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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MOSQUEDA,

Defendant and Appellant.

F064088

(Super. Ct. No. 11CM0643)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Robert Shane Burns, Judge.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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Jesus Mosqueda was convicted of attempted premeditated murder (Pen. Code, §§ 664, 187),¹ assault with a deadly weapon (§ 245, subd. (a)(1)), and active participation

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

in a criminal street gang (§ 186.22, subd. (a)). The convictions arose out of a retaliatory gang assault on Augustin Mora, who was stabbed several times.

Mosqueda argues the trial court erred in instructing the jury, and portions of the verdict were not supported by substantial evidence. We reject these arguments. We agree with Mosqueda, however, that the trial court made several errors at the sentencing hearing, and will remand the matter to allow the trial court to correct these errors.

FACTUAL AND PROCEDURAL SUMMARY

The first amended information charged Mosqueda with the crimes of which he was convicted. In addition, the information alleged in the attempted murder and assault counts that Mosqueda personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a), and the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1).

The issues in this case do not require a detailed summary of the testimony. Instead, we focus only on those witnesses whose testimony is relevant to the issues.

On the date of the assault, Colleen Ann Witcher had gone to the market to cash a check with her mother-in-law, Toni Schramm. Their vehicle was parked in the back of the store adjacent to an alleyway. Witcher observed four to six males who appeared to be hiding behind a car. A male, later identified as Augustin Mora, rounded the corner of the grocery store. One of the group asked if he was Mora. Mora denied his identity, but one of the group apparently called Mora on his cell phone. When Mora answered his phone, one of the group said “See, I told you that was him, get him.”

The group caught Mora when he tried to flee and they started beating him. Members of the group hit and kicked Mora. Witcher saw one of the group with a big object in his hand that he was using to hit Mora. Witcher thought it was a billy club or a stick that was about 18 inches long. Witcher and Schramm started screaming at the group to leave Mora alone. Witcher ran into the store and asked them to call the police.

At trial, Witcher identified Mosqueda as someone who was at the scene, and may have been involved in the assault.

Schramm also described the group as hitting Mora with something. Schramm did not identify the defendant as one of the assailants.

Mora testified he did not recall the incident, nor did he recall speaking to anyone about the incident while in the hospital. He admitted, however, that up to one week before trial he was involved in a gang, he knew what a snitch was, he knew being a snitch was bad, and a victim who told the police who stabbed him would be a snitch. He also admitted he was in the hospital, and he now has four scars that he did not have before he was in the hospital, one on his chest, one on each side of his rib cage, and one on his back. He claimed he did not know how he got the scars. Finally, he admitted he knew Mosqueda as Chile, but did not know his given name.

Detective Cory Mathews testified that he interviewed Mora when he was in the hospital. In that interview, Mora stated that he was walking behind the market when he saw a group of individuals. One of the group said “Hey, scrapa, you’re going to die right now.” Mora began running. Mora was stabbed when the group caught him. Mora stated that Mosqueda stabbed him. Mora also identified Sergio Valadez as one of the attackers.

Mathews testified that Mora was awake during the entire interview, and his answers were always appropriate. Mathews also interviewed Mora shortly after he was released from the hospital. At that time, Mora stated he could not recall the assault, nor could he recall speaking with Mathews at the hospital.

Luis Mora, Mora’s brother, went to the hospital to see his brother. On the day following the stabbing, Mora was able to talk to Luis about the assault.² Mora said that he tried to run away but he got stabbed. At that time, Mora did not identify who stabbed

² We refer to Luis Mora by his first name to avoid confusion with his brother, Augustin Mora.

him. The following day, Mora said that Chile stabbed him. At trial, Luis identified defendant as Chile.

Mosqueda's attorney attempted to cast doubt on Mora's competency at the time he made these statements to Luis. Luis testified that when Mora identified Chile as the stabber, Mora was awake for about a four-hour period. Mora went in and out of consciousness during this period, but he was conscious when telling Luis about Chile. The nurses were giving Mora pain medications while he was in the hospital. However, Luis testified that Mora was awake when he was interviewed by Detective Cory Mathews, and gave appropriate responses to Mathews.

Mosqueda's younger brother, Jerardo Mosqueda,³ and his friend Roman Alonzo, testified they remembered talking to Mathews, but denied any recollection of what was said in the conversation, and denied any recollection of an incident wherein they were attacked by rival gang members. Jerardo also testified the neither he nor his brother were gang members.

Mathews interviewed Jerardo and Alonzo shortly after the assault. Jerardo stated the day before the assault he was walking home from school with Alonzo when a vehicle approached. Mora got out of the vehicle yelling gang sayings and throwing gang signs. Several more Surenos exited the vehicle and chased Jerardo and Alonzo. The two escaped to Alonzo's house. Jerardo stated he spoke only to his aunt about the incident.

