

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD CRIADO,

Defendant and Appellant.

H042151

(Monterey County

Super. Ct. Nos. SS120913 &

SS092281)

Defendant Richard Criado was convicted by jury of: (1) first degree murder (Pen. Code, § 187, subd. (a))¹ of Jose Barragan on an aiding and abetting theory; (2) attempted premeditated murder (§§ 187, subd. (a); 664) of Angel Lopez; and (3) participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found several enhancement allegations true. On the murder and attempted murder counts, the jury found that defendant intentionally and personally discharged a handgun causing great bodily injury or death (§ 12022.53, subds. (d)-(e)) and acted for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(5)). On the attempted murder count, the jury found that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). The court sentenced defendant to 90 years to life in prison.

¹ All further undesignated statutory references are to the Penal Code.

Defendant raises three claims of error on appeal. First, he contends the trial court erred when it failed to instruct the jury sua sponte on attempted imperfect self-defense, a form of voluntary manslaughter, because there was substantial evidence from which the jury could have found that he shot Lopez in the unreasonable belief that he had to defend himself. We hold there was substantial evidence that supported instructing the jury on imperfect self-defense, but that the court's failure to so instruct was harmless. Second, defendant argues his trial counsel was ineffective for failing to object to portions of the prosecutor's closing argument regarding the gang enhancements. We conclude defendant has not met his burden of demonstrating that his counsel's performance was deficient or that counsel's alleged deficiencies resulted in prejudice. We will therefore reject the ineffective assistance of counsel claim. Third, defendant contends the abstract of judgment must be corrected because it does not accurately reflect the sentence imposed. The Attorney General agrees. We will accept the Attorney General's concession, order the abstract of judgment corrected, and affirm the judgment.

FACTS

At 9:45 p.m. on May 8, 2012, police responded to reports of shots fired near the intersection of Hutchison Drive and Hicks Drive in Greenfield, California. When the officers arrived, they found 18-year-old Jose Barragan lying in the middle of the intersection, bleeding from his waist, with gunshot wounds to his left flank, right upper thigh, and upper left buttock. Barragan's cousin, 17-year-old Angel Lopez, walked up to the one of the officers and asked for help. Lopez was not wearing a shirt. His chest was covered in blood and he had four gunshot wounds: three in his abdomen and one near his clavicle. Barragan and Lopez were both airlifted to a trauma center in San José. Barragan died several hours later; Lopez survived and testified at trial.

I. Prosecution Evidence

A. Testimony of Law Enforcement Officers and Witness at Scene

Greenfield Police Officers Francisco Ceja and Paul Charupoom responded to the police dispatch. Officer Ceja asked both victims who shot them. Barragan did not answer the question and said: “Please, please help me. I don’t want to die.” Lopez said he did not know who shot them. Lopez said that as he and Barragan walked down Hutchison Drive, a black car drove by and a person wearing a ski mask shot at them from the rear window of the car. The officers found four 9-millimeter shell casings in the area where Barragan had been lying.

Salvador Montoya, who lived near the intersection of Hutchison and Hicks Drives, testified that he heard 10 to 12 gunshots. Montoya then heard a man pounding on his front door, saying he had been shot. Montoya’s sister called the police. Montoya opened the door and spoke to Lopez, who said something about a relative. It was dark and the light at the intersection was not working. Montoya went outside with a flashlight and saw Barragan lying in the street. Montoya stayed with Barragan until the police arrived.

Greenfield Police Detective Ray Medeles testified that he interviewed Lopez at the hospital. Contrary to what Lopez told the officers at the scene, he told Detective Medeles that defendant and Jason Chavez were with him when he was shot. Lopez did not know which one shot him. Lopez gave two statements to the police. In his first statement, he said defendant and Chavez did the shooting. In his second statement, Lopez said defendant, Chavez, and Saul Gonzalez were all involved in the shooting. They were standing side by side, wearing masks, and one of them had to be the shooter. Detective Medeles also learned from an eyewitness—who wanted to remain anonymous—that Gonzalez was involved in the shooting. The police arrested Gonzalez and Chavez within

days of the shooting. Police officers searched for, but were unable to find defendant, who fled to his mother's home in Texas after the shooting.

Lopez, Gonzalez, Chavez, and defendant were members of the Northside gang, one of two Norteño criminal street gangs in Greenfield. There was disputed evidence on the question whether Barragan was also in the gang.

Gonzalez and Chavez were initially charged in the same complaint as defendant with: (1) premeditated murder, (2) attempted murder, (3) assault with a firearm (§ 245(a)(2)), and (4) street terrorism, with gang enhancements on the first three offenses. Gonzalez and Chavez testified for the prosecution pursuant to plea agreements about events related to the shootings, gang membership, and gang culture.

