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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.

HUGO FLORES,

Defendant and Appellant.

G044509

(Super. Ct. No. 08NF3176)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge.
Affirmed in part, reversed in part, and remanded.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Meredith S. White and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant was convicted of four counts relating to an incident during which he pointed a gun at a police officer and pulled the trigger. He was sentenced to a total term of 38 years and eight months to life. Defendant asserts: 1) the evidence was insufficient to support his conviction for attempted murder; 2) numerous errors with respect to his conviction for street terrorism (Pen. Code, § 186.22, subd. (a)),¹ including a

¹ Subsequent statutory references are to the Penal Code unless otherwise indicated.

claim that his consecutive eight-month sentence on this count should have been stayed pursuant to section 654; 3) this court should review the in camera materials regarding the police officers' personnel records; and 4) ineffective assistance of counsel. We agree with defendant's contention that the eight-month consecutive sentence for street terrorism should have been stayed, but find no other error. We therefore remand for resentencing consistent with this opinion and affirm in all other respects.

I

FACTS

At approximately 12:40 a.m. on September 27, 2008, Fullerton Police Department Gang Unit Detectives Jonathan Radus and Hugo Garcia were patrolling an area claimed by the Wicked Minds street gang. They were driving a black unmarked pickup truck, the city's primary gang suppression vehicle. The detectives drove this vehicle on a regular basis. While doing so, they regularly contacted suspected gang members. The detectives were wearing black polo shirts with a police patch on the front, and the word "POLICE" across the back in four-to-five-inch-high white letters. They also wore standard issue police belts. Both the driver's and passenger's front windows were rolled down as they patrolled.

As the detectives were slowly driving through the area, they saw defendant cross the street ahead of them. Radus recognized the defendant from prior contacts, but did not recall his name. Both detectives thought defendant might be underage and in violation of curfew.²

As the detectives came to a stop under a streetlight, defendant began running across the street. The detectives exited the vehicle, and Garcia called out to defendant to stop and "come here." Defendant did not do so, but put his left hand over

² Defendant was a few months past his 18th birthday on the night of the incident.

his face and raised his right hand toward the detectives' vehicle. Garcia saw an object in defendant's hand, but did not know what it was.

The detectives then pursued defendant. Garcia went around the front of a parked truck and saw defendant standing with his hands clasped together and pointed at him. A bandana covered the object defendant was holding. Garcia then heard three clicking sounds, which he believed was a gun clicking. Garcia took his weapon from his holster and defendant again fled. Radus, who had been running around the truck while defendant confronted Garcia, saw defendant running ahead of him. He heard Garcia call out that defendant had a gun and had tried to shoot him.

Both detectives continued to pursue defendant, who ran through surrounding alleys. Radus yelled at defendant to drop the gun, and then saw defendant drop what appeared to be a gun in a bandana. Eventually, Radus caught up with Flores and was able to take him to the ground.³

After his arrest and receiving warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, defendant was interviewed at the police station. He admitted being a Wicked Minds gang member who had been jumped in approximately 18 months earlier, and that his gang moniker was "Sly." He denied recognizing the detectives were police officers.

Subsequent investigation revealed that defendant had prior contacts with other police officers as well as Garcia and Radus. Approximately a month earlier, defendant had received a notice under the California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20, et seq.) from an officer in Placentia. About 10 days prior to his arrest, Garcia had interviewed defendant as a witness to a shooting, and at that time defendant admitted his gang membership to Garcia.⁴ Radus had contacted

³ Defendant sustained minor injuries that were treated at a hospital after his arrest.

⁴ Indeed, Garcia had initially believed defendant was a different Wicked Minds member when he saw him on the street the night of defendant's arrest.

defendant on the street a few weeks earlier as well. A few days before his arrest, another Fullerton officer had contacted defendant along with another Wicked Minds gang member, and defendant admitted his membership in the gang.

Defendant was charged with four counts. Count one alleged the attempted murder of Garcia (§ 664, subd. (e), § 187 subd. (a), count one), along with four accompanying allegations: premeditation and deliberation, that defendant knew or should have known that Garcia was a police officer, the personal use of a firearm (§12022.53, subd. (b)), and a street gang enhancement (§ 186.22, subd. (b)(1)). Counts two and three alleged assault with a firearm on a peace officer (§ 245, subd. (d)(1)), and also alleged the personal use of a firearm (§ 12022.53, subd. (b)) and street gang enhancements (§ 186.22, subd. (b)(1)). Count four alleged street terrorism (§ 186.22, subd. (a)).

