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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. PATRICK JOHN SPELDRICK, Defendant and Appellant.	G044685 (Super. Ct. No. RIF143836) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Helios (Joe) Hernandez, Judge. Affirmed in part, reversed in part, and remanded with directions.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Patrick John Speldrick was tried twice in this matter. In the first trial, the jury found him guilty of actively participating in a criminal street gang and was unable to reach a verdict on the remaining charges of conspiring to commit murder, attempted murder, and assault with a deadly weapon. In the second trial, the jury found defendant guilty of the remaining charges and found those offenses were committed for the benefit of a criminal street gang. Defendant subsequently admitted having served seven separate prior terms in state prison. He raises a number of issues on appeal. We agree with two. The trial court erred in instructing the jury in the first trial. We therefore reverse defendant's conviction for actively participating in a criminal street gang. The trial court also erred in imposing a consecutive 10-year gang enhancement to his 25 years to life sentence. The 10-year enhancement provided by Penal Code[1] section 186.22, subdivision (b)(1)(C) does not apply when a defendant has been sentenced to a life term in prison. Instead, section 186.22, subdivision (b)(5) imposes a 15-year minimum parole eligibility. Consequently, we will order the abstract of judgment corrected.

I

FACTS

The Riverside grand jury indicted defendant, Jason Lee Sawyer, and Kory Wayne Shaw with conspiring to murder Tony Staska (§§ 182, subd. (a), 187, subd. (a); count one), attempted murder (§§ 664, subd. (a), 187, subd. (a); count two), assault with a deadly weapon (§ 245, subd. (a)(1); count three), and actively participating in a criminal street gang (§ 186.22, subd. (a); count four).[2] The indictment also alleged the first three charges were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). An amendment to the indictment alleged Speldrick served eight prior terms in state prison. (§ 667.5, subd. (b).)

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[1] All undesignated statutory references are to the Penal Code.

[2] Sawyer and Shaw are not parties to this appeal.

The first jury trial in this matter began in May 2009. Trial on defendant's prior convictions was bifurcated from the trial on the substantive offenses. The jury found defendant guilty of active participation in a criminal street gang (count four). The court declared a mistrial on the remaining three charges because the jury was unable to reach verdicts on those counts.

The matter was retried in August 2010 and resulted in convictions on the remaining charges. The jury further found the offenses were committed for the benefit of a criminal street gang. Defendant waived his right to a jury trial on the state prison prior conviction allegations and admitted seven of the eight allegations. The court dismissed the remaining prior conviction allegation on the prosecution's motion.

The court sentenced defendant to a total term of 17 years plus 25 years to life. The sentence consisted of 25 years to life for the conspiracy to commit murder, plus 10 years for the gang enhancement found in conjunction with count one, and seven consecutive one-year terms for each of the state prison priors. The sentences on the remaining counts, including the conviction from the first trial for actively participating in a criminal street gang, and any attached enhancements were stayed pursuant to section 654.

District Attorney Investigator Michael Riley testified as a gang expert. So did the victim, Staska. Staska received a seven-year term in state prison, rather than a Three Strikes sentence he had been facing on a separate case, and testified in this case as well as a death penalty case against a former cellmate, Jeffree Buettner.

Defendant, Shaw, Buettner (whose moniker is Pusher), Michael Saenz, and Staska were members of a White prison gang known as PENI. Sawyer was a member of a smaller white gang known as American Front. Staska had been a member of PENI for approximately 17 years by July 2007. In 2007, the Aryan Brotherhood was the most powerful of the white gangs, followed by PENI, the Nazi Low Riders, and a medley of

other gangs. PENI's primary activities include murder, attempted murder, and assault with a deadly weapon.

Staska was housed in the administrative segregation unit of the Robert Presley Detention Center in July 2007. Sawyer was his cellmate. Defendant was housed in a cell in the same module. So was Buettner.

The detention center permits only two people in a module to use the dayroom at the same time. The two people are always from the same cell. While they use the dayroom, the other prisoners remain in their cells. On July 19, 2007, Staska and his cellmate Sawyer were released from their cell to use the dayroom. Defendant called out to Staska when Staska was let out of his cell. Defendant called Staska over to his (defendant's) cell and asked Staska to look at some paperwork through the window in his cell door. While Staska was at defendant's cell door, Sawyer suddenly grabbed Staska from behind and slit Staska's throat with a razor blade knife of a design Staska recognized as one used and made by Buettner. Staska fought with Sawyer. He also took off his own shirt, and wrapped it around his neck to stop the bleeding. When Staska asked Sawyer why he attacked him, Sawyer replied, "You're no good. That's from Pusher." Staska testified *you're no good* means he no longer had any status in the gang or was no longer part of the gang.