B. Testimony of Former Codefendant Jason Chavez

Chavez was 21 years old at the time of the shootings. He joined the Northside gang when he was 18 or 19 years old. He joined the gang because family members, friends, and people he grew up with were in the gang. One way to join the gang is to be “jumped in,” which means gang members beat up the prospective gang member for one minute 14 seconds. Chavez was “jumped in.”

Chavez testified about gang symbols and gang tattoos. Norteño gang members identify with the color red and the number 14. The number 14 refers to the letter “N,” the fourteenth letter of the alphabet, which stands for “Norteño.” Their enemies are the Sureños. Norteños have rules: a code of conduct they call “The 14 Bonds.” Chavez's gang tattoos included “Aztec 14” on his elbow, “Northside” on his back, “Dark Street Kid” on his ribs, and “Salad Bowl” on his abdomen. “Salad Bowl” means he is a Norteño from Monterey County; it refers to the county's agricultural heritage. “Dark Street Kid” means he is a fifth generation member of the Northside gang.

Chavez, like other gang members, had a “sponsor.” Sponsors guide younger gang members so they act in the best interests of the gang and do not make mistakes. Chavez and other witnesses described a special relationship between a gang member and his sponsor. Chavez’s sponsor vouched for him, gave him a place to stay and money when he needed help; Chavez did the same for his sponsor, and visited him in jail. Chavez would never do anything to harm his relationship with his sponsor or show disrespect to his sponsor.

Chavez made money by selling methamphetamine. He gave some of the money to his sponsor and kept some of the money for himself. Other acts Chavez performed for the gang included mailing guns to Texas. Gang members do this to “upgrade” (to get better guns) or to get rid of guns that are “dirty” (that had been used in a crime). Other gang members instructed Chavez to send the guns to Texas and he did what he was told.

Chavez testified that he and defendant were both the same generation in the gang. Defendant has a tattoo that says “Kid from the Dark Streets”; defendant’s gang moniker (nickname) is “Slick.” Chavez had known defendant since 2009, when Chavez joined the gang. He met Lopez, Gonzalez, and Barragan when they were “jumped in” in late 2011 or early 2012. Defendant had the most status of all of them, since he had been in the gang longer. Defendant was respected because he had “put in work” for the gang, which means he committed crimes, including shootings.

The Northside gang in Greenfield had a leader. In May 2012, the gang’s leader was Carlos Montez, who was known as “Brown Boy.” Before Brown Boy, defendant’s brother, Jessie Criado, was the Northside gang’s leader, and before that defendant’s uncle, Leonardo Garza, was the leader. A gang member becomes a leader based on how much and what they do for the gang, including committing crimes like murder, robbery, and selling drugs. A gang member obtains status within the gang by committing such crimes. The more violent the crime, the more status the gang member has. In gang

culture, it is considered a cowardly act not to back up a fellow gang member. If a gang member does not support his fellow gang members, he may be deemed “no good” and get a “green light” on him, which means he is “marked for death” and may be shot.

Norteños use violence to discipline members of their own gang. Such “red-on-red” crime and must be approved by gang leaders in advance. If such violence is “unsanctioned” (not pre-approved), the gang member must write an “[i]ncident report” and attempt to justify his actions to gang leadership. The incident report is written on a “kite”—a small strip of paper—in “[m]ini handwriting.” The kite is rolled up and covered with cellophane to make it compact and easy to get rid of. The kite is sent to the “higher command”: whoever is in charge of the street gang if you are on the streets or in charge of the gang’s housing unit if you are in jail. If gang leadership determines that a red-on-red crime was justified, the gang member has to “clean up,” meaning stab another gang member who has “mess[ed] up.” If the crime was not justified, the gang member gets “hit”—stabbed if he is in jail or shot if he is on the streets.

Norteños do not help or talk to the police or testify in court. That is “snitching.” If a Norteño gets caught snitching, it results in an automatic “green light.” By testifying in this case, Chavez put himself and his family at risk for being stabbed or shot. Chavez told the jury he agreed to testify as part of a plea bargain in which he pleaded guilty to first degree murder and will be sentenced to 25 years to life in prison. The deal required him to testify truthfully and if he did not tell the truth the deal would go away. At the time of trial, Chavez had left the gang of his own accord and was a Norteño “dropout.”

According to Chavez, there was a meeting of Northside gang members the day before the shootings. Defendant, Chavez, Gonzalez, and Brown Boy were there. At the meeting, defendant showed the others a .357 caliber revolver and said it was a new gun. Brown Boy challenged defendant to a fight. Defendant did not want to fight and got mad because Brown Boy had challenged him in front of the others.

On the day of the shootings, Chavez went to defendant's apartment in the afternoon. Three other gang members were there. When Chavez walked in, defendant said, "He's down," and Chavez agreed, not knowing what he had agreed to. The other gang members left. Later that day, Gonzalez came over. Gonzalez had a car and defendant asked Gonzalez to take Chavez to a house to pick up a gun. Gonzalez agreed and Chavez got the gun—a 9-millimeter Glock semiautomatic pistol. Chavez put the gun in his waistband and Gonzalez drove him back to defendant's apartment. Gonzalez left; Chavez went inside and gave defendant the gun.