Alonzo told Mathews he was walking towards his house with Jerardo, who Alonzo referred to as Lil Chile, the day before the assault. Alonzo described the vehicle stopping nearby, Mora getting out yelling gang slogans, and then other occupants from the vehicle chasing Alonzo and Jerardo. However, Alonzo stated they ran to his grandmother's

³ We refer to Jerardo Mosqueda by his first name to avoid confusion with the defendant.

house where Jerardo called Mosqueda and told him what occurred. Alonzo admitted that he associated with Nortenos, and identified Mora as a Sureno.

Valadez testified that he and Mora fought on the day of the assault, but he only used his fists to hit Mora, and he claimed he acted alone. He admitted to lying in wait to attack Mora. He ran away when he heard someone say they were calling the police. He denied that Mosqueda was at the site of the assault. He also admitted that he associated with the Nortenos, specifically the South Side Locs. The prosecution presented evidence found in Valadez's bedroom that linked him to the South Side Locs.

Mathews interviewed Valadez shortly after the incident. Valadez admitted being at the market where the assault occurred and fighting with Mora. At the end of the interview, Valadez stated that as he was running away he looked back and saw Mosqueda running behind him.

Mathews interviewed Mosqueda who admitted he was a member of the South Side Loc gang, a subset of the Norteno criminal street gang. Mosqueda stated his gang moniker was "Chile." He also stated that when Surenos start problems, the Nortenos have to retaliate.

Mosqueda told Mathews that on the day of the assault he paid \$2.00 to play basketball at the YMCA, and was at the YMCA at the time of the stabbing. Mosqueda said he signed in to enter the YMCA. Mosqueda denied knowing Mora, and denied any knowledge about an earlier incident that occurred involving Mora and Jerardo. Mosqueda also denied any involvement in the attack on Mora.

Donna Arevalo, an employee of the YMCA, testified that every nonmember who wants to use the facilities must pay a fee of \$8.00, and must sign a release of liability form. She could not find in the facility records a release of liability form for Mosqueda on the day of the assault.

Judy Griffith was also employed at the YMCA. She could not find any daily passes for the date of the assault. Nor was there a member by the name of Mosqueda that

day. However, it was possible to use the outside basketball courts without the knowledge of a YMCA employee.

John Henderson was a police officer with the City of Lemoore Police Department assigned to the Kings County Gang Task Force. Before he testified, the parties stipulated that he was qualified as an expert in the Norteno criminal street gang, specifically in Kings County. The parties also stipulated the Nortenos and its subset, the South Side Locs, are a criminal street gang engaged in a pattern of criminal gang activity as defined by Penal Code section 186.22.

Henderson reviewed the YMCA surveillance video that covered the front desk, and Mosqueda did not appear on that video at any relevant time on the day of the assault.

Henderson opined that Mosqueda, Abel Sanchez, Jerardo Mosqueda, Roman Alonzo, and Sergio Valadez were members of the Norteno criminal street gang. Mosqueda, Valadez, and Jerardo Mosqueda were members of the South Side Locs subset, while Sanchez was a member of an affiliated subset, the Brown Pride Nortenos.

Henderson also opined that Mora was a member of the East Side Dukes Sureno criminal street gang. Henderson explained that when a rival gang member attacks another gang member, the attacked gang is expected to retaliate, usually with more force than was initially used. The attack by Mora on Jerardo and Alonzo was an assault by a rival gang, and retaliation would normally be expected. The attack on Mora the following day would be an act of retaliation. The retaliation would benefit the Norteno criminal street gang by instilling fear in the Sureno gang and the community in general.

The jury found Mosqueda guilty as charged, and found all enhancements and allegations true. The trial court sentenced Mosqueda to a determinate term of 13 years and an indeterminate term of life with the possibility of parole.

DISCUSSION

I. JURY INSTRUCTIONS

A. Prior Inconsistent Statement

Mosqueda's defense against the charges was that the prosecution failed to prove beyond a reasonable doubt that he was one of the perpetrators in the assault of Mora. The prosecution relied on Witcher's incourt identification of Mosqueda, Valadez's statement that Mosqueda was behind him running from the scene, Mosqueda's false alibi, and the statements Mora made while in the hospital to Luis Mora and Mathews that identified Mosqueda as the individual who had stabbed him.

Mosqueda's argument focuses on the statements attributed to Mora while he was in the hospital. At trial, Mora testified he did not remember anything about the attack or his time in the hospital. Luis Mora and Mathews both testified that shortly after the assault Mora identified Chile, Mosqueda's moniker, as the individual that had stabbed him (the hospital statements).

The trial court instructed the jury with numerous instructions on prior statements. Before receiving any evidence, the trial court instructed the jury that prior inconsistent statements could be considered when assessing a witness's credibility, and that if the jury did not believe a witness's testimony that he or she could not remember something, then that testimony was inconsistent with a witness's earlier statement. (CALCRIM No. 105.)

