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

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND EDUARDO LOPEZ,

Defendant and Appellant.

H035015

(Santa Clara County  
Super. Ct. Nos. CC767952, CC808356)

In case No. CC767952, defendant Raymond Eduardo Lopez was convicted after jury trial of two counts of attempting to dissuade a victim or witness from reporting a crime (Pen. Code, § 136.1, subd. (b)(1))<sup>1</sup> and one count of arson (§ 451, subd. (d)). The jury also found true allegations that the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).)

In case No. CC808356, defendant was convicted after jury trial of assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1)) and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true an allegation that the assault was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

The trial court sentenced defendant in both cases, and in a third unrelated murder case, to a total term of 39 years to life consecutive to a determinate term of 10 years. The term included consecutive terms for the two attempted dissuasion counts.

On appeal in the attempted dissuasion and arson case (No. CC767952), defendant contends that 1) the trial court gave an erroneous special instruction regarding the specific intent element of the gang allegations, 2) there was not substantial evidence to support the specific intent element, 3) the alternate penalty under section 186.22, subdivision (b)(4) may not be imposed for the attempted dissuasion counts, 4) the gang expert provided improper opinion testimony, 5) the gang expert should not have been allowed to testify about a gang slogan, 6) the cumulative effect of the errors deprived him of a fair trial, and 7) section 654 precludes punishment for both counts of attempted dissuasion. For reasons that we will explain, we determine that the alternate penalty under section 186.22, subdivision (b)(4) may not be imposed for one of the attempted dissuasion counts. We will reverse the judgment and remand for possible retrial on the section 186.22, subdivision (b)(4) allegation for that count, and we will direct the trial court to determine whether section 654 precludes punishment for one of the two attempted dissuasion counts.

On appeal in the assault case (No. CC808356), defendant contends that 1) the gang expert provided improper opinion testimony, and 2) the prosecution in argument relied on an incorrect legal theory with respect to the gang enhancement. For reasons that we will explain, we will affirm the judgment.

## **I. ATTEMPTED DISSUASION AND ARSON CASE (No. CC767952)**

### **A. Background**

Defendant was charged by second amended information with two counts of attempting to dissuade a victim or witness from reporting a crime (§ 136.1, subd. (b)(1); counts 1 & 2), and one count of arson (§ 451, subd. (d); count 3). The information

further alleged that all three counts were committed for the benefit of, at the direction of, and in association with a criminal street gang. (§ 186.22, subd. (b)(1) & (4).)

## **1. The Trial Evidence**

### **a. The Stabbing and Attempted Cover Up**

Crystal Lopez was defendant's girlfriend. Crystal invited her friends, Rosa C. and T.C., to visit her. On May 4, 2007, Rosa drove her car, a Nissan Sentra, with T.C. to meet Crystal in San Jose. The three females, along with defendant and his friend named "Roach," then went driving in Rosa's car. Rosa and T.C. had previously met defendant. Roach drove, T.C. sat in the front passenger seat, and Rosa, Crystal, and defendant sat in the backseat. Rosa allowed Roach to drive her car because she was not familiar with San Jose.

Defendant and Roach were Norteños, and defendant was part of a "set or subclique of Nortenos" called "Roosevelt Park Locos." While the group was traveling in the car, Rosa allowed defendant to play a CD of "Norteno rap music." The "gang music" was playing "[r]eally loud" while all the windows were rolled down. The lyrics included references to the numbers 13 and 14 and to "scraps." A "scrap" is a "negative word" for a Sureño, and Sureños are a rival gang to Norteños. The music referred to "beating [scraps] up and killing them."

When the Nissan was stopped at a red light, a Ford Crown Victoria was nearby with two males in the front seat. Rosa saw the driver making hand gestures, which she characterized at trial as "gang signs." Rosa testified that she was not "real familiar with gangs," and that the driver was moving his hands "kind of like stereotypical of . . . how you see it in the movies." No one in the Nissan was "really paying attention" to the gestures, except defendant, who stated, "Look at these . . . fuckers" and/or "look at these fools." Defendant was "getting really fidgety" and was staring at the other car. Defendant told Crystal that the occupants of the car were "looking at him wrong."

According to Rosa, the driver of the Ford made “more gang signs” and defendant again indicated that he could not “believe what he’s seeing.” Rosa testified that defendant “thr[ew] up gestures” that were “similar to the ones” by the driver of the Ford. The driver of the Ford responded “with more gestures” and displayed a knife. Defendant was angry and was glaring at the occupants of the Ford.

Crystal testified that the occupants of the Ford “flipp[ed] . . . off” defendant and also threw up three fingers, which was a gang sign showing that they were Sureños. According to Crystal, defendant flipped them off and called them “fucking scraps,” but he did not respond with any gang sign. He yelled “[f]uck you” and that they were “lucky” there were “girls in the car.” Crystal told defendant to “[q]uit staring” and “[l]et it go.” Defendant said “something about them being in a rival gang” and that “they are throwing up signs.”

Once the cars were moving, the Ford tailgated the Nissan and also appeared to be trying to hit it. Roach initially tried to get away from the Ford. At some point, however, defendant stated to Roach words to the effect of “[c]ome on,” “[l]et’s go,” or “[l]et’s get them.” Defendant appeared “pumped up” and “ready to jump out of the car.” Roach stopped the car in the middle of a residential street. Either before or after the Nissan stopped, the Ford hit the back passenger door of the Nissan.

Crystal testified that the driver of the Ford exited the vehicle and tried to stab defendant through the Nissan’s window. Defendant and Roach exited the car thereafter. Rosa did not remember anyone reaching into the car with a knife, nor did T.C. see this either, although she did hear defendant say “something about a knife being thrown.”

Defendant did not testify at trial, but his testimony under oath from “another hearing,” in which the same prosecutor and the same attorney representing defendant

were present, was read to the jury.<sup>2</sup> Defendant stated that the driver of the Ford exited the car, came up to the Nissan, and tried to stab defendant through the open window. The passenger got into the driver's seat of the Ford and backed it up. Defendant and Roach exited the Nissan and went towards the individual who had just tried to stab defendant. Defendant stated that his "intent at that point in time . . . was to fight this guy." He felt that if he drove away, the occupants of the Ford "would have just kept coming."

T.C. was scared and Rosa was panicking. Rosa got into the driver's seat of her car and started driving away. Crystal yelled at Rosa to "[g]o back." Crystal indicated that if Rosa "didn't go back" and defendant died, "it was all going to be on" Rosa. Crystal also said that she would "mess [Rosa] up" if she did not go back. At defendant's trial, Crystal testified that she had pleaded guilty to a criminal threats charge for threatening Rosa at this point. She testified at defendant's trial as a result of an agreement with the district attorney's office. Prior to entering the agreement, she was charged with the same offenses as defendant and was facing a "substantial number of years in state prison." If she testified truthfully, she might receive credit for time served and "get a misdemeanor offense."

Rosa drove back to the scene where the males were fighting on a driveway. Defendant testified that he "sometimes" carried a knife, but denied having any weapons on him that day. He stated that he and Roach were hitting the individual and the individual stabbed defendant in the leg. Defendant and the individual then ran out of the way of the Ford, which was approaching them. Defendant wrestled the knife away from the individual and stabbed him repeatedly. Defendant stated that "it was more like a reaction, everything just happened." According to defendant, he never said anything to the individual and "there was no exchange of words through the whole incident from

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<sup>2</sup> The record does not disclose the case in which the prior testimony was given. To the extent we refer to testimony by defendant, we are referring to defendant's testimony from this prior hearing, as read to the jury.

beginning to end.” Defendant testified that that only he, and not Roach, stabbed the individual.

According to Rosa, when the Ford went up the driveway, the driver appeared to be trying to hit defendant and Roach. The participants in the fight “dispersed.” The Ford then backed out of the driveway and onto the street, where it hit the front of Rosa’s car. Either before or after Rosa’s car was hit, defendant and Roach got into the backseat of Rosa’s car. Crystal directed Rosa, who was still driving, out of the area.

Defendant’s hands were cut and his leg had a “pretty severe wound” from the stabbing. A lot of his blood got onto the backseat of Rosa’s car. Defendant and Roach were “boasting about how they hurt the other guys.” Roach stated that “he got one of them really good” and that “he stabbed the guy deep.” Defendant told Roach to “shut up” and “not to say anything about it.” Defendant or Roach told the females, “you guys can’t snitch. You guys can’t tell anyone.” Defendant also told them, “You guys didn’t see nothing; nothing happened, right.” Defendant was “[b]asically saying [they] weren’t there.” Defendant testified that he was “[t]rying to keep people from cooperating with the police.”

Defendant wanted to go to Roosevelt Park because it was “his hood.” There were “a lot of cops” at the park however, so defendant said to “keep driving.” Defendant directed Rosa to a house, where two men approached the car. Crystal believed that the house belonged to defendant’s grandmother and that the men approaching were defendant’s father and cousin. Defendant explained what happened. He “talked about stabbing the guys” and said that he “got them good” although he also got “cut.”

Defendant then directed Rosa to drive to a second house. Crystal testified that it was defendant’s aunt’s house. T.C. believed defendant’s cousin and a person named “Boxer” lived at the house. Boxer, like defendant, was a Norteño and affiliated with the Roosevelt Park Locos.

Everyone exited the car. Crystal told Rosa, “Calm down. Relax. Don’t freak out. If you’re not, they’re going to fuck us up.” They all went into the house. Eventually, the people at the house included defendant’s dad, aunt, uncle, two of his cousins, and Boxer. Defendant at some point stated that “he got in a fight with some scraps, and that one of them stabbed him.” Defendant, his dad, and his cousins told the three females “that [they] couldn’t tell the cops, because they would ask too many questions.”

T.C. heard defendant make a statement about her and Rosa “talking.” He stated, “Snitches end up in ditches,” which T.C. understood to mean that if she told the police, she would “get in trouble” or “would end up dying.” Defendant also told T.C. more than once that “snitches don’t get stitches; they end up in ditches.” Additionally, he told T.C. that “you guys can’t tell anyone or you’ll get hurt.”

One of the women at the house “was trying to stitch . . . up” defendant’s wound. Rosa, T.C., and Crystal were in the backyard. Rosa was scared. Crystal told her to “keep calm, to not say anything, just relax.”

Boxer, Roach, and possibly a third male followed Rosa and T.C. around. Rosa felt like she was being watched. While Rosa was outside the house, a male approached her and told her that she “had to do something about [her] car,” that “it had blood on it” and “was crashed,” and that she “had to deal with it.” Rosa felt the man “was trying to brainwash [her] to think that it . . . was [her] fault.” He told her that they could burn the car and say that it was stolen.

When Rosa and T.C. went into the house, defendant, Crystal, Roach, and at least two other men and two other women were present. One of the men stated that they needed to come up with a story about what happened, and he, Crystal, and another woman started making suggestions about the story. Rosa was told to report to the police that her car had been stolen. The plan also included Roach and at least one other individual burning Rosa’s car somewhere so “that way the cops couldn’t see the blood” or “the D.N.A.” Defendant was “helping to formulate [the] plan” about what they should

tell the police and “occasionally” would say something during the discussion. For example, he said that T.C. was “not a good liar” and “to keep her out of it,” and that they should say they were shopping so they would “have an excuse of why [they] left Rosa’s car somewhere.” Defendant’s dad, uncle, cousins, Boxer, and Roach were also involved in telling the females what to say to the police.

Defendant testified that he “made comments” to “any or all of the girls about talking about this incident” involving the Ford and its occupants. He admitted that “[t]he words . . . could be interpreted as a threat.” He also acknowledged that he did not want anyone to talk about the incident because he was worried about it being reported to the police. He further admitted that he was involved in a discussion about what to do with Rosa’s car and that he said it should be burned. He wanted the car burned because he bled all over the car and he wanted to get rid of the blood. He denied actually burning the car himself.

Rosa decided that she would “agree with whatever they” said so that she could leave and that she would later tell the police “everything that happened.” Rosa was worried because of Crystal’s earlier comment that “if they saw us freaking . . . they were going to fuck us up.” Rosa felt that she “didn’t have nowhere to run.”

T.C. testified that she felt like she “couldn’t leave” the house. She also testified that “everyone,” including Boxer, Roach, and defendant, told her that she “couldn’t tell the police” what had occurred. T.C. did not feel like she could tell the police the truth because she was being followed at the house and someone was “hovering around” her. She was worried about her life if she were to call the police. T.C. explained at trial that “if he was capable of stabbing someone that wasn’t really anything to him, . . . if they were capable of having that on their conscience and not feel any guilt towards that, . . . what if someone, like, betrayed them?”