Defendant removed the old bullets, cleaned some new bullets with a sock, and loaded the magazine with the sock over his hand so there would be no fingerprints. Defendant put the loaded gun on the bed. Chavez knew there were children in the apartment, so he put the gun in his waistband. Chavez saw defendant put the .357 revolver he had shown off the night before in his waistband. It was also loaded.

Defendant asked Chavez if he had heard any rumors about Lopez. Chavez said he had heard Lopez was talking to the "cops." Defendant gave Chavez black sweatpants and a black windbreaker to put on over his brightly colored clothing, which he did. Defendant was wearing a sports jersey and black pants. Chavez saw defendant put a black sweater on, over the jersey. Chavez believed they were going to shoot Lopez.

After Gonzalez returned, defendant, Chavez, and Gonzalez went to defendant's aunt's house in Gonzalez's car. Defendant and Chavez got out of the car. Defendant then instructed Gonzalez to pick up Lopez and Barragan. Gonzalez returned with Lopez only and defendant instructed him to get Barragan, too. When Gonzalez returned with Lopez and Barragan, defendant and Chavez got into the car. Defendant told Gonzalez to take them to Northside Park, which was around the corner on Hutchison Drive.

When they got to the park, defendant, Chavez, and Lopez got out of the car and started walking up Hutchison toward Hicks. Defendant had a ski mask on his head.

Gonzalez and Barragan stayed in the car. It was dark and there was not a lot of light in the area. When defendant realized Barragan was not with them, he sent Lopez back to the car to get Barragan. While alone with Chavez, defendant asked, “[s]hould I do it?” Chavez knew he meant shoot Lopez and said, “[n]o.” Chavez knew he would have to cover for defendant; he had also seen a white truck in the area that belonged to a gang member named Freddie who was working with the police.

When Lopez and Barragan returned, the four men ended up facing each other, about a foot apart. Lopez was in front of defendant, and Barragan was in front of Chavez. Lopez said, “[g]ive me the gun.” Defendant looked around, pulled his ski mask down over his face, grabbed his gun, and shot Lopez more than three times. After that, Chavez shot Barragan and started running. Chavez shot Barragan because he had to cover for defendant and could not leave any witnesses. He testified that what they did was against the Norteño code.

Chavez ran down Hutchison Drive and saw Gonzalez’s car coming toward him. He jumped into the car and they drove out of the neighborhood. Defendant had run off in the opposite direction. Chavez then noticed that Freddie was following the car in his truck. Freddie eventually gave up the chase. Chavez went to a friend’s house, threw the gun under the bed, took some sleeping pills, and went to sleep. Brown Boy woke him the next morning and told him he had made a mistake. Later that day, Jonathan Bernardes (Gonzalez’s sponsor) came over and took Chavez to a house on the east side. Defendant and Gonzalez were there. Chavez saw defendant wipe down Gonzalez’s car with a rag. Later, that day defendant said he was going to Texas and asked Chavez and Gonzalez if they wanted to go with him.

About a week before trial, Chavez saw defendant in the “holding tank[]” at the courthouse. Defendant told Chavez he better not testify against him and said he had

family on the “dropout side” of the jail where Chavez was housed. Chavez interpreted that as a threat.

C. Testimony of Victim Angel Lopez

Lopez testified that on the day of the shooting, Gonzalez picked him up and took him to a friend’s house. Defendant was there and asked them to pick up Barragan. Lopez recalled walking down the street in front of defendant and Chavez. The next thing he knew, both he and Barragan had been shot. He did not know who shot him.

Lopez was a Norteño on the day of the shooting. He told the police it was a drive-by shooting, but that was not the truth. He has left the gang and is in the process of having his gang tattoos removed. Prior to the shooting, there was an incident in which he sprayed defendant with a fire extinguisher.

D. Testimony of Former Codefendant Saul Gonzalez

Gonzalez joined the Northside gang at age 19. Defendant was one of his sponsors. Gonzalez corroborated much of Chavez’s testimony about gang culture, the structure of the Northside gang, and the events on the night of the shooting. We shall not repeat those facts, but will mention additional facts Gonzalez provided. Gonzalez dropped out of the gang the day after he was arrested. He testified pursuant to a plea agreement under which he pleaded guilty to accessory after the fact—which is a strike—with a gang enhancement, and was to receive up to seven years in prison. By testifying, he placed himself and his family in danger.

According to Gonzalez, Brown Boy took over the Northside gang after getting out of prison. He was appointed by senior Norteño leaders because Jessie Criado was not making enough money. Defendant was respected in the Northside gang because of his family’s history and because he was a “hitter”—someone who does shootings.