Before the attorneys presented their closing arguments, the trial court instructed the jury that it could consider prior inconsistent statements when evaluating a witness's credibility, and a false claim of lack of memory was an inconsistent statement. (CALCRIM No. 226.) The jury was also instructed that testimony about statements made by a witness before trial could be used to evaluate the witness's testimony in court, and as evidence that the earlier statement was true. (CALCRIM No. 318.) Mosqueda asserts the last portion of CALCRIM No. 318 is erroneous in this case.

A witness's prior statements that are inconsistent with his trial testimony are admissible to impeach the witness. (Evid. Code, § 780.) However, such statements are hearsay, and are not admissible for the truth of the matter asserted unless an exception to the hearsay rule applies. (Evid. Code, § 1200, subds. (a) and (b).) Evidence Code section 1235, an exception to the hearsay rule, permits admission of a prior statement that is inconsistent with his testimony if the statement is offered in compliance with Evidence Code section 770.⁴

Mosqueda acknowledges that a false statement of lack of memory constitutes inconsistent testimony (CALCRIM No. 226), but also points out that a true statement that a witness does not have a memory of an event is not inconsistent testimony.

“A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770. The ‘fundamental requirement’ of section 1235 is that the statement in fact be *inconsistent* with the witness’s trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness’s prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. ‘Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness’ prior statement [citation], and the same principle governs the case of the forgetful witness.’ [Citation.] When a witness’s claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness’s ‘I don't remember’ statements are

⁴ Evidence Code section 770 permits introduction of prior inconsistent statements only if the witness testified at trial and was given an opportunity to explain or deny the statement, and the witness has not been excused from further testimony in the action.

evasive and untruthful, admission of his or her prior statements is proper. [Citation.]” (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220 (*Johnson*)).

Applying the rule stated in *Johnson* to the facts of this case suggests no error occurred because the record provides “a reasonable basis ... for concluding that [Mora’s] ‘I don’t remember’ statements” were evasive and untruthful. (*Johnson, supra*, 3 Cal.4th at pp. 1219-1220.) Mora testified he did not want to testify because he had “nothing to do here.” He admitted he was involved with gangs at the time of the assault. He also admitted that being a snitch was bad, and if he identified his assailant he would be considered a snitch. This testimony provides more than a reasonable basis for concluding that Mora’s testimony that he did not remember who stabbed him was evasive and untruthful.

Mosqueda asserts error occurred because the instructions permitted the jury to use Mora’s out-of-court statements for the truth of the matter stated without first determining whether he honestly could not remember the assault or his time in the hospital, or he was simply being evasive and untruthful. To support his argument, he relies on Evidence Code section 403, subdivision (c)(1).

We begin by reviewing the article which contains Evidence Code section 403. The article begins with Evidence Code section 400 which defines a preliminary fact as “a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence.” Mosqueda asserts that a determination of the truth of Mora’s claimed lack of memory is the preliminary fact.

Evidence Code section 401 defines proffered evidence as “evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.” Mosqueda identifies Mora’s hospital statements as the proffered evidence.

Evidence Code section 402, subdivision (a) identifies the procedure that may be used when a preliminary fact is in dispute. Subdivision (b) provides that the trial court

may hear and determine the question of the admissibility of evidence out of the presence of the jury. Subdivision (c) provides that a “ruling on the admissibility of evidence implies whatever finding of fact is a prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.”

Evidence Code section 405 provides the procedure generally used when determining the admissibility of proffered evidence. This section provides that all disputed preliminary fact determinations not governed by a specific statute require the court to “determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.” (Evid. Code, § 405, subd. (a).)

The trial court’s actions in this case comply with Evidence Code section 405. The admission of the evidence also implies the trial court found that Mora’s lack of memory was feigned, and his trial testimony was therefore inconsistent with the statements he made while in the hospital. This procedure, as explained above, is also consistent with *Johnson* and the numerous other cases cited by the parties.

Evidence Code sections 403 and 404 address the procedure to be used in specifically identified situations, i.e. these two sections are the exceptions to the procedure stated in Evidence Code section 405. Evidence Code section 404 provides the procedure to be used when the proffered evidence may incriminate the declarant.

Evidence Code section 403 is the section on which Mosqueda relies.⁵

⁵ Evidence Code section 403 states in full: “(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact; [¶] (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony; [¶] (3) The preliminary fact is the authenticity of a writing; or [¶] (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted

Evidence Code section 403, subdivision (a) first imposes the burden of persuasion on the party seeking admission of the proffered evidence, and renders the proffered evidence inadmissible unless the trial court concludes there is sufficient evidence to sustain a finding of the existence of the preliminary fact. Subdivision (a) then lists the four situations in which the provisions of the section apply. Mosqueda's reliance on section 403 is misplaced because none of the circumstances identified by Mosqueda applies in this case.