Staska said he heard defendant yell to Sawyer, "Slide me the piece." Sawyer slid the weapon under defendant's cell door. Staska then heard defendant flush his toilet. Deputies did not recover the weapon. Sawyer returned to his cell when the deputies entered the day room. Staska was hospitalized for 10 days. It took 26 staples to close the wound to his neck.

Sometime later, deputies searched defendant's cell. A photograph of Staska was found inside. On the back of the photograph were a handwritten "smiley face" and the word "oopsee."

Prior to being cellmates with Sawyer, Staska had been Buettner's cellmate. Staska had told Buettner that he had been stabbed in the neck before and was particularly vulnerable to injury as a result. When Staska and Buettner were cellmates, Buettner was awaiting his trial on a death penalty case. Buettner talked with Staska about his upcoming trial. He asked Staska to "get rid of three witnesses in his case [who] were going to be testifying against him." Staska understood Buettner to mean that he should "either kill, maim, [or] disappear" the witnesses. Staska said he would take care of it, but had no intention of doing so. Instead, he planned to warn the witnesses.

Staska and Buettner were subsequently placed in different cells at their mutual request. Defendant and Buettner became cellmates. Buettner told Staska "everything was taken care of" with respect to the witnesses in his case and that Staska need not concern himself with it further. Staska believed defendant, who was due to be released soon, intended to harm the witnesses. Staska told a deputy about the situation. Later, Buettner told Staska he knew law enforcement had a new source within the gang who was informing on him.

After Sawyer attacked Staska, invesigators began reviewing recordings of telephone calls made by those suspected of being involved in the attack. They found a call made on July 9, 2007, between Buettner and Saenz. Buettner said he needed to find out more about "Indian Motorcycles." A gang expert testified "Indian Motorcycles" referred to Staska whose family was the sole Southern California distributor of Indian Motorcycles. Buettner said he needed "more info so we can get like it confirmed, whether or not it's . . . how serious it is." Buettner called Saenz again on July 13. Buettner said they were "just trying to get old Indian Motorcycle squared away." Referring to Staska, Saenz said, "You ought to find out what kind of s. . . he was talking too." Buettner asked for Shaw's address and Saenz said Shaw was expecting a phone call.

Two days later, on July 15, 2007, defendant called Shaw. Defendant said he needed something. He asked Shaw, "You know that dude Tony?" Shaw said Staska had "f. . . up, like ten too many times . . . ." Shaw mentioned when he did time with Staska. He said Staska watched a fellow gang member "get hit" and failed to keep a promise to do something upon his release. Staska confirmed the incident in his testimony. Defendant told Shaw, "That's good enough for me."

Shaw also said he was the only person "that handles business out here." Staska said the statement meant Shaw is the shot caller and no further authorization was necessary.[3] Staska further testified that when Shaw said he (Staska) was "no good," it meant "get rid of" Staska. During Shaw and defendant's conversation, Shaw told defendant, "I got some green cowboy boots just for you, brother." Staska said that meant defendant had a "green light" to kill him.

Buettner called Saenz the day after the attack on Staska and said, Indian Motorcycles was "handled." When Saenz asked what happened, Buettner responded "In the day room" and "Intensive care unit." Saenz responded, "Nice." Buettner then said, "So, all good." Buettner called Saenz again on July 27, 2007. Saenz inquired of the identity of the "alleged attacker" and Buettner said it was "his cellie." Buettner said Sawyer was "more than happy to, to do it, to, to handle it, you know."

Riley testified the July telephone calls were background checks on Staska, indicating Staska was in trouble in the gang. Riley also said Sawyer was an active member of American Front and attacked Staska on behalf of PENI at the gang's direction. Riley added that if the attack had not been authorized by PENI, Sawyer would

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[3] In addition to testifying about the gang and its activities, Staska and Riley said one who "holds the keys" or is a "shot caller" is the decision maker for the gang. Shaw was PENI's shot caller in July 2007. Reasons one in the gang would be subject to discipline include failing to backup another member of the gang and talking to law enforcement. A "background check" by one gang member on another member is an inquiry as to whether the second member has violated any gang rules.

have been assaulted or killed for his attack on Staska.