Defendant was Lopez's sponsor. But there were tensions between them. Several weeks before the shootings, while "horsing around," Lopez sprayed defendant with a fire extinguisher. Some of the retardant got in defendant's eyes and he threatened to send someone to shoot Lopez if he could not see the next day. Defendant was embarrassed by the incident. After the Northside gang meeting, defendant felt disrespected by Lopez because Lopez stayed with Brown Boy—who had challenged defendant to a fight—and did not leave with defendant—who was his sponsor. Defendant discussed this with other gang members later and asked what he should do about Lopez. Defendant was angry and asked whether he should "handle" Lopez, which meant beating him up or shooting him.

On the night of the shooting, Gonzalez thought they were going to the park to smoke marijuana. No one told him about a plan to harm Lopez or Barragan. Gonzalez stayed in his car while defendant, Chavez, Lopez, and Barragan walked up Hutchison Drive. He heard 10 to 12 gunshots. He had started to drive away when Chavez ran in front of his car.

Gonzalez spent the next day in a gang member's garage. Defendant and Chavez showed up. Defendant talked about the shooting and described how he did it. Defendant said that when Lopez asked for his gun, he said: "Here you go, you fat fuck," and shot Lopez. Defendant asked Gonzalez if he thought Lopez would survive; defendant seemed worried, and asked the others to help him wipe down Gonzalez's car to get rid of fingerprints.

E. Testimony of Deputy Wilson and Gang Experts

On August 31, 2012, Deputy Stephen Wilson was a bailiff at the courthouse, working with the inmates in the temporary holding area. While checking the pockets of inmate Cane Garcia, he found a kite that contained two messages relating to defendant and turned it over to the classification unit at the jail.

Deputy Nicholas Reyes testified as gang expert regarding the housing of gang members at the Monterey County Jail, communication among gang members in jail, and whether defendant was a gang member. Deputy Reyes explained that Norteños, Sureños, and gang dropouts are housed separately from one another at the jail. When a new inmate arrives, he is screened by the deputies to determine the proper housing unit or “pod.” The screening process considers the inmate’s gang affiliation, where the inmate has been housed before, whether the inmate has any enemies, the crimes charged, and the inmate’s tattoos.

Norteños do not want outsiders in their housing units; outsiders are asked to leave or assaulted. When a new inmate enters a Norteño pod, he is placed on “freeze” by the other inmates until they have had a chance to investigate him. The inmate is placed on a bed (where he is guarded by other inmates), fills out a questionnaire, and remains there while the other inmates check on his reputation. If the inmate is not cleared, he must write an incident report to explain his conduct. This is usually done in a kite.

There were four Norteño pods at the jail in 2012. Inmates communicate between pods by using sign language or kites, which are passed at the courthouse, or by inmate workers. The inmate who writes the kite is not the one who passes it along. Kites are rolled up and covered in cellophane so they can be stored in the mouth or anal cavity. But it is not uncommon for a kite to be carried to court in a pocket.

Defendant was arrested in Texas on July 8, 2012, two months after the shootings. He was extradited to California and arrived at the Monterey County Jail on August 28, 2012, at which time he entered a Norteño pod.

Deputy Reyes testified that the first kite was a report from one Norteño pod (the J-pod) to another about activity involving multiple inmates in the J-pod: who had come, gone, been put on freeze, or presented a discipline problem. As for defendant, the kite reported that he had been placed on freeze and was required to write an incident report to

explain the crimes he had been charged with. Deputy Reyes corroborated prior testimony that red-on-red violence has to be cleared by gang leadership before it occurs. If it is not, the gang member is looked upon negatively and has to write an incident report to explain himself. This is usually done in a kite. If the act is not justified, the gang member will be “removed,” which could be anything from a simple assault to death.

Deputy Reyes testified that the second kite was defendant’s incident report explaining the shootings to Norteño leaders in the jail. In the kite, defendant claimed he shot Lopez in self-defense. The kite was dated August 29, 2012—the day after defendant arrived at the jail—and was addressed “To La Casa, From Richard” with a reference line stating: “Re I.R.” “La Casa”—which means “the house” in Spanish—refers to those in charge of the Norteño gang in jail. “I.R.” is an abbreviation for incident report or incident review. Deputy Reyes had seen kites labeled this way before.