Mosqueda asserts that Evidence Code section 403, subdivisions (a)(2) and (a)(4) apply here. We disagree. Evidence Code section 403, subdivision (a)(2) applies where the preliminary fact is the personal knowledge of the witness concerning his testimony. It is beyond dispute that Mora had personal knowledge of the assault as he was the victim. Mosqueda did not argue otherwise, nor was there any evidence to suggest Mora lacked the personal knowledge of the events. Mora did not testify he did not make the hospital statements; he testified he could not recall making the statements.

Evidence Code section 403, subdivision (a)(4) applies where the proffered evidence is a statement, and the preliminary fact is whether the person made the statement.⁶ Here, the issue is not whether Mora made the hospital statements---the hospital statements were made to his brother, who could obviously identify Mora, and a

himself. [¶] (b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial. [¶] (c) If the court admits the proffered evidence under this section, the court: [¶] (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist. [¶] (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.”

⁶ Mosqueda argues that the preliminary fact is the conduct of Mora, but this is nonsense. The proffered evidence, according to Mosqueda's analysis, was the *statements* Mora made while in the hospital. Mora's conduct was never an issue in the trial court.

police officer present for the specific purpose of interviewing Mora, who lay in a hospital bed with four stab wounds. Mora's brother confirmed that Mathews interviewed Mora. Moreover, there was no evidence that Mora did not make the hospital statements. That was not the issue. The issue was Mora's truthfulness when he claimed he did not recall the assault or making the hospital statements. Because neither of the situations in subdivision (a) identified by Mora applies, the remaining provisions of Evidence Code section 403, which we discuss below, are inapplicable.

Evidence Code section 403, subdivision (b) authorizes the trial court to conditionally admit the proffered evidence subject to evidence of the preliminary fact being supplied later in the trial. Evidence Code section 403, subdivision (c), the subdivision on which Mosqueda relies, then provides that if the trial court "admits the proffered evidence under this section," it "[m]ay, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds the preliminary fact does exist." According to Mosqueda, the trial court erred because it did not instruct the jury that it must find Mora was untruthful before it could consider his statements made while in the hospital as substantive evidence that Mosqueda was the individual who stabbed Mora.

In addition to the inapplicability of Evidence Code section 403 to this case, Mosqueda's argument fails for at least two additional reasons. First, nothing in the record suggests the trial court conditionally admitted Mora's hospital statements subject to the prosecution providing evidence that Mora was being untruthful. Instead, the hospital statements were not admitted until after Mora had testified, and were deemed admissible at that time. Accordingly, the trial court determined before the admission of the hospital statements that Mora was untruthful when he claimed that he did not recall anything about the assault. Evidence Code section 402, subdivision (c) requires we imply the finding of the existence of the preliminary fact from this ruling, which is amply

supported by the portions of Mora's testimony identified above. In addition, the trial court had the benefit of observing Mora testify, which undoubtedly influenced this ruling.

The second reason Mosqueda's argument fails is because there is nothing in the record to suggest he ever requested an instruction that required the jury to determine Mora was untruthful when he claimed he could not recall the assault before it considered the hospital statements as substantive evidence of Mosqueda's guilt. Pursuant to Evidence Code section 402, subdivision (c), the trial court has discretion to instruct the jury on the existence of the preliminary fact. Since the trial court concluded that Mora was being untruthful, then no such instruction was necessary. This discretion to instruct the jury only becomes mandatory when a party requests the instruction. Since Mosqueda did not request an instruction on the existence of the preliminary fact, and the trial court found the preliminary fact existed, there was no error.

Mosqueda also argues the instructions were erroneous because CALCRIM Nos. 105 and 318 were in conflict. CALCRIM No. 105 informed the jury that in judging the credibility or believability of a witness it could consider, among other factors, whether the witness "ma[d]e a statement in the past that was consistent or inconsistent with his or her testimony."

On the other hand, CALCRIM No. 318 instructed the jury that "You have heard evidence of statements that a witness made before trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1 to evaluate whether the witness's testimony in court is believable; AND [¶] 2 as evidence that the information in those earlier statements is true."

We see no conflict. This first portion of CALCRIM No. 318 is consistent with CALCRIM No. 105. The second portion of CALCRIM No. 318 adds to CALCRIM No. 105 by informing the jury that the prior inconsistent statement could also be used as substantive evidence against Mosqueda. Since the trial court determined when it admitted the hospital statements that Mosqueda was being untruthful when he testified,

there was no preliminary fact for the jury to determine. Since the requirement that the jury must determine the existence of the preliminary fact was essential to Mosqueda's argument, the argument fails.

B. Attempted Voluntary Manslaughter

The trial court did not instruct the jury that attempted voluntary manslaughter was a lesser included offense to the charge of attempted murder. Mosqueda asserts this failure was erroneous.

