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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROMAN BANUELOS et al.,

Defendants and Appellants.

F068236

(Super. Ct. Nos. SF16860C,
SF16860D, SF16860E)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Roman Banuelos.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant Sebastian Jaime.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant James Salcido Sierra.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

At the conclusion of a jury trial, codefendants Roman Banuelos, Sebastian Jaime, and James Salcido Sierra were acquitted of attempted murder (Pen. Code, §§ 664, 187, subd. (a), count 1)¹ and of the lesser included offense of attempted voluntary manslaughter. Banuelos and Jaime were found guilty of assault likely to cause great bodily injury (§ 245, subd. (a)(4), count 2). The jury further found true great bodily injury (§ 12022.7) and gang enhancements (§ 186.22, subd. (b)(1)) alleged against Banuelos and Jaime. The jury did not reach a verdict on count 2 for Sierra and the trial court granted the prosecutor's motion to dismiss the count.²

All three defendants were convicted of the substantive offense of active participation in a criminal street gang. (§ 186.22, subd. (a), count 4.) In a bifurcated proceeding, the trial court found true a prior prison term enhancement (§ 667.5, subd. (b)) alleged against Sierra. The trial court sentenced Banuelos to a prison term of 17 years, Jaime to a prison term of 15 years, and Sierra to a prison term of four years.

On appeal, Banuelos contends the trial court abused its discretion in admitting evidence the victim was subjected to threats and violence in connection with his scheduled testimony in this case. Jaime contends there was insufficient evidence to support his conviction for committing assault by means of force likely to cause great bodily injury. All three defendants join in each other's contentions on appeal. We find no reversible error and affirm the judgment as to Banuelos and Jaime.

Sierra contends that because he was not convicted of an underlying felony offense, there is insufficient evidence he committed a felony on behalf of a criminal street gang. Sierra argues an element of count 4 is missing and his conviction must, therefore, be

¹Unless otherwise designated, statutory references are to the Penal Code.

²Count 3, a second allegation of assault by means likely to cause great bodily injury alleged as to all three defendants was dismissed at the beginning of the trial.

reversed. We note this contention is inapplicable to Banuelos and Jaime. We find there is substantial evidence to support Sierra's conviction on count 4 and affirm the judgment.

FACTS

Attack on Tony Villagomez

Tony Villagomez³ was born in Delano, lived in Wasco his entire life, and was 23 years old at the time of trial. When Tony was 15 or 16 years old he was "jumped" into the Varrio Wasco Rifas (VWR) gang. The VWR is a Southern Hispanic gang associated with the color blue. Tony testified that VWR gang members commit robberies, stabbings, and assaults. Two events occurred that made Tony realize he wanted to lead a normal life and leave the gang. The first was when Tony's girlfriend gave birth to a child Tony believed was biologically his. The second was when his cousin, a fellow gang member, was murdered.

Sometime in 2010, Tony began laser treatments to remove his gang tattoos. Not participating in gang activities and removing tattoos places a gang member in bad standing. Removing a tattoo can get a former gang member beat up by current VWR members. Talking to law enforcement officers is also considered taboo and results in being called a snitch or a rat. Tony had spoken to law enforcement officers, giving the VWR gang further reason to place him in bad standing, though Tony's standing with the gang was already poor. VWR members are required to attack and beat up fellow gang members in bad standing.

Tony went to a residence on October 13, 2012, with the expectation he would be "jumped out" of VWR: he would be beaten "a little bit" but then left alone. Three people, including Sierra, beat up Tony. The altercation lasted 20 seconds. Tony was hit on his lower body, chest, and back area. Tony was not hit in the jaw and did not fall down. At the end of the altercation, the attackers told Tony he "was okay already" and

³Several witnesses share the same last name. To avoid confusion, we refer to them by their first names. In doing so, no disrespect is intended.

they would tell others Tony was okay and not to mess with him anymore. Tony felt a burden lifted from his shoulders as he had been “jumped out” of the gang.

Between 10:00 or 11:00 that same evening, Tony was in a car with his brother Javier Villagomez, his cousin Rene Villagomez, and a friend named Noel. They parked their car near Adams and 10th Place in Wasco and began walking toward a residence where they thought there was a party. Before reaching the residence, Banuelos, Alex Garza, and another person named Ruben approached Tony. Banuelos asked Tony to identify himself. Banuelos punched Tony in the cheek. The group ran up toward Tony swinging at him, but Javier pulled him back. According to Tony, Jaime, Sierra, and Elijah Gonzalez also participated in beating him.