Prior to trial, defendant filed discovery requests for information regarding Garcia and Radus, pursuant to Evidence Code section 1043 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). The motions sought to discover information regarding complaints of excessive force, dishonesty, aggressive conduct, unnecessary violence, and other related subjects. The Fullerton Police Department opposed. The court conducted an in camera hearing, prior to which defense counsel agreed to limit the scope of the hearing to excessive force and dishonesty. Following the hearing, the court ordered limited disclosure of a list prepared by the Fullerton Police Department, which was sealed and given to defense counsel.

Testimony was heard from various witnesses at trial, including Thomas Matsudaira, a firearm examiner at the Orange Country crime laboratory. He examined the gun recovered the night of defendant's arrest. The gun was a six-shot revolver which had been loaded with five cartridges. He testified that to fire the revolver, the hammer had to be pulled manually back, and pulling the trigger released the hammer. Two clicks

would normally be heard, but if the gun did not fire properly, a third click would be heard as the hammer fell back. Matsudaira also testified that a light firing impression had been found on one of the revolver cartridges inside defendant's gun, which could have been caused by a failed attempt to fire the gun. An object, such as a bandana, might have impeded the gun's ability to fire properly.

Detective Vincent Mater of the Fullerton Police Department testified as a gang expert. We will discuss his testimony in more detail *post*.

Defendant also testified on his own behalf. He admitted to smoking methamphetamine on the night of his arrest. He stated he did not recognize the detectives' vehicle as a police car, blaming his poor eyesight, but heard someone yell "come here." Defendant said he ran because he was afraid of who was in the vehicle. He admitted he was carrying the gun wrapped in a bandana, stating he had found it under a dumpster about a week earlier. He denied pointing the gun at either detective, or attempting to fire it at Garcia. He did not remember speaking to the detectives that night, and he said another officer had punched him in the jaw and he woke up in a jail cell. Defendant denied being a member of the Wicked Minds gang, knowing any gang members, or ever admitting he was a gang member to any officer. He stated he had signed the STEP Act notice, but had not had the opportunity to read it before he signed it.

Several character witnesses also testified on defendant's behalf, stating, among other things, that he was not in a gang or a violent person. Family members were not aware of defendant's drug use.

At the conclusion of trial, the jury found defendant guilty of attempted murder (count one) and found true the allegations that defendant knew or should have known the victim was a police officer, acted with premeditation and deliberation, and personally used a firearm. On counts two and three, the jury found defendant guilty of the lesser included offense of assault with a firearm, and found true the allegation that

defendant personally used a firearm. The jury found the gang enhancement not true on counts one through three. On count four, street terrorism, defendant was found guilty.

Defendant was sentenced to 15 years to life on count one, plus a 10-year enhancement for the personal use of a firearm. Defendant also received a determinate sentence of 13 years and eight months on the remaining counts, comprised of a consecutive three-year term plus a 10-year firearm enhancement on count two, a concurrent three-year term plus a 10-year firearm enhancement on count three, and a consecutive eight-month sentence on count four. In sum, defendant was sentenced to 38 years and eight months to life. He now appeals.

II

DISCUSSION

A. Sufficient Evidence of Attempted Murder

Defendant argues that the evidence was insufficient to sustain his conviction for attempted murder, claiming that his attempt to fire the loaded revolver was frantic and impulsive. He also argues his poor vision and recent drug use impacted his ability to see that Garcia was a police officer. “Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) The standard of review is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.)

1. Premeditation and Deliberation

Throughout his argument on this point, defendant essentially argues the evidence could have supported a contrary finding in his favor. But before a verdict may

be set aside for insufficiency of the evidence, a party must demonstrate “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Defendant’s arguments do not clear this high bar.

“Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]’ [Citation.]” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1463.)

“Proof of deliberation, premeditation and willfulness may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion. [Citations.]” (*People v. Brubaker* (1959) 53 Cal.2d 37, 40.) “‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.] ‘The process of premeditation . . . does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041,1080.)