Roach told Crystal that she “couldn’t tell the cops” and that she had to make sure that Rosa and T.C. “didn’t tell the cops” either. Crystal told Rosa and T.C. to “do

whatever the guys told them to do” because she did not want anything to happen to any of the three of them.

Rosa gave her car keys to Roach and Boxer. She felt that she had no choice and that “they might hurt” her. When Rosa was asked at trial whether there was anything that led her to believe that she would be harmed if she “didn’t go along with the story,” other than what Crystal said to her, Rosa responded, “I know a guy got stabbed because whatever. I mean, if they were willing to stab him, . . . there was nothing to stop them to hurt me.”

Crystal, Rosa, and T.C. left the house and went to get Crystal’s car. Crystal told T.C. that defendant “is serious, and if we tell anyone, . . . he will hurt us.” Rosa and Crystal went to another location and reported the car stolen. Rosa participated in the lie about what happened to her car because she was afraid Crystal would “tell on” her to defendant. The police arrived and Rosa provided the fabricated story. The police told Rosa to “stop lying” and handcuffed her. Among other things, the police told Rosa that they had a witness who had described her. Rosa told the police that she did not want to talk “on the street.” At trial, Rosa explained that she was afraid “somebody else,” including Crystal, might hear her telling the truth to the police, that “they’d know” it was her telling the truth, and that “they would come after” her. She thought “somebody would come after” her because “it would be [her] fault . . . that [defendant] and Roach would get caught.” After being taken to the police station, Rosa disclosed the truth about what had happened that day. Crystal was arrested that same night, and four months later she told police the truth about what had happened.

When T.C. was initially questioned by the police, she was scared. She lied and said that she “didn’t know anything.” T.C. told the truth after the police told her that “they,” in reference “to [defendant’s] gang,” would not “hurt” her and that the police would “protect” her.

The police pulled the Ford over after the incident occurred. The individual in the passenger seat had been stabbed at least ten times, including in his head, chest, abdomen, back, hand, and leg. At the scene of the stabbing, the police found a knife. At some point, Rosa's car was found burned.

The parties stipulated that Norteños are a criminal street gang as defined by section 186.22. The parties also stipulated that defendant "is a member of the Nortenos, specifically Roosevelt Park Locos."

**b. Gang Expert Testimony**

Rocky Zantotto, a detective in the gang investigation unit for the San Jose Police Department, testified as an expert on Hispanic criminal street gangs. He explained that Norteños associate with the number 14, and will usually tattoo their bodies with four dots and one dot. Their enemy, the Sureños, associate with the number 13 and will "tattoo three dots on their body as opposed to four."

According to Detective Zantotto, music is one "indicator for gang members to identify rival gang members." Further, it is "disrespectful" for a gang to play its "gangster rap" music while driving through a rival gang's neighborhood. Regarding the CD that defendant played in Rosa's car, the detective believed it contained "Norteno gang rap," based on the CD cover and song titles.

Detective Zantotto explained that violence is "a way of life for gang members," and that gang members expect violence "on a daily basis." If a violent confrontation occurs with a rival gang, "[y]ou are expected to step up and back up your fellow gang member." In the gang culture, violence "benefits gang members." "[T]he more violent you are, the crazier you appear, the more street credibility you are going to get because nobody is going to mess with you. Nobody is going to mess with your" specific gang. "When your gang commits a violent act, the whole gang gets the notoriety from rival gangs." In addition, the violence "controls" and "terrorizes" the community. If a gang

has a violent reputation, community members will not call the police or testify against the gang.

Respect is important to gangs, including respect from other gangs. If other gangs do not respect and fear a gang, that gang “will just dissolve.” If a gang member is believed to have been disrespected, the gang member is expected to not let it “go unchallenged” and to “deal with” it, which usually means violence. Gang signs are displayed “to challenge rival gang members or in some cases to intimidate regular citizens.” If someone throws a gang sign at a Norteño, that gang member is “expected to react with some type of violence.”

In gang culture, the concept of not cooperating with police is “one of the primary things that they live by.” Even if a gang member acted legally in responding to a fight, gang culture dictates that the member not cooperate with the police. Gang members are viewed as cowards for cooperating with the police. Further, police involvement interferes with the ability of gang members to “take care” of it themselves later on. Gang members also discourage nonmembers from reporting crimes to the police. This benefits the gang “[b]ecause it allows the gang to thrive and grow.” “They can sell drugs in the open. . . . They can commit crimes against rivals and not worry about Joe Citizen sitting on his porch smoking and say[ing] no, he did it. I saw the whole thing.”

Based on a review of the facts in this case, which included reviewing police reports and information from the investigating officer, Detective Zanotto believed that the occupant of the Ford who had been stabbed was a Sureño. As for the other occupant, he testified that if the individual is in the same car, he is “definitely an associate” and “[i]f he is participating in that crime in any way, then he is a member.”

Detective Zanotto testified that the Norteño gang would benefit by telling witnesses not to report the events of May 4, 2007, if the gang members “were able to spin this crime and not have the police get involved.” Once others learned about defendant’s actions, “what he did and how he reacted appropriately,” that is going to “give him more

status in the gang.” “And by getting away with the crime and being able to dissuade witnesses,” the gang member “personally benefits” by not going to jail. At the same time, the gang benefits because the gang member does not go to jail, the “true facts of the case are never really revealed” while the version relayed always “supports” the gang’s cause, and it “benefits the gang’s reputation because they were able to stab a Sureño numerous times” and get away with it. Further, dissuading witnesses who are not a part of the gang culture benefits the gang because the fear instilled in the witnesses will be communicated to others, and those people in the community “are not going to testify against gang members in the future.”

Detective Zanotto believed that the events that occurred on May 4, 2007, leading up to the stabbing, were gang related based on the “totality of everything,” including the music, the hand gestures between the cars, defendant’s reference to “scraps,” the “back-and-forth exchange by a group of gang members,” and the end result of violence, “which is very common.” The detective also referred to evidence concerning the Nissan being pulled over, as opposed to being forced off the road or disabled so that it could not be driven. Further, the detective identified events after the stabbing that suggested the incident was gang related, including driving to Roosevelt Park, going to a family member’s house where one family member had medical training, getting stitched up at the house, the arrival of another gang member at the house, the formulating of a plan to get rid of evidence, and the “snitches” and “ditches” statement.

Regarding the burning of Rosa’s car and the statements concerning the hiding of DNA evidence from defendant’s blood, Detective Zanotto testified that hiding the blood would personally benefit defendant as well as the gang. The gang would benefit because evidence of the underlying violent act would be destroyed.

In Detective Zanotto’s opinion, the attempted dissuasion of witnesses was committed for the benefit of or in association with a criminal street gang, the Norteños. He explained that the gang will benefit because “if they can dissuade citizens not to

testify, they are never going to be caught. They can kill people at will and nobody is ever going to convict them and send them to jail.” Detective Zanotto believed that the crime of attempted witness dissuasion was committed in association with other gang members, based on the presence of three gang members, including Boxer and Roach, at the residence “directing people to do different things.”

The defense rested without proffering any testimony or other evidence. Defense counsel conceded to the jury that defendant was guilty of both counts of attempting to dissuade witnesses and the count for arson. Defense counsel told the jury that it had to decide whether defendant committed the crimes “for the benefit, association with a gang” and whether defendant had the requisite specific intent under the gang allegations.

## **2. The Verdicts and Sentencing**

The jury found defendant guilty of both counts of attempting to dissuade a witness (counts 1 and 2) and of arson (count 3). The jury also found true the gang allegation as to each count.

A combined sentencing hearing was held for the attempted dissuasion and arson case (No. CC767952), the assault case (No. CC808356) (discussed *infra*), and a third unrelated murder case. In the attempted dissuasion and arson case, defendant was sentenced to a total term of 14 years to life consecutive to the determinate term of seven years. The sentence was calculated as follows. For each of the two counts of attempted dissuasion (§ 136.1, subd. (b)(1)), the trial court imposed seven years to life pursuant to the penalty provision of section 186.22, subdivision (b)(4)(C). For the arson count (§ 451, subd. (d)), the court imposed the midterm of two years, plus five years for the gang enhancement (§ 186.22, subd. (b)(1)(B)). The sentences on all counts were to run consecutive to each other.

In the assault case (discussed *infra*), defendant was sentenced to a total term of two years, which was to run consecutive to the attempted dissuasion and arson case. In an unrelated murder case, defendant was sentenced to 25 years to life consecutive to one

year. The sentence in the murder case was to run consecutive to the two other cases. Defendant's total term for all three cases was 39 years to life consecutive to a determinate term of 10 years.

## **B. Discussion**

### **1. Special Instruction Regarding Specific Intent Element of Gang Allegations**

At the beginning of the trial, the court instructed the jury concerning the specific intent element of the gang allegations pursuant to CALCRIM No. 1401. The jury was instructed that the prosecution had to prove defendant "intended to assist, further, or promote criminal conduct by gang members."

During a subsequent instruction conference, defense counsel observed that the court had agreed to give, pursuant to the prosecution's request, the following special instruction: "The defendant's own conduct may qualify as the gang-related criminal activity. There is no requirement that the defendant intend to assist or promote criminal activity other than his own." Defense counsel stated that he "accept[ed] that instruction" and thought it was "a correct statement of law," but requested that the jury also be instructed as follows: "However, you must also determine whether such conduct was specifically intended to promote, further, or assist in criminal conduct by gang members." The court refused to give the instruction proposed by defense counsel because the language was already included in CALCRIM No. 1401.

After the close of evidence, the trial court again instructed the jury pursuant to CALCRIM No. 1401 that the prosecution had to prove defendant "intended to assist, further, or promote criminal conduct by gang members." The court also gave the special instruction requested by the prosecution that "defendant's own conduct may qualify as the gang-related criminal activity. [¶] There is no requirement that the defendant intended to assist or promote criminal activity other than his own."

On appeal, defendant contends that the special instruction by the trial court “misdescrib[ed]” the specific intent element of the gang allegations, that the error violated his state and federal constitutional rights, and that the error requires reversal. Defendant argues that his claim is cognizable on appeal because, among other reasons, it implicates his substantial rights and, to the extent his trial counsel failed to preserve the issue, his trial counsel rendered ineffective assistance.

The Attorney General suggests that defendant has forfeited the claim but acknowledges that this court may entertain the claim if defendant’s substantial rights were affected. As to the merits of the claim, the Attorney General contends that the special instruction was correct and that, if there was error, it was harmless.

Without determining whether defendant has forfeited his objection to the special instruction, we will address defendant’s argument that the instruction was erroneous in view of his contention that his substantial rights were affected by the instruction. (§ 1259.)

The gang allegation for each count required proof that defendant committed the offense “for the benefit of, at the direction of, or in association with any criminal street gang, *with the specific intent to promote, further, or assist in any criminal conduct by gang members.*” (§ 186.22, subd. (b)(1) & (4), italics added.) This scienter requirement “applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” (*People v. Albillar* (2010) 51 Cal.4th 47, 66 (*Albillar*)). In addition, “[t]here is no further requirement that the defendant act with the specific intent to promote, further, or assist a gang; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*. [Citations.]” (*Id.* at p. 67.)

In *People v. Hill* (2006) 142 Cal.App.4th 770, the Court of Appeal considered the specific intent element in the context of a crime where the defendant was the only gang member present. In that case, the defendant’s car scraped against another car. In

exchanging words with the driver of the other car, the defendant referred to his gang, told the other driver that she had “ ‘disrespected’ ” him, and later threatened to shoot her. (*Id.* at p. 772.) A police detective testified that “taking action when one feels ‘disrespected’ is important to a gang member,” and that the defendant’s gang benefited from his threat “because it showed that the gang could not be ‘disrespected’ without consequences.” (*Id.* at pp. 772-773.) The jury found the defendant guilty of making a criminal threat and found the gang allegation true. (*Id.* at p. 773.)

On appeal, the defendant contended that there was insufficient evidence to support the gang enhancement. The Court of Appeal disagreed. The court first determined that there is “no requirement in section 186.22, subdivision (b), that the defendant’s intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense the defendant commits. To the contrary, the specific intent required by the statute is ‘to promote, further, or assist in *any* criminal conduct by gang members.’” (*Ibid.*, italics added.) Therefore, defendant’s own criminal threat qualified as the gang-related criminal activity. No further evidence on this element was necessary.” (*People v. Hill, supra*, 142 Cal.App.4th at p. 774.) The court next rejected the defendant’s assertion that there was “insufficient evidence that he intended to enable or further any other gang crime.” (*Ibid.*) The court explained that “[s]ince there is no requirement in section 186.22 that the crime be committed with the intent to enable or further any other crime, defendant’s contention fails in its premise.” (*Ibid.*)

We agree with the conclusion in *People v. Hill, supra*, 142 Cal.App.4th 770, that the specific intent element may be satisfied when the defendant gang member intended to promote or further the defendant’s own gang related criminal conduct, and that the defendant’s specific intent need not relate to criminal activity apart from the offense that the defendant commits. (*Id.* at p. 774.)