Tony began back peddling away from the group approaching him and then tried to run back to the car. Tony was being hit around his head and face and fell to the ground. Before Tony fell to the ground, Banuelos and Sierra were throwing most of the punches. Javier picked him up and Tony ran toward an intersection. The attackers, including the three defendants, chased Tony and tackled him against a fence.

As Tony was being hit again on his face and head, he again fell to the ground. About nine people, including the defendants, were attacking Tony. Sierra was hitting Tony. Jaime and Sierra both kicked Tony. Tony heard the assailants say he was going to die and approximately five times they said they were going to kill him. During the attack, the assailants called Tony a snitch and yelled “Varrío Wasco Rifas.” Tony believed he was hit with fists as well as kicked over a hundred times. While Tony was being assaulted, Jaime attacked Tony’s brother Javier, trying to wrap a rope around Javier’s neck. Tony grabbed Jaime’s legs to get him off Javier. The attack stopped once Tony heard the sound of sirens.

On cross-examination, Tony stated Banuelos and Sierra were on him after he was knocked to the ground. Others attacked him too, but Banuelos and Sierra were the primary attackers. Also on cross-examination, Tony said he and Sierra had a friend in

common, Laura Barraza. Tony used to date Barraza, but did not see her anymore. Tony could not remember precisely when he stopped seeing Barraza, but it was sometime in 2011. Tony said he did not know if Sierra was dating Barraza. When asked if sheriff's deputies contacted Tony about making threats at the home of Barraza's parents on December 31, 2011, Tony admitted deputies questioned him about the incident. When asked if he still held a grudge against Sierra, Tony replied, "I don't know."

Cynthia Feliciano testified that at 11:30 p.m. on October 13, 2012, she heard several guys screaming and then someone said, "Let's shank this fool." Feliciano also heard someone yell, "VWR." Feliciano walked out of her home and saw 10 to 15 people, including the person being attacked who was on the ground. There was a second person present who was not being attacked by the group. Feliciano called 911 and saw the attackers run away in different directions when the police arrived.

Tony remembered Deputy Philip Garza of the Kern County Sheriff's Department was the first law enforcement officer to talk to him. Initially, Tony told Deputy Garza he wanted nothing done because he was afraid of the VWR gang. Tony could feel nothing in his mouth and thought he had lost all of his teeth. As he was being put into the ambulance, Tony kept blacking out and thought he would not survive. Tony told Deputy Garza who attacked him, identifying four of his attackers. Tony spoke to Deputy Garza at the hospital, identifying his attackers from photographic lineups. Tony circled photographs in separate lineups of Banuelos, Jaime, Sierra, Elijah Gonzalez, Alex Garza, and other members of the VWR gang.

Deputy Garza testified he was dispatched to investigate a disturbance at Adams Street and 10th Place in Wasco on October 13, 2012. After turning down Adams Street, Deputy Garza saw two people walking toward him in the street. Deputy Garza recognized Tony and Javier Villagomez. Tony could barely walk. Javier had his arm around Tony to support him and hold him up. Tony's face was black and blue and swollen. His eyes were puffed up to the point they were almost completely closed. Tony

was bleeding from his mouth, blood was coming down the sides of his head, and he had blood on his face. Tony left a trail of blood behind him. Javier had a lump on the back of his head.

After Deputy Garza exited his patrol car, Tony and Javier took a few steps forward and Tony collapsed. Javier had to hold and guide Tony to the ground to prevent Tony's head from hitting the street. At first, Tony was unresponsive to Deputy Garza's questions. When he woke up, Tony said he was done with the incident and did not want anything done. After being placed on a gurney, however, Tony told Deputy Garza he had been beaten earlier that day. Tony told Deputy Garza he did not fear the VWR gang after being attacked earlier. Tony identified four people in the second attack, including Banuelos and Sierra.

Several people, including Banuelos and Jaime, were detained near the scene of the assault. Banuelos and Jaime had what appeared to be blood spatters on their clothing. Photographs of their clothing were admitted into evidence. At the hospital, Deputy Garza showed Tony a series of six-pack photo lineups. Tony identified Banuelos, Jaime, and Sierra as some of his attackers that evening. Tony specifically mentioned Jaime as one of the men in the group who attacked and hit him.