Inmate Dominic Slayton testified the altercation between Sawyer and Staska was about bail. He did not see Staska's neck wound. Slayton said defendant, who he referred to as a friend, never told Sawyer to give him the knife and that it was not slid under defendant's door.

II

DISCUSSION

A. *Issues Arising from the First Trial*

1. *Inconsistent Verdicts*

Defendant first contends his conviction for active participation in a criminal street gang (§ 186.22, subd. (a)), suffered in the first trial, must be reversed because the jury that returned the guilty verdict was unable to reach a verdict on any of the other charges. He claims that as a violation of section 186.22, subdivision (a) requires the accused to "willfully promote[], further[], or assist[] in any felonious criminal conduct by members of that gang" (§ 186.22, subd. (a)) and the jury was unable to convict him on any of the charged underlying felonies, there are inconsistent verdicts and the conviction must be reversed.

Inconsistent verdicts are generally permitted in this state and in the federal courts. The United States Supreme Court "has made it clear that inconsistent verdicts may stand when one of those verdicts is a conviction and the other an acquittal. [Citations.] The underlying rationale of these cases is that the acquittal on one count may be explained as an exercise of lenity by the jury that is not necessarily grounded in its view of the evidence.[4] [Citation.]" (*Ferrizz v. Giurbino* (9th Cir. 2005) 432 F.3d 990,

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[4] "In *Dunn v. United States*, 284 U.S. 390 (1932), this Court held that a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." (*United States v. Powell* (1984) 469 U.S. 57, 58.)

992-993.) California takes the same approach. Section 954 specifically provides: "An acquittal of one or more counts shall not be deemed an acquittal of any other count." In *People v. Lewis* (2001) 25 Cal.4th 610, our Supreme Court held "[a]n inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of the verdict. [Citations.]" (*Id*. at p. 656.) A fortiori, if a conviction and an acquittal on related charges do not require the conviction be set aside due to inconsistent verdicts, a jury's inability to reach a verdict on one or more counts does not compel the setting aside of a verdict the jury was able to reach.

2. *Sufficiency of the Evidence*

Defendant next argues the evidence from the first trial was insufficient to support a conviction for violating section 186.22, subdivision (a). "'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 and determine if substantial evidence exists to support each element of the offense. (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].' [Citation.]" (*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.) Viewing the evidence in the light most favorable to the judgment, we conclude the evidence supports the conviction.

Defendant, Buettner, Shaw, and Staska were members of PENI, a criminal street gang. Buettner and Staska had been cellmates at the detention center in the past. Buettner was facing prosecution for a capital offense and sought Staska's help in eliminating witnesses. Staska agreed to help, though he had no intention of aiding Buettner. Staska later told authorities he and Buettner were not compatible and as a result, Buettner was moved to defendant's cell.

Prior to the attack on Staska, defendant made a telephone call to Shaw. When Staska was in prison in Chino, he was Shaw's cellmate and was informed Shaw held the keys, which meant he was the decision maker for the gang at Chino. While there, Staska promised to send Shaw a package of heroin, but never did.

Defendant asked Shaw if he knew Staska. Shaw told defendant Staska had f . . . up too many times, including watching a fellow gang member get stabbed without doing anything about it. Defendant said that was good enough for him. Staska testified that when Shaw said Staska was "no good," it meant "get rid of" him. Staska also concluded that when Shaw told defendant he had a pair of green cowboy boots for him, Shaw gave defendant the "green light" to kill Staska.

Thereafter, on the day of the attack when cellmates Sawyer and Staska were let out of their cell to use the dayroom, defendant called Staska over to his cell. Sawyer, who had not made any knives while he was Staska's cellmate, did not have a weapon and had no pockets in his boxer shorts. Sawyer went upstairs toward another cell. Buettner was housed in a cell on the upstairs tier. Staska knew Buettner made knives, including razor blade knives. His signature design was a handle with a number of parallel razor blades.

