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

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO GODINEZ RAMIREZ,

Defendant and Appellant.

F065996

(Super. Ct. No. BF137538A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Sylvia Whatley Beckham, 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, Stephen G. Herndon and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

On July 9, 2011, appellant Alberto Godinez Ramirez stabbed Nathaniel Neal (Neal) and Joseph “Carlos” Miranda (Carlos) during a gang-related altercation at a birthday party.<sup>1</sup> Appellant was convicted after jury trial of premeditated attempted murder of Carlos (count 1); active participation in a criminal street gang (count 3); two counts of assault with a deadly weapon (counts 2 and 4); and both simple mayhem and battery with serious bodily injury on Neal, as lesser included offenses to the charged crime of aggravated mayhem (count 5). The jury found the gang and great bodily injury enhancements that were attached to counts 1, 2, 4 and 5 to be true. Appellant was sentenced to an aggregate determinate term of 21 years plus an indeterminate term of 15 years to life imprisonment.

Appellant challenges the sufficiency of the evidence supporting the verdicts on count 3 and the gang enhancements. He raises a claim of prejudicial *Killebrew*<sup>2</sup> error. He argues the prosecutor committed misconduct during closing arguments. He raises several claims of instructional error. He argues that defense counsel was ineffective. None of these contentions are persuasive. Appellant also argues that the battery conviction must be reversed because it is a lesser included offense to the crime of mayhem. Respondent concedes this point and we accept the concession as properly made. The judgment will be modified to strike the battery conviction. As so modified, the judgment is affirmed.

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<sup>1</sup> Solely to enhance clarity and readability some individuals will be referenced by their first names or nicknames. No disrespect is intended or implied by this informality.

<sup>2</sup> *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*).

## FACTS

### Events Surrounding the Stabbings

Lillie Certuche (Lillie), her cousin Adrianna Ramirez (Adrianna) and Jessica Contreras shared a house in Bakersfield. During the evening of July 9, 2011, Lillie and Adrianna hosted a birthday party at their home jointly honoring Lillie and Carlos, who is Adrianna's brother. About 30 to 40 people attended the party.

Lillie's brother, Albert Hernandez (Albert), invited some friends to the party, including Adrian Maldonado (Maldonado). Maldonado brought appellant and two other men. Appellant knew Lillie and Adrianna. Before they left for the party, appellant showed Maldonado a large knife, which appellant took to the party. Maldonado thought appellant concealed the knife in his waistband under his shirt. They arrived at the party around 11:00 to 11:30 p.m.

Lillie testified that party guests were drinking pretty heavily but there were no arguments or weapons at the party before Maldonado, appellant and the two other men arrived. Upon arrival, appellant said to a man, "[T]hey call me Tank. I'm from South Side Bakers. Where are you from?" It was Lillie who answered. She told appellant that this was a family party and she did not want "any kind of gang relation thing."<sup>3</sup> Appellant apologized. Maldonado became aware there were Norteno and Sureno gang members at the party.

Around 12:30 a.m., a conflict involving appellant occurred inside the house. Lillie and Adrianna testified that appellant and Carlos verbally sparred. Appellant said something about "South Side." Carlos testified that appellant and his friends were arguing "over some drugs." Lillie and Albert asked appellant to leave because this was a family function and they did not want any trouble. Appellant refused. Carlos went into the front yard with two older cousins.

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<sup>3</sup> Lillie did not relate this information in her initial interview with the police.

Adrianna asked appellant to calm down. Appellant placed her hand on his waistband and she felt a knife handle. Appellant said something to the effect of, “[I]t’s all right. I’m not worried.” Adrianna told Lillie that appellant had a weapon.

Carlos saw appellant and his friends arguing with some girls who were trying to get them to leave. Carlos and Neal joined the argument. Carlos became angry and told appellant to leave his sister’s house. Adrianna heard appellant say “South Side” and ask Carlos who he “knew from there.” Lillie and Adrianna unsuccessfully tried to stop the argument. Adrianna and other people continued trying to get appellant to leave. Appellant yelled obscenities, pulled out a large hunting knife and brandished it. Appellant yelled, “Fuck you fools South Side.” Neal and Carlos went into the front yard.

Meanwhile, a group of young men arrived in the area, congregating across the street from the party. Neal and some other people crossed the street to talk to them. Neal asked the men “who they were” and they replied that they were “nobody.”

Maldonado entered the house from the backyard. He was talking on his cell phone. He approached appellant and whispered something in his ear. They both ran out the back door and walked along the side of the house towards the front yard. Nichoal Swenson heard them say, *inter alia*, “They can’t see us. Let’s go get them.”