The categories of evidence relevant to premeditation and deliberation are often called the *Anderson* factors. (*People v. Anderson* (1968) 70 Cal.2d 15.) Those factors, broadly speaking, are planning activity, motive, and the manner of killing. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) The factors are pertinent, but not exclusive or determinative. (*People v. Silva* (2001) 25 Cal.4th 345, 368.)

Here, the evidence showed that defendant was carrying a loaded weapon on the street for several hours, a fact relevant to planning. From possession of a weapon, the jury can infer an intent to use the gun to kill. (See *People v. Young* (2005) 34 Cal.4th 1149, 1183 [possession of gun demonstrates defendant “‘considered the possibility of murder in advance’ and intended to kill”].) Defendant argues the gang expert testified that gang members often carry guns to protect the gang’s turf, but that does not negate the inference that one who carries a gun is prepared to use it.

Respondent argues defendant’s act of concealing himself behind the box truck could also indicate planning, and we agree. Garcia came around the corner of the truck, and defendant appeared to be waiting for him. Defendant then fired the gun. Because defendant fired after concealing himself, as opposed to, for example, while fleeing, a jury could reasonably infer that he decided to wait and shoot Garcia. Planning, in the context of premeditation and deliberation, does not require a long period of time. It is the extent of the reflection that matters, and the jury could reasonably determine that defendant’s decision to conceal himself constituted such reflection. (*People v. Koontz, supra*, 27 Cal.4th at p. 1080.)

Motive evidence includes “facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim” (*People v. Anderson, supra*, 70 Cal.2d at p. 27.) Mater, the gang expert, opined that a gang member who kills a police officer would gain an enormous amount of respect. He also testified that gang members had a “rule” that if confronted by a police officer, the gang member should, if armed, kill the police officer to prevent retaliation if that gang member finds himself incarcerated. These were facts from which the jury could reasonably infer motive to kill on defendant’s part.⁵

⁵ We reject defendant’s argument that because the jury found the gang enhancement on the attempted murder count to be not true, the jury must have concluded defendant’s motive was not gang related. We do not know the reason the jury found the enhancement not true, and it is therefore irrelevant.

Finally, the manner of the attempted murder supports the jury's finding of premeditation and deliberation. Defendant was only a few feet away from Garcia, and pointed the weapon at his chest and head. Both the distance and aim of a weapon can support the conclusion that defendant's act was premeditated and deliberated. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 422; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552.) Further, the testimony about the gun showed that defendant was required to pull the hammer back before pulling the trigger. This also supports the inference that defendant made a deliberate, rather than impulsive, decision to fire the gun. Taken together, the evidence was sufficient for the jury to conclude that defendant committed the attempted murder with premeditation and deliberation.

2. *Knowledge that Garcia was a Police Officer*

Defendant also argues that the evidence was insufficient to establish that he knew or should have known that Garcia was a police officer. Defendant, however, views the facts in the light most favorable to his own argument. When viewed in the light most favorable to the judgment, as we are required to do on appeal (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1382), the evidence is sufficient to support the jury's finding.

Defendant contends that he has poor vision and he was not wearing his glasses the night of his arrest. Further, he had smoked methamphetamine shortly before the incident. The detectives were in an unmarked vehicle, not wearing uniforms, and they did not shout "police" during the chase. But there was also evidence that detectives patrolled the area, which is where defendant lives, in the unmarked vehicle "almost daily" and "two to three times a night." The jury could reasonably have found that due to its frequent presence, defendant was familiar with it as a gang suppression vehicle.

The jury could also have found that defendant recognized the detectives because he had prior contacts with both of them. Garcia had interviewed defendant as a

witness in another case for about 30 minutes some 10 days prior to the incident. The interview occurred at the police station, and Garcia wore the same gang suppression clothing that he wore the night of defendant's arrest. Radus had also contacted defendant on the street a few weeks earlier.

Further, the jury could have found that if defendant did not recognize the detectives as police when he first saw them and fled, he recognized Garcia as a police officer before he fired the gun. At that time, defendant was six to eight feet from the detective, who was wearing a shirt with a police emblem on it as well as a gun belt. Even if the jury believed defendant's testimony regarding his poor eyesight, which they were not required to do, defendant testified he did not always wear his glasses, and would sometimes, for example, play soccer without them. The jury was entitled to believe that if defendant could see well enough to play soccer without his glasses, he could recognize a police officer standing six to eight feet in front of him. There was substantial evidence to support the jury's finding that defendant knew or should have known Garcia was a police officer.

