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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD ALI AYACHE,

Defendant and Appellant.

G043201

(Super. Ct. No. 09ZF0052)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William F. Froeberg, Judge. Affirmed.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Edward Ali Ayache was convicted of murder, two counts of attempted murder, and active participation in a criminal street gang on November 18, 2000. The jury found true gang enhancements, a gang special circumstance, and firearm use allegations. The jury also found defendant guilty of being a felon in possession of a firearm and active participation in a criminal street gang on January 9, 2009. Defendant challenges the admission of the gang expert's testimony, alleges his attorney was ineffective for failing to object to certain testimony by the expert, challenges two jury instructions, contends the evidence was insufficient to support one of the gang participation charges, and argues the trial court was obligated to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, and erred in failing to rule on his new trial motion. We affirm.

I

FACTS

Defendant and Steven Alexander Morales were charged in an indictment with the murder of Michael Olvera (Pen. Code,¹ § 187, subd. (a); count one), alleged to have been carried out to benefit a criminal street gang (§ 190.2, subd. (a)(22)), the attempted murders of Felipe Ochoa (§§ 664, subd. (a), 187, subd. (a); count two) and Manny Estrada (count three), and with active participation in a criminal street gang (§ 186.22, subd. (a); count four). These offenses were alleged to have occurred on November 18, 2000. The murder and attempted murders were alleged to have been committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).) The indictment further alleged defendant personally discharged a weapon causing death in count one, the murder (§ 12022.53, subd. (d)), and discharged a weapon in connection with each of the attempted murders (§ 12022.53, subds. (c) and (e)(1)).

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

Defendant was also charged with a three offenses alleged to have occurred on January 9, 2009: possession of a firearm by a felon (§ 12021, subd. (a)(1); count five); active participation in a criminal street gang (count six); and resisting or delaying an officer (§ 148, subd. (a)(1), a misdemeanor; count seven).

November 18, 2000: Counts One Through Four

1. Karla Quinteros

On November 18, 2000, there was a party for Manual Estrada and Karla Quinteros in the backyard of her sister's house in Garden Grove. About 50 to 100 flyers about the party were made and distributed. Next to the backyard was a detached garage. There was a pool table inside the garage. A disc jockey set up in the backyard, next to the wall of the garage.

The party consisted of close friends in the beginning. Then the party started to get crowded. Quinteros said that around 9:30 or 10:00 p.m. there were too many people present, including people she did not know. Quinteros brought out cake, believing people would start leaving once the cake was eaten.

Quinteros set the cake on a table. She heard arguing and fighting. There was a fight in the garage. Estrada was inside, being hit by people. Quinteros tried to stop the fight and was struck with a pool cue. She heard five gunshots. Michael Olvera, a friend who had been invited to the party, had been shot and was being moved. Quinteros did not see any of her friends with any weapons.

When Quinteros went to the hospital to see Olvera the next day, he was already dead. He died of multiple (four) gunshot wounds.

2. Andrew Hernandez

Andrew Hernandez had been invited to the party by a friend. He headed to the party in a car with four other men. On the way they stopped by an apartment to meet up with other people going to the party. Hernandez knew Gilbert, one of the four men in

the car, “hung out with” the gang Under No Authority (UNA). Inside the apartment Hernandez was introduced to “Sleepy.”² Somebody announced that Hernandez was a Marine. He was then taken to a back room and shown a gun. It appeared to be a nine millimeter. He picked up the weapon and somebody asked, “Are you crazy or something?” The gun was then put on a table and a bandana placed over it. The group left the apartment and proceeded to the party. Defendant, Gilbert, and Johnny Losoya rode in the car with Hernandez. Hernandez had met defendant once or twice before that night and had heard him referred to as “Rascal.”

Hernandez estimated there were 80 to 100 people at the party. Losoya got on the disc jockey’s stand and yelled “UNA” into a microphone. That immediately changed the tenor of the party. Another person said “UNA” and a fight broke out. Hernandez heard one or two gunshots and quickly got on the ground. He then “took off” and heard a couple more shots when he got back to the car. He went back to the party to look for his wife’s cousin, Carlos. As Hernandez went up the driveway to the house, he saw two men exit the garage with either a bat or a crowbar. He found Carlos and headed back for the car. On the way back, he saw the two men who had exited the garage beating another man in the garden. Hernandez may have hit one of the men and said, “Stop.” He and Carlos then ran to the car.

As they were getting into the car to leave, Gilbert, Losoya, and defendant wanted to get into the car. Defendant got into the rear seat, behind the driver. He said his “shit jammed.” Hernandez saw defendant had something under his sweatshirt. Carlos and Hernandez dropped the others off at an apartment.

3. *Hugo Castaneda*

Hugo Castaneda was in federal custody for drug sales when he testified. He went to the party that night because it was his friend Estrada’s birthday. Castaneda

² Codefendant Morales testified his moniker is “Sleepy.”

was a member of Killing Society (KS), a tagging crew³ at the time of the party.

Castaneda said he has never been affiliated with a gang.

Estrada “was from KS” too, but also “hung out” with guys belonging to a street gang, Southside Huntington Beach. John Ovalle was at the party. Ovalle was not a gang member, but like Estrada, Ovalle associated with members of Southside Huntington Beach.

Castaneda said everybody was having a good time early on. The disc jockey was playing music and people were dancing, drinking, and playing pool. The atmosphere changed when members of UNA, including defendant and Daran Gudehus, a friend of Castaneda’s, arrived. Castaneda knew defendant because they had been in the same tagging crew when they were younger. There were approximately 10 people in the UNA group at the party. Once the UNA group arrived, people started mad-dogging (staring down) each other and talking on the disc jockey’s microphone, shouting out “UNA” and “KS.” Then a fight broke out.

Someone “hit-up” Ovalle. Castaneda saw Olvera take a swing at one of the UNA people, knocking him down. That was the first punch thrown. Defendant took out a gun and shot Olvera three or four times. Castaneda said, “Then everybody starts fighting.” Olvera said he could not breathe and wanted someone to call an ambulance. Castaneda said he could not get out through the gate because people were fighting in that area. He heard more shots and jumped a fence to get out of the backyard. Hiding behind a tree, Castaneda saw two gunmen shooting at people, and saw two people get hit. Ochoa was one of the people shot. Castaneda left when he felt safe to do so.

4. *Leonard Colbert*

Leonard Colbert, a member of KS at the time and another friend of Estrada’s, arrived at the party. He saw Estrada in a fight, on the ground and being hit.