Lillie ran out the front door and saw appellant, Maldonado and two other men kick down a fence separating the front and back yards. The men ran into the front yard. They knocked down Adrianna and rushed across the street. They approached Neal, who had started to walk back across the street to the house. Someone hit Neal and knocked him to the ground. Neal got up and hit someone. Appellant swung his hand, slashing Neal across the face. Neal’s girlfriend held Neal back from fighting. Neal did not see who stabbed him.

Appellant waved the knife and yelled “gang-related slurs.” People were afraid of appellant and ran away from him. Trevino testified that no one was attacking or threatening appellant. Neal did not see who stabbed him.

Carlos was facing the street. He turned and saw appellant approach him. When appellant was about three feet away from Carlos, he pulled a knife from its sheath and stabbed Carlos in the abdomen. Lillie and Carlos identified appellant as the person who stabbed Carlos. Carlos was unarmed and was not fighting with appellant or anyone else when he was stabbed. As Carlos hunched over and grabbed his abdomen, appellant quickly walked away.

Lillie confronted appellant, asking him why he stabbed Carlos. Lillie said that the cops would catch him and she would testify against him. Appellant did not reply to her. He walked away, knelt down near a utility box, then rose and continued walking.

The police arrived and Lillie pointed out appellant, who was further down the street by an alley. Appellant was detained by the officers. Lillie identified appellant as the assailant in an infield show-up. Bakersfield Police Officer Robert Woods did not observe any injuries, scratches or abrasions to appellant's head, face, hands or torso indicating that he had been involved in a fight.

Neal and Carlos received medical treatment for their wounds. Carlos sustained a single stab wound to the upper abdomen that caused internal bleeding and required surgical repair. The treating surgeon considered this injury to be life-threatening. The slash across Neal's cheek left a scar.

#### Physical Evidence

A police officer located the knife lying on the ground by the utility box; the sheath was lying on the ground about four feet away. There was blood on the knife blade that was subsequently determined to be consistent with Carlos's DNA profile. DNA was gathered from the knife handle. The major portion of DNA on the knife handle was subsequently determined to be consistent with appellant's DNA profile. There was blood on one of appellant's hands and on his shirt. This blood was subsequently determined to be consistent with Neal's DNA profile.

Appellant's Statements to the Police

Appellant told Bakersfield Police Officer Louis Wood that he was affiliated with the Southside Baker gang and “put in work for them” by selling marijuana. Appellant said that someone yelled “Northside” at the party and he responded by making references to Southside. People became hostile and told him to leave. He exited through the front door. A heavy man wearing a white tank top approached him and referred to the Northside. Appellant said that he noticed a large knife lying on the ground in the front yard. He decided to pick it up to defend himself because he thought he was going to be assaulted by several people who were affiliated with a rival gang. As he picked up the knife, he was hit twice and knocked unconscious. Appellant said that when he regained consciousness he was in the middle of the street. He saw police cars arriving and, when he tried to run, he was taken into custody. Appellant denied stabbing anyone.

After being transported to the police station, appellant was interviewed by Officer Robert Woods.<sup>4</sup> Appellant said that he and his friends were Southside Bakers. Many of the party guests were Nortenos. Appellant said that he was in the backyard chugging beers when a heavy set Hispanic man in a white tank top confronted him about his Southside gang affiliation. This man told appellant and his companions to leave. Appellant said the entire incident was gang-related. Appellant initially told Officer Woods that a group of people pushed him through the house and into the front yard. Appellant subsequently said that he was inside the house when a group of people entered through the front door. They surrounded him and demanded that he leave. Some of these people had their fists under their shirts and he heard that someone had a gun. He did not see anyone at the party displaying a knife or gun. Appellant left the house through the front door. He saw a knife lying on the grass in the front yard. He picked it up to protect

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<sup>4</sup> Appellant's interviews with Officer Louis Wood and Officer Robert Woods were recorded and played for the jury.

himself. Immediately thereafter, he was punched and lost consciousness. Appellant subsequently said that he was standing in the middle of the street when he was knocked unconscious.

Appellant initially denied possessing a knife. After Officer Woods told him that a friend indicated that he saw appellant with the knife, appellant admitted possessing the knife prior to going to the party. Appellant initially said he did not know how the knife came to rest by the utility box. Later, appellant said that he held the knife as he fled and left it by the utility box. Still later, appellant said that was not holding the knife when he fled.

Appellant initially told Officer Woods that he did not stab anyone. Appellant subsequently said that if he had stabbed someone, he did not remember it and did not know what he was doing because he had blacked out from alcohol and having been punched. Appellant said that if everyone at the party said he stabbed the victims, he must have been swinging instinctively in self-defense. As the interview progressed appellant said that he now remembered picking up the knife and swinging it around. He said that he might have stabbed someone before he was knocked unconscious. Ultimately, appellant said he was fairly certain that he stabbed one person and perhaps a second person.