In reaching this conclusion, we apply the well-settled rules governing statutory interpretation. “We begin with the fundamental premise that the objective of statutory

interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]” (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

In construing the statutory language that requires the defendant to have committed the underlying offense “with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1) & (4)), we observe that subdivision (a) of section 186.22 includes similar language. Subdivision (a), which pertains to the substantive gang offense, punishes a defendant “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.*” (§ 186.22, subd. (a), italics added.) Subdivision (a) has been interpreted as applying to a defendant gang member who acts *solely* as the perpetrator of a felony, without any evidence that the defendant aided and abetted *another* gang member. (See, e.g., *People v. Ngoun* (2001) 88 Cal.App.4th 432, 433-436 (*Ngoun*); *People v. Salcido* (2007) 149 Cal.App.4th 356, 366-369; see also *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1305-1308.)<sup>3</sup> In *Ngoun*, the appellate court observed that “[i]n common usage, ‘promote’ means to contribute to

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<sup>3</sup> In *People v. Rodriguez* (2010) 188 Cal.App.4th 722, review granted Jan. 12, 2011, S187680, the issue before the California Supreme Court is whether an active participant in a criminal street gang may be found guilty of violating section 186.22, subdivision (a), when the defendant acts entirely alone in committing a felony, and there is no other evidence indicating the crime had anything to do with the gang. (See also *People v. Gonzales* (2011) 199 Cal.App.4th 219, review granted Dec. 14, 2011, S197036.)

the progress or growth of,” and “ ‘further’ means to help the progress of.” (*Ngoun, supra*, at p. 436.) The appellate court determined that “[t]he literal meanings of these critical words squares with the expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense ‘contributes’ to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity.” (*Ibid.*)

Here, with respect to the specific intent element of subdivision (b)(1) and (4) of section 186.22, a defendant gang member who commits a gang related felony can commit that felony with the specific intent to promote or further criminal conduct by a gang member—that same felony by the defendant gang member. It is not reasonable that the Legislature, in attempting to deter criminal gang activity, intended the punishment provided by that subdivision to apply to a defendant committing a gang related crime with the intent to promote or further criminal conduct *by other* gang members, but *not* apply the punishment if the defendant intends to promote or further criminal conduct committed by the defendant gang member himself or herself.

We are not persuaded by defendant’s argument that the reference to “gang members” in the plural (§ 186.22, subd. (b)(1) & (4)) means that the statute requires the defendant to have specifically intended to promote or further criminal conduct by *another* gang member. We believe that a reference to “gang members” in the plural in subdivision (b)(1) and (4) of section 186.22 may mean “gang member” in the singular. (See § 7 [the plural number includes the singular, and words and phrases must be construed according to the context].)

In sum, we believe that the specific intent element may be satisfied when a defendant gang member commits the underlying offense with the specific intent to

promote or further the defendant's own gang-related criminal conduct, and that the defendant's specific intent need not relate to criminal activity apart from the charged offense that the defendant committed. In this case, the trial court instructed the jury pursuant to CALCRIM No. 1401 that the prosecution had to prove defendant "intended to assist, further, or promote criminal conduct by gang members." Defendant stipulated that he was a member of a criminal street gang. The trial court's special instruction stated: "The defendant's own conduct may qualify as the gang-related criminal activity. [¶] There is no requirement that the defendant intended to assist or promote criminal activity other than his own." This special instruction correctly informed the jury that the specific intent element may be satisfied if the defendant intended to promote his own gang-related criminal activity. Because the trial court's special instruction was not erroneous, we conclude that defendant's substantial rights were not affected by the instruction. (§ 1259.)

## **2. Sufficiency of the Evidence Regarding Specific Intent Element**

Defendant contends that the record does not contain substantial evidence to support the specific intent element of the gang allegations. The Attorney General responds that there was "ample evidence" the crimes were committed "solely for gang reasons."

As we have stated, the gang allegation for each count against defendant required proof that he committed the offense "for the benefit of, at the direction of, or in association with any criminal street gang, *with the specific intent to promote, further, or assist in any criminal conduct by gang members.*" (§ 186.22, subd. (b)(1) & (4), italics added.) The same standard of review applies to claims of insufficiency of the evidence to support a gang enhancement finding as for a conviction. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224; *People v. Leon* (2008) 161 Cal.App.4th 149, 161.) "A reviewing court faced with such a claim determines 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt.’ [Citations.] We examine the record to determine ‘whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] Further, ‘the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Catlin* (2001) 26 Cal.4th 81, 139 (*Catlin*)). “ ‘A reasonable inference, however, “may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.” ’ [Citation.]” (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

“This standard applies whether direct or circumstantial evidence is involved.” (*Catlin, supra*, 26 Cal.4th at p. 139.) The element of intent is generally proved with circumstantial evidence. “Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense. [Citations.]” (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) Evidence to support the element of specific intent may be shown by a defendant’s conduct, including any words spoken, and by all the circumstances surrounding the commission of the acts. (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.)

Defendant acknowledges that at trial, the defense “conceded” to the jury that he “attempted to dissuade [witnesses] not to cooperate and assisted in burning of their car to cover up blood.” Further, defendant does not dispute and instead “assum[es] potential gang benefit” from the crimes. He contends, however, that there was not substantial evidence that he had the “specific intent to promote crimes by *other* gang members” or “to induce *other* gang members to commit discrete crimes.” (Italics added.) As we have just explained with respect to defendant’s claim of instructional error on the specific intent element, there is no requirement that the defendant intend to promote or further

another gang member's criminal conduct. "Since there is no requirement in section 186.22 that the crime be committed with the intent to [promote] or further any other crime, defendant's contention fails in its premise." (*People v. Hill, supra*, 142 Cal.App.4th at p. 774.)

Moreover, substantial evidence supports the specific intent element of the gang allegations for the attempted dissuasion and arson counts. At trial, defendant stipulated that he was a member of Norteños, a criminal street gang. The evidence established that Roach and Boxer were also Norteño gang members. As defendant acknowledges, it was conceded at trial that he committed the attempted dissuasion counts and that he assisted in burning Rosa's car to cover up his blood. The evidence at trial further reflected that defendant, Roach, and Boxer jointly participated in these crimes. Defendant verbally attempted to dissuade Rosa and T.C., and Roach and Boxer told T.C. that she could not tell the police what had occurred. Further, Roach told Crystal that she had to make sure that Rosa and T.C. did not tell the police what had happened. Roach and Boxer also followed Rosa and T.C. around. All three gang members participated in the creation of the false story and the plan to burn Rosa's car. A reasonable inference arises that the gang members' efforts were directed at hiding from the police any evidence linking defendant and Roach to the earlier incident involving the stabbing of a rival gang member. Defendant does not dispute that there is substantial evidence that he committed the offenses, attempted dissuasion and arson, for the benefit of the gang. In view of the record, we believe that substantial evidence also supports the inference that defendant committed these gang-related offenses with the intent to promote or further these gang-related offenses by defendant himself. A rational factfinder might have also reasonably concluded that defendant intended to assist Roach and Boxer in the commission of these offenses. (See *Albillar, supra*, 51 Cal.4th at p. 68.) In sum, we determine that substantial evidence supports the specific intent element of the gang allegations.

### **3. Penalty Provision Under Section 186.22, subdivision (b)(4)**

As we stated above, defendant was charged with two counts of attempting to dissuade a victim or witness under section 136.1, subdivision (b)(1), and the information further alleged that both counts were committed for the benefit of, at the direction of, or in association with a criminal street gang under section 186.22, subdivision (b)(4). At trial, the court instructed the jury regarding the elements of the attempted dissuasion offense as follows: “To prove that the defendant is guilty of this crime, the People must prove that, number one, the defendant tried to prevent or discourage Rosa [C.] in Count 1, [T.C.] in Count 2, from making a report she was a victim of or a witness to a crime to a peace officer or local law enforcement officer. [¶] Number two, that Rosa [C.] and [T.C.] were witnesses to and/or victims of a crime. [¶] And number three, that the defendant knew he was trying to prevent or discourage Rosa [C.] or [T.C.] from making a report that she was a victim of or a witness to a crime and intended to do so.” (See § 136.1, subd. (b)(1); CALCRIM No. 2622.) On appeal, the parties agree that the court did *not* give an instruction that required the jury to also determine whether defendant’s act was accompanied by an express or implied threat of force or violence. (See § 136.1, subd. (c)(1); CALCRIM No. 2623.) The jury ultimately found defendant guilty of both counts of attempting to dissuade a victim or witness, and it found true the gang allegations under section 186.22 as to both counts. For each of the attempted dissuasion counts, the trial court imposed a life sentence pursuant to the penalty provision of section 186.22, subdivision (b)(4)(C).

Defendant contends that, whereas the crime of attempted dissuasion under section 136.1, subdivision (b)(1) does *not* require the use of force or threats, the penalty provision of section 186.22, subdivision (b)(4)(C) *does* require “proof of threats beyond the simple dissuasion offenses” of which he was convicted. Defendant contends that the prosecution “failed to plead the . . . factual issue” concerning threats, that he “was not fairly apprised of the underlying factual basis requiring proof of threats so as to dispute

the matter at trial,” and that “[r]eversal is required with prejudice to retrial.” (Italics omitted.) He also argues that there was a failure to “instruct upon or secure any jury finding” that the attempted dissuasion offenses “involved threats,” and that the error is not harmless beyond a reasonable doubt. In response to our request for supplemental briefing, defendant further contends that the threat element is not supported by substantial evidence and therefore retrial is not permitted.

The Attorney General concedes that a defendant must “dissuade witnesses by means of threats” in order for the penalty provision of section 186.22, subdivision (b)(4)(C) to apply. The Attorney General contends, however, that defendant had “proper notice” from the information that the prosecution intended to prove that threats were made. Regarding jury instructions, the Attorney General concedes that the trial court erroneously failed to instruct that, in order to find the gang allegations true for the attempted dissuasion counts, the jury had to determine that defendant “dissuaded the witnesses by means of threats.” The Attorney General contends, however, that the error was “harmless beyond a reasonable doubt because there is no possibility that the jury believed that [defendant] dissuaded Rosa and [T.C.] from speaking honestly to the police, but did so without any overt or implicit threats.” In supplemental briefing, the Attorney General contends that if the instructional error was not harmless, there is substantial evidence of threats to justify a retrial.

For the following reasons, we determine that the judgment must be reversed as to the true finding on the gang allegation for count 1, attempting to dissuade Rosa, but not as to the true finding on the gang allegation for count 2, attempting to dissuade T.C.

First, we agree with the Attorney General’s concession that the penalty provision of section 186.22, subdivision (b)(4)(C) applies in this case only if defendant’s attempt to dissuade was accompanied by a threat. Section 186.22, subdivision (b)(4) “ ‘sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.’ [Citation.]” (*People v.*

*Jones* (2009) 47 Cal.4th 566, 576 (*Jones*.) The conditions of subdivision (b)(4) include that the underlying felony was committed for the benefit of a criminal street gang with the requisite specific intent. (§ 186.22, subd. (b)(4).) If the underlying felony is “*threats to victims and witnesses, as defined in Section 136.1*” (§ 186.22, subd. (b)(4)(C), italics added), then the sentence is “an indeterminate term of *life imprisonment* with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term determined . . . pursuant to [the determinate sentencing law] for the underlying conviction . . . [or] [¶] . . . [¶] (C) [i]mprisonment in the state prison for seven years . . .” (§ 186.22(b)(4), italics added; see *Jones, supra*, 47 Cal.4th at p. 571.)

Section 136.1 defines several related offenses regarding witness or victim dissuasion.<sup>4</sup> (See *People v. Torres* (2011) 198 Cal.App.4th 1131, 1137.) In this case, defendant was convicted of violating section 136.1, subdivision (b)(1), which makes it a crime for a defendant to attempt “to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from . . . [¶] . . . [m]aking any report of that victimization to any peace officer or . . . local law enforcement officer . . .”

