at p. 135.) "Thus, in order to introduce evidence of [King's] fear, the prosecution was not required to show that [his] testimony was inconsistent with prior statements or otherwise suspect." (*Valdez*, at pp. 135-136.)

Finally, defendants argue admission of King's testimony about his fear of testifying violated their constitutional rights to a fair trial because the trial court did not give the jury an instruction limiting the purposes for which it could consider that testimony. Defendants did not request a limiting instruction at trial, however, and therefore may not raise the issue on appeal. (*Valdez, supra*, 55 Cal.4th at p. 149; *Thomas, supra*, 53 Cal.4th at p. 810; *Clark, supra*, 52 Cal.4th at p. 942.)

D. *The Court Did Not Err in Imposing and Executing Enhancements for Both Use of a Deadly Weapon and Infliction of Great Bodily Injury in Connection with True's Attempted Murder Conviction*

True contends imposition and execution of both a weapon use enhancement (§ 12022, subd. (b)(1)) and a great bodily injury enhancement (§ 12022.7, subd. (a)) for his conviction of attempted murder "constituted multiple punishment in violation of . . . section 654." We disagree.

As pertinent here, section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Our Supreme Court recently held that section 654 generally applies to imposition of multiple enhancements for a single crime, but only if a more specific sentencing statute does not provide the answer as to how the enhancements interact. (*People v. Ahmed* (2011) 53 Cal.4th 156, 159-160 (*Ahmed*).

Here, section 1170.1 specifically addresses the interaction of enhancements for use of a deadly weapon and infliction of great bodily injury in the commission of an offense.

Section 1170.1, subdivision (f) provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.*" (Italics added.) Section 1170.1, subdivision (g) provides: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm.*" (Italics added.) Section 1170.1 thus permits a sentencing court to impose and execute on a defendant convicted of an offense both one weapon use enhancement and one great bodily injury enhancement. (*Ahmed, supra*, 53 Cal.4th at p. 168.)

Accordingly, under section 1170.1 the court properly increased the prison term of 15 years to life for True's conviction of attempted murder (§§ 186.22, subd. (b)(5), 664, subd. (a)) with consecutive prison terms of one year for use of a deadly weapon (§ 12022, subd. (b)(1)) and three years for infliction of great bodily injury (§ 12022.7, subd. (a)). Further, because section 1170.1, a specific sentencing statute, "provides the answer to the question of this case, we do not consider section 654." (*Ahmed, supra*, 53 Cal.4th at p. 168.)

DISPOSITION

The judgments are affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.