### Gang Evidence

Bakersfield Police Officer Travis Harless testified as an expert witness on criminal street gangs in Bakersfield. The Southside Baker gang is a subset of the Sureno gang. He opined that appellant was an active participant in the Southside Baker criminal street gang when the stabbings occurred. The stabbings were consistent with the pattern of

criminal activity committed by Southside Bakers. Officer Harless opined that the stabbings benefitted the Southside Baker gang.<sup>5</sup>

Defense Evidence

Jessica Trevino told a police officer that she saw several men yelling and punching each other.

Eric Cervantes testified that he saw three or four men and several women close to appellant inside the house. The women told appellant to leave and he was trying to do so. However, the men were blocking the front door. Appellant stood with one of his hands by his waist. Appellant followed Cervantes out the back door and they walked around the side of the house. Appellant tried to jump over the fence separating the front and back yards, but the fence fell over. A group of men attacked appellant. Cervantes saw four or five men swinging their arms at appellant. Cervantes grabbed one of the men to protect appellant. Appellant was defending himself but he did not lunge at anyone. Cervantes did not see appellant holding a knife.<sup>6</sup>

Carlos Nuno testified that he was at the party. He heard some shouting and went into the front yard. Several people had surrounded appellant. They talked “smack” as appellant tried to leave. Approximately 15 people began kicking and punching appellant. Nunos tried to break up the fight but was assaulted so he retreated to the backyard.

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<sup>5</sup> The gang expert’s testimony will be set forth in greater detail as necessary during the discussion of appellant’s challenge to the sufficiency of the evidence supporting count 3 and the gang enhancements.

<sup>6</sup> Cervantes told a defense investigator that while he and appellant were inside the house, appellant brandished a knife.

## DISCUSSION

### I. THE BATTERY CONVICTION MUST BE REVERSED

#### A. Facts

Appellant was charged in count 5 with aggravated mayhem; great bodily injury and gang enhancement allegations were attached to this count. The jury was instructed on both simple mayhem and battery with serious bodily injury as lesser included offenses of aggravated mayhem. The jury found appellant not guilty of aggravated mayhem as alleged in count 5 but guilty of both simple mayhem and battery with serious bodily injury. The jury also found both enhancement allegations attached to count 5 to be true.

The court imposed an eight-year term for the mayhem conviction to be served consecutive to the term of 15 years to life that was imposed for count 1. A three-year term for the great bodily injury enhancement was imposed and stayed pursuant to section 654. A 10-year term was imposed for the gang enhancement. The court neither imposed punishment for, nor dismissed, the battery with serious bodily injury conviction.

#### B. Battery with Serious Bodily Injury is a Lesser Included Offense of Simple Mayhem

Appellant argues that the battery conviction must be reversed because this crime is a lesser included offense of simple mayhem. Respondent concedes this point and we accept the point as properly made.

Multiple convictions arising out of a single act or course of conduct are prohibited when one of the offenses is a lesser included offense to another offense. “Although the reason for the rule is unclear, this court has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]’ [Citation.] “The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.” [Citations.]’ [Citation.]” (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) “The completed offense of mayhem, of necessity, includes the completed offense

of battery with serious bodily injury.” (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 859.) Thus, the battery conviction must be reversed. (*Id.* at p. 863.) Since the court did not sentence appellant on the battery conviction, remand for resentencing is not necessary.

## II. THE VERDICTS ON THE GANG PARTICIPATION CHARGE AND GANG ENHANCEMENTS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant was found guilty in count 3 of the substantive crime of actively participating in a criminal street gang (Pen. Code,<sup>7</sup> § 186.22, subd. (a)). Street gang enhancements attached to counts 1, 2, 4, and 5 were found true (§ 186.22, subd. (b)(1).)

Appellant challenges the sufficiency of the evidence proving the predicate offenses that are necessary to establish a pattern of criminal gang activity. (§ 186.22, subd. (e).) This issue turns on the sufficiency of the evidence proving that Delfino Barboza committed or was convicted of a qualifying predicate offense. As will be explained, there is adequate proof of the contested element.

### A. Facts

Detective Harless, who gave expert gang testimony, reviewed gang packets pertaining to David Lozano, Anthony Lozano, Daniel Lucatero, Richard Arambulo and Delfino Barboza.<sup>8</sup> A gang packet contains court records pertaining to the named individual’s criminal convictions. The gang packets were admitted into evidence as People’s exhibits 26 to 30. People’s exhibit 26 “is a certified CJIS printout of the record of conviction for Delfino Barboza ... regarding Case Number BF135570A ....” The

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<sup>7</sup> All further statutory references are to Penal Code unless noted otherwise.