³ A tagging crew does graffiti.

Colbert saw “some girl” try to pull a male off Estrada. Colbert swung a pool cue at the male, but accidentally struck “the girl.”

Colbert saw defendant, a person he had met once before, shoot Olvera. He said he saw defendant fire two or three shots. Colbert was struck by somebody during the fight and went to the ground. While on the ground, he saw defendant fire another shot.

5. *Steven Morales*

The charged codefendant, Steven Morales, testified while in custody on this matter. He had been in custody for approximately nine months by the time of trial. At the time of the party in 2000, he was a member of the UNA gang. By the time of his arrest, Morales was working as an accountant, after having gone to college, and was married for six years with three children. He said he was an active member of UNA at the time of the party, but not long after that he became “a Christian man” and walked away from the gang. He said he simply cut off ties with the gang.

When Morales was “jumped in” to the gang, a process whereby four or five gang members jump the newcomer physically and kick and beat him, defendant took part in the beating. Defendant was an active participant in UNA at the time Morales attended the party on November 18, 2000.

Prior to the party, Morales got a call from other UNA members about a flier party — an invitation printed on a flier to let people know the date, time, and place of the party. He stopped at a woman’s apartment on the way to the party. UNA members Danny Cervantes and Rodney Keoho were present. Morales did not see a gun there and did not remember if defendant was present. After meeting up at the apartment, a group of UNA members caravanned to the party. There was music playing when they arrived and it appeared to Morales there were “a lot of females along with other men that looked like gang members.”

He heard gang names, “UNA” and “Southside,” being yelled back and forth. He saw another UNA member, Jose, “hit up” a male. A “hit up” is an inquiry into a person’s gang association. In the gang world, violence is the response to a hit up. Morales saw defendant throwing gang signs at that time. Jose got punched in the face and a fight broke out. The man who punched Jose was not armed. Once Jose was punched, people from the party and UNA members rushed in to fight. Then shots were fired.

Morales saw two to three shots fired, but did not see who fired them. He looked in the direction of the shots and saw defendant, Keoho and Cervantes, all UNA members, jumping over a wall. Morales pulled out a knife and joined the fight so as to look good in front of his friends, because engaging in violence garners respect from other gang members.

Morales attempted to stab a person in the fight, but as he lunged at the person, he stabbed his own left hand. He said the knife went through his palm and the tip exited the back of his hand toward his little finger. After stabbing himself, he turned and ran out the gate and down the street to where the two cars they drove to the party were parked. At the cars Morales told Keoho he had been shot in the hand and had to leave. He said he had been shot in the hand because he did not want to “look like an idiot by stabbing” himself.

Keoho did not want to help Morales, so Morales ran off. He ran to a house for help and an ambulance eventually took him to the hospital. At the hospital, Morales reiterated he had been shot.

The first time Morales became aware someone had died at the party was when he was arrested a few years later “for a homicide.” The only other time Morales was ever arrested was on December 15, 2000, when he was with other UNA gang members in a motel room in Buena Park and was arrested for possessing a gun. The .25-caliber gun was passed around by UNA members. Morales said he got the gun from

either defendant or Cervantes a week or so after the party. He got the gun because his hand was injured and he feared retaliation for what happened at the party. When he got the gun, defendant advised him against carrying it, telling him it was “dirty” and that he should get rid of it.

Morales got the motel room with his girlfriend and invited some UNA members over. The police arrived and found the gun and some drugs. Cervantes was present in the motel when the police arrived. Morales, who had been a minor at the time, had a juvenile petition for possession of a firearm sustained as a result of that incident.

Morales identified a “gang picture” of himself with Joey (whose moniker is Crow), and defendant (whose moniker is Rascal), Robert (whose moniker is Puppet), and Keoho (whose moniker is Creeper). Among those making a gang sign with their hands was defendant.

Morales received multiple threats from defendant about testifying in this matter. Defendant told Morales that paperwork would follow Morales to prison so that others knew he testified and that he should be concerned about the safety of his family as well as his own. Defendant specifically told Morales, “If you know what is best for your family then you’ll keep your mouth shut.”

6. Detective Gregory Pelton

On December 15, 2000, Buena Park Detective Gregory Pelton responded to a hotel where he contacted Morales, Cervantes, Keoho, and two females. During a search of the room he found a .25-caliber Lorcin firearm small enough to fit into the palm of one’s hand. The parties stipulated a bullet removed from Estrada’s wrist had been fired from the .25-caliber Lorcin pistol seized by Pelton.

January 9, 2009 (Counts Five Through Seven)

On January 9, 2009, at about 2:30 or 2:45 a.m., Cypress Detective Jonathan Krok contacted defendant in a parked vehicle. Having found marijuana on defendant’s

person, Krok had defendant sit on the curb. Krok asked for and received consent to search defendant's shoes. Defendant's left shoe contained a loaded .22-caliber revolver. The parties stipulated that defendant had previously been convicted of a felony.

Gang Expert Testimony

Investigator Rick Reese of the district attorney's office testified as a gang expert. He explained gang culture, including the roles played by fear, intimidation, and respect. The more violent a gang member is, the more respect he garners. Reese said UNA was formed in 1990 by members of Western High School's football team, and became a criminal street gang in 1992. The gang's primary activities include narcotics violations, murder, and robbery. Reese also testified to the predicate offenses committed by members of the gang to establish the requisite pattern of criminal gang activity.

Reese said the gang is a nontraditional gang in that like prison gangs, it is not turf oriented. UNA does not have a dominant racial makeup and includes Whites, Blacks, Asians, and Pacific Islanders, although Reese said UNA has an Hispanic leaning in its allegiance and is tied to the Mexican Mafia prison gang. The gang uses a U hand sign to identify itself. It also uses the horseshoe of the Indianapolis Colts as a symbol and its color is the Colts' blue.

Reese testified to the use of gang tattoos by more hardened gang members to show pride in the gang. He explained that if a person had a gang tattoo and was not in good standing with the gang, failure to cover up the tattoo would make the person a target for "a hit." Defendant has UNA tattooed across his stomach and on top of his head. Defendant also has a horseshoe tattooed on his head. The horseshoe tattoo was documented by police in 2007.