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<sup>4</sup> Section 136.1 states in part: “(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. [¶] . . . [¶] (c) Every person doing any of the acts described in subdivision . . . (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person. [¶] . . . [¶] (d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section. . . .”

As we explained, the gang statute imposes greater punishment under section 186.22, subdivision (b)(4) when, among other things, the felony committed is “threats to victims and witnesses, as defined in Section 136.1.” (§ 186.22, subd. (b)(4)(C).) The only reference to a threat in section 136.1 is in subdivision (c)(1). Subdivision (c) of section 136.1 provides in relevant part: “Every person doing any of the acts described in subdivision . . . (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: [¶] (1) Where the act is accompanied by force or by *an express or implied threat of force or violence*, upon a witness or victim or any third person or the property of any victim, witness, or any third person.” (§ 136.1, subd. (c)(1), italics added.) Thus, in order for the penalty provision under section 186.22, subdivision (b)(4)(C) to apply in this case, defendant’s attempt to prevent or dissuade Rosa or T.C. from making a report to the police must have been accompanied by “an express or implied threat of force or violence.” (§ 136.1, subd. (c)(1); cf. *People v. Neely* (2004) 124 Cal.App.4th 1258, 1261 (*Neely*) [section 1192.7, subdivision (c)(37), which defines a serious felony as including “intimidation of victims or witnesses, in violation of Section 136.1,” includes all felony violations of section 136.1].)

Second, we disagree with defendant that he did not have notice as to the factual basis for imposition of the penalty under section 186.22, subdivision (b)(4). “Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. [Citations.] ‘Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.’ [Citation.] ‘The “preeminent” due process principle is that one accused of a crime must be “informed of the nature and cause of the accusation.” [Citation.] Due process of law requires that an accused be advised of the charges against him so that he

has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.’ [Citation.]” (*People v. Seaton* (2001) 26 Cal.4th 598, 640-641.)

In the second amended information, two counts of attempted dissuasion were alleged, and each referred to section 136.1, subdivision (b)(1). Following each count of attempted dissuasion, the prosecution alleged that defendant “*committed an offense, a violation of Penal Code section 136.1, for the benefit of, at the direction of, and in association with a criminal street gang, . . . with the specific intent to promote, further, and assist in criminal conduct by members [of] this gang within the meaning of Penal Code section 186.22(b)(4).*” (Italics added.) The information, by citing section 186.22, subdivision (b)(4), provided notice to defendant that the prosecution was seeking life punishment based on the underlying felony of “threats to victims and witnesses, as defined in Section 136.1.” (§ 186.22, subd. (b)(4)(C).) Thus, the information apprised defendant that the prosecution intended to seek life imprisonment under section 186.22, subdivision (b)(4), and that the basis for this punishment was threats to victims and witnesses, as defined in section 136.1. To the extent the references in the information to subdivision (b)(1) of section 136.1 created an uncertainty as to whether the prosecution intended to prove threats to victims or witnesses as provided in subdivision (c)(1) of that section, the defect is waived by defendant’s failure to demur. (See *People v. Equarte* (1986) 42 Cal.3d 456, 466-467.)

Third, we determine that the instructional error was harmless beyond a reasonable doubt as to the true finding on the gang allegation for count 2, attempting to dissuade T.C., but that the error warrants reversal as to the true finding on the gang allegation for count 1, attempting to dissuade Rosa. “ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.]” ’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) A trial court’s failure to instruct on an element of a crime, or an

element under section 186.22, subdivision (b)(4) of the gang statute, is reviewed under the constitutional standard of harmless error set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325, 327; see *People v. Sakarias* (2000) 22 Cal.4th 596, 624-625 (*Sakarias*).) Under the *Chapman* standard, it must appear “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman*, at p. 24.) In the context of an omitted element, “we may affirm despite the error if the jury that rendered the verdict at issue could not rationally have found the omitted element unproven; the error is harmless, that is, if the record contains no substantial evidence supporting a factual theory under which the elements submitted to the jury were proven but the omitted element was not. [Citation.]” (*Sakarias*, at p. 625.)

In this case, as to count 2, regarding the attempted dissuasion of T.C. and the accompanying gang allegation, we determine that the trial court’s error in failing to instruct regarding the requirement of an express or implied threat was harmless beyond a reasonable doubt. T.C. testified that she heard defendant say, “[s]nitches end up in ditches,” in reference to her and Rosa “talking.” T.C. understood this statement to mean that if she told the police, she would “get in trouble” or “would end up dying.” Defendant also told T.C. more than once that “snitches don’t get stitches; they end up in ditches.” Additionally, he told T.C. that “you guys can’t tell anyone or you’ll get hurt.” T.C.’s testimony that she heard these statements from defendant was uncontroverted. Indeed defendant admitted that he made comments to one or more of the three females “about talking about [the] incident” and that his comments “could be interpreted as a threat.” Given the words used by defendant, we do not believe the statements could be interpreted as something other than threats of force or violence. (§ 136.1, subd. (c)(1) [attempt to dissuade must be accompanied by “an express or implied threat of force or violence”]; see *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1344 [violation of section 136.1, subdivision (c)(1) may be established where the defendant’s words or

actions support inference that the defendant attempted by threat of force to induce withholding testimony].) In view of the uncontradicted testimony by T.C. that defendant made multiple threats to her concerning talking to the police, and defendant's admission that he threatened at least one of the females, we conclude that the jury could not have rationally found the omitted threat element unproven as to the count pertaining to the attempted dissuasion of T.C. (See *People v. Ortiz* (2002) 101 Cal.App.4th 410, 416 [holding that failure to instruct on threat element was harmless beyond a reasonable doubt where uncontradicted testimony of the defendant's statements to the victim was such that "no reasonable jury could have decided" the defendant made the statements "and yet have viewed the statements . . . as not threatening force"].) The instructional error as to the threat element was therefore harmless as to the true finding on the gang allegation for count 2.

With respect to count 1, regarding the attempted dissuasion of Rosa and the accompanying gang allegation, we reach a different conclusion. As the Attorney General acknowledges, Rosa did not testify as to an express threat of force or violence by defendant. The Attorney General contends, however, that there is evidence of implied threats by defendant. The Attorney General points to Rosa's testimony that she gave her keys to Roach because she felt she had no choice and believed that she might be hurt; that in talking to the police, she did not want anyone to overhear because she feared someone would come after her; that she was told by others that she had to make up a story about what had happened; that she let them take her car to burn because she believed they would keep her at the house until she agreed; and that after she left the second house but before she talked to the police, she threw up.

We believe there was substantial evidence from which the jury could have found that defendant's attempt to dissuade Rosa was accompanied by a threat. The evidence reflected that Rosa and T.C. travelled in the car with defendant after the stabbing. There was also evidence that Rosa and T.C. were in the backyard of the second house, in the

front of the house, and inside the house at the same time. Rosa and T.C. also left the house at the same time. Further, T.C. testified about the threats she heard from defendant while inside the house and which were about her and Rosa “talking.” Defendant himself admitted that he made comments to one or more of the three females “about talking about [the] incident” and that his comments “could be interpreted as a threat.” Further, when defendant was asked whether he “made statements that someone could interpret as a threat to the three girls *in the car* not to report this incident to the police,” he responded, “No. That was not the threat. *The threats came later.*” (Italics added.) In view of defendant’s admission that he made threats after he and the females had exited the car, the evidence that T.C. heard threats by defendant at the second house, and the evidence indicating that T.C. and Rosa were in the same locations at the second house at the same time, there is substantial evidence that defendant’s attempted dissuasion of Rosa was accompanied by a threat.

Although there was sufficient evidence for the jury to have found that the attempt to dissuade Rosa was accompanied by a threat, we cannot conclude on the record before us that the error in failing to instruct on the threat element was harmless beyond a reasonable doubt. The jury might have rationally concluded that defendant attempted to dissuade Rosa, but that he did so without any threat. Consequently, as to count 1, the attempted dissuasion count involving Rosa, the judgment must be reversed as to the true finding on the gang allegation and remanded for possible retrial of the gang allegation.

#### **4. Opinion Testimony by Gang Expert**

During a hearing on motions in limine, defense counsel acknowledged that the expert may “talk about the benefit and association” element of the gang allegations. He stated, however, that he was “concerned” about the prosecution’s gang expert testifying about “an ultimate issue of fact” and particularly defendant’s specific intent. The prosecutor agreed that the expert “cannot testify as to the specific intent the defendant had.” The trial court granted defense counsel’s “request,” ruling that the gang expert may

offer an opinion regarding whether the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, but that the expert was precluded from offering an opinion on whether defendant had the requisite specific intent under section 186.22.

At the beginning of the testimony by the gang expert, the trial court instructed the jury pursuant to CALCRIM No. 332 as follows: “This witness will be allowed to testify as an expert and to give opinions. You must consider the opinions, but you are not required to accept them as true and correct. The meaning and importance of any opinions are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert’s knowledge, skill, experience, training and education, the reasons the expert gave for an opinion, and the facts or information on which the expert relied on in giving the opinion. You must decide whether the information on which the expert relied . . . was true and accurate. And you may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.”

Relevant to defendant’s contentions on appeal, the gang expert, Detective Zanutto, was asked at trial if he “ha[d] an opinion as to whether or not the dissuading of the witnesses was committed for or in association with a criminal street gang, the Norteños.” The detective stated, “Yes.” When asked for his opinion in that regard, Detective Zanutto explained that both the individual personally, as well as the gang would “reap the benefits of getting away with dissuading someone not to testify. And it goes back to if they can dissuade citizens not to testify, they are never going to be caught. They can kill people at will and nobody is ever going to convict them and send them to jail.” The prosecution then asked the detective, “in regards to the association, what are you basing your opinion on this crime was committed in association with other gang members?” Detective Zanutto answered: “During the time at the residence, it’s my opinion there were three members of a criminal street gang there directing people to do different

things.” The detective subsequently testified that Boxer and Roach were two of the three gang members to whom he was referring.

After the close of evidence, the trial court again instructed the jury pursuant to CALCRIM No. 332 concerning expert witness testimony. The court also instructed the jury: “An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume that certain facts are true and then to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. And if you conclude that an assumed fact is not true, consider the effect of the expert’s reliance on that fact in evaluating the expert’s opinion.” (See CALCRIM No. 332.)

On appeal, defendant argues that the gang expert improperly testified as to the “intentional commission of the charged offenses in association with other gang members.” According to defendant, the testimony “told jurors [that defendant] and two other gang members committed *and* directed the charged crimes in association with each other,” and the testimony “effectively told jurors how to decide the case and certainly the gang allegations, including on the intent element.” Defendant further contends that the testimony “was not helpful or necessary to the lay jury to understand questions of intent and conduct which the jury could resolve itself, and further invaded the factfinding province of the jury in unduly authoritative and unfair fashion.” He asserts that the errors violated his federal and state constitutional rights. Defendant also argues that, to the extent his counsel was required to assert “further” objections or requests to strike the expert’s testimony, he was deprived of effective assistance of counsel.

The Attorney General contends that defendant has forfeited his claim on appeal, but that defendant’s claim of ineffective assistance “would preserve the issue.” Regarding the substance of defendant’s claim concerning the expert’s testimony, the Attorney General argues that the testimony was proper.

Without deciding whether defendant has forfeited his objection on appeal, we conclude that the challenged testimony by the expert was properly admitted. “California

law permits a person with ‘special knowledge, skill, experience, training, or education’ in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’ (*Id.*, subd. (a).) The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*)). Opinion testimony concerning the culture and habits of criminal street gangs may include testimony regarding “whether and how a crime was committed to benefit or promote a gang.” (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657 (*Killebrew*)); see also *People v. Williams* (2009) 170 Cal.App.4th 587, 601, 621; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509.)

“ ‘Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.’ (Evid. Code, § 805 . . . .) Rather, the reason for the rule is similar to the reason expert testimony regarding the defendant’s guilt in general is improper. ‘A witness may not express an opinion on a defendant’s guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] “Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.” ’ [Citations.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

In this case, contrary to defendant’s contention, the testimony at issue did not concern defendant’s specific intent. The expert’s testimony, as framed by the questions posed to him, was directed to another element of the gang allegations: whether the crime was committed “*for the benefit of . . . or in association with any criminal street gang.*” (§ 186.22, subd. (b)(4), italics added.) Specifically, Detective Zanotto was asked whether

he had an opinion regarding whether “the dissuading of the witnesses was committed *for* or in *association with* a criminal street gang, the Norteños” (italics added), and he responded affirmatively. In response to further questioning, the detective explained how the gang would *benefit*, and he stated the basis for his opinion that the crime was committed *in association with* other gang members. In contrast, the specific intent element of the gang allegations requires proof that the defendant had “the specific intent to promote, further, or assist in any criminal conduct by gang members.” (*Ibid.*) The challenged testimony here did not offer the expert’s opinion on defendant’s specific intent. Rather, the testimony offered an explanation as to why Norteño gang members in general would be motivated to attempt to dissuade witnesses from reporting the activities of gang members. If they dissuade witnesses, they will not get “caught” for those activities. They can commit crimes “at will” and will never be punished. Although the testimony explained defendant’s possible motivation for attempting to dissuade Rosa and T.C., the gang expert did *not* offer an opinion as to whether defendant actually harbored the requisite specific intent when engaging in the conduct.