<sup>8</sup> Respondent did not dispute appellant’s argument that there were key omissions in the evidence pertaining to Lucatero, Arambulo and the Lozanos. Consequently, their crimes do not qualify as predicate offenses. Since there is adequate proof of two predicate offenses without consideration of their crimes, it is not necessary to set forth further facts about them.

printout reflects that Barboza was arrested on February 8, 2011. On February 10, 2011, a felony complaint was filed charging Barboza with violating Health and Safety Code sections 11377, subdivision (a), 11379, subdivision (a) and 11370.1, subdivision (a); in addition to violating Penal Code section 186.22, subdivision (a) and former sections 12316, subdivision (b)(1), and 12021, subdivision (a)(1).<sup>9</sup> A negotiated plea agreement was reached. On April 7, 2011, appellant pled nolo contendere to violating former section 12021, subdivision (a)(1), felon in possession of a firearm, on the condition that he would not be sentenced to any more than two years' imprisonment. The rest of the charges were dismissed. On May 31, 2011, Barboza was sentenced to two years' imprisonment.

Harless testified that he had reviewed court and/or probation records pertaining to case number BF135570A. Harless testified that the crimes involved in that case occurred on February 8, 2011. The prosecutor asked Harless "to tell us the facts and circumstances involved in that case." Harless answered:

"Yes. Mr. Barboza was contacted during a traffic stop. During that stop officers ended up conducting a search of his vehicle. They located methamphetamine and a loaded firearm hidden in his vehicle. Mr. Barboza admitted former membership to the Southside Bakers and ... he had a shirt which had a picture of a dead Southside Baker, Cruz Martinez, who goes by the moniker of Bam Bam who was killed in a gang-related stabbing. Mr. Barboza was later found guilty of possession of a firearm by a felon."

Defense counsel did not object to this question or answer on any ground.

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<sup>9</sup> The Deadly Weapons Recodification Act of 2010 repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005; Cal. Law Revision Com. com, 51D pt. 2 West's Ann. Pen. Code (2012 ed.) foll. § 16000, p. 317.) Former section 12021, subdivision (a)(1) was repealed by Statutes 2010, chapter 711 section 4, operative January 1, 2012. (Historical and Statutory Notes, 51D pt. 1 West's Ann. Pen. Code (2012 ed.) foll. §§ 12010 to 12021.3, p. 48; Historical and Statutory Notes, 51D pt. 1 West's Ann. Pen. Code (2012 ed.) foll. §§ 12316 to 12325, p. 293.)

## B. Standard of Review

The same standard of review is applied to challenges to the sufficiency of the evidence supporting guilty verdicts on substantive counts and to true findings on enhancement allegations. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

“When a defendant challenges the sufficiency of the evidence, “[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]’ [Citations.] ‘Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]’ [Citation.] We ““presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” [Citation.]’ [Citation.]” (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

“Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

“Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the [disputed] finding.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) “Reversal is not warranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ [Citation.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.)

## C. Pattern of Criminal Activity was Adequately Proved

“The substantive offense defined in section 186.22(a) has three elements. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element of the

substantive offense defined in section 186.22(a). The second element is ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and the third element is that the person ‘willfully promotes, furthers, or assists in any felonious conduct by members of that gang.’ (§ 186.22(a).)” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

“[In order to prove] that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group’s primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group’s members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]” (*People v. Duran, supra*, 97 Cal.App.4th at p. 1457.)

Subdivision (e) of section 186.22 permits a true finding on the sentencing enhancement allegation only if the evidence proves a pattern of gang activity. A “‘pattern of criminal gang activity’ means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of” offenses that are listed in subdivision (e)(1)-(33) of section 186.22. At least one of the offenses must have occurred after the effective date of this chapter of the Penal Code and the last of the offenses must have occurred within three years after a prior offense. The two crimes must have occurred on separate occasions or been committed by two or more persons. (§ 186.22, subd. (e).)

In this case, one of the predicate offenses was satisfied by the evidence proving appellant was guilty of assault with a deadly weapon and convicted of this crime (count 2). “The charged crime may serve as a predicate offense ...” (*People v. Duran, supra*, 97 Cal.App.4th at p. 1457.) The jury could have relied on Barboza’s conviction for violating former section 12021 as the second predicate offense. This crime is a listed qualifying offense (§ 186.22, subd. (e)(31)). This crime was committed on February 8, 2011, which is prior to and within three years of appellant’s current convictions.

Barboza's gang packet and Harless's testimony constitutes substantial evidence proving the date that this crime was committed and the fact of appellant's conviction.

Appellant contends that the date of the crime that resulted in Barboza's conviction for violating former section 12021, subdivision (a)(1) was not adequately proved by the documentary evidence admitted as exhibit 26 (the gang packet). He argues that Harless's testimony about the date cannot be considered because the expert lacked personal knowledge. This point was not preserved for appellate review.