At trial, Tony described his injuries from photographs taken of him after the attack. Tony explained the attack caused the left side of his face to be numb and has resulted in migraine headaches. Dr. Robert Barnes, an emergency room physician since 1975, treated Tony at the Delano Regional Medical Center in the early morning of October 14, 2012. Dr. Barnes explained Tony's jaw was fractured in two places and the bone behind his left eye was also fractured. Tony suffered contusions on both sides of his head and swelling on the left side of his jaw. Tony's eyelids were swollen shut. Dr. Barnes believed the injuries Tony suffered would have been immensely painful.

Threats Made to Victim After Assault

While at home recovering after being assaulted, Tony was in his front yard when he was approached by three VWR members, including one named Luis. Tony was told to go to the county jail to talk to Banuelos. Tony felt compelled to go and was driven to the jail by Luis about 10 days after the October 13th incident. Tony talked to Banuelos. A recording of their conversation was played for the jury. During the conversation Banuelos said, "It had to happen like that dude."

Tony explained he did not want to visit Banuelos. After the jail visit, Banuelos called Tony four or five times. Each time, Banuelos asked Tony to visit him. Although Tony told Banuelos he would visit him, Tony never visited again.

In March or April of 2013, a car pulled up next to Tony as he was walking to the liquor store. Tony did not recognize anyone in the car. There were four Hispanic males in the car wearing black Washington Nationals caps with "W" insignias and blue bandanas over their faces. A passenger told Tony he should not go to court if he knew what was good for him. Tony took the comment as a threat. As the car drove away, someone yelled "Varrio Wasco Rifas." Tony reported the incident to Deputy Jeff Dickey.

On May 26, 2013, Tony was driving in Wasco and was waiting at a stop sign. A burgundy Chevy pickup truck with three occupants pulled up and asked if he was Tony. Tony did not respond because he was scared. Someone said, "It's him," and they tried to drag Tony out of his car. One of the occupants in the pickup truck told Tony that if he testified, they would kill him.

Tony sped back to his house. He was followed by the same burgundy pickup truck. Someone fired six or seven shots. The truck hit Tony's vehicle from behind, causing Tony to hit a parked truck. Tony had an injury to his head, apparently lost consciousness, and remembered finding himself on the ground. Deputy Maldonado

assisted in the investigation of this incident and found seven shell casings in an alley adjacent to Tony's house. He also observed that Tony's car had been in an accident.

On June 18, 2013, Tony and Javier were walking to their cousin's house when Jose Pineda jumped out of a car and brandished a shotgun at them. Elijah Gonzalez, one of the assailants during the October 13, 2012, attack, would drive by Tony's house and "throw" gang signs. On August 7, 2013, Tony and two friends were standing outside his mother's house when someone across the street asked if he was Tony. The person yelled, "VWR, Sup 13" and "My homies ain't gonna get life for you." The person pulled a gun and fired five to six shots, putting bullet holes in Tony's friend's car.

Evidence of Criminal Street Gang Activity

Detective Juan Bravo was assigned to the sheriff's office gang suppression section, commonly referred to as the gang unit, and testified as an expert on criminal street gang activity. Bravo explained that the VWR gang was a Sureño gang allied with the Mexican Mafia and with the city of Wasco as its territory.

Among the VWR gang's primary activities are: attempted murder, assault with firearms, assault with deadly weapons, narcotics sales, burglary, grand theft auto, grand theft from people, possession of concealed weapons, witness intimidation, and vandalism. Members can be kicked out of the gang for being charged with any type of sexual assault or child molestation crimes, and for talking to law enforcement, also known as snitching. Gang members have to participate with other members when they are committing crimes.

Based on booking reports, field identification cards, police reports, and gang tattoos, Bravo believed all three defendants were active members of the VWR gang. Based on a hypothetical assault with facts similar to those in this case, Bravo opined such an assault would be conducted for the benefit of or at the direction of the VWR criminal street gang.

Bravo further testified concerning the predicate offenses leading to felony convictions of VWR members. On August 28, 2010, VWR members Epifanio Soto and

Anthony Romero assaulted a victim at a party in Wasco. Romero and Soto were convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) and Soto was convicted of misdemeanor participation in a criminal street gang (§ 186.22, subd. (a)). During the attack, in which other VWR gang members participated, Romero made a statement about not disrespecting Wasco. The offense occurred within the traditional boundaries of the VWR gang.

On September 24, 2011, VWR member Jaziel Santos engaged in a “rap battle” with another person at a party in Wasco and ultimately stabbed victims. Santos inflicted serious bodily injury on the victims and was convicted of assault with a deadly weapon and participation in a criminal street gang. Santos was an active VWR member and during the rap battle he continuously made reference to his membership in the VWR gang.