Reese investigated defendant, reviewing police reports and field identification cards from within the county. Reese said gang members are known by their monikers. Defendant has a couple of monikers, although Rascal is the one that

usually shows up in police reports. The police have contacted defendant 24 times between 1997 and 2009. In 1998, defendant was identified as a UNA gang member. In a two week period in 2001, defendant was arrested twice for possession of a firearm. On each occasion he was present with a UNA gang member. Defendant was shot in a gang-related shooting in 2007, and claimed membership in UNA in a 2008 police contact. A gang photograph seized from UNA member Keoho's residence, shows defendant with a number of other UNA members.

In 2004, while defendant was in prison, he was contacted by Investigator Echavarria about "an old homicide that had occurred over in Garden Grove." Defendant declined to talk to Echavarria, but thereafter, defendant's telephone calls from prison to UNA members were monitored and defendant was heard discussing "throwing rats" (people talking to police) and of the need for people to keep quiet.

Reese opined defendant was an active gang participant at the time of the shooting in November 2000, at the time defendant possessed a firearm on January 9, 2009, and that defendant, because of his level of activity in the gang, knew members of UNA committed a pattern of criminal activity.

Finally, Reese testified the murder and the other shootings at the party in November 2000 were for the benefit of and in association with a criminal street gang and promoted the status of the gang because shootings instill fear in witnesses and the community. He also opined defendant's possession of a firearm in January 2009 was for the benefit of the gang and that defendant's possession enhanced the status of the gang. Reese said possession of a firearm by a member of UNA who has been convicted of a felony is consistent with a crime committed with the specific intent to promote, further, or assist in criminal conduct. He said the possession enhances the gang's stature if defendant is challenged and a "weapon is a projection of power."

The Verdicts and Posttrial Events

The jury found defendant guilty on all charges and found all the special allegations true. Defendant wrote two letters to the court prior to his sentencing hearing. The first, dated December 16, 2009 and file stamped December 21, 2009, requested the court's assistance in obtaining all of defendant's paperwork, including grand jury transcripts, police reports, and Morales's "deal." Defendant complained that he made numerous requests of his appointed counsel for the materials, but had been informed they were too voluminous and the attorney would not pay to have them printed or to have his investigator take the time to "black out addresses [and] phone numbers." Defendant stated it was his understanding that he was entitled to the materials, that he needed the materials before he goes "back up state," and asked the court to "shine some light" on the matter.

The second letter, dated December 23, 2009 and file stamped December 28, 2009, specifically asked for a new trial based on "so many things" that he had asked the attorney and investigator to do. He provided an example, stating there was a "key witness" who would speak on his behalf, but his attorney never contacted the witness, or said the witness could not be located. Defendant stated the witness contacted him through a mutual friend. Defendant complained there were "many other factors of the case" he had wanted his attorney to "point out," but the attorney "never did." He complained that his trial attorney "[did] nothing for [him] at all." He closed by stating that if the court granted him a new trial, he did not want the same attorney to represent him on retrial because his attorney did not give him any paperwork and did nothing he was asked to do.

On January 22, 2010, the date set for sentencing, defense counsel waived arraignment for judgment and sentencing, stated no legal cause existed why sentence should not be pronounced, and did not argue sentencing. The court sentenced defendant

to a determinate term of 32 years in state prison, and consecutive terms of life without the possibility of parole, life with the possibility of parole, and 45 years to life.

II

DISCUSSION

A. *Gang Expert Issues*

Defendant raises a number of arguments in connection with the gang expert's testimony, including ineffective assistance of counsel for failing to object to inadmissible, prejudicial testimony. That issue is discussed separately below. In this section we deal with two areas of the gang expert's testimony. The first involves Reese's testimony that his investigation confirmed certain individuals were present at the party where the shooting occurred. The second concerns Reese's opinion that defendant knew members of UNA engaged in a pattern of criminal gang activity.

In connection with the evidence relating to the shootings on November 18, 2000, the prosecution showed Reese photographs of a number of UNA gang members, including defendant. The prosecutor then asked, "And based on your investigation, were all these individuals present at the scene of the shooting?" Reese said they were. The court ruled the evidence was not admissible and not only struck the answer, it told the jury Reese did *not* know who was at the party. "Obviously Investigator Reese wasn't there, so he couldn't possibly know who was at the party, so disregard that testimony from Investigator Reese." This case does not present a situation for us to reject the assumption that the jury followed the court's instruction and disregarded Reese's answer (*People v. Mills* (2010) 48 Cal.4th 158, 199), even if admission would have violated the Sixth Amendment.

The next area of concern had to do with defendant's knowledge that the UNA criminal street gang was involved in a pattern of criminal conduct as required by section 186.22, subdivision (a), the substantive gang crime. (*People v. Llamas* (2007) 42 Cal.4th 516, 523 [second element of the offense "is 'knowledge that [the gang's]

members engage in or have engaged in a pattern of criminal activity”].) Defendant was charged with violating subdivision (a) of section 186.22 on the date of the murder in 2000, as well as on the date he possessed a firearm in 2009.

Defendant concedes Reese properly testified defendant was an active participant in UNA. Reese was then asked whether he had “an opinion that [defendant] had knowledge of gang members committing a pattern of gang activity?” Reese answered, “Yes.” Shortly thereafter, the prosecutor asked the following question. “As an active participant in 2009, what is your opinion as to whether defendant . . . still had knowledge of UNA gang members engaging in a pattern of criminal activity?” Reese answered, “That he did have knowledge and would have knowledge.” Defendant argues that this testimony “expressly violated” the trial court’s earlier ruling precluding a gang expert from testifying “whether or not [a] specific person would have knowledge of particular events of crime or activity.”

Prior to the introduction of evidence, the court conducted an in limine hearing regarding the permissible extent of gang expert testimony, initiated by the following statement of defense counsel. “Your Honor, at this time I would just make [an Evidence Code section] 402 motion under [*People v.*] *Killebrew* [(2002) 103 Cal.App.4th 644,] that the gang expert is not allowed to testify to the ultimate issue in this case.” When asked what he meant by “the ultimate issue,” defense counsel replied, “whether [defendant] was a member of a gang and whether he participated in this alleged crime in furtherance of the gang activity. . . .”

The prosecutor stated he intended to ask the gang expert whether defendant was an active gang participant on the dates alleged. Defense counsel’s response was: “Your Honor, as long as [the prosecutor] doesn’t try to elicit the question, ‘Was [defendant] doing these crimes in furtherance of that gang?’” Counsel stated he did not believe there was an issue as to whether defendant was or was not a gang member, but

that “[i]t’s just whether or not [defendant] participated in this act, this alleged crime in furtherance of the gang.”