“In an adversary proceeding such as a criminal trial, the side which later claims that error was committed must object to the reception of questioned evidence or other procedure; a failure to do so is normally considered a waiver of any objection. [Citations.]” (*People v. Campbell* (1965) 233 Cal.App.2d 38, 47-48; Evid. Code, § 353, subd. (a).) A contemporaneous objection rule applies to claims of state and federal constitutional error as well as claims of state evidentiary error. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10.) Here, defense counsel did not object to admission of Harless's testimony about the date Barboza violated former section 12021, subdivision (a). Harless's testimony on this topic was admitted without limitation as to its purpose. Since appellant did not interpose a timely objection below, the point was forfeited.

For these reasons, we hold that the record contains substantial evidence proving two predicate offenses.<sup>10</sup> The verdicts on the substantive gang offense and the gang enhancements will be upheld.

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<sup>10</sup> This conclusion obviates any necessity to consider respondent's argument that there was substantial evidence proving that Barboza violated Health and Safety Code section 11379, subdivision (a), which is a listed qualifying offense. (§ 186.22, subd. (e)(4).)

### III. THERE WAS NO *KILLEBREW* ERROR

#### A. Facts

Appellant filed an in limine motion to bifurcate the gang charge and enhancements. In appellant's supporting points and authorities he argued the court was required to exclude testimony proffered by the gang expert that is based on speculation or conjecture and lacking in foundation. The motion was denied. The court did not address the argument concerning expert evidence.

During trial the prosecutor asked gang expert Harless, "You talked about [defendant's] knowledge of members in incidents concerning the Southside Bakers. Do you recall that?" Harless answered, "Yes." The prosecutor asked: "In your opinion -- you have already stated this, I believe, but *members of this gang* basically have a general knowledge of the crimes and activities ongoing within the gang?" (Italics added.) Harless again replied, "Yes." Defense counsel interposed: "Objection. Speculation." The objection was summarily overruled. Harless testified, "Yes, *they* have knowledge of other crimes." (Italics added.)

#### B. The Gang Expert Did Not Testify About Appellant's Personal Knowledge of Crimes Committed by Others

In *Killebrew*, *supra*, 103 Cal.App.4th 644, this court ruled that it was improper to admit a gang expert's testimony that each individual in three cars knew there was a gun in two of the cars and each individual jointly possessed both guns for their mutual protection. (*Id.* at pp. 658-659.) The *Killebrew* decision has been limited by the California Supreme Court. In *People v. Gonzalez* (2006) 38 Cal.4th 932, it determined that *Killebrew* is properly read to prohibit a gang expert "'from testifying to his or her opinion of the knowledge or intent of a defendant on trial.' [Citations.] [Fn. omitted.]" (*Gonzalez*, *supra*, at p. 946.) In *People v. Vang* (2011) 52 Cal.4th 1038, it "disapprove[d] of any interpretation of *Killebrew* ... as barring, or even limiting, the use of hypothetical questions." (*Id.* at pp. 1047-1048, fn. 3.) *Vang* upheld the prohibition on expert

testimony “regarding whether the *specific* defendants acted for a gang reason.” (*Id.* at 1048.)

Appellant argues that the gang expert was improperly permitted to speculate about appellant’s personal knowledge or intent in violation of the *Killebrew* decision. We disagree. Harless testified that unspecified gang members have a general knowledge of criminal gang activities. Harless did not offer an opinion concerning appellant’s specific knowledge or intent. Consequently, this claim of evidentiary error fails.

#### IV. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT

##### A. Facts

During defense counsel’s closing argument he said, “If there is a reasonable interpretation of the facts that shows that Mr. Ramirez was jumped and attacked by multiple people and he fought back, you must find him ... not guilty of counts 1, 2, 4, and 5, and all of the lesser-included offenses.” Also, “[I]t’s not simply that it’s possible that Mr. Ramirez was jumped that night. It is probable. I don’t have to give you proof beyond a reasonable doubt that he did defend himself. But, frankly, I think we are very close. I think for certain there is a reasonable possibility of it.” His argument concluded, “[T]here’s not only a possibility that Mr. Ramirez was jumped, there’s a likelihood. There’s a probability.”

At the opening of his rebuttal argument the prosecutor stated that “the first thing you heard in the instruction for reasonable doubt is it’s not about possibilities. It has nothing to do with possibilities.... When you are talking about possibilities, reasonable or otherwise, it has nothing to do with *my burden* of beyond a reasonable doubt. It never has.” (Italics added.) He argued that the direct and circumstantial evidence was inconsistent with the defense’s position that appellant was attacked and beaten by a group of people. In conclusion, the prosecutor said: “[T]he circumstantial evidence in this case points to guilt. The direct evidence points to guilt. The physical condition of the defendant in his physical state when he was apprehended points to guilt. *They have not*

*overcome that.* And that’s what self-defense is all about.” (Italics added.) Defense counsel’s objection on the ground of “[b]urden shifting,” was overruled. The prosecutor concluded by arguing that “the evidence says there was no justification for self-defense.... ¶] ... [C]ome back with a guilty verdict because it is corroborated by the evidence. This isn’t a self-defense case. What Mr. Ramirez did was not self-defense.”