On February 17, 2012, Adrian Murietta and Sierra assaulted someone at a party in Wasco and etched VWR into the victim’s vehicle. They were both convicted of felony vandalism (§ 594, subd. (b)(1)) and misdemeanor participation in a criminal street gang. The offense occurred within the boundaries of the VWR gang, and felony vandalism is a primary activity of the VWR gang.

Defense Evidence

Sierra did not present any evidence in his defense. Banuelos called Tony to testify about the phone calls he made to Banuelos following the assault. Recordings of the conversations were played for the jury. Tony agreed during the conversations to visit Banuelos in jail. Tony testified he had no intention of visiting Banuelos. Tony admitted Banuelos did not threaten him during the phone calls.

Jaime’s sister, Gabriella Jaime, testified that on the evening of the assault, she was with her brother around 10:30 p.m. near the intersection of 10th Place and Broadway. Gabriella was in the residence for about 15 minutes when she saw a white car stop in the middle of the road. Four men, including Tony, exited the car. When Tony exited the car,

he said, “wassup ese.” Gabriella explained that Tony led his group in starting the fight by throwing the first punches. Gabriella saw Jaime help one of Tony’s friends off the ground. She watched the fight for a minute or two longer and went back into the house. Gabriella did not call 911 or tell investigators the wrong individuals had been arrested.

DISCUSSION

I. Evidence of Threats After Assault

A. Introduction

Banuelos contends the trial court abused its discretion under Evidence Code section 352 in admitting evidence of threats made to Tony by VWR gang members after the assault. Banuelos argues the trial court’s ruling improperly allowed into evidence incidents of intimidation without the requisite proof he was present when these acts occurred or that he authorized this illegal conduct. Jaime and Sierra join Banuelos’s argument. We conclude the evidence of threats to the victim after he was assaulted were relevant to the issue of his credibility and were properly admitted into evidence.

B. Background

At the beginning of trial, the court ordered a hearing pursuant to Evidence Code section 402 to determine whether evidence of threats made to Tony after the incident were admissible. At the hearing, Tony testified to four incidents that occurred after he was assaulted on October 13, 2012. Tony explained that in March or April of 2013, he and Javier were walking to the store when four individuals in a car told him not to attend court or they would “go after” him.

On May 26, 2013, Tony was driving when several individuals in another vehicle dragged him out of his car, pointed a gun at his head, and yelled “Varrio Wasco.” On June 18, 2013, Tony and Javier were walking to their cousin’s house when Jose Pineda jumped out of a car, pointed a shotgun at them, and told Tony not to testify or he would kill him. Pineda is Jaime’s cousin. On August 7, 2013, Tony was outside his home when someone in dark clothing approached and asked if he was Tony. When Tony replied

affirmatively, several gunshots were fired. Another gang member, Elijah Gonzalez, constantly walks by Tony's house and throws VWR gang signs at him. This causes Tony to be afraid.

The trial court denied defendants' motion to exclude these subsequent events. The court explained it conducted an Evidence Code section 352 evaluation and found the incidents admissible. The court stated it would admonish the jury to consider these incidents only as to Tony's state of mind, attitude, actions, bias, prejudice, and credibility.

During the trial, Tony testified Elijah Gonzalez was one of the assailants the evening of October 13, 2012. Tony testified Gonzalez drove by after the assault, throwing gang signs at Tony, and he had been in the courtroom observing the trial. Tony also told the jury that Gonzalez's presence in the courtroom made him scared and nervous as he was testifying.

The trial court specifically advised the jury during trial concerning the limited admissibility of the post-incident threats as Tony or investigators testified about them. When Tony testified concerning the incident where he was brought to the jail to meet with Banuelos, the trial court admonished the jury to consider Tony's conversation with people in the front yard prior to being taken to the jail "only to show the subsequent acts of [Tony] by going to the Lerdo detention facility." The court told the jury not to consider the actual substance of the conversation because it was being "admitted for [the] limited purpose to show what [Tony] did."

When Tony later testified concerning threats he received after the assault incident, the court advised the jury: "The testimony regarding any evidence of threats to or actions against ... Tony ... after October 13, 2012, may be considered by you, members of the jury, only as to the state of mind, attitude, actions, bias, prejudice, and credibility of Tony" After a recess had been taken and Tony's testimony resumed concerning the subsequent incidents, the court again advised the jury that "this testimony is to be

considered by you only as to the state of mind, attitude, actions, bias, prejudice and credibility of ... Tony”

When the investigator testified concerning the presence of shell casings found after the threat incident on May 26, 2013, the court advised the jury:

“As I’ve mentioned to you before, ladies and gentlemen, the testimony, not limited to but inclusive of the May 26th, 2013, incident regarding any potential threats or actions against ... Tony ... may be considered by you only as to the state of mind, attitude, actions, bias, prejudice, and credibility of Tony”

In closing instructions to the jury, the trial court advised them with CALCRIM No. 303: “During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.”