The court expressed its opinion that a properly qualified gang expert may opine whether a defendant was an active gang participant on a given date, and “[w]hat experts cannot do is render opinion on whether or not a particular individual had a specific intent to do anything and whether or not that specific person would have knowledge of particular elements of crime or activity. . . .”

Defendant argues “expert testimony is *not* permitted on the ultimate issue to be decided by the jury.” He is incorrect. “Otherwise admissible expert opinion testimony which embraces the ultimate issue to be decided by the trier of fact is admissible. (Evid. Code, § 805.)” (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 651.) The question is whether an opinion that defendant knew UNA members committed a pattern of criminal activity was proper. It was not, but the error was harmless.

In *People v. Killebrew, supra*, 103 Cal.App.4th 644, a gang-related killing occurred and the police expected one gang to retaliate for the shooting. (*Id.* at pp. 647-648.) The shooters claimed to be East Side Crips. (*Id.* at p. 647.) Police officers saw three cars appear to be driving together in East Side Crip territory. The officers knew one of the 10 males in the vehicles was a member of East Side Crips and stopped one of the cars, a Chevrolet. Approaching the vehicle, a rear seat passenger was observed putting a handgun under the front seat. Other officers were called to stop the two other cars, a Mazda and a Chrysler. Those cars were located at a taco stand nearby. Another firearm was found in a box by the taco stand. Killebrew was not in any of the vehicles when police made contact. He was seen watching the stop of the Chevrolet from a street corner. (*Id.* at pp. 648-649.)

Killebrew was charged with conspiracy to possess the handgun found in the Chevrolet. The prosecution theory was that the threat of retaliation for the earlier

shooting drove the occupants of the vehicles to conspire to possess the handguns, and that all the occupants were active gang members in a criminal street gang. The prosecution attempted to place Killebrew in one of the two cars found at the taco stand, although all eyewitnesses testified Killebrew was not in either of the vehicles. (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 649.) In an effort to establish a conspiracy, a gang expert was permitted to testify that members of the gang would travel in large groups because they were anticipating retaliation, and that all occupants of the three cars would know about the presence of a gun in one of the cars and all the occupants would mutually possess the gun. (*Id.* at p. 652 & fn. 7.)

A qualified gang expert may, when relevant, testify about “the ‘culture and habits’ of criminal street gangs [citation], including testimony about the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant’s membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citation], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations].” (*People v. Killebrew, supra*, 103 Cal.App.4th at pp. 656-657, fns. omitted.) In response to hypothetical questions, the expert in *Killebrew* “testified that each of the individuals in the three cars (1) knew there was a gun in the Chevrolet and a gun in the Mazda, and (2) jointly possessed the gun with every other person in all three cars for their mutual protection. In other words, [the gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle.” (*Id.* at p. 658.) The appellate court found the expert’s testimony “did nothing more than inform the jury how [the gang expert] believed the case should be decided,” was an improper opinion, and should have been excluded.⁴ (*Ibid.*)

⁴ The court also stated the expert’s opinion went to the ultimate issue, but as the court stated earlier in its decision that an expert *may*, when admissible, properly

In the present case, Reese did not render an opinion based on a hypothetical set of facts, however thinly disguised. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1041.) Rather, he testified in no uncertain terms that in his opinion *defendant* knew the UNA gang engaged in a pattern of criminal activity.

The *Killebrew* court reversed the conviction in that matter because the improper gang expert opinion “provided the only evidence” to support the charge. (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 659.) In defendant’s case, however, there was other evidence to support the knowledge element and the error here was harmless. Reese said gang members garner respect from other gang members by “putting in work,” which consists of “assaults, shootings, robberies, [and] carjackings.” The more violent the crime, the more respect is amassed. Active gang participants discuss their criminal activities with each other to increase their respect within the gang. Defendant had claimed membership in UNA since at least 1998, and was an active participant in the gang. This evidence was more than sufficient to support a jury determination that he acquired knowledge of crimes committed by other members of the gang prior to the party in 2000. He was entrenched in the gang culture by the time of the shooting.

Although there were sufficient predicate offenses established prior to the shootings at the party, the shootings themselves could have been used to establish the requisite predicate offenses. (*People v. Gardeley* (1996) 14 Cal.4th 605, 625.) Additionally, the same offenses may be used to establish a “pattern of criminal gang activity.” (*People v. Tran* (2011) 51 Cal.4th 1040, 1046.) Defendant knew of his own acts.

There is even more evidence defendant continued to have that knowledge in 2009. He had twice been arrested for gun possession by that time. On each occasion he

render an opinion involving the ultimate issue (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 651), the fact that the gang expert’s opinion went to the ultimate issue is not what made the opinion improper.

was with another UNA member. Police noted defendant had UNA tattoos across his stomach and on top of his head, marking himself as one of the more hardcore members of the gang. Even while in prison, defendant kept in contact with the gang, calling members to alert them to people talking about the charged murder. The error in permitting Reese to testify defendant personally knew UNA members committed a pattern of criminal activity was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. *Ineffective Assistance of Counsel*

Defendant concedes Reese’s testimony in connection with UNA’s predicate offenses, primary criminal activities, hand signs, and the fact that defendant was an active participant in the gang were all properly admitted. His complaint here is that Reese also testified about prison gangs, specifically the Mexican Mafia and the Nuestra Familia, and that defense counsel was ineffective in failing to object to this evidence.

A criminal defendant has the right to the assistance of counsel under the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This right to counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 428.) There is no “substantive difference between” the federal and state constitutional right to effective assistance of counsel. (*People v. Doolin* (2009) 45 Cal.4th 390, 421.) “To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. (*Strickland [v. Washington]* (1984) 466 U.S. 668,] 687–688, 693; [*People v. Ledesma* [(1987) 43 Cal.3d 171,] 216.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) “Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. [Citation.]” (*Id.* at p. 93.)

“In general, ‘[t]he People are entitled to “introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.” [Citation.]’ [Citation.] ‘[E]ven where gang membership is relevant,’ however, ‘because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it.’ [Citations.] On the other hand, “[b]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” [Citations.]’ [Citation.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.)

Defendant relies on *People v. Albarran* (2007) 149 Cal.App.4th 214, for the proposition that Reese’s testimony about the Mexican Mafia was prejudicial and thus, would have been stricken had counsel objected to its admission. The distinctions between the present case and *Albarran* establish no connection between the two. The *Albarran* court stated the general rule that “evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.]” (*Id.* at p. 223.)