B. Street Terrorism Issues (Count Four)

Defendant raises a number of issues relevant to his conviction for street terrorism. We address each in turn.

1. Gang Expert's Testimony

We begin with defendant's challenges to the testimony of Detective Mater, the gang expert. Defendant claims the expert exceeded the permissible scope of expert testimony, violating his constitutional rights.

The standard of review for evidentiary issues is well-settled. “Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.” (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Even where evidence has been erroneously excluded or admitted, the judgment or decision shall not be reversed unless the reviewing court believes the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.)

Among other things, Mater testified as to crimes committed by members of Wicked Minds in order to establish that it was a criminal street gang within the meaning of section 186.22, subdivision (f). Prior to offering any opinions, Mater testified as to his experience and qualifications as a gang expert. (Those qualifications were not challenged below, and defendant does not challenge them on appeal). Mater stated he had spoken to at least “hundreds” of gang members about their habits and culture. He gathered information about gang activities from both his own and other law enforcement agencies.

With respect to Wicked Minds, Mater stated they had been in existence since 2003 or 2004, and had approximately 20 to 25 members. The gang had a specific sign and symbols used in graffiti, and claimed specific turf in Fullerton. Defendant’s crimes had taken place within gang territory. Mater testified that based on investigations he had been involved in or heard about, his opinion was the primary activities of Wicked Minds were attempted murders, assault with deadly weapons, and felony vandalism. Mater then testified about specific crimes involving Wicked Minds, including shootings in January and April 2007, and persistent vandalism involving gang signs “at least monthly.”

Defendant first argues that Mater’s testimony about gang crimes was outside the scope of proper opinion testimony (Evid. Code, § 801, subd. (a)) because an average juror can decide whether a crime was committed without expert testimony. Only after such evidence has been admitted, defendant argues, should a gang expert be

permitted to opine as to whether the crime was committed by a member of a particular gang. We disagree, and defendant cites no California case supporting this theory.

“The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.]” (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1371.) “Gang sociology and psychology are proper subjects of expert testimony” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1120.) Taken as a whole, Mater’s testimony about gang crimes was outside the knowledge of a lay juror.

Further, as long as an expert’s testimony is reliable, “even matter ordinarily inadmissible, such as hearsay, can form the proper basis for an expert’s opinion testimony. [Citation.] Thus, a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies. [Citations.]” (*People v. Hill, supra*, 191 Cal.App.4th at pp. 1121-1122.)

Defendant also argues that allowing the gang expert to testify about other crimes committed by Wicked Minds members violated his constitutional rights. We disagree. Mater’s testimony was supported by a proper foundation, used hearsay for proper purposes, and was subject to cross-examination. (See, e.g., *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) We therefore find no constitutional violation.

2. *Sufficiency of the Evidence*

Defendant first argues that the evidence is insufficient to sustain his conviction under section 186.22, subdivision (a), the street terrorism statute.⁶ As we discussed *ante* with respect to the evidence on the attempted murder count (see section II.A), our review of sufficiency of the evidence claims is quite limited. (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1382.)

The STEP Act (§ 186.20, et seq.) criminalizes specified acts when committed in connection with a criminal street gang. The statute provides: “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” (§ 186.22, subd. (a).)

a. “Promotes, furthers or assists”

Defendant argues there was insufficient evidence of that his actions “promot[ed], further[ed], or assist[ed]” Wicked Minds. “The gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang. . . . Accordingly, the Legislature determined that the elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related.” (*People v. Albillar* (2010) 51 Cal.4th 47, 55-56 (*Albillar*).)

⁶ Both parties discuss cases on related issues pending before the California Supreme Court. We remind the parties that noncitable cases are just that. These cases are depublished, under review, and therefore of no use to us in resolving defendant’s appeal. They should not have been cited, except, perhaps, for the limited purpose of pointing out the Supreme Court’s pending review.