After the close of evidence, and before instructing the jury, the trial court put on the record the results of the jury instruction conference it had with counsel. The first thing the trial court stated was that at the conference all parties agreed there was no evidence to support any lesser included offenses, especially considering that Mosqueda's defense was an assertion that he was not part of the assault on Mora. Both counsel agreed the trial court's statement was accurate. We also agree.

We begin with the general principles relevant to the three areas of law we must consider in resolving this issue: (1) the trial court's duty to instruct the jury, (2) the law relating to lesser included offenses, and (3) the law related to voluntary manslaughter.

“It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.’ [Citation.]” (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*).

The general principles of law include instructions on lesser included offenses if there is a question about whether the evidence is sufficient to permit the jury to find all the elements of the charged offense. (*Breverman, supra*, 19 Cal.4th at pp. 154-155.) There is no obligation to instruct the jury on theories that do not have substantial

evidentiary support. (*Id.* at p. 162.) “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citation.]” (*Ibid.*) Evidence is substantial if it would permit the jury to conclude the lesser offense was committed, but the greater offense was not. (*Ibid.*) The trial court must instruct on lesser offenses even in the absence of a request for such instructions, or in the face of an objection by the defendant to the giving of the instructions. (*Id.* at pp. 154-155.)

Manslaughter is the unlawful killing of a human being without malice. (§ 192.) “But a defendant who intentionally and unlawfully kills lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a ‘sudden quarrel or heat of passion’ [citation], or when the defendant kills in ‘unreasonable self-defense’--the unreasonable but good faith belief in having to act in self-defense [citations].” (*People v. Barton* (1995) 12 Cal.4th 186, 199.) Voluntary manslaughter is a lesser included offense to murder. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.)

There was no evidence to support an unreasonable self-defense theory of voluntary manslaughter, so we, like Mosqueda, focus on the theory of heat of passion. “Although section 192, subdivision (a), refers to ‘sudden quarrel or heat of passion,’ the factor which distinguishes the ‘heat of passion’ form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] ‘Heat of passion arises when “at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of

average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.” [Citation.]” (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

“Thus, ‘[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, ‘this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,’ because ‘no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.’ [Citation.]’ [Citations.] [¶] “‘To satisfy the objective or ‘reasonable person’ element of this form of voluntary manslaughter, the accused’s heat of passion must be due to ‘sufficient provocation.’” [Citation.]’ [Citation.]” (*People v. Manriquez, supra*, 37 Cal.4th at p. 584.)

Contrary to Mosqueda’s argument, we conclude there was not substantial evidence to support either the objective or subjective component of the heat of passion requirement.

The cause of Mosqueda’s asserted heat of passion was the “attack” on his brother, Jerardo Mosqueda. The attack consisted of Mora and a few other gang members chasing Jerardo and Alonzo the day before the stabbing. There was no evidence of a punch being thrown or any injury to any party. Nor was there any evidence that Mosqueda was upset or otherwise affected by this incident.

This simply is not sufficient provocation to establish either the objective or subjective component of the heat of passion defense. No reasonable person would be so inflamed that he or she would plan an ambush to stab someone who chased his or her

younger brother. The standard is that for a reasonable person, not a reasonable criminal street gang member.

Nor is there anything in the record to support the claim that Mosqueda was actually provoked. Indeed, Jerardo Mosqueda testified that he never told his brother of the attack, although Alonzo claimed that Mosqueda was informed. In either event, the attack on Mora was a planned ambush, not the result of one acting under the heat of passion. The planned ambush was consistent with the only testimony in the record relevant to Mosqueda's state of mind. The prosecution's gang expert testified that the attack on Jerardo Mosqueda required a quick response or a loss of respect would result. This is not evidence of provocation sufficient to support an instruction on voluntary manslaughter, but instead is evidence of a retaliatory attack.

None of the cases cited by Mosqueda support his position. *People v. Berry* (1976) 18 Cal.3d 509 involved a "strange course of events" between Berry and his new wife that lasted over two weeks and involved taunting about an affair his wife was having and threats to divorce. (*Id.* at p. 513.) Needless to say, this provocation is not similar to that relied on by Mosqueda.

Similarly, in *People v. Brooks* (1986) 185 Cal.App.3d 687 the appellate court concluded an instruction on voluntary manslaughter was required where Brooks shot the man he believed had killed Brooks's brother two hours earlier. It is unreasonable to suggest that Mora's chasing Jerardo Mosqueda the previous day was comparable to the stabbing death that motivated Brooks.

Finally, in *People v. Heffington* (1973) 32 Cal.App.3d 1 (*Heffington*), the appellate court held the trial court erred by failing to give a voluntary manslaughter instruction in an unusual case. Heffington was driving through town when he had an exchange with a "hippie," at the end of which the "hippie," Robert Mattos, "flipped the man the bird." (*Id.* at p. 6.) Heffington, who had been drinking, returned to the scene a short time later, confronted Mattos, and a brawl ensued. Heffington claimed Mattos was the aggressor,

and he, Heffington, used a knife to defend himself. Heffington claimed he had prior head injuries, and as a result he had a difficult time remembering the incident. The jury found Heffington guilty of assault with the intent to commit murder.