Albarran who belonged to a criminal street gang, and another person, shot at the front of the victim’s residence at 1:00 a.m., while there was a party going on inside and in the backyard. The prosecutor admitted he “had no percipient witness or evidence to prove the crime was gang related or motivated, but instead would be relying on testimony of the sheriff’s gang expert” (*People v. Albarran, supra*, 149 Cal.App.4th at p. 219.) Over Albarran’s objection the expert testified the offenses were gang related because two shooters were involved and the shooting would intimidate people, although he conceded he did not know the reason for the shooting and no direct evidence linked Albarran’s gang to the crimes. (*Id.* at pp. 220-221.)

The jury convicted Albarran of the charged offenses, including attempted murder and shooting at an occupied residence. The jury also found the gang

enhancement true. (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 217, 222.)

Albarran filed a motion for a new trial, arguing the evidence did not support the gang enhancement and the gang evidence should not have been admitted because it was irrelevant and prejudicial. In response to the trial court's statement to the effect that the gang evidence was relevant to establish motive and intent, Albarran's counsel argued there was no evidence of any motive and the gang evidence was used to provide a motive not otherwise supported by any other evidence. (*Id.* at pp. 225-226.)

On appeal Albarran maintained that the gang evidence was irrelevant, prejudicial, and constituted nothing more than "bad character" evidence. (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 222, 225.) During argument to the jury, the prosecutor certainly appeared to use the gang evidence for just that purpose, arguing: "Mr. Albarran has a ton of motive, a ton of motive. He's a gang member. . . . You've seen the tattoos. This shooting happens in his gang area, near his home, near his work. That's what gangsters do. Don't kid yourself. Nobody is—Gangsters, what they do is engage in violent crime and they shoot at people and they shoot at houses. That is what they do. That's how they earn their bones. That's how they move up in gang. That's what they do. He's got a ton of gang motivation to conduct a gang shooting in his own gang area. That's a motive for the crime. He wasn't plucked off the planet somewhere like that. He had a ton of motive to shoot at that house, because that's what gang members do in order to get bragging rights in their own gang, in order to move up in their gang. That's what they do. He's got a ton of motive.'" (*Id.* at p. 222, fn. 4.)

In an attempt to establish Albarran's membership in a gang as a motive for the shooting, the gang expert testified respect for a gang member increases when his identity becomes known to the victims and the neighborhood. The appellate court found the gang evidence insufficient to supply a motive. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 227.) The problem in *Albarran* was that there was a complete lack of evidence the shooters announced their presence or purpose. There was no evidence the

shooters called out anything, much less a gang name or their monikers. And there was no evidence the shooters took credit for the shooting in any manner, such as creating graffiti or bragging about it. And again, the gang expert conceded he did not know the reason for the shooting. (*Ibid.*)

Defendant relies on language in *Albarran* condemning, in the circumstances of that case, the use of gang expert testimony concerning “the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, [that] had no legitimate purpose in [Albarran’s] trial.” (*People v. Albarran, supra*, 149 Cal.App.4th at p. 230.) He first complains about Reese stating a group of investigators discussed “new ‘edicts that are coming down from Eme,’” the Mexican Mafia. At the point that statement was made, Reese was testifying to his expertise. He said he was a member of the Orange County Gang Investigators Association, he had been the president of the association for four years and the vice-president for two years, that anywhere from 80 to 150 law enforcement officers from a number of agencies meet on the first Wednesday of each month, and during these working meetings “you’ll have training either by gang investigators or you’ll have training by the district attorney’s office. You’ll discuss what’s going on throughout the county, where — the problems are beginning, some new gangs that might have popped up, [and] any edicts that are coming down from Eme.” In context, this testimony was foundational, relating only to Reese’s expertise, and was not prejudicial to defendant.

According to Reese, UNA is a unique gang because it involves members of different races and does not have a “predominate race.” He concluded that despite the racial makeup of the gang, it has an Hispanic leaning, as evidenced by the 13 at the end of all its graffiti. Defendant claims counsel should have objected to Reese’s testimony that the 13 indicates a tie with the Mexican Mafia, and thus, if a UNA gang member were to go to prison, he would “tend to align with the Southside people in prison,” rather than Nuestra Familia, a northern California prison gang.

Defendant contends Reese attempted to link UNA to the Mexican Mafia in describing UNA as a nontraditional, not “turf oriented” gang. Again, in context, Reese was testifying to UNA’s beginnings as a gang. In addition to the fact that UNA is unique in having members from a number of races, Reese said the gang is also nontraditional in that it is not “turf oriented.” He stated, “They’re nontraditional. They weren’t formed turf oriented. It’s like a prison gang. I mean, they weren’t formed from the turf. They’re formed nontraditionally.” Reese did not compare UNA to the Mexican Mafia itself. He said UNA is a nontraditional street gang, not tied to turf and in that regard UNA was similar to prison gangs. The clear inference to be drawn from that portion of Reese’s testimony is that prison gangs are not turf oriented either.

In *Albarran* the evidence about the Mexican Mafia and the crimes committed by other members in Albarran’s gang was irrelevant, prejudicial, and used for an improper purpose as bad character evidence. (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 227-228.) The same is not true here. The evidence of the crimes committed by other UNA members was admissible to prove UNA is a criminal street gang, which was relevant. Additionally, because there was evidence gang members brag to each other about crimes they have committed, the evidence was relevant to prove defendant knew the gang committed a pattern of criminal activity, an element of charged allegations. In *Albarran*, the gang expert testified to a wide variety of crimes other members of Albarran’s gang (13 Kings) committed and a number of contacts those other gang members had with police. The expert also testified to threats to kill police officers in 13 Kings’s graffiti. (*Id.* at pp. 227-228.) The court found “[t]he paramount function of this evidence was to show Albarran’s criminal disposition — a fact emphasized in the prosecutor’s closing argument when he argued: ‘[Albarran] is all about being a gang member day in and day out, every day, every night, despite efforts of the deputies He’s all about it.’” (*Id.* at p. 228.) The evidence in the present matter was not used in this improper fashion.

Although it may have been the wiser course to avoid potential prejudice by omitting references to the Mexican Mafia, this evidence did not prejudice defendant. As stated above, the first reference to the Mexican Mafia was made in connection with the meetings of the gang investigators association. Reese said these were working meetings where the investigators discuss recently obtained intelligence, including Eme's recent edicts. This evidence was foundational to establishing his expertise and did not implicate defendant in any manner.