Defendant's argument on this point appears to be that he did not promote, further or assist in any felonious criminal conduct by any other member of his gang. While we recognize that issues related to this one are pending before the California Supreme Court, we rule in light of the current state of the law. There is no requirement that the conduct subject to section 186.22, subdivision (a) be the work of more than one gang member, or gang related. In a number of cases, courts have held that section 186.22, subdivision (a) applied to a defendant acting as sole perpetrator of the crime. (*People v. Ngoun* (2001) 88 Cal.App.4th 432; *People v. Salcido* (2007) 149 Cal.App.4th 356; *People v. Sanchez* (2009) 179 Cal.App.4th 1297.) Thus, given defendant's actions as a gang member in gang territory, there is sufficient evidence to uphold the street terrorism conviction. We disagree with defendant's reading of *Albillar* that section 186.22, subdivision (a) requires either aiding and abetting or acting in concert with or by another gang member.

b. Knowledge of gang activities

Defendant also claims there was insufficient evidence that he knew Wicked Minds engaged in or has engaged in a pattern of gang activity. As we noted above, such knowledge is one of the three elements necessary for a conviction under section 186.22, subdivision (a). (*Albillar, supra*, 51 Cal.4th at pp. 55-56.) To prove such knowledge, reliance on circumstantial evidence is permissible. (*People v. Carr* (2010) 190 Cal.App.4th 475, 489.) Further, "just as a jury may rely on evidence about a defendant's personal conduct, as well as expert testimony about gang culture and habits, to make findings concerning a defendant's active participation in a gang or a pattern of gang activity, it may also rely on the same evidence to infer a defendant's knowledge of those activities." (*Ibid.*, fn. omitted.) Defendant claims that he must be aware of the specific crimes relied upon by the prosecution, but the current state of the law does not support that argument. (See *People v. Loeun* (1997) 17 Cal.4th 1, 10.)

There was ample evidence here from which the jury could infer defendant's knowledge about prior gang crimes. Defendant had admitted gang membership to police on several prior occasions. He admitted having the gang moniker "Sly," and had been questioned about a gang shooting shortly before the incident that led to the instant charges. He had received and signed a STEP Act notice, which listed 30 specific crimes attributable to Wicked Minds, and the officer who served the notice testified that he read and explained the notice to defendant. Mater had also testified that committing crimes was a way to earn respect within gangs, and that gang members share information about crimes they commit with other members. From these facts, the jury could infer defendant was aware of the gang's criminal activities.

c. Primary activities of the gang

Defendant also argues there was insufficient evidence presented regarding the primary activities of Wicked Minds. To qualify as a street gang within the meaning of the street terrorism statute, one of the gang's "primary activities" must be the commission of an enumerated crime listed in section 186.22, subdivision (e). (*People v. Loeun, supra*, 17 Cal.4th at p. 8.) The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . 'Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a *primary activity* of the department. Section 186.22 . . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime[s]. . . .'" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324 (*Sengpadychith*)). To establish the nature of the gang's primary activities, the trier of fact may look to both the past and present criminal activities of the gang. (*Id.* at p. 323.)

To establish a gang's primary activities, the prosecution may use an expert witness to testify as to the predicate crimes. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*)). When asked about the primary activities of Wicked Minds, Mater stated: "attempted murders, assault with deadly weapons, felony vandalism." His answer was based on investigations he had conducted, as well as information from other officers and agencies. An expert's testimony may provide sufficient evidence of the gang's primary activities. (*Ibid.*) Mater's testimony was uncontradicted, and thus, we find it sufficient to support defendant's conviction under section 186.22, subdivision (a).⁷

3. *Constitutional Issues*

Defendant next argues that this conviction for street terrorism violates state and federal constitutional provisions guaranteeing due process and protecting freedom of association. He argues the violations occur by permitting conviction for street terrorism when a defendant acts alone and the underlying crime has no connection to the gang. Defendant relies on a misreading of *People v. Casteneda* (2000) 23 Cal.4th 743 (*Casteneda*), asking us to imply a holding that does not exist.

Citing the leading federal case on criminalizing associations, *Scales v. United States* (1961) 367 U.S. 203, the court in *Casteneda* held: "Under *Scales*, the due process requirement that criminal liability rest on personal guilt means simply that a person convicted for active membership in a criminal organization must entertain 'guilty knowledge and intent' of the organization's criminal purposes. [Citation.] When our Legislature enacted section 186.22(a), which is at issue here, it was fully cognizant of the guilty knowledge and intent requirements the high court had articulated in *Scales*. [Citation.] This explains why the Legislature expressly required in section 186.22(a) that

⁷ Defendant's citation to *In re Alexander L.* (2007) 149 Cal.App.4th 605, is misplaced. In that case, the gang expert did not provide a sufficient foundation to support his opinion. Here, Mater's opinion was supported by facts that constituted a legally sufficient foundation.

a defendant not only ‘actively participates’ in a criminal street gang (the phrase at issue here), but also that the defendant does so with ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and that the defendant ‘willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.’ These statutory elements necessary to prove a violation of section 186.22(a) exceed the due process requirement of personal guilt that the United States Supreme Court articulated in *Scales . . .*” (*Castaneda, supra*, 23 Cal.4th at p. 749.)