B. Considered in Context, the Remark Did Not Shift the Burden of Proof

““[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]”” ( *People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) Yet, the prosecutor’s latitude is not unlimited. “[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]’ [Citation.]” (*Hill, supra*, 17 Cal.4th at pp. 829-830.) Even an unintentional misstatement of the law may constitute misconduct if it can reasonably be interpreted as suggesting to the jury that the prosecution did not have the burden of proving every element of the crime beyond a reasonable doubt. (*Id.* at p. 831.)

“To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) Counsel’s arguments “must be judged in the context in which they are made. [Citations.]’ [Citation.]” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.) “[A] prosecutor is justified in making comments in rebuttal, perhaps otherwise improper, which are fairly responsive to

argument of defense counsel and are based on the record.” (*People v. Hill* (1967) 66 Cal.2d 536, 560.)

In this case, the challenged remark was part of a rebuttal argument responding to defense counsel’s argument that appellant acted in self-defense. We are persuaded by respondent’s argument that there is not a reasonable likelihood that the jury understood the challenged remark as shifting the burden of proof onto appellant. The prosecutor acknowledged during his rebuttal argument the People bore the burden of proving that appellant did not act in self-defense. When the challenged remark is viewed in context of the entire rebuttal argument, it is clear that the prosecutor was arguing that the direct and circumstantial evidence did not show that appellant acted in self-defense. In addition, the jury was instructed the prosecutor bore the burden of proof beyond a reasonable doubt that appellant did not act in self-defense. The jury is presumed to have understood and followed its instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.) Accordingly, we conclude that the prosecutor did not engage in misconduct.

## V. THERE WAS NO INSTRUCTIONAL ERROR

Appellant has raised several claims of instructional error. He argues that the combined prejudice from the instructional errors prejudicially infringed on his state and federal constitutional fair trial guarantee. We have individually considered each claim of instructional error and conclude that none of them have any merit.

### A. Contents of the Jury Charge

The jury charge included CALJIC No. 1.01, which explained that the court’s instructions are to be considered as a whole. The jury was instructed on crimes of attempted murder, manslaughter and on self-defense principles with CALJIC Nos. 5.12, 5.13, 5.14, 5.15, 5.17, 5.30, 5.31, 5.50, 5.51, 5.52, 5.54, 5.55, 8.66 and 8.67.<sup>11</sup> The

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<sup>11</sup> The language of the jury instructions will be set forth as necessary during discussion of appellant’s instructional challenges.

instructions were modified, as necessary, to refer to an attempted killing and to the crimes of attempted murder and attempted manslaughter.

B. Legal Standard

“The rules governing a trial court’s obligation to give jury instructions without request by either party are well established. ‘Even in the absence of a request, a trial court must instruct on general principles of law that are ... necessary to the jury’s understanding of the case.’ [Citations.]” (*People v. Roberge* (2003) 29 Cal.4th 979, 988.) “[N]o particular form is required; the instructions must be complete and a correct statement of the law.” (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citations.]” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) It is presumed that jurors are intelligent persons who are capable of understanding and correlating all of the jury instructions which they are given. (*People v. Carey, supra*, 41 Cal.4th at p. 130; *People v. Guerra* (2006) 37 Cal.4th 1067, 1148.) A challenge to the jury charge on the ground that the jury was incorrectly or incompletely instructed requires the reviewing court to evaluate the jury charge as a whole to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel. (*People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182.) On appeal, we independently review whether the trial court erred in failing to give an instruction. (Cf. *People v. Booker* (2011) 51 Cal.4th 141, 181.)

C. CALJIC No. 5.17 Would Have Been Understood by the Jurors as Referring to Attempted Killing, Attempted Murder and Attempted Manslaughter

On its own motion the court modified and gave CALJIC No. 5.17, which instructs on the effect unreasonable self-defense has on a murder charge. As modified, this instruction provides, in relevant part:

“A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, *kills* unlawfully but does not harbor malice aforethought and is not guilty of *murder*. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of *attempted* [voluntary] manslaughter.” (Italics added.)

Appellant argues that the court erred by failing to modify the first sentence of CALJIC No. 5.17 to refer to an attempted killing and the crime of attempted murder. We agree with respondent that it is not reasonably probable that the jury would not have understood that the first sentence of CALJIC No. 5.17, like the rest of the jury charge, set forth legal principles relevant to an attempted killing and a charge of attempted murder and attempted manslaughter. Reasonable jurors would have understood that the references to unlawful killing and murder in the first sentence of CALJIC No. 5.17 were typographical errors. The rest of CALJIC No. 5.17 was properly modified to refer to attempted murder. All other jury instructions relating to count 1 referenced attempted killing, attempted murder and attempted manslaughter. The verdict forms on count 1 pertained to attempted murder and attempted manslaughter. All of the closing arguments referred to attempted killing, attempted murder and attempted manslaughter. The jurors knew that no one was fatally stabbed. The two victims testified at trial. Therefore, we hold that the jury would not have construed this instruction in the manner urged by appellant and did not operate under a misconception of the law. (*People v. Wright* (1985) 39 Cal.3d 576, 589.)