Further, the subject matter of the challenged testimony by Detective Zanotto was a proper area of expert testimony because it pertained to the culture and habits of Norteños, an area “sufficiently beyond common experience.” (Evid. Code, § 801, subd. (a); see also *Gardeley, supra*, 14 Cal.4th at p. 617; *Killebrew, supra*, 103 Cal.App.4th at p. 657.) As we explained, the detective’s testimony offered an explanation as to why Norteños in general would be motivated to attempt to dissuade witnesses from reporting the activities of gang members. If they dissuade witnesses, they will not get “caught” or punished for those activities. The detective had also earlier explained that discouraging the reporting of crimes “allows the gang to thrive and grow.” “They can commit crimes against rivals and not worry about Joe Citizen sitting on his porch smoking and say[ing] no, he did it. I saw the whole thing.” The detective also testified that the gang benefits because the gang member does not go to jail, the “true facts of the case are never really revealed” while the

version relayed always “supports” the gang’s cause, and it “benefits the gang’s reputation because they were able to stab a Sureño numerous times” and get away with it. In sum, the expert’s testimony regarding the motivation of Norteños concerned a subject matter well beyond common experience.

Moreover, although Detective Zanutto referred to Boxer, Roach, and implicitly defendant as “directing people to do different things” at the residence, the testimony was in response to the prosecution’s question about the *basis* for his opinion that the crime was committed in association with other gang members. The jury was twice instructed, before expert testimony by Detective Zanutto and at the close of evidence, that in evaluating the believability of an expert witness, the jury should consider “the reasons the expert gave for an opinion, and the facts or information on which the expert relied on in giving the opinion.” The jury was further instructed that it “must decide whether the information on which the expert relied . . . was true and accurate,” and that it “may disregard any opinion that [it] find[s] unbelievable, unreasonable, or unsupported by the evidence.” We must presume the jury followed the court’s instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 231.) Accordingly, we determine that the challenged testimony by the gang expert was properly admitted.

### **5. Gang Expert’s Reference to Gang Slogans**

At trial, Detective Zanutto indicated that he had reviewed police reports containing statements by the individual from the Ford who was stabbed. The detective was then asked whether this individual had reported that defendant stated gang slogans “while this event was occurring on May 4th out on that driveway.” Detective Zanutto testified, “I don’t know specifically if he said the defendant, but somebody made some gang slogans.” In response to further questioning, Detective Zanutto indicated that this information “help[ed] form” his opinion that the attempted dissuasion of Rosa and T.C. was committed for the benefit of the gang. On cross-examination, Detective Zanutto acknowledged that he did not have a statement from any other individual regarding gang

slogans being made. On redirect examination, the detective indicated that the individual had reported the gang slogans while he was in the infirmary at jail.

The prosecutor and defense counsel had earlier discussed in an unreported conference in chambers whether the expert would be allowed to testify about the gang slogans. The trial court apparently indicated that the expert would be allowed to testify.

After the expert testified, and outside the presence of the jury, defense counsel stated his objection on the record to the testimony by the expert regarding gang slogans. According to defense counsel, a police report stated that when defendant and Roach exited the car, they “yelled puro . . . Norte, showing their willingness to commit extreme acts of violence for the benefit of the Norteño movement . . . .” The individual from the Ford had apparently reported these gang slogans to the police. Relying on *People v. Coleman* (1985) 38 Cal.3d 69 (*Coleman*) and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), among other authorities, defense counsel argued that the expert was being allowed to testify that the gang slogan had been made, which was an ultimate issue of fact in the case; the statement by the individual from the Ford was being used for the truth of the matter, was testimonial in nature, and its validity or truthfulness was questionable; and the statement was prejudicial while the probative value was questionable. Defense counsel further stated that he agreed only “under protest” to “watering . . . down” the testimony by “referring to slogans and not using the specific statement.” The trial court explained that when the objection was previously discussed in chambers, the court engaged in an Evidence Code section 352 analysis and “thought [the proposed testimony] was more probative than prejudicial.” After the court indicated that the proposed testimony would be permitted, the parties “and the officer talked about basically watering down the actual statement to a gang slogan . . . .”

The trial court later gave a limiting instruction to the jury as follows: “Officer Rocky Zanotto testified that in reaching his conclusions as an expert witness, he considered statements made by other persons such as other law enforcement officers,

crime victims, gang members, and statements made by [the individual from the Ford] to San Jose police officers. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true." (See CALCRIM No. 360.)

On appeal, defendant contends the trial court erred in allowing the testimony concerning gang slogans even with a limiting instruction. Defendant argues that the error violated his "right to due process, a fair trial, and the right to confront testimonial hearsay since the limiting instruction was not realistic or effective."

"Evidence Code section 801 limits expert opinion testimony to an opinion that is '[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .' [Citation.]" (*Gardeley, supra*, 14 Cal.4th at p. 617.) Thus, "[e]xpert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*Id.* at p. 618; *People v. Bell* (2007) 40 Cal.4th 582, 608 (*Bell*).)

"Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.]" (*Gardeley, supra*, 14 Cal.4th at p. 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*Ibid.*; *Bell, supra*, 40 Cal.4th at p. 608.)

“A trial court, however, ‘has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.’ [Citation.] A trial court also has discretion ‘to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.’ ([*Coleman, supra*, 38 Cal. 3d at p.] 91.) This is because a witness’s on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into ‘independent proof’ of any fact. [Citations.]” (*Gardeley, supra*, 14 Cal.4th at p. 619; *Bell, supra*, 40 Cal.4th at p. 608.)

“[P]rejudice may arise if, ‘“under the guise of reasons,” ’ the expert’s detailed explanation ‘ “[brings] before the jury incompetent hearsay evidence.” ’ [Citations.] ¶¶ Because an expert’s need to consider extrajudicial matters, and a jury’s need for information sufficient to evaluate an expert opinion, may conflict with an accused’s interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court’s sound judgment. [Citations.] Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his [or her] opinion and should not be considered for their truth. (*Coleman, supra*, 38 Cal.3d at p. 92.)” (*People v. Montiel* (1993) 5 Cal.4th 877, 918-919 (*Montiel*); *Catlin, supra*, 26 Cal.4th at p. 137.) However, “[s]ometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert’s testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. (*Coleman, supra*, 38 Cal.3d at pp. 91-93.)” (*Montiel*, at p. 919; *Bell, supra*, 40 Cal.4th at p. 608.)

We review a claim of erroneous admission of evidence under the abuse of discretion standard of review. “ ‘As a general matter, a trial court is vested with broad discretion in ruling on the admissibility of evidence. The court’s ruling will be upset only

if there is a clear showing of an abuse of discretion, i.e., that the court exceeded the bounds of reason.’ [Citation.]” (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.)

In this case, we determine that the trial court properly admitted the gang expert’s testimony regarding an individual’s statement about gang slogans, and that the trial court’s limiting instruction was sufficient to address any potential prejudice from admission of the statement. The expert’s testimony was relevant to show the basis for his opinion. Further, the testimony about the statement concerning gang slogans was relatively brief, and the testimony did not indicate who uttered the gang slogan or the specifics of what was expressed. This reduced the potential for prejudice from the statement. Moreover, the court instructed the jury that it may consider the statement by the individual “only to evaluate the expert’s opinion,” and that the statement was not to be considered “proof that the information contained in the [statement] is true.” (See CALCRIM No. 360.) We do not believe the instructions would have been ineffective in this case, as defendant argues. (Cf. *Coleman, supra*, 38 Cal.3d at p. 92 [“in aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem”].)

Further, we are not persuaded by defendant’s argument that the testimony violated his right to confront witnesses. In *Gardeley, supra*, 14 Cal.4th 605, the California Supreme Court determined that the gang expert’s testimony in the case before it helped establish whether a particular gang met the definition of a criminal street gang, and provided evidence that the defendant had attacked the victim for the benefit of the gang with the requisite specific intent. (*Id.* at pp. 619-620.) The court observed that, “[c]onsistent with [the] well-settled principles” concerning expert witness testimony, the detective “could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay.” (*Id.* at p. 619.)

Subsequently, in *Crawford, supra*, 541 U.S. 36, the United States Supreme Court held that, under the confrontation clause, “[t]estimonial statements of witnesses absent

from trial” are admissible “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness].” (*Id.* at p. 59, fn. omitted.)

In *People v. Thomas* (2005) 130 Cal.App.4th 1202 (*Thomas*), Division Two of the Fourth Appellate District considered *Crawford* in the context of a defendant’s challenge to testimony by a gang expert. The defendant in *Thomas* contended that “his right to confront witnesses was violated by the admission of hearsay evidence in the form of the gang expert’s conversations with other gang members in which they identified defendant as a gang member.” (*Thomas*, p. 1208.) The appellate court observed that “[t]he rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. (See [*Gardeley, supra*, 14 Cal.4th at pp.] 618-619 . . . .)” (*Thomas*, p. 1209.) The appellate court reasoned that “*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion. *Crawford* itself states that the confrontation clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’ (*Crawford, supra*, 541 U.S. at p. 59, [fn. 9] . . . .)” (*Thomas*, p. 1210.) The appellate court ultimately concluded that, because the statements in the case before the court “were not offered to establish the truth of the matter asserted, but merely as one of the bases for an expert witness’s opinion, the confrontation clause, as interpreted in *Crawford*, does not apply. There was no error in the use of the hearsay statements.” (*Id.* at p. 1210.)

In *People v. Hill* (2011) 191 Cal.App.4th 1104, the defendant similarly contended that the gang expert improperly testified about inadmissible material that formed the basis for his opinions. In considering this issue, the First Appellate District disagreed with the analysis in *Thomas*. The appellate court stated: “Central to the reasoning in *Gardeley* and *Thomas* is the implied assumption that the out-of-court statements may help the jury evaluate the expert’s opinion without regard to the truth of the statements. Otherwise, the conclusion that the statements should remain free of *Crawford* review because they are not admitted for their truth is nonsensical. But this assumption appears to be incorrect.” (*People v. Hill, supra*, 191 Cal.App.4th at pp. 1129-1130.) The appellate court explained that “where basis evidence consists of an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert’s opinion.” (*Id.* at p. 1131, fn. omitted.)

The appellate court in *People v. Hill* further observed that “the California Supreme Court decisions concluding basis evidence is not admitted for its truth were reached before the United States Supreme Court reconsidered the confrontation clause in *Crawford, supra*, 541 U.S. 36. . . . Since that reconsideration, there has been a heightened concern regarding an expert’s disclosure of basis evidence consisting of out-of-court statements. [Citation.] And, although the California Supreme Court considered the hearsay implications of such evidence, none of the cases specifically considered the argument raised by appellant here: admitting the out-of-court statements to *evaluate* the opinion effectively admitted them for their *truth*.” (*People v. Hill, supra*, 191 Cal.App.4th at p. 1131.)

The appellate court in *People v. Hill* ultimately concluded that the gang expert’s testimony concerning the information serving as the basis for his opinion was properly admitted. The appellate court explained that, “[b]ut for the long line of California Supreme Court precedent supporting *Thomas*, we would reject that opinion . . . . But our position in the judicial hierarchy precludes that option; we must follow *Gardeley* and the

other California Supreme Court cases in the same line of authority. We conclude that the trial court here properly determined that the challenged basis evidence related by [the gang expert] was not offered for its truth but only to evaluate [the expert's] opinions. Therefore, its admission did not violate the hearsay rule or the confrontation clause.” (*People v. Hill, supra*, 191 Cal.App.4th at p. 1131, fns. omitted; see also *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In the present case, based on *Gardeley, supra*, 14 Cal.4th at pages 618 through 619, we conclude that the challenged testimony concerning gang slogans was properly admitted to show the basis of Detective Zannotto's opinion, and was not admitted for the truth of the statement concerning gang slogans. Thus, admission of the testimony did not violate the confrontation clause.<sup>5</sup>

Even if the expert's testimony concerning a statement about gang slogans should have been excluded, we find that defendant was not prejudiced by any error in the admission of the testimony. A confrontation clause violation is subject to federal harmless-error analysis under *Chapman, supra*, 386 U.S. at page 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681-682, 684.) “[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” (*Id.* at p. 681.)