The kite stated that defendant had heard Lopez was hanging around a gang dropout that defendant considered an enemy. Defendant was upset about this because he had brought Lopez into the gang. Defendant wrote: “I told myself I’m going to get at him.” He stated that he, Chavez, Lopez, Gonzalez, and Barragan went to Northside Park by car to smoke marijuana. “Well, [Gonzalez] stayed at the car talking on the phone. Me, [Chavez], . . . Lopez and [Barragan] decided to walk back to my uncle’s. . . . [¶] Well . . . I’m always strapped with my .357 Smith and Wesson. And [Chavez] had a Glock 19 nine-millimeter with a 32 round clip. We’re now at the corner of Hicks. Honest to God, truth, Bro. I asked him, ‘Hey, are you kicking it . . . with Lecho? Tell me the truth.’ Well, he pulled out a 380 Lorcin and began to cock it. It jammed on him. 380 Lorcins are well known to jam. . . . I jumped back and shot him first around his neck and five more in his chest. He still had his gun in his hand. I pulled away from his hands in fear he would shoot me in my back. I get away. Make it to a pad down the street and jump the fence to my [aunt’s] pad. [¶] I believe in a sense it was not a good thing to do.

But ask yourself, people, what would you do if somebody pulled a gun on you? Kill or be killed was what went through my head in a matter of seconds. [¶] . . . [¶] This was clearly a self-defense case. That [*sic*] my word. But I'm willing to take a DP or assist in removal with strong positive attitude, Casa. Sorry for my actions, bros. But he endangered my life. So I shot back. His jammed, gracias. And gracias for allowing me to explain the full-on truth. If you have another question, [*sic*] something, free to ask and I will tell you the truth, Casa. Gracias, Casa. CR Slick." The kite was signed "Richard Criado" and ended with the date "8/29/12." Deputy Reyes testified that "CR" stands for "con respecto," which means "with respect" in Spanish. "Willing to take a removal with a strong positive attitude" means the writer will "have no problem committing a violent act on another individual" when told to by the gang. "Gracias" means "thank you" in Spanish.

Deputy Reyes opined that the kite was an attempt by defendant to justify what he had done to Lopez. The kite did not mention Barragan's shooting because in the eyes of the gang, that was not its business since Barragan was not a gang member. Indeed, the kite stated that Barragan was "not a fellow N." The kite also showed that defendant was an active participant in the Norteño gang while in jail. On cross examination, Deputy Reyes testified that it was possible, but unlikely, that the kite had been written by someone else to cast defendant in a negative light.

Deputy Reyes testified about two incidents in which defendant attacked other inmates. In June 2013, defendant hit a gang dropout with a closed fist. In September 2013, defendant was part of a group that attacked an inmate in the jail yard. According to Deputy Reyes, defendant did these things to get back in good standing with the gang. Defendant remained in a Norteño pod until December 2013, when he was attacked in jail and placed in an isolation cell. Since he has been in isolation, defendant

has told Deputy Reyes repeatedly that he wants to return to an active Norteño pod. This shows he is still fully committed to the Norteño cause.

Peter Austen also testified as a gang expert. Austen had been an investigator for the district attorney's office assigned to the gang unit for four and a half years. Prior to that, he was a gang sergeant for the Gonzales Police Department for 19 years.

Austen testified that Norteño gang members strive for respect and get respect by creating fear by committing violent crimes. Gang members increase their status by going to prison, where they learn about the bonds and become more educated in the ways of the gang. Austen testified about the importance of loyalty to gang members, the need to back up fellow gang members, and the special relationship between a gang member and his sponsor. Failing to back up a fellow gang members is considered an act of cowardice and treason, and may have violent repercussions. Talking to the police is also considered an act of cowardice and Norteños who cooperate with the police become targets when they get out of jail. In his experience, a Norteño has never testified without a plea deal. Austen corroborated other testimony about the organization and history of Norteño gangs in Greenfield, gang culture and leadership, the need to obtain preapproval for red-on-red violence, the consequences of failing to do so, and the use of incident reports.

The evidence included photographs of defendant's gang tattoos. Defendant's tattoos include: (1) "Another Kid from the Dark Streets" at his neckline, (2) "Salad" and "Bowl" on his right and left shoulders, (3) "Grinfas" (short for Greenfield), "NS" (an abbreviation for Northside), and Aztec symbols on his chest; (4) a single dot on his right hand and four dots on his left hand (which stand for the number 14); and (5) a large "S" on his right forearm and a large "K" on his left forearm (which stand for "scrap killer"). "Scrap" is a derogatory term for Sureño gang members, who are Norteños' enemies. The "S" and "K" tattoos have to be earned.

Austen described defendant's five prior contacts with police. In October 2009, defendant was arrested for being under the influence of drugs. A fight ensued and when defendant was taken into custody, he had a loaded .22 caliber revolver on him. He pleaded guilty to carrying a concealed firearm (former § 12025, subd. (a)(2)) and misdemeanor street terrorism (§ 186.22, subd. (a)). The court granted probation and ordered defendant to register as a gang member.