Defendant called Staska over to his cell. While standing at the door of defendant's cell, Staska heard footsteps approaching. Sawyer's hand came across Staska's throat and slit it open. Staska saw in Sawyer's hand the kind of razor blade knife Buettner made. Staska asked Sawyer why he did it and Sawyer said it was because Staska was "no good," i.e., no longer in the gang. Defendant told Sawyer to slide him "the piece." Sawyer slid the weapon under the door to defendant's cell. Staska then heard defendant flush his toilet.

This substantial evidence supports a finding defendant actively participated in a PENI, a criminal street gang, "with knowledge that the gang's members engage or have engaged in a pattern of criminal activity,[5] and willfully promote[d], further[ed], or assist[ed] in . . . felonious criminal conduct by gang members." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 54.) Accordingly, we conclude the evidence supports defendant's conviction in the first trial for active participation in a criminal street gang.

3. *Unanimity Instruction*

Defendant argues the court prejudicially erred when it failed to instruct the jury pursuant to CALCRIM No. 3500 on the requirement the jurors unanimously agree on the assaultive acts defendant purportedly aided, committed, or conspired to commit. Although the conspiracy, the attempted murder, and the assault with a deadly weapon on Staska involved the same basic facts, defendant contends a unanimity instruction was necessary because the jury heard of two *other* assaults during the testimony of one of the prosecutor's gang experts, Investigator Riley. Because the jury must unanimously agree whether the defendant committed a specific crime, "when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court

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[5] Defendant does not contend PENI is not a criminal street gang whose members engage in a pattern of criminal activity or that he did not know the gang qualifies as a criminal street gang.

must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

In order to find defendant guilty of actively participating in a criminal street gang, the prosecution was required to prove defendant "willfully promoted, furthered, or assisted members of his gang in felonious criminal conduct . . . ." (*People v. Lamas* (2007) 42 Cal.App.4th 516, 520, italics omitted.) The jury was informed the felonious conduct it was to consider in this case consisted of "attempted murder, [or] assault with a deadly weapon." The attempted murder and assault with a deadly weapon charges (counts two and three) were each based on the same act, the slitting of Staska's throat.

Given the attempted murder of Staska and the assault with a deadly weapon on Staska involved the same act — the slitting of Staska's throat — there would have been no need for a unanimity instruction had there been no other evidence of any other assault with a deadly weapon by defendant. The continuous-course-of-conduct exception to the unanimity requirement "applies when (1) 'the acts are so closely connected in time as to form part of one transaction,' (2) 'the defendant tenders the same defense or defenses to each act,' and (3) 'there is no reasonable basis for the jury to distinguish between them. [Citations.]' [Citation.] 'This exception "'is meant to apply not to all crimes occurring during a single transaction but only to those "where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim's testimony in toto." [Citation.]' [Citation.]" [Citation.]' [Citation.]" (*People v. Lueth* (2012) 206 Cal.App.4th 189, 196.)

Defendant argues, however, that as the prosecutor introduced evidence of two other assaults through a gang expert, the court was obligated to instruct the jury on the unanimity requirement. The "other" assaults were introduced as part of the prosecution's evidence in its effort to prove PENI qualifies as a criminal street gang and defendant was an active gang participant. For example: "Q. [A]re there any other assaults in the jail system or surrounding area that inform your opinion that [defendant] is

actively involved in PENI or gang conduct within the woodpile? [¶] A. Yes. [¶] Q. What would that be? [¶] A. There were at least two prior assaults that I can think of — no, three. One was within a month ago, month or five weeks, and it was actually either on this floor or the fifth floor, I think it was very — in this courthouse [defendant] was placed in the holding area with a protective custody inmate. I reviewed the report and watched the video of [defendant] grab the inmate from behind, slam his head repeatedly into the wall, throw him on the ground, and then assault him when he was on the ground using his legs and feet. [¶] Q. How is an assault on a protective-custody inmate, in your mind, evidence of active participation in gang politics? [¶] A. It's expected of someone who is an active gang member in custody, if they are placed in a position with a protective-custody inmate — and the people in protective custody are there because they have done something to earn the ire of other gang members — they are to be immediately attacked when they're placed in closed quarters." Riley also testified to another incident where the victim of a stabbing had identified defendant as the suspect in the stabbing incident.