Other than UNA's use of the number 13 in its graffiti, the references to the Mexican Mafia had to do with it being a prison gang. Testimony about the conflict in prisons between the Mexican Mafia and the Nuestra Familia was irrelevant. However, the testimony about conflicts in prison was limited in its duration and the use of evidence was not exploited as it was in *Albarran*, where the prosecutor used references to the Mexican Mafia in his argument to the jury in arguing Albarran's character. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 228.) Any error in admitting testimony about the Mexican Mafia was harmless under any standard.

Because admission of the evidence was harmless, defendant's ineffective assistance of counsel claim must be denied for his failure to show prejudice from the alleged error of failing to object. An appellate court need not address both prongs of an ineffective assistance claim if the defendant failed to make an adequate showing as to either prong. In other words, if the defendant fails to establish the prejudice prong, the claim may be resolved on that basis alone. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

C. Sufficiency of the Evidence

The jury found defendant guilty of active gang participation (§ 186.22, subd. (a)) as charged in count six of the indictment. This violation was found to have occurred on January 9, 2009. The felonious conduct necessary to a conviction for active

gang participation was defendant's possession of a firearm on January 9, 2009, there having been no evidence of any other felonious conduct on that date. Defendant contends that although the jury could depend upon Reese's opinion that defendant was an active participant in a criminal street gang, the evidence did not support the remaining elements of the offense, i.e., that defendant had knowledge of a pattern of criminal activity and that he committed the underlying felony "with the specific intent to either further that pattern or otherwise benefit the gang." In his supplemental opening brief defendant adds that the conviction must be reversed because defendant acted alone and could not violate section 186.22, subdivision (a) when acting alone.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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." [Citation.] (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We must accept all assessments of credibility made by the trier of fact, then determine if substantial evidence exists to support each element of the enhancements. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

A violation of section 186.22, subdivision (a) "is established when a defendant actively participates in a criminal street gang with knowledge that the gang's members engage or have engaged in a pattern of criminal activity, and willfully promotes, furthers, or assists in *any* felonious criminal conduct by gang members." (*People v. Albillar* (2010) 51 Cal.4th 47, 54.) We first address defendant's argument that

a gang participant acting alone cannot be found guilty of this offense. Another panel of this court recently rejected this argument. In *People v. Gonzales* (2011) 199 Cal.App.4th 219, the court upheld a conviction for active gang participation based upon the defendant's possession of methamphetamine for personal use and possession of a firearm. Relying on decisions in *People v. Sanchez* (2009) 179 Cal.App.4th 1297, *People v. Salcido* (2007) 149 Cal.App.4th 356, and *People v. Ngoun* (2001) 88 Cal.App.4th 432, the *Gonzales* court concluded the Legislature "intended to punish *any* felonious criminal conduct by an active gang participant who knows the gang's members engage in or have engaged in a pattern of criminal gang activity. (*People v. Gonzales, supra*, 199 Cal.App.4th at p. 232, italics added.) The court concluded "someone can 'promote' or 'further' felonious criminal conduct by acting alone, without assistance or participation by others. The Legislature surely did not intend for an active gang participant committing a felony alone to be punished less harshly than an active gang participant assisting such felonious conduct." (*Id.* at p. 231.) Accordingly, we reject defendant's contention that his felony possession of a firearm cannot support his conviction for active participation in a criminal street gang.

The evidence supports the jury's determination defendant had knowledge of UNA gang members' pattern of criminal activity. Reese testified that active members brag to each other about the crimes they have committed in order to increase their respect within the gang. Defendant admits the evidence was sufficient to establish he was an active participant in UNA. Moreover, defendant knew about his own crimes, which not only included the shootings at the party in November 2000 (see § 186.22, subds. (e)(1), (e)(3)), but also his possession of the firearm after having been convicted of a felony (see § 186.22, subd. (e)(31)).

Contrary to defendant's contention, the crime of active participation in a criminal street gang does not require a defendant specifically intend to further the pattern of gang activity or promote the gang. "The gang enhancement under section

186.22(b)(1), *unlike* the offense of active participation in a criminal street gang, punishes the commission of a crime with a particular intent, purpose, or state of mind.” (*People v. Gonzales, supra*, 199 Cal.App.4th at p. 233, italics added.) “Senate Bill No. 1555 (1987-1988 Reg. Sess.) (Senate Bill No. 1555), the bill that was chaptered as Statutes 1988, chapter 1256, eventually enacted the first Penal Code section 186.22, included in its original form a gang-related-activity requirement The original bill created a separate offense for ‘[a]ny person who actively conducts or participates, directly or indirectly, in any gang, with the specific intent to promote or further any of its criminal *gang-related activity* or to assist in continuing its pattern of criminal *gang-related activity*. . . .’ (Sen. Bill. No. 1555, as introduced Mar. 6, 1987, § 1, p. 5, italics added [proposing Pen. Code, § 186.13, subd. (a)].) When amended to consolidate the substantive gang offense and create a separate enhancement on May 22, 1987, the italicized language was deleted throughout. The amended bill added a new section 186.22 to the Penal Code, which provided that ‘[a]ny person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity’ was guilty of a felony if the person ‘willfully promotes, furthers, or assists in *any* criminal conduct by gang members or participants,’ and provided for an alternative felony-misdemeanor ‘wobbler’ if the person has ‘the specific intent to promote, further, or assist in *any* criminal conduct by its members or participants.’ (Sen. Bill No. 1555, as amended May 22, 1987, § 1, pp. 10-11, italics added.) Subsequent amendments deleted the specific intent requirement, deleted the reference to ‘participants,’ and added the word ‘felonious’ to the ‘criminal conduct’ that was promoted, furthered, or assisted, so that the definition of the gang offense, a wobbler, read (as the current version of § 186.22(a) still reads): ‘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’ (Sen. Bill No. 1555, as amended June 23, 1987, § 1, pp. 5-6; former § 186.22(a), as enacted by Stats. 1988, ch. 1256, § 1, p. 4179, repealed and reenacted by Stats. 1989, ch. 930, §§ 5, 5.1, pp. 3251, 3253.)” (*People v. Albillar, supra*, 51 Cal.4th at pp. 56-57.)

To violate section 186.22, subdivision (a), an accused must actively participate in a criminal street gang with knowledge that members of the gang have engaged in a pattern of criminal activity. Additionally, the accused must “willfully” further, promote, or assist “any felonious criminal activity” by members of the gang. (§ 186.22, subd. (a).) “Willfully” does not require a specific intent. “The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require an intent to violate law, or to injure another, or to acquire any advantage.” (§ 7, subd. 1.) The section does not require a specific intent to promote, further or assist in criminal conduct by gang members. The evidence was sufficient to support the conviction in count six of the indictment.