The appellate court summarily concluded the trial court erred by failing to instruct the jury that attempted voluntary manslaughter was a lesser included offense to the charged crime. It focused most of its discussion on Heffington's claimed "chronic impairment of the deliberative faculties aggravated, at the time of the incident, by ingestion of alcohol." (*Heffington, supra*, 32 Cal.App.3d at p. 12.)

Heffington provides no support for Mosqueda. The appellate court did not explain how it concluded that Heffington was acting under a heat of passion, and did not discuss either the objective or subjective component of the defense. To the extent *Heffington* can be read to support Mosqueda's position, we respectfully disagree with the decision.

There was not substantial evidence that would support a voluntary manslaughter instruction, accordingly the trial court did not err in failing to instruct the jury on that theory.

II. ACTIVE PARTICIPATION IN A CRIMINAL STREET GANG

Mosqueda was convicted in count three with violating section 186.22, subdivision (a), active participation in a criminal street gang. He argues the conviction must be reversed for two related reasons.

"The elements of the gang participation offense in section 186.22[, subdivision] (a) are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523 (*Lamas*).) A person who is not a member of a gang, but who actively participates in the gang, can be guilty of violating section 186.22[, subdivision] (a). (§ 186.22, subd. (i).) The offense is punishable as a felony

with a state prison term of 16 months, two years, or three years, or as a misdemeanor. (§ 186.22[, subd.] (a).)” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.)

Mosqueda’s argument is related to the second element of the offense, which required the prosecution to prove that when Mosqueda participated in the criminal street gang, he *knew* that members of the gang engage in or have engaged in a *pattern of criminal activity*. Mosqueda argues that (1) there was insufficient evidence that he knew members of the gang engaged in a pattern of criminal activity, and (2) the jury instructions were insufficient because they failed to define a pattern of criminal activity so the jury did not have the tools to decide if Mosqueda knew whether members of the gang engaged in a pattern of criminal activity.

Central to both arguments is the definition of “a pattern of criminal activity,” which is found in section 186.22, subdivision (e). This subdivision defines a pattern of criminal activity as “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, 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.” Thus, as relevant to this case, a pattern of criminal activity consists of (1) commission of two or more of the identified offenses, (2) one of which occurred after September 26, 1988, (3) one of which occurred within three years of a prior offense, and (4) the offenses were committed on separate occasions, or on the same occasion by two or more people. (*People v. Loewn* (1997) 17 Cal.4th 1, 9-10 (*Loewn*).)

Loewn is instructive. The jury found true an allegation that the defendant committed an assault with a deadly weapon for the benefit of a criminal street gang. Defendant argued on appeal the evidence was insufficient to support this finding because there was no evidence to support a finding that the gang engaged in a pattern of criminal activity. The Supreme Court found sufficient evidence existed because there was

evidence that on the occasion when defendant committed his assault with a deadly weapon, another gang member also committed an assault with a deadly weapon on the same victim. Thus, the two predicate offenses necessary to establish the pattern of criminal activity were proved based on the assault of which defendant was convicted. In other words, “the prosecution can establish the requisite ‘pattern’ exclusively through evidence of crimes committed contemporaneously with the charged incident.” (*Loeun, supra*, 17 Cal.4th at p. 11.)

Here, the evidence established that other gang members joined Mosqueda when he committed the attempted murder and the assault with a deadly weapon against Mora. The issue, as we see it, is whether there was evidence that a second gang member committed one of the offenses listed in section 186.22, subdivision (e). The two offenses committed by Mosqueda are offenses listed in section 186.22, subdivision (e). (§ 186.22, subd. (e)(1) and (3).) The trial court instructed the jury on the elements of these two offenses, and also instructed the jury that a pattern of criminal gang activity as used in this case meant the commission of or attempted commission of assault with a deadly weapon or attempted murder. We now turn to Mosqueda’s arguments.

A. Sufficiency of the Evidence

The first issue is whether there is substantial evidence that one of the attackers other than Mosqueda also committed or attempted to commit assault with a deadly weapon or attempted to murder Mora. Substantial evidence is defined as evidence which is reasonable, credible, and of solid value. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) We review the entire record in the light most favorable to the judgment to determine whether there is substantial evidence to support the judgment. (*Ibid.*) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. (*People v. Kraft* (2000) 23

Cal.4th 978, 1053.) We will not substitute our evaluations of a witness's credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

We find substantial evidence that another gang member committed an assault with a deadly weapon in the testimony of Witcher and Christopher O'Neal, a paramedic who treated Mora at the scene.

Witcher testified that she observed one of the attackers striking Mora with a billy club, which she described as being approximately 18 inches long. Witcher also identified Mosqueda as one of the individuals present during the attack, but she could not say whether he was the attacker with a club.