Had the jury been instructed the evidence to which Riley testified was not admitted for the truth of the matter asserted, but only as support for his expert opinion (see CALCRIM No. 360), the need for a unanimity instruction may not have arisen. But the jury was not informed this evidence was admitted for a limited purpose. In such a case, when the jury is informed the defendant's conviction for actively participating in a criminal street gang (§ 186.22, subd. (a)) requires him to have engaged in "felonious criminal conduct," which in this case involved either attempted murder or assault with a deadly weapon, and there is evidence of a number of possible felony assaults committed by the defendant and the jury is *not* instructed the noncharged assaults cannot serve as the underlying felonious conduct, the court errs if it does not instruct the jury that it must unanimously agree on the assault underlying the felonious criminal conduct element.

When a trial court errs in failing to provide a unanimity instruction, the error is deemed prejudicial absent the prosecution demonstrating the error was harmless beyond a reasonable doubt. (*People v. Frederick* (2006) 142 Cal.App.4th 400, 419.) "'[U]nder the mandate of *Chapman* . . . we must ultimately look to the evidence *considered* by defendant's jury under the instructions given in assessing the prejudicial impact or harmless nature of the error.' (*People v. Harris* (1994) 9 Cal.4th 407, 428.) '[W]e must inquire whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction. [Citation.]' (*Id*. at p. 429.)" (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 188.)

Given the fact multiple felony assaults by defendant were introduced into evidence, including one where he repeatedly slammed an inmate's head into a wall and then kicked him when he fell to the ground, *and* the fact that the jury that found defendant guilty of actively participating in a criminal street gang did not convict defendant of either of the charged assaultive offenses, we cannot hold the failure to instruct the jury on the need for unanimity was harmess beyond a reasonable doubt. Accordingly, we reverse defendant's conviction for actively participating in a criminal street gang.[6]

B. *Issues from the Second Trial*

As will be recalled, the second jury found defendant guilty of conspiracy to commit murder, attempted murder, and assault with a deadly weapon.

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[6] Because we reverse defendant's conviction for actively participating in a criminal street gang, there is no need to address defendant's contention that the trial court erred in instructing the jury pursuant to CALCRIM No. 400, which contained language disapproved by the court in *People v. Nero* (2010) 181 Cal.App.4th 504.

1. *Gang Expert Testimony*

Defendant argues the court committed prejudicial error when it permitted a gang expert to testify to defendant's mens rea in aiding and abetting the charged crimes. He further asserts his mens rea was the ultimate issue in the case. "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* (2002) 103 Cal.App.4th 644, 651.) In *Killebrew*, a case relied on by defendant, the court found that although an expert may express an opinion that embraces the ultimate issue, "'"there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision."' [Citation.]" (*Ibid.*)

The complained of testimony in this case consisted of Staska's *interpretation* of gang-related terms used by defendant and Shaw during their telephone conversations. Staska testified as a gang expert. He said the "green light" Shaw gave Staska was an authorization to kill and that the phrase meant the same thing to everyone in prison regardless of their race. After listening to the tape of defendant's telephone call to Shaw, Staska testified without an objection from defendant that Shaw's statement about having "green cowboy boots" for defendant meant defendant had a green light to kill him.[7] Defendant appears to argue the error occurred because Staska was not asked in a hypothetical question what the terms meant.

Defendant has forfeited the issue by not objecting when the evidence was admitted. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) Here, Staska, a member of

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[7] Shaw's attorney objected the testimony called for a conclusion as to the state of mind of Shaw, but defendant's counsel made no objection when the evidence was offered.

PENI for more than a decade, was familiar with the slang or terms PENI members use in an effort to hide their meaning from intruding ears, which is what defendant and Shaw were attempting to do. Defendant concedes Staska's many years in the gang gave him "the requisite foundational knowledge to testify as an expert about PENI." Just as a member of a baseball team could be asked what a certain sign means on his team, Staska was entitled to say what certain terms mean within PENI. The question put to Staska was whether Shaw's reference to "green cowboy boots" is "code for the green light?" Defendant now objects to Staska's answer: "Yeah. This is — in my mind, definitely this is — what he is saying is he's got a green light; go ahead and run with it, meaning the cowboy boots. Hit him." As Staska explained on cross-examination when asked about the meaning of green cowboy boots, "I've been a gang member for almost 20 years. This is our lingo. I mean, we — this is how we communicate. This is how we talk."