C. Analysis

A trial court’s rulings on the relevance and admission or exclusion of evidence under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668; *People v. Scott* (2011) 52 Cal.4th 452, 491.) We review the evidence in the light most favorable to the trial court’s ruling. (*People v. Edwards* (2013) 57 Cal.4th 658, 711.) The trial court’s exercise of discretion will not be set aside unless it is so arbitrary, capricious, or patently absurd that it results in a miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, disapproved on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

Evidence Code section 780 provides a jury may “consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing.” (*Ibid.*) Among the circumstances the jury may consider such evidence are to determine: (1) “[t]he existence or nonexistence of a bias, interest, or other motive” (*id.*, subd. (f)), (2) “[t]he existence or nonexistence of any fact testified to by him” (*id.*, subd. (i)), (3) the consistency or inconsistency of any part of the witness’s testimony (*id.*, subds. (g), (h)), and (4) the witness’s “attitude toward

the action in which he testifies or toward the giving of testimony” (*id.*, subd. (j)). Each of these subdivisions are relevant to a witness’s credibility.

Evidence a witness is afraid to testify, or fears retaliation for testifying, is relevant to the witness’s credibility and is therefore admissible. Evidence of any explanation of the basis for such fear is likewise relevant to the jury’s assessment of the witness’s credibility and admissible for that particular nonhearsay purpose, but not for the truth of any matters asserted by third parties. (*People v. Chism* (2014) 58 Cal.4th 1266, 1291-1292.)

Evidence a witness testifies despite fear is important in fully evaluating his or her credibility. This rationale does not hinge on whether the witness gave prior inconsistent testimony. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1086, citing *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369.) Within the limits of Evidence Code section 352, a jury may not only evaluate a witness’s testimony knowing the witness was afraid, the jury may hear those facts that would enable it to evaluate the witness’s fear. A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony. (*Olguin, supra*, at pp. 1368-1369.)

Banuelos argues the trial court erred by admitting evidence of post-assault threats pursuant to Evidence Code section 780 because Tony was unequivocal in his testimony and unequivocal in his identification of the defendants. We disagree because Tony’s credibility was critical to both parties. Tony testified one of his attackers, Elijah Gonzalez, had thrown gang signs at Tony after the attack and had been present in the courtroom; his presence caused Tony fear. Tony was pulled out of his car on one occasion and had his car crashed into on another. Shots were fired after one threat. Tony had been threatened multiple times after the assault and told not to testify at defendants’ trial. Tony was the primary prosecution witness. He testified over several days and his credibility was at the foundation of the prosecution’s case. Undermining Tony’s credibility was at the heart of defendants’ case.

Courts presume jurors generally comprehend, accept, and follow instructions. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1216; *People v. Brock* (2006) 143 Cal.App.4th 1266, 1277.) The jury was specifically advised four times during Tony's testimony that evidence of post-assault threats was admissible only on the issues of Tony's state of mind, actions, bias, prejudice, and credibility. The jury was further instructed with CALCRIM No. 303 that evidence admitted for a limited purpose could not be considered for any other purpose. The jury was *not* instructed to apply the post-incident threats to determine defendants' consciousness of guilt. There was no consciousness of guilt instruction to the jury.

Defendants argue there was no evidence they ordered or authorized the intimidation incidents against Tony. Generally, evidence someone other than the defendant has tried to intimidate a witness is not admissible as evidence of the defendant's consciousness of guilt unless there is evidence the defendant authorized the attempt. (*People v. Hannon* (1977) 19 Cal.3d 588, 599.) The post-assault threats were admitted, however, to demonstrate the victim's fear in testifying, not to show consciousness of guilt. Defendants ignore the fact the jury was specifically instructed on the limited use of this evidence to show the credibility of the prosecution's chief witness. The record indicates the trial court properly understood and fulfilled its responsibilities under Evidence Code section 352. (See *People v. Mendoza, supra*, 52 Cal.4th at pp. 1086-1087.) We reject this contention as to all three defendants.