Further, as the court explained in *Albillar*, and as we discussed above, the conduct need not be gang related. (*Albillar, supra*, 51 Cal.4th at p. 55.) The conduct must, however, indicate personal guilt, not merely passive or nominal association. (*Id.* at p. 58.) There is nothing in the court’s language to indicate that a due process concern arises because defendant promoted and furthered his own conduct rather than that of a fellow gang member. Nor do we, as defendant suggests, ponder how the Supreme Court might have decided if the facts of the case had been entirely different. We find defendant’s constitutional arguments are without merit.

4. *Instructional Error*

Defendant argues that the court violated its sua sponte duty to instruct the jury on the elements of felony vandalism and assault with a deadly weapon, two of the primary activities of Wicked Minds. During a conference on jury instructions, the prosecutor indicated that such an instruction might be necessary based on CALCRIM No.

1400.⁸ The court asked defense counsel if such an instruction was desired as to felony vandalism,⁹ noting that defense counsel could have valid tactical reasons for either wanting the instruction or wanting it omitted and suggesting what those considerations might be. The court stated: “I leave it to the defense.” Defense counsel replied, “I wasn’t going to argue felony vandalism,” and the matter went no further.

The Attorney General argues the doctrine of invited error bars further consideration on this point, and we agree. “[T]he doctrine of invited error bars defendant from challenging an instruction given by the trial court when the defendant has made a “conscious and deliberate tactical choice”” with respect to giving or not giving a jury instruction. (*People v. Lewis* (2001) 25 Cal.4th 610, 667.) Defendant argues counsel was not making a deliberate choice, but simply indicating that he did not intend to focus closing argument on the felony graffiti issue. We disagree. The context of defense counsel’s statement was the discussion of a tactical choice by the defense, and the court’s statement that the instruction would be defense counsel’s choice. Given that context, we find defense counsel made such a deliberate choice when deciding not to request the instruction. As we shall discuss *post* (see II.D.2) we also find this decision did not render counsel constitutionally ineffective.

5. Section 654

⁸ The relevant section of CALCRIM No. 1400 states: “To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ <insert felony or felonies from Pen. Code, § 186.22(e)(1)-(25), (31)-(33)> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].” The pertinent usage note states: “Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.” (Some italics omitted.)

⁹ The Attorney General argues, and we agree, that the issue did not arise with respect to assault with a deadly weapon because defendant was charged with the nearly identical crime of assault with a firearm, and the jury was instructed with the elements of that crime. We find the jury was adequately instructed with regard to assault with a deadly weapon.

Defendant next claims that his sentence of eight months for street terrorism should have been stayed pursuant to section 654. Whether section 654 applies is generally a question of fact. (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.) Thus, except in cases of “the applicability of the statute to conceded facts,” (*People v. Harrison* (1989) 48 Cal.3d 321, 335) “the trial court’s finding will be upheld on appeal if it is supported by substantial evidence. [Citations.]” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

Section 654, subdivision (a) states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654 therefore bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*); *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal, supra*, 55 Cal.2d at p. 19, italics added.)

We agree with defendant that enough evidence was not presented in this case to establish a divided intent. The only inferences to be drawn about defendant’s intent come from his actions — simply put, that police officers saw and tried to stop him, and he intended to assault or attempted to murder one of them. Any other conclusion about defendant’s intent is speculation, and we therefore find there is insufficient evidence to sentence defendant to a consecutive term of eight months on the street terrorism count. The law requires that sentence be stayed pursuant to section 654.

C. Discovery of Detectives' Personnel Files

As noted above, prior to trial, defendant filed discovery requests under *Pitchess, supra*, 11 Cal.3d 531. After an in camera hearing, the court disclosed potentially relevant information regarding excessive force and dishonesty. Defendant does not argue the court abused its discretion in determining what should be disclosed, but asks us to undertake an independent review of the materials.