In this case, there was overwhelming evidence that the attempted dissuasion counts were gang related, and that evidence included facts showing that the underlying incident involving the Ford was gang related. When defendant and another Norteño gang

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<sup>5</sup> In *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886, the California Supreme Court ordered briefing on whether the defendant was denied his constitutional right of confrontation when one expert testified as to the manner and cause of death in a murder case based on another pathologist's autopsy report. In *People v. Williams* (2010) 238 Ill.2d 125 [939 N.E.2d 268, 345 Ill.Dec. 425], cert. granted *sub nom. Williams v. Illinois*, June 28, 2011, No. 10-8505, the United States Supreme Court will consider whether allowing an expert witness to testify about the DNA test results of a non-testifying analyst violates the confrontation clause.

member were in Rosa's car, defendant played Norteño rap music. The music made references to scraps, a derogatory reference to Sureños, and to beating and killing them. The music was playing loudly while all the windows were rolled down. When Rosa's car was near the Ford, the occupants, who were Sureños, made gang signs, which are generally used to challenge a rival gang. Defendant was angry, referred to them as scraps, flipped them off, and yelled at them. After the two cars stopped, defendant suffered a stab wound while one of the occupants of the Ford was stabbed multiple times.

In describing to others what had happened, defendant stated that he had been in a fight with "some scraps, and that one of them stabbed him." Crystal testified that whenever she went out with defendant, he said that if anything happened when she was around him, she could not tell on him. After the stabbing incident, defendant similarly told all the females in Rosa's car that they "didn't see nothing" and "nothing happened." Crystal testified that defendant and others "from his gang" used to say that "'snitches' . . . 'get stitches or end up in ditches.'" Defendant made similar statements to T.C. after the stabbing incident.

At the second house where the group stopped, another Norteño gang member, Boxer, was present. This gang member and Roach, also a Norteño, followed Rosa and T.C. around. Roach told Crystal that he did not want any of the females talking to the police. Defendant, Roach, and Boxer were involved in telling the females what to say to the police. Roach and Boxer obtained Rosa's car keys and her car was later burned.

Detective Zanotto believed that the events that occurred on May 4, 2007, leading up to the stabbing, were gang related based on the "totality of everything," including the music, the hand gestures between the cars, the reference to "scraps" by defendant, the "back-and-forth exchange by a group of gang members, and the end result was violence, which is very common." The detective also referred to evidence concerning the Nissan being pulled over, as opposed to being forced off the road or disabled so that it could not be driven. Further, the detective identified events after the stabbing that suggested the

incident was gang related, including driving to Roosevelt Park, going to a family member's house where one family member had medical training, getting stitched up at the house, the arrival of another gang member at the house, the formulating of a plan to get rid of evidence, and the "snitches" and "ditches" statement.

The challenged testimony by the expert, that "somebody made some gang slogans" at some point after the Nissan and the Ford stopped in the residential area, lacked any specifics about who uttered the gang slogans as well as what specifically was expressed. Further, the defense on cross-examination elicited an acknowledgment from Detective Zanutto that there was no statement from any other individual regarding gang slogans being made, other than the statement by the individual from the Ford.

Although the prosecutor in argument to the jury made reference (without any objection from the defense) to the testimony concerning gang slogans, that reference was relatively brief. Further, the prosecutor made the reference in the context of arguing that, even if the jury accepted defendant's testimony that no words were exchanged during the stabbing incident, defendant's testimony still supported the inference that the incident was gang related. The prosecutor argued: "I mean, although it would make sense that things [gang slogans] were said like that in this exchange, this is scarier. So again the defendant knows why this fight is occurring. He doesn't even have to talk about it. . . . He doesn't have to say one word to this guy and the other guy who is driving the car and getting out of the car and going what's going on here? Because the defendant knows this is all about the gang. The defendant knows this is all about the life. He knows these aren't random individuals just coming up and he had to defend himself. He knows this is part of what occurs in gang culture. So there is no exchange of words."

In sum, in considering the strength of the prosecution's case that the crime was gang related, including the evidence showing that the underlying incident involving the stabbing of the individual from the Ford was gang related, and in view of the somewhat

ambiguous testimony about gang slogans being uttered, we believe that any error in admitting the testimony was harmless beyond a reasonable doubt.

## **6. Cumulative Error**

Defendant contends that the cumulative effect of the errors that he has raised on appeal deprived him of a fair trial, “requiring reversal of the disputed gang findings.” The California Supreme Court has stated that “a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.” (*People v. Hill* (1998) 17 Cal.4th 800, 844.) In this case, we have not found numerous errors by the court or counsel. We have determined that, to the extent there was error in admitting testimony by the gang expert concerning gang slogans being uttered, the error was harmless beyond a reasonable doubt. We have also determined that instructional error as to the issue of a threat in connection with the attempted dissuasion counts warrants reversal of the judgment as to the true finding on the gang allegation for count 1, attempting to dissuade Rosa, only. Defendant fails to demonstrate, and we do not believe, that the cumulative error doctrine warrants reversal in this case as defendant was not deprived a fair trial. (See *id.*, at pp. 844-847)

## **7. Section 654**

As we stated above, for the two counts of attempted dissuasion (§ 136.1; counts 1 & 2), defendant received two consecutive sentences of seven years to life pursuant to the penalty provision of section 186.22, subdivision (b)(4)(C). Neither the parties nor the court discussed section 654 at the sentencing hearing. As we have explained, the true finding on the gang allegation for count 1, attempting to dissuade Rosa, cannot stand and must be remanded for possible retrial on that gang allegation.

On appeal, defendant contends that he may not be separately punished for the two attempted dissuasion counts and that the sentence on count 1 should be stayed pursuant to section 654. In making this argument, he also asserts that the exception for multiple victims of violence does not apply. The Attorney General responds that the multiple

victim exception applies in this case but that, even if it does not, consecutive sentences were properly imposed and executed for both counts.

Section 654 provides in relevant part: “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.” (§ 654, subd. (a).) Section 654 “ ‘precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts.’ ” (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129 (*Spirlin*)). The California Supreme Court has stated that “[a]lthough section 654 does not expressly preclude double punishment when an act gives rise to more than one violation of the same Penal Code section . . . , it is settled that the basic principle it enunciates precludes double punishment in such cases also. [Citations.]” (*Neal v. State of California* (1960) 55 Cal.2d 11, 18, fn. 1 (*Neal*)<sup>6</sup>; accord, *People v. Gbadebo-Soda* (1989) 215 Cal.App.3d 1371, 1375, quoting *Neal*.)

“ ‘ “Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.” [Citations.] “If all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.” [Citation.]’ [Citation.]” (*Spirlin, supra*, 81 Cal.App.4th at p. 129; *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208; *Neal, supra*, 55 Cal.2d at p. 19.) However, if the defendant harbored “multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise

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<sup>6</sup> In *People v. Correa* (2008) 161 Cal.App.4th 980, review granted July 9, 2008, S163273, the California Supreme Court ordered supplemental briefing on whether it should reconsider its statement in *Neal, supra*, 55 Cal.2d at page 18, footnote 1, and instead conclude that section 654 does *not* govern multiple convictions of the same provision of law.

indivisible course of conduct. [Citation.]” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; see also *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.)

Under the multiple victim exception to section 654, “ “even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim.” [Citations.]’ ” (*People v. Centers* (1999) 73 Cal.App.4th 84, 99.) The determination of whether section 654 applies in a case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Attempted dissuasion under section 136.1 is a continuous conduct crime. (*People v. Salvato* (1991) 234 Cal.App.3d 872, 882.) “ ‘[T]he statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]’ [Citation.] ” (*Ibid.*) “The language of section 136.1 focuses on an unlawful goal or effect, [the dissuasion from making a report to the police], rather than on any particular action taken to produce that end. ‘Prevent’ and ‘dissuade’ denote conduct which can occur over a period of time as well as instantaneously. The gravamen of the offense is the cumulative outcome of any number of acts, any one of which alone might not be criminal.” (*Id.* at p. 883.)

In this case, we are remanding the matter for possible retrial of the gang allegation attached to count 1, the attempted dissuasion count involving Rosa. We will also direct the trial court to determine upon resentencing whether section 654 precludes punishment for one of the two attempted dissuasion counts. If the trial court determines that section 654 applies, the trial court shall stay the shorter of the two sentences imposed for these counts. (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264.)

## **II. ASSAULT CASE (No. CC808356)**

### **A. Background**

Defendant was charged by information with assault with a deadly weapon (§ 245, subd. (a)(1); count 1), assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1); count 2), and active participation in a criminal street gang (§ 186.22, subd. (a); count 3). The information further alleged that both counts for assault (counts 1 & 2) were committed for the benefit of, at the direction of, and in association with a criminal street gang. (§ 186.22, subd. (b)(1).)

### **1. The Trial Evidence**

#### **a. The Events of March 2008**

On March 27, 2008, Correctional Officer Mario Rogers was working at the county jail. His duties included monitoring “program time” during which inmates were allowed to be outside their cells. Officer Rogers saw an inmate with a cup walking towards a hot water bottle. This inmate was a trustee, which allowed him to have more privileges than other inmates. The inmate had a tattoo of a star on his temple, and another star tattoo on his arm. At trial, the inmate denied that they were gang tattoos and denied that he was affiliated with any gang. He testified that one of the stars represents the “star people” and “enlightenment” in “Native American culture.” The other star meant “to be faithful, to carry the integrity” of “[b]eing a Native American.”

As this inmate was walking to get water, he was hit in the face with a fist. Officer Rogers did not see who struck the inmate, but he did see another inmate, Julio Ledesma, “beg[i]n assaulting” the victim. Ledesma was “striking” the victim in the head and body. Defendant, also an inmate, joined in the assault and was “striking” the victim in the head and torso region. A third inmate, Robert Candelaria, also joined in the assault on the victim. Officer Rogers ordered a “lockdown.”

Once Candelaria joined in the assault, the victim was knocked to the ground. While on the ground, Ledesma and defendant continued punching the victim in the head

while Candelaria kicked him. Officer Rogers attempted to stop the attack, including by using pepper spray on the attackers. Other officers responded and the attackers were handcuffed. As a result of the attack, the victim had several injuries, including lacerations to the lower right cheekbone, the bridge of the nose, and below the left ear. He suffered permanent nerve damage to one eye and multiple cracked teeth.

The victim initially did not want to press charges. He reported that he thought the assault was “about a girlfriend that he had” and that she may have been dating another inmate. The victim did not identify the inmate or the girlfriend.

After the attack, Fidel Vasquez replaced the victim as trustee. Vasquez had been Ledesma’s cellmate on the date of the attack. Two days after the attack, a letter was found in the property of Vasquez. In the letter, the author took credit for initiating the attack on the victim, and indicated that it was done because the victim had tattoos that “belong to the Norteno organization” and the victim was “no good.”<sup>7</sup> Officer Rogers had not seen Vasquez involved in the attack on the victim.

The victim eventually indicated that he wanted to press charges. Officer Rogers testified that he showed the victim a photograph of Vasquez and that the victim identified

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<sup>7</sup> The letter stated in part: “Hello there mamasita whatcha up to? . . . So since my last letter some stuff has happnd. Have I got a story for you! Well it starts with this Indian trustee. I’ve noticed some tatts that belong to the Norteno organization. So I do some investigation work. Well I come to find out this cat is not only a homeboy posing as Indian, but he’s also no good! So I orcastrate his removal. One dude will slice dudes face & two others will smash him so the slicer gets away. My celly wants to earn some stripes so I’m like OK. He’s takin a good one. So I got some blades just in case. So here’s the funny part. Program opens and I’ve been watchin so I know his routine. Goes to the water pot as soon as program opens. Sure enough he takes the bate. My celly frooze. I should’ve have known don’t send a boy to do a sav’s job. So I get dude myself. I was so smooth. I chop this dudes ear lobe off the others handle theres. I flush my heat. Done deal. They come and riot gear so I spin to my celly still frozen. So they take 5 people. He go to the hospital. Next day I work my game on this trick C.O. Now I’m the new trustee. . . .”

Vasquez as the person who had first hit him. At trial, the victim testified that he did not see who initially assaulted him.