Defendant argues Staska expressly stated defendant interpreted Shaw's statements the same way. On cross-examination by Shaw's attorney, Staska was asked, "Are you saying that [defendant] takes that as the authorization for the hit?" Staska answered affirmatively. While defendant asserts the answer went beyond that to which an expert may testify and amounted to no more than Staska's opinion as to how the case should be decided, he again did not object to the testimony brought out on cross-examination and has waived the issue.

2. *Instructional Issues*

a. *Failure to Instruct on Lesser Included Offense*

Defendant asserts the trial court should have instructed the jury on conspiracy to commit simple assault as a lesser included offense of the charged conspiracy to commit murder, and should have instructed on simple assault as a lesser included offense of attempted murder and assault with a deadly weapon. "When there is substantial evidence that an element of the charged offense is missing, but that the

accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so. [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 443.) "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) We review de novo whether the trial court was obligated to instruct on a purported lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.)

According to defendant, the conflicting evidence relating to the telephone call he made to Shaw is substantial evidence from which a reasonable jury could have concluded defendant did not intend to have Staska murdered, but only assaulted. Although Staska testified Shaw's statement about a pair of green cowboy boots for defendant meant Shaw authorized Staska's killing, defendant maintains the prosecution's professional gang experts were unable to reach that same conclusion and were not sure green cowboy boots meant anything or opined it meant defendant was cleared for anything from an assault, to a felony assault, to murder.

Two tests are utilized to determine whether an offense is a lesser included offense of a charged crime. The two tests are known as the "elements test" and the "accusatory pleading test." An offense must meet one of these two tests to qualify as a lesser included offense. (*People v. Cook* (2001) 91 Cal.App.4th 910, 918.) An offense qualifies as a lesser included offense under the elements test "if the statutory elements of the greater offense include all the elements of the lesser offense so that the greater offense cannot be committed without committing the lesser offense. [Citation.]" (*Ibid*.)

When a defendant is charged with conspiracy to commit murder, the court has a duty in an appropriate case to instruct on lesser included offenses of the target offense of murder. (*People v. Cook*, *supra*, 91 Cal.App.4th at p. 918.) However, as the *Cook* court correctly observed, given the fact that violence is not an element of murder,

assault is not a lesser included offense of murder under the elements test. (*Id*. at pp. 918-919.)

Under the accusatory pleading test, a crime qualifies as a lesser included offense "if 'the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].' [Citation.]" (*People v. Cook*, *supra*, 91 Cal.App.4th at p. 918.) In *Cook*, the defendants were charged with conspiracy to commit murder. The information set forth several overt acts. The first overt act alleged that on the day the defendants conspired to murder the victim, two of the defendants acquired a gun and the gun was desired to use as a means of extracting revenge against the victim. The information further alleged the defendants met together after having acquired a firearm, discussed killing the victims, went to the apartment occupied by the victims, entered, and one of the defendants then shot and killed one of the victims and wounded another victim pursuant to the conspiracy. (*Id*. at p. 919, fn. 22.) From these alleged facts, the *Cook* court found assault to have been a lesser included offense of the target crime of the conspiracy, "murder by means of a firearm." (*Id*. at p. 919.)

In the present case, the indictment alleged but three overt acts. The first alleged defendant informed Shaw that no further instructions were needed for Staska's execution. The second alleged Shaw represented to defendant that he (Shaw) had authority to authorize the attack. The last overt act alleges Sawyer slit Staska's throat in front of defendant's cell. Unlike *Cook*, where the defendant's immediately acquired a firearm for the purpose of seeking their revenge against the victims, and subsequently discussed the plan to kill the victims, presumably by shooting them, here the indictment only makes one reference to the deadly weapon used by Sawyer to slit Staska's throat; as the last overt act in furtherance of the conspiracy. As alleged, it cannot be said the indictment in effect charges the defendants with conspiracy to commit murder by means of a dangerous weapon. Although a dangerous weapon was eventually used to slit

Staska's throat, unlike the situation in *Cook* where the defendants obtained the firearm to kill the victims and thereafter planned the killing, there is no allegation the conspirators in this instance sought to kill in a particular manner, much less by a shank. Because assault is not a lesser included offense of murder under the elements tests and assault does not qualify as a lesser included offense under the accusatory pleading test, we find the trial court was not required to instruct the jury on assault as a lesser target offense of the conspiracy to commit murder. (See *People v. Alarcon* (2012) 210 Cal.App.4th 432, 436 [gun use and great bodily injury enhancements alleged in conjunction with attempted murder does not render assault with a firearm a lesser included offense of attempted murder under the pleading elements test].)