Austen opined that defendant was a gang member and that the shootings were gang motivated. He reasoned that at the time of the shootings, defendant was with other gang members. He noted that before Brown Boy took over, defendant's uncle and brother led the gang. When Brown Boy took over, that was the beginning of a line of disrespect toward defendant's family. In addition, Lopez, who defendant had sponsored, was disrespectful toward defendant in the fire extinguisher incident. When defendant heard Lopez might be working with the police, that added fuel to the fire. Austen also opined that the attempted murder of Lopez and the murder of Barragan were done in association with the gang.

II. Defense Evidence

Defendant's sister, Marisa Criado,² testified that at the time of the shootings, she lived in an apartment with her boyfriend, her two daughters, defendant, defendant's girlfriend (Girlfriend), and Girlfriend's daughter. In the morning on the day of the shootings, defendant and Girlfriend argued because Girlfriend was pregnant. Marisa left to take her daughter to school. When she returned, defendant was gone. Marisa was home the rest of the day and did not see defendant again until months later. Although

² For ease of reference and meaning no disrespect, we shall hereafter refer to defendant's siblings by their first names.

Chavez and Gonzalez testified that they spent part of the day at defendant's apartment, Marisa said they were never there; defendant was not allowed to have his friends there.

Defendant testified. He admitted belonging to the Northside Norteño gang. He grew up with gang members and his family is deeply involved with the gang. He was not "jumped in." He was able to join at age 14 because of family ties to the gang. He testified that Brown Boy—his relative by marriage—was not the leader of the gang. Initially, he testified that the Northside gang does not have a leader; they are all equal and make decisions together. Later, he testified that the gang experts' testimony about the gang's leadership was accurate for the most part.

According to defendant, neither Lopez nor Barragan were members of the gang; they hung out with gang members and defendant knew them from parties. Defendant denied being Lopez's sponsor. He did not bear a grudge against either Lopez or Barragan and was not mad at Lopez about the fire extinguisher incident. Defendant denied that there was a meeting the day before the shootings, that Brown Boy challenged him to a fight, or that Lopez disrespected him by staying with Brown Boy when defendant left the meeting. Defendant testified that some of his tattoos were not gang-related and said he got the "S" and "K" tattoos because others had them.

Defendant testified that in morning on the day of the shootings, Girlfriend told him she was pregnant with his child and they argued about the pregnancy. After they argued, defendant went to his aunt's house. He returned to his apartment at lunchtime and stayed until about 5:00 p.m. Marisa was there the afternoon. His friends did not come over because they were not allowed there.

At 5:00 p.m., defendant went back to his aunt's house to talk to his grandmother about the pregnancy. After that, he went to a Jonathan Bernal's house. Later, Bernal took him to his (defendant's) cousin's house. Other people were there. Defendant was upset and stayed there, drinking, until his sister, Vanessa Criado, picked him up. Vanessa

took him to her house. They got there around 9:30 p.m.; defendant spent the night and did not leave Vanessa's house.

Defendant learned about the shootings two days later. He denied shooting Lopez and said he had nothing to do with Barragan's murder. He said Chavez and Gonzalez were lying. Prior to the shootings, he planned to visit his mother in Texas for Mother's Day; he left by bus on May 10, 2012, a few days before Mother's Day.

Defendant recognized the kite as an incident report. He explained that gang members write incident reports in response to requests for an explanation from someone in authority in the gang. He never received such a request and did not write the kite that Deputy Wilson found. Defendant testified that the kite did not contain his handwriting or his signature; he denied giving it to Garcia and said he had not seen it until shortly before trial. Defendant submitted four intake forms from prior arrests as evidence of his signature for comparison. No handwriting expert testified.

On cross-examination, defendant said none of the nine people he claimed to have been with on the night of the shooting would be testifying. As for the concealed firearm conviction, defendant testified that he was taking the gun to a friend, he was not familiar with guns, and has never shot a gun. At the time of the shootings, he was on probation for the firearm conviction. Defendant admitted punching a jail deputy in the face in November 2012, but denied saying as he threw the punch that he did not care because he is a murderer. In December 2013, defendant was stabbed multiple times in jail by other Norteños. He does not know who stabbed him and has been in isolation since then. The stabbing had nothing to do with this case.

III. The Verdict and Sentencing

The jury found defendant guilty of: (1) first degree murder (§ 187, subd. (a)) of Barragan on an aiding and abetting theory; (2) attempted murder (§§ 187, subd. (a), 664)

of Lopez; and (3) participation in a criminal street gang (§ 186.22, subd. (a)). On the first two counts, the jury found that defendant personally discharged a handgun causing great bodily injury or death (§ 12022.53, subds. (d)-(e)) and acted in association with a criminal street gang (§ 186.22, subd. (b)(5)). On the attempted murder count, the jury also found that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)).