D. *Jury Instruction Issues*

1. *Identity of the Killer*

The court instructed the jury that the defendant could not be convicted of any crime based on the defendant’s statements alone, but that “[t]he identity of the person who committed the crime . . . may be proved by the defendant’s statements alone.” (CALCRIM No. 359.) Defendant contends his statements could not support proof beyond a reasonable doubt that he was the shooter and therefore his murder and attempted murder convictions must be reversed.

Two statements were attributed to defendant. The first was made immediately after the shooting when defendant, Gilbert (an individual Hernandez said “hung out” with UNA) and Losoya, who Reese said is an active member of UNA, met up

with Hernandez and Carlos at the car. Defendant got into the car and said, “my shit (gun) jammed.” The other statement was made a week or two later when Morales was given a gun used during the shootings. Defendant told Morales the gun was “dirty” and should be disposed of.

The court did not err in instructing the jury. As defendant points out, the defense was defendant *was not at the party* and thus could not have been the shooter. Defendant’s statement that his gun jammed was made immediately after the party and was made to others who had just run from the party where the shootings took place. The statement circumstantially placed defendant at the party with a gun and, at a minimum, attempting to shoot someone. Hernandez testified that after hearing defendant make the statement, he saw defendant with something underneath his sweatshirt. Had defendant’s statements been the evidence the jury relied to find defendant was the shooter — rather than the testimony of the witnesses who saw him shoot Olvera — it would have supported the convictions. There is no likelihood the jury interpreted the instruction, permitting it to find defendant was the shooter based on his statements, as authorizing a conviction on less than proof beyond a reasonable doubt. This is especially true given the very next sentence in the instruction provided: ““You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.””

2. *Motive*

Defendant was charged with active participation in a criminal street gang on the date of the shooting and on the date he was found in possession of a firearm. He contends that as those offenses required the jury to determine *why* he shot and *why* he possessed a firearm on the charged dates, it was error for the court to instruct the jury that the prosecution did not have to prove defendant’s motive for committing those offenses.

The court instructed the jury pursuant to CALCRIM No. 370, as follows: ““The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the

defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.” Defendant argues the substantive gang offense alleged in counts four and six required the prosecution to prove his motive for committing the felony that serves as an element of the gang offense,⁵ and that by instructing the jury pursuant to CALCRIM No. 370, the court lessened the prosecution’s burden of proof as to the substantive gang offenses. No case has so held. Indeed, the law is to the contrary.

This same argument was raised and rejected in *People v. Fuentes* (2009) 171 Cal.App.4th 1133, where the court held “[a]n intent to further criminal gang activity is no more a ‘motive’ in legal terms than is any other specific intent.” (*Id.* at p. 1139.) After initially noting a premeditated murderer’s intent to kill is not considered “a ‘motive,’ though his action is motivated by a desire to cause the victim’s death” (*ibid.*), the court acknowledged that “[a]ny reason for doing something can rightly be called a motive in common language, including—but not limited to—reasons that stand behind other reasons. For example, we could say that when A shot B, A was motivated by a wish to kill B, which in turn was motivated by a desire to receive an inheritance, which in turn was motivated by a plan to pay off a debt, which in turn was motivated by a plan to avoid the wrath of a creditor.” (*Id.* at p. 1140.)

Neither is an intent to steal considered to be a motive for purposes of robbery. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) But just as an intent to kill is not a motive for purpose of determining whether a defendant has committed a murder and an intent to steal is not a motive for purposes of robbery (*ibid.*), an intent to actively participate in a criminal street gang is not a “motive” that must be found by the jury

⁵ The third element of a violation of section 186.22, subdivision (a) is that the defendant “willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: [¶] a. directly and actively committing a felony offense; [¶] OR [¶] b. aiding and abetting a felony offense.” (CALCRIM No. 1400.)

before it may find a defendant committed a felony with the intent to participate in a criminal street gang. As the Supreme Court found in *Hillhouse*, motive and intent “‘are separate and disparate mental states. The words are not synonyms. . . .’” Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent” (*Ibid.*)

Defendant’s attempt to analogize the substantive gang offense to the financial gain special circumstance (§ 190.2, subd. (a)(2)) is unconvincing. The special circumstance requires an intent *and* a motive for the murder. The special circumstance applies when “[t]he murder was intentional *and* carried out for financial gain.” (§ 190.2, subd. (a)(1), italics added.)

“[M]otive is not an element of any crime” (*People v. Daly* (1992) 8 Cal.App.4th 47, 59.) The one exception to this statement is a violation of section 647.6. That section punishes individuals who engage in prohibited conduct “*motivated* by an unnatural or abnormal sexual interest in children” (§ 647.6, subd. (a)(2), italics added.) Recognizing the general rule, the court in *People v. Maurer* (1995) 32 Cal.App.4th 1121 declared “section 647.6 is a strange beast.” (*Id.* at p. 1126.) “[I]t applies only to offenders who are *motivated* by an unnatural or abnormal sexual interest or intent.’ [Citation.]” Because section 647.6 specifically required proof of an unnatural or abnormal sexual interest of the defendant as the motivation for the prohibited touching, the general motive instruction was at odds with the instruction on the elements of a section 647.6 violation. (*Id.* at p. 1127.) Unlike section 647.6, however, section 186.22, subdivision (a) does not require a motive behind the requisite intent. Accordingly, we find the court did not err in instructing the jury pursuant to CALCRIM No. 370.

E. Defendant’s Posttrial Letters

After trial and before sentencing defendant wrote two letters to the court. He stated in the first letter that he needed certain documents (the police reports, grand

jury transcripts, the indictment, and papers dealing with his codefendant's "deal") before he "go[es] back up state." The letter represented defendant had asked his attorney for the materials and the attorney responded there were 12,000 pages of materials, he was not going to pay to have copies made or to have his investigator go through the 12,000 pages to excise addresses and telephone numbers,⁶ and if defendant wanted the materials his family would have to pay for them. The second letter requested that the court grant defendant a new trial based on trial counsel's conduct and appoint a new attorney *if* the court grants a new trial. "If you grant me a new trial, I don't want the same lawyer" Based on these letters, defendant argues the court had a duty under *People v. Marsden*, *supra*, 2 Cal.3d 118, 125-126, to inquire as to specifics of defendant's complaint about counsel's performance.

The rule under *Marsden* is well settled. "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.)