II. Substantial Evidence of Assault and Great Bodily Injury

Jaime raises a number of contentions he argues establish there was insufficient evidence he assaulted the victim by means likely to cause great bodily injury and insufficient evidence the victim suffered great bodily injury caused by defendants. Jaime argues (1) Tony's identification of him prior to going to the hospital failed to establish Jaime as an attacker; (2) Tony's statements to Deputy Garza were not substantial evidence to support a finding Jaime was a direct perpetrator; (3) there was insufficient

evidence Jaime aided and abetted the crime; and (4) the same paucity of evidence failed to establish Jaime personally inflicted great bodily injury on the victim.

Although most of Jaime's contentions are unique to the facts as they relate to him, his codefendants join in Jaime's argument. We analyze these contentions as to all three defendants and find them meritless.

A. Substantial Evidence of Assault by Means Likely to Cause Great Bodily Injury

In assessing a claim of insufficiency of the evidence, appellate courts review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Evaluating substantial evidence for each element of the charged offense, we draw all reasonable inferences derived from the evidence. Under standards of federal due process, review for sufficiency of the evidence does not entail a determination as to whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. (*People v. Watkins* (2012) 55 Cal.4th 999, 1019-1020.)

Jaime's initial argument—Tony failed to identify Jaime while Tony was being loaded into the ambulance—ignores the facts adduced at trial. When Deputy Garza arrived at the scene, Javier was trying to hold Tony up as they walked toward the deputy. Tony collapsed. Tony's head was bloody, his eyes nearly swollen shut, and he lapsed in and out of consciousness. Tony could speak to Deputy Garza only a limited time prior to being transported by ambulance to the hospital. When Tony was questioned later at the

hospital by Deputy Garza, Tony was not described as losing consciousness and was able to identify Jaime, Banuelos, and Sierra in photographic lineups.⁴

At trial, Tony testified Jaime participated in the beating. When picking Jaime out of a photographic lineup, Tony told Deputy Garza that Jaime was one of his attackers. While Jaime was attacking Javier, Tony remembered trying to hold Jaime's legs down and other assailants pulled Jaime away from Tony's hold. Tony also testified that when he later tried to help his brother, Jaime was one of the assailants kicking him. Jaime surmises he likely kicked Tony out of self-defense, but we agree with the People's appraisal of this evidence: from Tony's testimony, the jury could have reasonably found Jaime attacked Tony as part of the assault, not in an act of self-defense.

In effect, Jaime is asking this court to reweigh the evidence on appeal in a light more favorable to his argument than to the People's. Deputy Garza, however, testified Jaime was one of four people detained at the scene of the assault. Jaime had blood spatter on his clothing. Photographs of Jaime's clothing with likely blood stains were admitted into evidence. Banuelos's clothing also had apparent blood stains.

Although Tony testified Banuelos and Sierra were his primary attackers, substantial evidence established Jaime was also a direct perpetrator of the assault. Because Jaime was a direct perpetrator of count 2, we need not further discuss Jaime's liability as an aider and abettor in detail. We simply note the evidence summarized above also supported his conviction on count 2 as an aider and abettor. Similarly, although the jury failed to reach a verdict as to Sierra's culpability for committing an assault likely to cause great bodily injury, substantial evidence would have supported such a finding. Sierra was not acquitted of count 2, a point we discuss in more detail *post*.

⁴Tony identified both Banuelos and Sierra prior to leaving in the ambulance and going to the hospital.

B. Substantial Evidence of Great Bodily Injury

Jaime argues there was insufficient evidence he personally inflicted great bodily injury on the victim. We disagree.

Great bodily injury is defined as significant or substantial physical injury as distinguished from injuries that are trivial or cause only moderate harm. (§ 12022.7, subd. (f); *People v. Cross* (2008) 45 Cal.4th 58, 63-64; *People v. Escobar* (1992) 3 Cal.4th 740, 749-750.) Our Supreme Court has long held the question of whether a victim has suffered great bodily injury is a factual inquiry to be resolved by the jury, not a question of law for the court. There can be a fine line dividing a significant or substantial injury from one not meeting the description. (*People v. Cross, supra*, at pp. 63-64; *People v. Escobar, supra*, at pp. 750-752.) Great bodily injury “is commonly established by evidence of the severity of the victim’s physical injury, the resulting pain, or the medical care required to treat or repair the injury.” (*Cross, supra*, at p. 66.)