O'Neal testified that when he approached Mora in the alley he observed a head injury as well as an "obvious stab wound to his chest." The head injury was described as an abrasion on the right side of his forehead, which had mild swelling starting to occur.

From this testimony, the jury could logically and reasonably infer that there were two weapons used during the assault, a billy club as well as a knife. The existence of a knife is beyond dispute since Mora suffered several stab wounds. It is unlikely the weapon described by Witcher was the knife used to stab Mora because it was too long (18 inches) and she described it as "round stick." The jury could also have logically and reasonably inferred that the injury described by O'Neal was the result of Mora being struck in the head by the billy club.

This testimony, as in *Loeun*, is sufficient to establish there were two attackers using deadly weapons during the assault, thus establishing both predicate offenses necessary to prove a pattern of criminal activity. Since the jury found that Mosqueda was present during the attack, his knowledge of the pattern of criminal activity is beyond dispute. Accordingly, we reject Mosqueda's substantial evidence argument.

B. Jury Instructions

Mosqueda also argues the trial court erroneously instructed the jury on this element.

The trial court instructed the jury with a modified version of CALCRIM No. 1400 because the parties stipulated that Mosqueda's gang, the Nortenos and its subset, the South Side Locs, was a criminal street gang engaged in a pattern of criminal gang activity as defined by section 186.22. The trial court initially instructed the jury on this count as follows:

“The defendant is charged in Count 3 with participating in a criminal street gang in violation of Penal Code Section 186.22, subdivision (a).

“To prove that the defendant is guilty of this crime, the People must prove that:

“[(1)] The defendant actively participated in a criminal street gang;

“[(2)] When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and

“[(3)] The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:

“Directly and actively committing a felony offense; or

“Aiding and abetting a felony offense.

“Active participation means involvement with a criminal street gang in a way that is more than passive or in name only.

“The People do not have to prove that the defendant devoted all or a substantial part of his time or efforts to the gang, or that he was an actual member of the gang.

“The People and the defendant have stipulated the Nortenos are a criminal street gang as defined in Penal Code Section 186.22.

“As the term is used here, a willful act is one done willingly or on purpose.

“Felonious criminal conduct means committing or attempting to commit any of the following crimes: Attempted murder and assault with a deadly weapon.

“To decide whether a member of the gang committed attempted murder and assault with a deadly weapon, please refer to the separate instructions that I have given on those crimes.

“To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that:

“A member of the gang committed the crime;

“The defendant knew that the gang member intended to commit the crime;

“Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; and

“The defendant’s words or conduct did in fact aid and abet the commission of the crime.

“Someone aids and abets a crime if he or she knows of the perpetrator’s unlawful purpose, and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.

“If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abetter. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abetter.”

After the People and Mosqueda’s counsel completed their opening arguments, the trial court concluded that this instruction was incorrect, and, provided the following clarification to the jury:

“Sorry about the delay on the break, but it came to my attention that I improperly instructed you on one instruction, so that would be number 1400. I had to discuss that with the attorneys and I have to instruct you properly.

“Before [the prosecutor] responds I’m going to advise you of a couple of things. First, and this is specifically relating to 1400, the instruction on violation of Penal Code Section 186.22[, subdivision] (a) which is alleged in Count 3.

“For that the party’s stipulation that the Nortenos are a criminal street gang pursuant to Penal Code Section 186.22 encompasses and includes a stipulation that its members engage in a pattern of criminal gang activity.

“A pattern of criminal gang activity as used here means the commission of or attempted commission of assault with a deadly weapon or attempted murder. The definitions for these crimes are contained in other instructions already provided to you.

“So those need to be read in conjunction with 1400, so I’m going to reread that to you just so you have that in mind with that stipulation and the finding which is:

“The defendant is charged in Count 3 with participating in a criminal street gang in violation of Penal Code Section 186.22[, subdivision] (a).

“To prove that the defendant is guilty of this crime, the People must prove that:

“The defendant actively participated in a criminal street gang;

“When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and

“The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by directly and actively committing a felony offense, or aiding and abetting a felony offense.

“Active participation means involvement with a criminal street gang in a way that is more than passive or in name only.

“The People do not have to prove that the defendant devoted all or a substantial part of their time towards efforts of the gang, or that he was an actual member of the gang.

“The People and the defendant have stipulated that the Nortenos are a criminal street gang as defined in Penal code Section 186.22.

“As the term is used here, a willful act is one done willingly or on purpose.

“Felonious criminal conduct means committing or attempting to commit any of the following crimes: Attempted murder and assault with a deadly weapon.

“And in deciding whether a member of the gang committed attempted murder and assault with a deadly weapon, please refer to the separate instructions that I have already given on those crimes.