In *Pitchess*, the California Supreme Court held that a criminal defendant is entitled to discovery of officer personnel records if the information contained in the records is relevant to his ability to defend against the charge. A defendant may file a motion seeking to obtain information contained in a police officer's personnel records if it is material to the facts of the case. (Evid. Code, § 1043, subd. (b)(3).) The trial court then determines whether there is good cause for disclosure. (Evid. Code, §§ 1043, 1045.) If the court orders disclosure, the custodian of the officer's records brings to court all the potentially relevant personnel records, and the trial court conducts an in camera review to determine whether any of the records are to be disclosed to the defense. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227 (*Mooc*).)

“[T]he custodian of the records is obligated to bring to the trial court all ‘potentially relevant’ documents to permit the trial court to examine them for itself. [Citation.] . . . A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record. [Citation.] [¶] The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined.” (*Mooc, supra*,

26 Cal.4th at pp. 1228-1229.) When requested to do so by a defendant, an appellate court can and should independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant documents. (*Id.* at p. 1229.)

We independently reviewed the sealed reporter's transcripts of the in camera hearings regarding defendant's *Pitchess* motion. As reflected in the sealed transcripts, the court's findings are sufficient to permit appellate review. Based on our review of those findings, we conclude the trial court properly exercised its discretion in ordering discovery of limited information regarding incidents that might be pertinent to claims of excessive force or dishonesty. We find no error.

D. Ineffective Assistance of Counsel

Defendant argues that several purported errors by defense counsel rise to the level of ineffective assistance of counsel. "The standards for ineffective assistance of counsel claims are well established. 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' [Citation.] To establish a meritorious claim of ineffective assistance, defendant 'must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations] or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations].' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 261.)

A defendant making a claim for ineffective assistance of counsel must overcome a strong presumption “that, under the circumstances, the challenged action “might be considered sound trial strategy.” [Citations.]’ [Citation.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.) Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel’s choice. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260; *People v. Ray* (1996) 13 Cal.4th 313, 349.)

1. Failure to Object

At trial, counsel did not object to Mater’s testimony regarding the primary activities of Wicked Minds or to a statement in which Mater associated Wicked Minds and the Mexican Mafia. But “deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) As we discussed *ante*, Mater’s opinion regarding Wicked Minds’ primary activities was admissible. The failure to object to admissible evidence is not unreasonable. “Counsel does not render ineffective assistance by failing to make motion or objections that counsel reasonably determines would be futile.” (*People v. Price* (1991) 1 Cal.4th 324, 387.)

With respect to Mater’s testimony regarding the Mexican Mafia, that testimony was elicited by defense counsel, who was asking Mater about gang custom regarding firearms. Counsel asked Mater who created those rules, and he replied that the Mexican Mafia did. Counsel then asked how they were related to this case. Because defense counsel initiated the discussion, any objection could have been pointless, and once again, such objections are not required.

2. Closing Argument

Defendant argues counsel was ineffective for failing to argue there was insufficient evidence of the primary activities of Wicked Minds. As defendant notes, counsel did argue the evidence was insufficient to prove he was an active gang member and had knowledge of a pattern of gang activity. As the jury was required to find all of these facts were true in order to find defendant guilty of street terrorism count, choosing not to focus on the primary activities of Wicked Minds was a valid tactical decision. Further, a reasonable attorney could easily have concluded that the facts did not support any argument that Wicked Minds' primary activities were not the enumerated felonies. There are no facts here to demonstrate that counsel's performance was deficient under prevailing professional norms. (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) We find no error.

3. Failure to Request a Jury Instruction

As we discussed *ante* (section II.B.4), defense counsel chose not to request an instruction on felony vandalism. We noted that the context of the conversation regarding this instruction revealed it was a deliberate tactical choice, and we find it was a valid one. As the court noted, choosing to give such an instruction might confuse the jury from the primary issues in the case. There were also numerous photos of Wicked Minds graffiti that were entered into evidence, and choosing not to call attention to such activity would also have been a valid tactical reason. We find counsel's actions were reasonable.

III

DISPOSITION

We remand to the trial court for resentencing, and direct the court to stay sentence on count four pursuant to section 654. The trial court is also directed to

forward a copy of the new abstract to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.