D. Trial Court Did Not Err by Failing to Give CALJIC No. 8.50 Sua Sponte

Appellant asserts that the court had a sua sponte duty to give a modified version of CALJIC No. 8.50. This instruction distinguishes between murder and manslaughter. It states that the People bear the burden of proving that the act that led to the victim’s death was not committed in the heat of passion, or upon a sudden quarrel, or in unreasonable self-defense. If the act causing death is done in the heat of passion, provocation or

unreasonable self-defense, “even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.” (CALJIC No. 8.50.)

The comment to CALJIC No. 8.50 states that this instruction should be given *sua sponte* when there is evidence substantial enough to merit consideration that the defendant had an actual but unreasonable belief in the need to defend against imminent peril to life or of great bodily injury. (Com. to CALJIC No. 8.50 (Spring 2014 ed.) p. 660.) The use note and comment to CALJIC No. 8.50 do not contain any reference to the crime of attempted murder or attempted manslaughter. They do not state that the judge has a *sua sponte* obligation to modify and give CALJIC No. 8.50 when the defendant has been charged with attempted murder and there is evidence of, *inter alia*, unreasonable self-defense. (*Id.* at pp. 659-660.) Appellant has not cited any decision or other authority reaching this conclusion.

The record establishes that the court gave jury instructions setting forth the same legal principles that are contained in CALJIC No. 8.50. The jury was instructed on the elements of attempted murder with CALJIC No. 8.66. In relevant part, this instruction provides that the crime of murder “is the unlawful killing of a human being with malice aforethought.” As previously discussed, the jury was instructed with a modified version of CALJIC No. 5.17. This instruction informed the jury that if a person acts in unreasonable self-defense he or she does not harbor malice aforethought and is not guilty of murder, but an actual but unreasonable belief in the need for self-defense is not a defense to the crime of attempted manslaughter. (CALJIC No. 5.17.) The jury was given a modified version of CALJIC No. 5.15 which instructed that the prosecutor bears the burden of proving beyond a reasonable doubt that the attempted killing was unlawful and not justifiable. “If you have a reasonable doubt that the attempted killing was unlawful, you must find the defendant not guilty.” The jury was also given a modified version of CALJIC No. 5.30 which provides, in relevant part: “The burden is on the prosecution to prove beyond a reasonable doubt that the defendant did not act in self defense. If you

have a reasonable doubt that the defendant acted in self defense, you must find the defendant not guilty.” When these instructions are considered together, they adequately convey to the jury the legal principles that are set forth in CALJIC No. 8.50. Therefore, the trial court did not err by failing to modify and give this instruction.

E. Trial Court Did Not Err by Failing to Give CALJIC No. 8.72 Sua Sponte.

CALJIC No. 8.72 instructs that if the jurors unanimously agree the killing is unlawful but they have a reasonable doubt whether the crime is murder or manslaughter, they must give defendant the benefit of that doubt and find him guilty of manslaughter. Appellant contends that the court had a sua sponte duty to modify and give this instruction.

*People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*) held that “when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*Id.* at p. 555.) *People v. Musselwhite, supra*, 17 Cal.4th 1216 concluded this instructional duty is satisfied when the court gives generally applicable instructions requiring the jurors to give defendant the benefit of any doubt. (*Id.* at pp. 1262-1263.)

Respondent argues that the court gave jury instructions setting forth the same legal principles that are set forth in CALJIC No. 8.72. We agree. The jury was instructed on the reasonable doubt standard with CALJIC No. 2.90. The jury was given CALJIC No. 2.01, which states that “each fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt.” (CALJIC No. 2.01.) Also, if the circumstantial evidence allows two reasonable interpretations the jury “must adopt that interpretation that points to the defendant’s innocence, and reject that interpretation that points to [his] guilt.” (*Ibid.*) The jury was given CALJIC No. 5.15, which provides that the prosecution bears the burden to prove that the attempted killing was unlawful and “[i]f you have a reasonable doubt that the

attempted killing was unlawful, you must find the defendant not guilty.” (CALJIC No. 5.15.) It was given CALJIC No. 5.30, which provides that if the jurors have “a reasonable doubt that the defendant acted in self defense, you must find the defendant not guilty.” (CALJIC No. 5.30.) The jury was instructed on the elements of attempted murder with CALJIC No. 8.66. This instruction provides that the accused cannot be found guilty of attempted murder unless the jurors conclude that he “harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being.” (CALJIC No. 8.66.) It was given CALJIC No. 17.10, which states that if the jury is not “satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged,” you may convict him of a lesser crime “if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.” (CALJIC No. 17.10.)