Defendant testified under oath at an “unrelated hearing” in a “different matter” where the same prosecutor “put questions to him,” and this testimony was read to the jury in the present case.<sup>8</sup> Defendant stated that he started the attack and that Candelaria joined in. He asserted that Ledesma was not involved in the attack.

At the prosecution’s request, the trial court took judicial notice of the fact that Ledesma pleaded no contest to the assault on the victim. The court instructed the jury that the fact was being admitted for the limited purpose of assessing defendant’s credibility when he stated that Ledesma was not involved in the assault.

The parties stipulated that the victim had previously been convicted of felony stalking. The jury was instructed that the victim’s prior conviction was admitted into evidence for the limited purpose of assessing his credibility. The parties also stipulated that Norteños are a criminal street gang as defined by section 186.22.

**b. Gang Expert Testimony**

Sergeant Nellie Davis, who worked for the Santa Clara County Sheriff’s Office, testified as an expert in Hispanic criminal gangs. In her current assignment as a detective in the investigations division, she investigated jail crimes and gang crimes. She explained that if the Norteño gang determines an individual in jail is “no good,” the individual’s name will be put on a list and the individual will be assaulted. The gang may put a “puto mark” on the individual’s face. This mark is usually a cut from the ear to the mouth. The mark notifies other Norteños that the individual is “no good” and should not be associated with.

Sergeant Davis explained that gang assaults in jail may be accomplished through “camouflage tactics.” The initial attacker stabs the victim and then more attackers join in

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<sup>8</sup> The record does not disclose the case in which the prior testimony was given.

to kick or punch the victim while the initial attacker walks away. The goal of the technique is for the stabber to get away and dispose of the weapon before law enforcement intervenes. Sergeant Davis explained that Norteño gang members are expected to “go in and assist” if an assault happens at the jail.

Sergeant Davis investigated the attack on the victim as part of her job duties. In the sergeant’s opinion, Candelaria, Ledesma, and Vasquez were Norteño gang members based upon, among other things, their readily visible gang tattoos, affiliations, and/or admissions of gang membership. Sergeant Davis also testified that defendant was an active Norteño gang member. In the sergeant’s opinion, the attack on the victim was committed for the benefit of, at the direction of, and in association with the Norteño gang. Among other things, the sergeant explained that the assault was committed in front of a correctional officer and other inmates, which benefitted the gang by showing it was not afraid to commit an assault in the presence of law enforcement. Further, the letter found in Vasquez’s property indicated that the assault was committed because the victim had tattoos that the attacker felt belonged to Norteños. Sergeant Davis explained that “a regular street-level Norteno shouldn’t have” a star tattoo unless it has been “earned.” The sergeant believed that the cut on the victim’s face was an attempted “puto mark.”

## **2. The Verdicts and Sentencing**

Defendant was acquitted of assault with a deadly weapon (count 1). The jury found him guilty of assault by means of force likely to produce great bodily injury (count 2), and active participation in a criminal street gang (count 3). The jury found true the gang allegation for count 2. At a combined sentencing hearing, defendant was sentenced to a total term of two years, which was to run consecutive to two other cases.

### **B. Discussion**

#### **1. Opinion Testimony by Gang Expert**

During a hearing on motions in limine, defendant’s trial counsel indicated that he was “concerned about the gang expert testifying to an ultimate issue of fact.” Defense

counsel stated: “I’m not asking for a ruling on this right now, I just want to bring it up so the court’s aware of it . . . .” After further discussion, the court stated that “if it comes up we can discuss it more . . . .”

At the beginning of the testimony by the gang expert, the trial court instructed the jury pursuant to CALCRIM No. 332 as follows: “A witness will be allowed to testify as an expert and to give certain opinions. You must consider the opinions, but you are not required to accept them as true and correct. [¶] The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert’s knowledge, skill, experience, training, and education. Consider the reasons the expert gave for the opinion, and the fact or information on which the expert relied . . . in reaching the opinion. [¶] You must decide whether the information on which the expert relied . . . was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.”

Relevant to defendant’s contentions on appeal, the gang expert, Sergeant Davis, testified that, in her opinion, the attack on the victim was committed for the benefit of, at the direction of, and in association with the Norteño gang. Sergeant Davis was asked for the basis for her opinion that the “crime was committed in association with the Norteno gang.” The sergeant responded that there were several individuals from “different Norteno cliques” who had “come together to commit an assault” on the victim. It was part of the “policies and procedures” of the Norteños that if a gang member sees a fellow member engaged in an assault, the gang member “will assist.” The attackers in this case, including Ledesma, Candelaria, and defendant, joined in the assault, and “they are all committing it together in association with each other as Nortenos with the understanding that this is what they do. It’s an understanding that you will back up your fellow Norteno.” Defendant’s trial counsel did not object to this testimony.

After the close of evidence, the trial court again instructed the jury pursuant to CALCRIM No. 332 concerning expert witness testimony. The court also instructed the jury: “An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume that certain facts are true and then to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. And if you conclude that an assumed fact is not true, consider the effect of the expert’s reliance on that fact in evaluating the expert’s opinion.” (See CALCRIM No. 332.)

In argument to the jury, the defense conceded that defendant had committed an assault with force likely to produce great bodily injury on the victim. The defense argued that the issue was whether defendant committed the assault for gang purposes.

On appeal, defendant contends that the gang expert was improperly allowed to testify to the “intentional commission of the charged offenses by [defendant], and by [defendant] as a Norteno with the understanding (i.e., intent) he was acting as a gang member according to gang rules.” (Italics omitted.) Defendant argues that this expert testimony was improper because it invaded the jury’s province. He further asserts that the errors violated his federal and state constitutional rights. Defendant also contends that, to the extent his counsel was required to raise “[f]urther” objections to the expert’s testimony, he was deprived of effective assistance of counsel.

The Attorney General argues that defendant has forfeited his challenge to the expert’s testimony because he failed to make a timely objection at trial. As to the substance of defendant’s claim, the Attorney General contends that the expert’s testimony was admissible.

Without deciding whether defendant has forfeited his objection on appeal, we conclude that the challenged testimony by the expert was properly admitted. Contrary to defendant’s contention on appeal, the testimony at issue did not concern the specific intent element of the gang allegations. The expert’s testimony, as framed by the question posed to her, was directed to another element of the gang allegations: whether the crime

was committed “*in association with any criminal street gang.*” (§ 186.22, subd. (b)(1), italics added.) Specifically, Sergeant Davis was asked the *basis* for her opinion that the “crime was committed *in association with the Norteno gang.*” (Italics added.) The sergeant responded that it was part of the “policies and procedures” of the Norteños that if a gang member sees a fellow member engaged in an assault, the gang member “will assist.” She testified that Norteño gang members operate with the “understanding” that they must join any assault by a fellow gang member because of the “understanding [within the Norteño gang] that you will back up your fellow Norteno.” In contrast, the specific intent element of the gang allegations requires proof that the defendant had “the specific intent to promote, further, or assist in any criminal conduct by gang members.” (*Ibid.*) The challenged testimony did not offer the expert’s opinion on defendant’s specific intent. Rather, the testimony by Sergeant Davis offered an explanation as to why Norteño gang members in general would be motivated to assist their fellow gang members. The sergeant explained that the culture of Norteños was such that a gang member was expected to back up his fellow gang members. Although the testimony explained defendant’s possible motivation for joining the assault, the gang expert did *not* offer an opinion as to whether defendant actually harbored the requisite specific intent when he participated in the assault on the victim. Moreover, the subject matter of the challenged testimony by Sergeant Davis was a proper area of expert testimony because it pertained to the culture and habits of Norteños, an area “sufficiently beyond common experience.” (Evid. Code, § 801, subd. (a); see also *Gardeley, supra*, 14 Cal.4th at p. 617; *Killebrew, supra*, 103 Cal.App.4th at p. 657.) We conclude that the gang expert’s testimony was properly admitted.

## **2. Incorrect Legal Theory by Prosecution**

Defendant next contends that the prosecutor improperly told the jury that the gang allegations may be found true if he intentionally aided other gang members in the commission of the *charged* offenses. Defendant argues that the gang statute requires an

“intent to promote crimes *other than* those charged.” (Italics added.) He asserts that the prosecution’s improper argument necessitates reversal of the judgment, that his claim is cognizable on appeal, and that his trial counsel rendered ineffective assistance to the extent counsel failed to preserve the claim.

As we explained above, to establish the gang enhancement, the prosecution had to prove that defendant committed the charged offense “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) The California Supreme Court has held that this scienter requirement “applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” (*Albillar*, *supra*, 51 Cal.4th at p. 66.) We therefore reject defendant’s contention that the prosecution relied on an improper theory.

### **III. DISPOSITION**

In case No. CC767952, the judgment is reversed, and the matter is remanded for possible retrial of the section 186.22, subdivision (b)(4) allegation attached to count 1, the attempted dissuasion count involving Rosa. If the prosecution does not elect to retry that allegation, the trial court upon resentencing defendant shall not impose the alternate penalty under section 186.22, subdivision (b)(4), and defendant shall instead be subject to the penalty set forth in section 136.1, subdivision (b). The trial court shall also determine whether section 654 precludes punishment for one of the two attempted dissuasion counts (counts 1 & 2) and, if section 654 does apply, the trial court shall stay the shorter of the two sentences imposed for these counts.

In case No. CC808356, the judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P. J.

I CONCUR:

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DUFFY, J.\*

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\*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

**Mihara, J., Concurring and Dissenting.**

I agree with the majority opinion that there is no basis for reversal of the judgment in case No. CC808356. However, I disagree with the majority opinion’s resolution of case No. CC767952. I would find that the trial court prejudicially erred in instructing the jury that “[t]here is no requirement that the defendant intended to assist or promote criminal activity other than his own.” In my view, this instruction conflicts with the plain language of the statute and therefore misstates an element of the Penal Code section 186.22, subdivision (b) enhancement allegations. Because defendant was prejudiced by this instruction, the jury’s true findings on the gang enhancement allegations as to the attempted dissuasion and arson counts cannot be upheld.<sup>9</sup>

The gang allegations required proof that defendant committed the substantive offenses “for the benefit of, at the direction of, or in association with any criminal street gang, *with the specific intent to promote, further, or assist in any criminal conduct by gang members.*” (Pen. Code, § 186.22, subds. (b)(1) & (4), italics added.) “[T]he specific intent to promote, further, or assist in any criminal conduct by gang members’—is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” (*People v. Albillar* (2010) 51 Cal.4th 47, 66 (*Albillar*)). The prosecution need not prove “that the defendant act[ed] with the specific intent to promote, further, or assist a *gang*; the statute requires only the

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<sup>9</sup> I would not reach the issue of whether that instructional error regarding the “threats” element of the Penal Code section 186.22, subdivision (b)(4) enhancement allegations was prejudicial because, in my view, none of the gang enhancements may be upheld due to the trial court’s misleading instruction on the specific intent element.

specific intent to promote, further, or assist criminal conduct by *gang members*.”  
(*Albillar*, at p. 67.)

At the beginning of the trial, the court instructed the jury that the gang allegations required proof that defendant “intended to assist, further, or promote criminal conduct by gang members.” At the instruction conference, defendant’s trial counsel noted that the prosecutor had requested the following special instruction regarding the specific intent element: “The defendant’s own conduct may qualify as the gang-related criminal activity. There is no requirement that the defendant intend to assist or promote criminal activity other than his own.” Defendant’s trial counsel “accept[ed] that instruction” and conceded that it was “a correct statement of law” but wanted the court to add: “However, you must also determine whether such conduct was specifically intended to promote, further, or assist in criminal conduct by gang members.” The court saw no need to add this language because it was already included in CALCRIM No. 1401. The court thereafter instructed the jury that the gang allegations required proof that “defendant intended to assist, further, or promote criminal conduct by gang members,” but it also instructed the jury that “[t]here is no requirement that the defendant intended to assist or promote criminal activity other than his own.”

The majority opinion, like the prosecutor and the Attorney General, relies on *People v. Hill* (2006) 142 Cal.App.4th 770 (*Hill*) to support its conclusion that the special instruction was proper. (Maj. opn., *ante*, pp. 15-16.) The issue in *Hill* was whether substantial evidence supported a gang enhancement allegation. (*Hill*, at p. 773.) After a minor vehicle accident, Hill told the other driver that she had disrespected him, mentioned his gang, and subsequently threatened to shoot her with a gun he had in his waistband. (*Hill*, at p. 772.) A gang expert testified that disrespect was important to gang members, and that Hill’s gang benefitted from his threat because it showed that his gang could not be disrespected without consequences.

(*Hill*, at pp. 772-773.) Hill was convicted of making a criminal threat, and a gang enhancement allegation was found true. (*Hill*, at p. 773.)