“To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that: A member of the gang committed the crime; The defendant knew that the gang member intended to commit the crime; and

“Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; and

“The defendant’s words or conduct did in fact aid and abet the commission of the crime.

“Someone aids and abets a crime if he or she knows of the perpetrator’s unlawful purpose, and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.

“If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider an abetter. However, the fact that the person is present at the scene of the crime or fails to prevent the crime does not by itself make him or her an aider and abetter.”

This instruction omitted from the pattern jury instruction the definition of a criminal street gang, and the definition of a pattern of criminal gang activity.

Mosqueda argues the trial court erred when it omitted the definition of a pattern of criminal activity despite the stipulation of the parties. As explained above, the phrase “a pattern of criminal gang activity” is defined in section 186.22, subdivision (e) in very specific terms. We agree with Mosqueda that by omitting the definition of this phrase, the trial court failed to provide the jury with all of the tools it would need to find Mosqueda violated section 186.22, subdivision (a).

The stipulation, as stated above, was that the Nortenos and its subset, the South Side Locs, were a criminal street gang that engaged in a pattern of criminal activity as defined in section 186.22. However, the jury was required to find that Mosqueda knew “that members of the gang engage in or have engaged in a pattern of criminal gang activity.” Without knowing the definition of “a pattern of criminal gang activity,” the jury could not find he had the requisite knowledge to be guilty of a violation of section 186.22, subdivision (a).

The People, in essence, concede the trial court erred, but argue the error was harmless. The parties agree that this error must be evaluated under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) (see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325), that is, we must decide whether the error was harmless beyond a reasonable doubt.

The People’s argument is straightforward. They point out the only evidence of a pattern of criminal conduct presented by the prosecution was the crime in this case. As explained above, the testimony provided substantial evidence to support the conclusion that Mosqueda knew the Nortenos engaged in a pattern of criminal activity because he actively participated in the two crimes that comprised the pattern of criminal activity.

Since the two crimes occurred in 2011, at the same time, the jury would necessarily have found that the crimes occurred after the effective date of the California Street Terrorism Enforcement and Prevention Act, and occurred within three years of each other. The issue is whether the jury would have found beyond a reasonable doubt that two individuals committed an assault with a deadly weapon on Mora.

This question is different than whether the judgment is supported by substantial evidence. Our substantial evidence review is deferential, and we merely review the record to determine if there is reasonable, credible, and solid evidence to support the challenged finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 37; *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

However, under the *Chapman* standard, an error is harmless when it is found to be “unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on different grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn 4.) “Consistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which ‘the jury *actually rested* its verdict.’ [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee. [Citations.]” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Even applying this heightened standard of review, we conclude the omission was unimportant in relation to the evidence on the issue, and the verdict was unattributable to the omission in the instruction. Mosqueda did not dispute the assault, nor did he present any evidence to suggest that one of the attackers did not use a billy club. Instead, his defense was based on the assertion that he was not one of the attackers. Not only was there evidence of the two predicate crimes in this case, but the People also presented evidence through its gang expert that defendant admitted committing crimes in the past to represent the gang, specifically vandalism (tagging).⁷ When combined with the evidence

⁷ We recognize that vandalism is not one of the crimes listed in section 186.22, subdivision (e). Nonetheless, Mosqueda’s willingness to commit crimes to “represent” the Nortenos strongly suggests he knew that others also committed crimes on behalf of the gang.

that defendant admitted being in the gang for approximately five to six years, it is clear that the jury was presented with overwhelming evidence that Mosqueda knew that the Nortenos engaged in a pattern of criminal gang activity. Accordingly, we conclude the error was harmless.

III. SENTENCING

Mosqueda argues there were three errors related to his sentencing that must be corrected. The People concede the trial court erred. Our review of the record confirms the errors.

First, Mosqueda points out that the trial court erred when it imposed a 10-year enhancement for the gang allegation the jury found true on count one. As the Supreme Court explained in *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, “Penal Code section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) ... imposes a 10–year enhancement when such a defendant commits a violent felony. Section 186.22[, subdivision] (b)(1)(C) does not apply, however, where the violent felony is ‘punishable by imprisonment in the state prison for life.’ (Pen. Code, § 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) ... applies and imposes a minimum term of 15 years before the defendant may be considered for parole.”

Second, the abstract of judgment states that Mosqueda was sentenced to a term of imprisonment of life *without the possibility of parole*. The trial court sentenced Mosqueda to a term of life in prison, not life without the possibility of parole. (See § 664.) The abstract of judgment must be modified.

Finally, the trial court incorrectly calculated the amount of presentence credit to which Mosqueda was entitled. This is the result of the sentencing hearing being continued for one week without a recalculation of the credits listed in the probation report. This also must be corrected.

DISPOSITION

The convictions are affirmed. The matter is remanded to the trial court to permit it to correct the errors that occurred at sentencing.

Franson, J.

WE CONCUR:

Kane, Acting P.J.

Poochigian, J.