The court sentenced defendant to 25 years to life for the murder of Barragan, plus 25 years to life consecutive for the firearm enhancement. The court imposed 15 years to life for the gang enhancement on the murder count, but stayed that sentence. The court sentenced defendant to 15 years to life for the attempted murder of Lopez, plus 25 years to life consecutive for the gun enhancement. As before, the court imposed 15 years to life for the gang enhancement on the attempted murder count, but stayed that sentence. The court did not impose a sentence for the great bodily injury enhancement on the attempted murder count. As for participation in a criminal street gang, the court imposed the upper term of three years, but stayed that term. The total sentence was 90 years to life. The court imposed fines and fees that are not at issue on appeal.

At the time of the shootings, defendant was on probation in case No. SS092281, in which he had been convicted of carrying a concealed firearm (former § 12025, subd. (a)(2)) and misdemeanor street terrorism (§ 186.22, subd. (a)) (hereafter the firearm case). After he was arrested in the murder case, defendant was charged with a probation violation in the firearm case. At sentencing in the murder case, the court denied probation and sentenced defendant to eight months in prison in the firearm case. Defendant has appealed the judgment in both cases.

DISCUSSION

I. Failure to Instruct on Voluntary Manslaughter Based on Imperfect Self-defense

Defendant contends the evidence, particularly the kite, would have allowed a reasonable jury to conclude that he shot Lopez because he unreasonably believed he needed to defend himself. He argues the jury never had a chance to consider that theory because the court failed to instruct sua sponte on attempted voluntary manslaughter. He argues this omission violated his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to due process and therefore requires reversal.

A. Governing Legal Principles

As the California Supreme Court recently explained in *People v. Simon* (2016) 1 Cal.5th 98 (*Simon*), “[a]n instance of imperfect self-defense occurs when a defendant acts in the actual but unreasonable belief that he or she is in imminent danger of great bodily injury or death. (*People v. Duff* (2014) 58 Cal.4th 527, 561) Imperfect self-defense differs from complete self-defense, which requires not only an honest but also a reasonable belief of the need to defend oneself. (*People v. Elmore* (2014) 59 Cal.4th 121, 133-134) It is well established that imperfect self-defense is not an affirmative defense. (See *People v. Barton* (1995) 12 Cal.4th 186, 199-201 . . . (*Barton*).) It is instead a shorthand way of describing one form of voluntary manslaughter. (*Id.* at p. 200.) Because imperfect self-defense reduces an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice, this form of voluntary manslaughter is considered a lesser and necessarily included offense of murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 [(*Breverman*)].)” (*Id.*, at p. 132.)

Imperfect self-defense “ ‘is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, . . . , is not a defense but a crime; more

precisely, it is a lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on [imperfect] self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises *whenever* the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense.' ” (*Breverman, supra*, 19 Cal.4th at p. 159, quoting *Barton, supra*, 12 Cal.4th 186, 200-201, italics in *Breverman*.)

This sua sponte duty arises “ ‘regardless of the theories of the case proffered by the parties.’ ” (*Breverman, supra*, 19 Cal.4th at p. 159.) “[T]he jury must be allowed to ‘consider the *full range* of possible verdicts—not limited by the strategy, ignorance, or mistakes of the parties,’ so as to ‘*ensure* that the verdict is no harsher or more lenient than the evidence merits.’ [Citations.]” (*Id.* at p. 160.) “[R]egardless of the tactics or objections of the parties, or the *relative* strength of the evidence on alternate offenses or theories, the rule requires sua sponte instruction on *any and all* lesser included offenses, or theories thereof, which are *supported* by the evidence.” (*Ibid.*) In a murder case, this means that the jury must be instructed on imperfect self-defense if there is substantial evidentiary support for that theory. (*Ibid.*)

A defendant acts in imperfect self-defense when the defendant actually believes (1) that he or she is in imminent peril of being killed or suffering great bodily injury, and (2) that the immediate use of deadly force is necessary to defend against the danger, but (3) at least one of those beliefs is unreasonable. (*People v. Her* (2009) 181 Cal.App.4th 349, 352 (*Her*); CALCRIM No. 571.)

The trial court has sua sponte duty to instruct on voluntary manslaughter—attempted voluntary manslaughter in this case—on an imperfect self-defense theory, when evidence of that theory is “ ‘substantial enough to merit consideration’ ” by the jury. (*Breverman, supra*, 19 Cal.4th 162, 153-163.) “A trial court has a sua sponte duty

to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733 . . . (*Waidla*.) Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. (*People v. Manriquez* (2005) 37 Cal.4th 547, 587-588 . . . (*Manriquez*); see also *Barton, supra*, 12 Cal.4th at p. 201, fn. 8 [“Substantial evidence is evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.”].) Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense. (*Mendoza, supra*, 24 Cal.4th at p. 174; see also *Barton*, at p. 201)” (*Simon, supra*, 1 Cal.5th at p. 132.)