A finding of great bodily injury will be sustained when there is “some physical pain or damage, such as lacerations, bruises, or abrasions.” (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047.) For example, a great bodily injury finding was sustained where the victim suffered a severely swollen jaw, sore ribs for two weeks, cuts to the arms, and bruises to the head, neck, and back. (*People v. Corona* (1989) 213 Cal.App.3d 589, 592-593.) The finding was also sustained where the victim was strangled with a scarf to the point of nearly passing out, felt herself choking, could not breathe, had a swollen eye and bleeding nose, saw blood on herself, felt pain in her neck, and had a large lump on her neck. (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1489.)

In *People v. Modiri* (2006) 39 Cal.4th 481, 495 (*Modiri*), the California Supreme Court reaffirmed the established interpretation of section 12022.7, subdivision (a): To be criminally liable for a great bodily injury enhancement, there has to be “a direct physical link between his own act and the victim’s injury.” The court in *Modiri* concluded that in a group beating scenario, such as the one we confront, “a personal-infliction finding where the physical force the defendant and other persons applied to the victim at the

same time *combined* to cause great bodily harm.” (*Modiri, supra*, at p. 496.) To hold otherwise would permit “all participants in a group attack who personally caused or contributed to the infliction of harm [to] conceivably escape enhanced punishment.” (*Id.* at p. 497.)

Although the parties do not challenge the severity of Tony’s injuries, it is undisputed he suffered two fractures to his jaw, one to the orbital bone in his face behind his eye, and lapsed into unconsciousness. Tony suffered great bodily injury at the hands of all three defendants. Under the test established in *Modiri*, it is also undisputed all three defendants hit, kicked, and used physical force on Tony. We reject Jaime’s attempts to reduce his culpability for kicking Tony. Substantial evidence shows Jaime participated in using physical force on Tony, and he is therefore culpable for inflicting great bodily injury. We note Jaime’s kick to Tony occurred well into the assault after Tony had no doubt suffered many of the over one hundred blows he sustained to his body.

III. Substantial Evidence of Gang Participation

A. Introduction

Sierra contends his conviction for the substantive offense of active participation in a criminal street gang is not supported by substantial evidence. His conclusion is premised on his acquittal of attempted murder in count 1 and a hung jury on count 2—assault by means likely to cause great bodily injury (later dismissed on the prosecutor’s motion). Sierra argues the People failed to establish he was a direct perpetrator or an aider and abettor of count 2 because he was not convicted on that count. Sierra concludes the People therefore failed to establish he willfully promoted, furthered, or assisted in any felonious criminal conduct by members of the gang, and there is insufficient evidence to support his conviction on count 4, the substantive criminal street gang offense.

As we explain, section 186.22, subdivision (a) does not mandate an underlying felony *conviction* to satisfy the third element of the substantive gang offense. There must be substantial evidence, however, of the defendant willfully promoting, furthering, or

assisting in felonious criminal conduct by members of the gang. We find substantial evidence supports the verdict on count 4 and affirm Sierra's conviction.⁵

B. Elements of Participation in Criminal Street Gang Offense

Section 186.22, subdivision (a) provides in relevant part: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished"

The elements of this offense 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. Rodriguez* (2012) 55 Cal.4th 1125, 1130; see *People v. Lamas* (2007) 42 Cal.4th 516, 523.) A person who is not a member of the gang, but who actively participates in it, can violate section 186.22, subdivision (a). (*People v. Rodriguez, supra*, at p. 1130.) Mere active and knowing participation in a criminal street gang is not a crime. (*Ibid.*) Applying the third element of section 186.22, subdivision (a), a defendant may be convicted of the offense of criminal gang participation only if he or she also willfully does an act that "promotes, furthers, or assists in any felonious criminal conduct by members of that gang." (*Rodriguez*, at pp. 1130-1131.)

A gang member acting alone, however, has not satisfied the third element of the crime. (*People v. Rodriguez, supra*, 55 Cal.4th at pp. 1131-1139.) The felony offense does not itself have to be gang related. (*Id.* at p. 1133; *People v. Albillar* (2010) 51 Cal.4th 47, 55.) Also, the offense committed as the third element of section 186.22,

⁵Although Banuelos and Jaime join in Sierra's argument, they have both been convicted of an underlying felony and the People have established all the elements of section 186.22, subdivision (a) as to them. Sierra's argument is inapplicable to his codefendants.

subdivision (a) cannot be a misdemeanor, it must be a felony. (*People v. Lamas, supra*, 42 Cal.4th at p. 524.) The promotion of the felony offense may be accomplished by directly committing a felony or by aiding and abetting other gang members in committing it. (*People v. Rodriguez, supra*, at pp. 1132, 1135-1136; *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [following common usage of promote (to contribute to the progress or growth of); further (to help the progress of); and assist (to give aid or support)].)