Hill's contention on appeal was that Penal Code section 186.22, subdivision (b)'s reference to "criminal conduct by gang members" in the specific intent element could not properly apply to the charged criminal conduct but referred only to "other" criminal conduct. (*Hill, supra*, 142 Cal.App.4th at pp. 773-774.) The Third District Court of Appeal rejected Hill's contention. "There is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense defendant commits. To the contrary, the specific intent required by the statute is 'to promote, further, or assist in *any* criminal conduct by gang members.' (Pen. Code, § 186.22, subd. (b), italics added.) Therefore, defendant's own criminal threat qualified as the gang-related criminal activity. No further evidence on this element was necessary. [¶] Defendant concedes the evidence was sufficient that he committed the crime for the benefit of the street gang; he asserts that there was insufficient evidence that he intended to enable or further any other gang crime. Since there is no requirement in section 186.22 that the crime be committed with the intent to enable or further any other crime, defendant's contention fails in its premise." (*Hill*, at p. 774.)

In *Albillar*, a case in which *three* gang members committed the charged offense *in concert*, the California Supreme Court held that "'any criminal conduct by gang members'" does not require that "the conduct be 'apart from' the criminal conduct underlying the offense of conviction . . . ." (*Albillar, supra*, 51 Cal.4th at p. 66.) But the Third District went beyond *Albillar*'s holding and held, after only brief analysis, that the specific intent to "promote, further, or assist in any criminal conduct by gang members" may be satisfied by a *lone* defendant's specific intent to "enable or further" *his own* substantive offense, which he committed *by himself*. This was not dicta. Hill indisputably acted alone in making his criminal threat. While the evidence in *Hill*

might have supported a reasonable inference that Hill's mention of his gang before making his threat indicated that he intended to promote *other* criminal activity "by gang members," the Third District held that there was no need for such evidence.

Interpretation of the language of Penal Code section 186.22, subdivision (b) is governed by well established rules. "When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" [Citations.] '[W]e begin with the words of a statute and give these words their ordinary meaning.' [Citation.] 'If the statutory language is clear and unambiguous, then we need go no further.' [Citation.] If, however, the language supports more than one reasonable construction, we may consider 'a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.] Using these extrinsic aids, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.) "Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 (*Dix*).

The California Supreme Court has noted that the "legislative history [of Penal Code section 186.22] is consistent with a plain language construction of the statute." (*Albillar, supra*, 51 Cal.4th at pp. 56, 67.) The plain language of Penal Code section 186.22, subdivision (b) is clear and unambiguous. There must be proof that the defendant committed the substantive offense with the "specific intent to *promote, further, or assist* in any criminal conduct by gang members." (Pen. Code, § 186.22, subd. (b), italics added.) If the Third District's analysis in *Hill* were correct, the specific intent element could be satisfied by proof that a gang member defendant

committed the substantive offense with the specific intent to “promote, further, or assist in” his own solo commission of the substantive offense. Yet this would essentially read the specific intent element out of the statute. Virtually every criminal defendant acts with the intent to “promote, further, or assist” himself or herself in committing the substantive criminal conduct when he or she commits the substantive criminal act. Hence, such an interpretation of the specific intent element would mean that this element would be satisfied in every case where the criminal defendant was a gang member. Nothing in the language of Penal Code section 186.22, subdivision (b) supports a conclusion that this was the Legislature’s intent.

The Third District’s contortion of the statutory language ignored the key phrase defining the specific intent element and essentially dispensed with the specific intent requirement entirely. The key phrase in the definition of the specific intent element is “promote, further, or assist in.” Interpreting this phrase in such a manner that it is necessarily satisfied by the defendant’s intent with respect to his *own* commission of the substantive offense *by himself* would render the specific intent requirement superfluous and absurd, a construction that we should avoid. (*Dix, supra*, 53 Cal.3d at p. 459.) The words “promote,” “further,” and “assist” are not ordinarily used to refer to a person’s intent with respect to that person’s *own* singular act.<sup>10</sup> For instance, it would make little sense to say that John assaulted Mary with the specific intent to “promote, further, or assist in” his own assault on Mary. Of course, a defendant may engage in one criminal act that he intends to “promote, further, or assist in” *another* of his own or another’s criminal acts. John might falsely imprison Mary with the specific intent to “promote, further, or assist in” his assault on Mary. But the Third District’s

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<sup>10</sup> The word “assist” means “AID.” (Webster’s Collegiate Dict. (10th ed. 1999) p. 70.) The word “further” means “to help forward.” (*Id.* at p. 474.) The word “promote” means “to move forward.” (*Id.* at p. 933.)

construction of the statute and the trial court’s special instruction in this case did not limit the specific intent element in that fashion.<sup>11</sup>

Unlike the majority opinion, I would reject the Third District’s conclusion in *Hill* that the specific intent element may be completely satisfied by proof that the defendant had the specific intent to “promote, further, or assist in” his own solo commission of the substantive offense. The specific intent element requires proof that the defendant committed the substantive offense with the specific intent to “promote, further, or assist in any criminal activity by gang members,” and a specific intent directed solely at the defendant’s solo commission of the substantive offense is inadequate by itself to satisfy this statutory requirement.

The majority opinion also purports to find support for its interpretation of Penal Code section 186.22, *subdivision (b)* in several Court of Appeal opinions interpreting the language of Penal Code section 186.22, *subdivision (a)*.<sup>12</sup> Penal Code section 186.22, subdivision (a) describes a substantive criminal offense that has *no specific intent element* and is a wobbler punishable by a maximum sentence of three years in

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<sup>11</sup> Whether this would satisfy the specific intent element is arguable. The statute requires that the perpetrator have the specific intent to “promote, further, or assist in any criminal conduct by gang *members*.” The Legislature could have said “by a gang member,” but instead it used the plural. The majority opinion relies on Penal Code section 7 to support a conclusion that “members” means “member.” (Pen. Code, § 7 [In the Penal Code, “the singular number includes the plural, and the plural the singular”].) However, Penal Code section 7 is not an inflexible rule that invariably applies to all instances of singular or plural usage in the Penal Code. Instead, the overriding principle that invariably applies is that the Legislature’s intent governs. (*People v. Navarro* (2007) 40 Cal.4th 668, 680.) The majority opinion cites no evidence of the Legislature’s intent, and the Legislature’s use of the phrase “promote, further, or assist in” suggests that it was referring to the conduct of someone other than the defendant. It is not necessary to resolve this particular issue of statutory construction to resolve this case.

<sup>12</sup> The propriety of applying Penal Code section 186.22, subdivision (a) to a lone gang member defendant committing a solo felony is currently before the California Supreme Court in *People v. Rodriguez* (2010) 188 Cal.App.4th 722, review granted January 12, 2011, S187680.

prison. (Pen. Code, § 186.22, subd. (a).) This substantive criminal offense is committed when a person “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.” (Pen. Code, § 186.22, subd. (a), italics added.) While the phrase “promotes, furthers, or assists in” appears in both Penal Code section 186.22, subdivision (a) and subdivision (b), the similarity between the two subdivisions ends there. This phrase is used in subdivision (a) to describe part of the actus reus of the offense: “felonious criminal conduct by members of that gang.”<sup>13</sup> In subdivision (b), on the other hand, this phrase is used to describe the specific intent element. Even if it were established that the Legislature intended subdivision (a) to apply to a lone gang member committing a solo felony, it would be a mistake to draw an inference therefrom that the Legislature intended its description of the *actus reus* element of the subdivision (a) substantive offense to correspond to the *specific intent* element of the subdivision (b) enhancement.

Penal Code section 186.22, subdivision (b)’s specific intent requirement is the gravamen of an enhancement that subjects a defendant to a minimum of two additional years in prison and up to *life* in prison. Indeed, in this case, two of the three subdivision (b) enhancements subjected defendant to life terms. The majority opinion’s attempt to analogize subdivision (a)’s actus reus requirement to subdivision (b)’s specific intent requirement lacks substance when it is considered in light of the enormous punitive difference in the consequences at issue and the fact that subdivision (a) is describing an act while subdivision (b) is describing a specific intent. The Legislature’s specification of a specific intent requirement for the highly punitive subdivision (b) enhancement and its omission of such a requirement for the relatively

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<sup>13</sup> The other part of the actus reus of the substantive crime is active participation in a criminal street gang.

minor subdivision (a) offense reflects that the Legislature did not intend for this specific intent requirement to be essentially read out of the statute as superfluous. (*People v. Craft* (1986) 41 Cal.3d 554, 560 [“a statute should not be given a construction that results in rendering one of its provisions nugatory”].)

The majority opinion’s final argument is its assertion that it would be unreasonable for the Legislature to provide that a defendant would be subjected to the enhancement if he intended to “promote, further, or assist” in the conduct of others but not if he intended to “promote, further, or assist” in his own conduct. (Maj. opn., *ante*, p. 18.) I strongly disagree. The Legislature could have reasonably decided that a defendant who committed a criminal act with the intent to “promote, further, or assist” in the criminal conduct of other gang members, whether in the joint commission of the substantive offense or in the commission of additional criminal conduct, should be punished more severely because he had a more culpable state of mind than a defendant who committed a criminal act with the intent to “promote, further, or assist” only in his own commission of that criminal act. A person who intends to facilitate a crime in concert or additional crimes is more deserving of additional punishment than a person who merely engages in a criminal act with the intent to facilitate his own solitary commission of that very criminal act.

For all of these reasons, I reject the majority opinion’s reasoning. I would conclude that Penal Code section 186.22, subdivision (b) means what it says and requires that the perpetrator intend more than the facilitation of his or her own solo commission of the substantive crime. The trial court’s special instruction told the jury that “[t]here is no requirement that the defendant intended to assist or promote criminal activity other than his own.” Because a defendant’s intent to “assist or promote” his own substantive offense cannot satisfy the specific intent requirement of Penal Code section 186.22, subdivision (b), the trial court’s special instruction was erroneous. It suggested that defendant’s intent to commit the substantive offense

fulfilled the specific intent element, which conflicts with the plain language of the statute. The Attorney General concedes that this type of error violates the United States Constitution and therefore is reviewed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

The *Chapman* standard of review requires “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman, supra*, 386 U.S. at p. 24.) “To say that an error did not ‘contribute’ to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous.” (*Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) “To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” (*Yates*, at pp. 403-404.) “[T]he appropriate inquiry is ‘not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.’ (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 2081, 124 L.Ed.2d 182], italics original.)” (*People v. Quartermain* (1997) 16 Cal.4th 600, 621; accord *People v. Neal* (2003) 31 Cal.4th 63, 86.)

The Attorney General bears the burden of demonstrating that this instructional error did not contribute to the jury’s findings on the gang allegations. The record reflects that the prosecutor repeatedly relied on this erroneous instruction. Although he initially argued in his opening argument that defendant intended to “help” fellow gang members commit these crimes, he immediately followed this up by relying on the erroneous instruction. “This includes the defendant because the defendant’s own conduct may qualify as the gang-related criminal activity. There is no requirement that the defendant intended to assist or promote . . . criminal activity other than his

own. He can be doing it for himself. *He can be assisting his own gang conduct.* He can be telling them to cover it up to benefit his own criminal gang activity.” (Italics added.) At the tail end of his opening argument, the prosecutor again relied on the erroneous instruction. “[I]n association with the gang for the specific intent to aid gang members. *And that gang member that he can be aiding is himself.*” (Italics added.) The prosecutor continued to emphasize and rely on the erroneous instruction in his closing argument. “[T]he other element is the specific intent to further or promote criminal conduct by gang members, . . . and you are going to find in the instruction there is no requirement that that specific intent to assist or promote criminal activity be criminal activity other than his own.” “And the defendant only has to be promoting his own criminal conduct in the fact that telling these women not to tell the police what occurred. [¶] In regards to the arson, same thing.”

The Attorney General disregards the prosecutor’s repeated and insistent reliance on the erroneous instruction and argues simply that the instruction was harmless because there was substantial evidence to support the specific intent element. This argument does not satisfy the Attorney General’s burden of demonstrating that the erroneous instruction did not contribute to the jury’s verdict. The evidence before the jury could have created a reasonable doubt as to whether defendant’s *intent* extended beyond his own commission of the substantive offenses to “promote, further, or assist in” anyone else’s criminal activity. It follows that the erroneous instruction was not harmless, and the jury’s findings on the gang allegations in this case should not be upheld.

I would reverse the judgment and remand the matter for possible retrial of all three gang allegations due to this instructional error.

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Mihara, J.