If assault is not a lesser included offense of murder, it necessarily does not qualify as a lesser included offense of attempted murder. We therefore find the trial court did not err in failing to instruct the jury on simple assault as a lesser included offense of the charged attempted murder.

Assault is, however, a lesser included offense of assault with a deadly weapon. (*People v. Toledo* (2001) 26 Cal.4th 221, 226.) However, the obligation to instruct on lesser included offenses occurs "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citation.]" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) Here, the uncontradicted testimony established that Sawyer slashed Staska's throat with a homemade razor blade knife. The wound required 26 staples to close. There was no evidence Staska was a victim of anything less than an assault with a deadly weapon or that a simple assault was what defendant intended to aid and abet. Consequently, the court was not required to instruct on simple assault as a lesser included offense of assault with a deadly weapon.

b. *Motive*

Pursuant to CALCRIM No. 370, the court instructed the jury the prosecution was not required to prove the defendant had a motive to commit the charged crimes. Defendant contends the court committed prejudicial error when it gave the instruction without amending it to state the instruction did not apply to the gang enhancement allegation. (§ 186.22, subd. (b)(1).) According to defendant, motive is an element of the gang enhancement, which requires an underlying offense be "committed . . . for the benefit of, at the direction of, or in association with a criminal street gang" and that the defendant "intended to assist, further or promote criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

CALCRIM No. 370 is a correct statement of the law. (*People v. Howard* (2008) 42 Cal.4th 1000, 1024; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192-1193.) Defendant did not object to the giving of the instruction or seek to have it amended. He has therefore forfeited the issue. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Even still, defendant's argument was raised and rejected in *People v. Fuentes* (2009) 171 Cal.App.4th 1133. Fuentes had been charged with a number of crimes including active participation in a criminal street gang (§ 186.22, subd. (a)), as well as the gang enhancement (§ 186.22, subd. (b)(1)). (*People v. Fuentes*, *supra*, 171 Cal.App.4th at p. 1137.) The *Fuentes* 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 intent to steal considered 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 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. . . . [Citation.]' 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*.)

"[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.]" (*Id*. at p. 1127.) Because section 647.6 specifically requires 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. (*People v. Maurer*, *supra*, 32 Cal.App.4th at p. 1127.)

The section 186.22, subdivision (b)(1) gang enhancement requires an accused possess a certain specific intent: "to promote, further, or assist in any criminal

conduct by gang members." It does not require a motive for the commission of the underlying crime.

3. *Sentencing Error*

After imposing a 25 years to life term for the conspiracy to commit murder (§ 182, subd. (a)(6) [conspiracy is "punishable in the same manner and to the same extent as provided for the" target offense]; § 190, subd. (a) [punishment for first degree murder is 25 years to life]), the court imposed a consecutive 10-year term for the gang enhancement (§ 186.22, subd. (b)(1)) found in connection with that count. As the Attorney General concedes, this was error.

The 10-year term provided by section 186.22, subdivision (b)(1)(C)[8] does not apply when either subdivision (b)(4) or (b)(5) apply. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) Here subdivision (b)(5) of section 186.22 applies. "Except as provided in paragraph (4), a person who violates this subdivision in commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5).) As a result, the court erred in imposing a consecutive 10-year term on the gang enhancement. The trial court should have noted defendant was ineligible for parole "until a minimum of 15 calendar years have been served."

III

DISPOSITION

Defendant's conviction for active participation in a criminal street gang (§ 186.22, subd. (a); count four) is reversed and the matter is remanded to the trial court for possible retrial of that charge. The 10-year enhancement imposed pursuant to section

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[8] "If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (§ 186.22, subd. (b)(1)(C).)

186.22, subdivision (b)(1)(C) is stricken. If, within 30 days of the filing of the remittitur the district attorney does not elect to retry the charge, the abstract of judgment must be corrected, eliminating the 10-year enhancement for the gang enhancement, and forward a copy of the new abstract to the Department of Corrections and Rehabilitation. If the district attorney retries count four and obtains a conviction, defendant must be resentenced. In all other respects, the judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.