There are thoughtful, persuasive cases that support defendant's position. (See *People v. Mendez* (2008) 161 Cal.App.4th 1362, 1365-1368 [defendant's oral motion for new trial based on ineffective assistance of counsel triggered duty to inquire

⁶ "Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed to a defendant, . . . the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause." (§ 1054.2, subd. (a)(1).)

under *Marsden*]; *People v. Eastman* (2007) 146 Cal.App.4th 688, 695-696 [letter complaining about attorney and requesting an “adequate defense” triggered duty to inquire under *Marsden* although defendant did not expressly ask to have counsel replaced].) However, as pointed out in *People v. Richardson* (2009) 171 Cal.App.4th 479, 485, these cases did not consider the effect of the Supreme Court’s decision in *People v. Dickey* (2005) 35 Cal.4th 884 (*Dickey*). As we explain below, *Dickey* compels our conclusion that defendant’s letters did not trigger the court’s duty to make inquiry under *Marsden*.

Dickey was found guilty of capital murder. (*Dickey, supra*, 35 Cal.4th at p. 894.) Prior to the penalty phase of the trial, Dickey’s trial attorney informed the court Dickey desired an attorney appointed to prepare a new trial motion based on ineffective assistance of counsel, as well as other grounds. (*Id.* at p. 918.) The trial court addressed Dickey and mentioned *Marsden*, making erroneous statements about when *Marsden* motions may be heard. (*Id.* at pp. 918-919.) The court informed Dickey that new counsel would be appointed for the possible preparation of a new trial motion after the penalty phase. (*Id.* at p. 920.)

The Supreme Court found the trial court did not commit *Marsden* error. The court reiterated that *Marsden* does not require a formal motion, but stated ““there must be ‘at least some clear indication by defendant that he wants a substitute attorney.’” [Citations.]’ [Citation.]” (*Dickey, supra*, 35 Cal.4th at p. 920.) The court found no *Marsden* error because, while Dickey made known his desire to have different counsel appointed for purposes of a new trial motion, he “did *not* clearly indicate he wanted substitute counsel appointed for the penalty phase.” (*Ibid.*; accord *People v. Gay* (1990) 221 Cal.App.3d 1065, 1069-1071 [motion for new trial filed in propria persona and alleging ineffective assistance of counsel does not trigger an obligation to conduct a *Marsden* hearing absent a request for substitute counsel].) In the present case, defendant made known his desire to have different counsel appointed *if* the court granted him a new

trial, but applying *Dickey*, he did not clearly indicate a desire for different counsel at any point prior to the court actually granting him a new trial.

After this matter was submitted, our Supreme Court issued its decision in *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*). We invited the parties to address the application of *Sanchez* and have considered their briefs submitted in response. At issue in *Sanchez* was the practice of some trial courts to appoint an attorney to investigate whether a defendant had been adequately represented by his or her appointed counsel. In *Sanchez*, the defendant pled guilty to cultivation of marijuana and admitted violating probation in two other cases for a sentence of 32 months in state prison. (*Id.* at p. 84.) When the matter was back in court for sentencing, Sanchez's deputy public defender told the court Sanchez wanted the public defender to "explore having his plea withdrawn." When the court inquired whether the public defender could do that or whether substitute counsel was required, the deputy stated new counsel could not be appointed unless the court found appointment necessary under *Marsden*. (*Id.* at p. 85.) Rather than conduct a *Marsden* hearing, the court appointed substitute counsel "for the sole purpose of looking into the motion to withdraw [Sanchez's] plea." (*Ibid.*)

The Supreme Court found that procedure improper. The trial court is obligated to make the determination whether a defendant has been rendered ineffective assistance of counsel, not substitute counsel. (*Sanchez, supra*, 53 Cal.4th at pp. 89-90.) The Supreme Court agreed the Court of Appeal correctly concluded "the trial court's duty to conduct a *Marsden* hearing was triggered by defense counsel's request for appointment of substitute counsel to investigate the filing of a motion to withdraw [the] plea on Sanchez's behalf." (*Id.* at p. 90, fn. 3.)

In addressing its earlier decision in *Dickey*, the Supreme Court stated the defendant in *Dickey* sought substitute counsel for a future proceeding (a new trial motion) and did not seek to discharge his attorney for the next phase of the trial (the penalty phase of the capital trial). (*Sanchez*, 53 Cal.4th at p. 91.) By analogy, defendant did not seek to

discharge his attorney for purposes of a new trial motion or sentencing. He sought to have new counsel appointed *if* the court granted a new trial. Since the court did not grant a new trial, we conclude it did not commit *Marsden* error.

Lastly, defendant contends the trial court's failure to rule on his motion for a new trial requires the matter be remanded. Under section 1202, a defendant is entitled to a new trial "[i]f the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation." Defendant's second letter to the court specifically requested a new trial. The basis for granting a new trial was purported to be the conduct of his trial attorney. Defendant alleged in the letter there was a "key witness" who should have testified on his behalf, but that his attorney did not contact the witness, "or said" the witness could not be located. The letter stated the witness "has made contact with [defendant] through a mutual friend," but it does not indicate who the witness is or what the witness's testimony would have been. Defendant's letter asserted there were "many other factors of the case" his attorney failed to "point out" after being requested. We deem defendant's letter to have been a motion for a new trial.

The second letter was filed 30 days before defendant's sentencing. The court did not rule on the motion. As there is no evidence in the record indicating the contrary, we conclude the court's failure to rule on the motion was inadvertent. As a general rule, "a party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error of omission was inadvertent. [Citations.]" (*People v. Braxton* (2004) 34 Cal.4th 798, 813-814.) The reason for this rule is that "[i]n the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them." [Citations.]" (*Id.* at p.

814.) This rule applies when it the trial court’s failure to rule on a new trial motion appears to have been inadvertent. (*Id.* at p. 813.)

Defendant forfeited this issue by not raising the matter of a new trial when he appeared in court at sentencing, his only court appearance after having mailed the letters to the court. The only words spoken by defendant on the day of his sentencing were “Yeah, I’ll waive that right,” when asked whether he wanted to be present for a subsequent restitution hearing, and “No,” when asked if he had any questions about how to file an appeal. There is no indication his attorney knew of the existence of the letters, so the onus of raising the issue cannot be shifted to him.

Defendant is not left without a remedy. He asserts that the new trial motion “was based solely on ineffective assistance of counsel.” He may bring a petition for a writ of habeas corpus if he has evidence that counsel’s performance violated his Sixth Amendment rights.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.