When the jury charge is considered as a whole, it adequately instructed the jurors that if they determined appellant unlawfully attempted to kill Neal but had a reasonable doubt whether the crime was attempted murder or attempted manslaughter, the jury was required to give him the benefit of that reasonable doubt and find him guilty of the lesser offense. This is all that *Dewberry* requires.

#### VI. THE INEFFECTIVE ASSISTANCE CLAIM FAILS ON DIRECT APPEAL

CALJIC No. 8.73 is a pinpoint instruction that must be given only on request when there is supporting evidence in the record. The trial court does not have a sua sponte duty to instruct with CALJIC No. 8.73. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-879.) CALJIC No. 8.73 provides:

“If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.” (CALJIC No. 8.73.)

Appellant argues that defense counsel was ineffective because he did not ask the court to give a modified version of CALJIC No. 8.73 and did not argue in his closing argument that evidence of provocation may be considered as negating premeditation. As will be explained, this argument fails because defense counsel could have made an informed and reasonable tactical decision not to request this instruction or argue the point.

A. Legal Standard

“A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.)” (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

“The constitutional standard for determining whether counsel has failed to provide adequate legal representation is by now well known: First, a defendant must show his or her counsel’s performance was ‘deficient’ because counsel’s ‘representation fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.’ [Citations.] Second, he or she must then show prejudice flowing from counsel’s act or omission. [Citations.] We will find prejudice when a defendant demonstrates a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.] ‘Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.’ [Citation.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

The standard for judging counsel’s representation is extraordinarily deferential. The appellant bears the burden of overcoming the strong presumptions that counsel’s conduct fell within the wide range of reasonable professional assistance and that the challenged act or omission might be considered sound trial strategy. (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.) On direct appeal, reviewing courts “will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or

omission.’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) This is a difficult burden to satisfy. (*Lucas, supra*, at p. 437.)

“If ‘counsel’s omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.’ [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel’s reasons. To engage in such speculations would involve the reviewing court “‘in the perilous process of second-guessing.’” [Citation.] Because the appellate record ordinarily does not show the reasons for defense counsel’s actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal. [Citation.]” (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

B. Defense Counsel Could Have Made an Informed and Reasonable Tactical Decision Not to Request CALJIC No. 8.73 or Argue Provocation

During his closing argument, defense counsel urged the jury to acquit appellant on a theory of justified reasonable self-defense. Appellant argues that a reasonably competent defense attorney would also have presented “a meritorious defense that appellant was acting without a premeditated intent to kill, even if the heat of passion was not sufficient to reduce attempted murder to attempted manslaughter.” Based on this premise, appellant urges us to find that defense counsel was deficient because he did not request CALJIC No. 8.73 or argue that provocation negated premeditation. Appellant also contends that these omissions could not have been reasoned tactical choices. We are not convinced.

Defense counsel argued that appellant acted in self-defense and did not have an intent to kill. A provocation defense would have been inconsistent with this theory. Defense counsel reasonably could have decided that a provocation defense would not have been successful. The record contains compelling evidence proving premeditation: (1) appellant brought a knife to the party; (2) he brandished it; (3) he shouted gang references; (4) Nichoal Swenson heard appellant and his companions say, “They can’t

see us. Let's go get them," as they walked towards the front yard immediately before the confrontation; and (5) there was a brief separation in time between the two stabbings. This evidence effectively contradicts the position that appellant stabbed the victims in an impulsive decision solely because he was provoked. Defense counsel even might have astutely recognized that advocating a provocation defense, which necessarily includes an admission that appellant formed an intent to kill, could disadvantage appellant. The prosecutor could have made a strong rebuttal argument that appellant's intent to kill, once formed, was not momentary. "[P]remeditation can occur in a brief period of time." (*People v. Perez* (1992) 2 Cal.4th 1117, 1127.) "'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly ....' [Citations.]" (*Ibid.*) Thus, advancing a provocation defense actually might have caused the jury to be more likely to find appellant guilty of attempted murder rather than attempted manslaughter. For all of these reasons, we conclude that defense counsel could have made an informed and reasonable tactical decision not to request CALJIC No. 8.73 or argue provocation. The ineffective assistance claim fails for this reason. (*People v. Diaz, supra*, 3 Cal.4th at pp. 557-558.)

### DISPOSITION

The conviction for battery with serious bodily injury is reversed. The judgment is affirmed in all other respects. The superior court is directed to prepare a corrected abstract of judgment and to transmit a copy of it to the parties and appropriate authorities.

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Franson, J.

WE CONCUR:

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Levy, Acting P.J.

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Kane, J.