When interpreting statutes, we begin with the plain, commonsense meaning of the language employed by the Legislature. Where the language is unambiguous, the plain meaning controls. Whenever possible, significance must be given to every word in the statute to achieve the legislative purpose of the law. Courts should avoid constructions that make some words surplusage. Courts may also reject a literal construction that is contrary to the legislative intent apparent in the statute or would lead to absurd results. (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1131.)

The issue before us is whether the third element of section 186.22, subdivision (a) requires an underlying *conviction* for a felony offense. We conclude it does not. The third element of section 186.22, subdivision (a) punishes one who “willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” The language in this provision of the statute is simple, declarative, and unambiguous. It does not require an underlying conviction for the felony conduct being committed. It requires the promotion, furtherance, or assistance in felonious criminal conduct achieved, as explained by *Rodriguez* and *Ngoun*, by direct participation in the felony or by aiding and abetting it. (*People v. Rodriguez, supra*, 55 Cal.4th at pp. 1132, 1135-1136; *People v. Ngoun, supra*, 88 Cal.App.4th at p. 436.)

Sierra argues he was not convicted of the assault allegation in count 2, as were his codefendants, and this constitutes insufficient evidence to support the substantive gang offense alleged in count 4. There was, however, substantial trial evidence of Sierra’s active participation in the assault by means likely to cause great bodily injury. Tony

identified Sierra as the one who assaulted him prior to being taken to the hospital and at the hospital. More than once during his testimony, Tony described Sierra and Banuelos as the primary attackers. The assault against Tony could not be interpreted as anything but a felony. It was brutal, unrelenting, and committed by so many members of the gang that the victim and his brother did not have a reasonable opportunity to defend themselves long enough to escape the violence perpetrated on them. There is no evidence Sierra acted passively or as a mere bystander. Banuelos and Jaime were found guilty of felony assault by means likely to cause great bodily injury, and the jury found true the great bodily injury enhancement alleged on that count.

Whether Sierra was a direct participant or an aider and abettor, the jury had substantial evidence before it of Sierra promoting, furthering, or assisting the felony assault by means likely to cause great bodily injury.⁶ A jury *conviction* of Sierra for felony assault by means likely to cause great bodily injury as alleged in count 2 was therefore unnecessary to support the felony finding required to support the substantive gang offense alleged in count 4.

The People note that, at best, the verdicts reached by the jury were inconsistent and such verdicts are permitted. There is merit to the People's argument. We initially observe the jury did not acquit Sierra of count 2, it merely deadlocked on this count. The jury's verdicts concerning Sierra are incomplete. We agree with the People the doctrine of inconsistent verdicts is helpful in analyzing this contention.

Mere inconsistency in a jury's verdict is not a valid reason for a court to reject a jury verdict. (*People v. Carbajal* (2013) 56 Cal.4th 521, 532.) An assessment of the reason for the inconsistency would be based on pure speculation, or would require

⁶In addition to being instructed on the elements of section 186.22, subdivision (a), the jury was instructed the third element was met if the People proved defendant directly and actively committed a felony offense, or aided and abetted a felony offense. In addition to general aiding and abetting instructions, the jury was further instructed on the definition of aiding and abetting in the substantive criminal street gang offense.

inquiries into the jury’s deliberations that courts do not generally undertake. Courts have always resisted inquiring into a jury’s thought processes and through this deference brings the criminal process to the collective judgment of the community and an element of finality. (*United States v. Powell* (1984) 469 U.S. 57, 66-67; *People v. Carbajal*, *supra*, at p. 532.) For this reason, California courts generally and consistently have held inherently inconsistent verdicts are allowed to stand. (*Carbajal*, at p. 532.) A court cannot decline to accept a jury verdict or refuse to hear it simply because it is inconsistent with another verdict in the same case by the same jury. (*Id.* at p. 533.)

We reiterate that the jury’s failure to reach a verdict on count 2 as to defendant Sierra was not an acquittal of that count. To the extent the verdict can be interpreted as inconsistent with the substantive gang offense alleged in count 4, the jury is permitted to reach inconsistent verdicts. We have no way of understanding the jury’s thought processes in reaching the verdict in count 4 and deadlocking on count 2. Based on the evidence, however, we easily conclude substantial evidence supported the jury’s verdict on count 4, the substantive gang offense.

DISPOSITION

The judgment as to each defendant is affirmed.

PEÑA, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

DETJEN, J.