“In deciding whether evidence is ‘substantial’ in this context, a court determines only its bare legal sufficiency, not its weight.” (*Breverman, supra*, 19 Cal.4th at p. 177.) Moreover, the determination whether substantial evidence supports instructing on a lesser included offense “must be made without reference to the credibility of that evidence.” (*People v. Marshall* (1996) 13 Cal.4th 799, 847.)

We review a trial court’s decision not to give an imperfect self-defense instruction under the de novo standard of review. (*Simon, supra*, 1 Cal.5th at p. 133.)

B. Analysis

Defendant contends the kite contains substantial evidence that he shot Lopez “under an actual but unreasonable belief that he had to defend himself against imminent serious harm,” which required the court to instruct on imperfect self-defense. The kite states that defendant was walking from the park to his uncle’s house with “Kid” [(Chavez)], Lopez, and “Hoser” [(Barragan)] when defendant asked Lopez if he was spending time with “Lecho.” In response, Lopez pulled out a gun (“a 380 Lorcin”) and began to cock it. But the gun jammed on him. Defendant stated: “380 Lorcins are well

known to jam.” Defendant, who always carries his “.357 Smith and Wesson,” “jumped back and shot [Lopez] first around his neck and five more in his chest.” Defendant then “pulled away from his hands,” fearing that Lopez would shoot him in the back, and ran off. Defendant added: “Kill or be killed was what went through my head in a matter of seconds” and “he endangered my life. So I shot back.”

The Attorney General argues that the evidence contained in the kite was insufficient to support instructing on imperfect self-defense because defendant claimed he did not write it and his defense contradicted the self-defense claims made in the kite. Indeed, the kite was inconsistent with defendant’s theory of the case. Defendant testified that he was at his sister’s house and was not at the crime scene at the time of the shootings. He also disavowed the kite, stating that he did not write it. But as we have explained, the sua sponte duty to instruct on lesser included offenses that are supported by substantial evidence arises “ ‘regardless of the theories of the case proffered by the parties.’ ” (*Breverman, supra*, at pp. 159; see also *In re Walker* (2007) 147 Cal.App.4th 533, 552 [instruction must be given so long as there is substantial evidence of imperfect self-defense even if “inconsistent with a defendant’s theory of the case and directly at odds with the defendant’s testimony describing how the crime occurred”].)

Defendant argues the kite was substantial evidence that he shot Lopez under an actual but unreasonable belief that he needed to defend himself. He contends the evidence supports a finding that Lopez pulled a gun on him first and defendant feared for his life. He argues “a juror could have found [defendant’s] belief that he needed to shoot to defend himself unreasonable because Lopez’s gun had jammed, so there was no need to shoot.” Or a juror could have found, given the two men’s history and relationship, that it was unreasonable to believe Lopez would actually shoot defendant.

We agree with defendant that the text of the kite was sufficient to require the court to instruct sua sponte on imperfect self-defense. To support the instruction, there had to

be evidence that defendant believed: (1) he was in imminent peril of being killed or suffering great bodily injury, and (2) that the immediate use of deadly force was necessary to defend against the danger, but (3) at least one of those beliefs is unreasonable. (*Her, supra*, 181 Cal.App.4th at p. 352.) Evidence that Lopez pulled a gun on defendant, that “[k]ill or be killed” went through defendant’s mind, and it happened within “a matter of seconds” was sufficient to show that defendant both believed he was in imminent peril and needed to use deadly force to defend himself. Although defendant was carrying a gun, there was nothing in the kite to suggest that defendant pointed his gun at Lopez first. The evidence in the kite also supports the conclusion that both beliefs were unreasonable. According to the kite, defendant saw Lopez’s gun jam *before* he shot Lopez and defendant knew the type of gun Lopez allegedly used had a tendency to jam. Based on this, the jury, if it credited the explanation in the kite, may also have concluded it was unreasonable for defendant to believe that he was in imminent danger of being killed or suffering great bodily injury. The jury may also have concluded that defendant’s belief that he needed to shoot to defend himself was unreasonable because Lopez’s gun had jammed.

C. Prejudice

Although we hold the trial erred by not instructing on imperfect self-defense, we conclude any error in failing to give the instruction in this case was harmless. California Supreme Court “precedent holds that an erroneous failure to instruct the jury on a lesser included offense is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 837, and that evidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given.” (*People v. Banks* (2014) 59 Cal.4th 1113, 1161, overruled on another ground as stated in *People v. Scott*

(2014) 61 Cal.4th 363, 391, fn. 3; see also *People v. Blackburn* (2015) 61 Cal.4th 1113, 1135-1136; *People v. Beames* (2007) 40 Cal.4th 907, 929; and *Breverman*, *supra*, 19 Cal.4th at pp. 165 [“the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility” under the *Watson* harmless error test].) “[S]uch misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.” (*Breverman*, at p. 165.)

As the *Breverman* court explained, “the sua sponte duty to instruct on a lesser included offense arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. [Citation.] This standard requires instructions on a lesser included offense whenever ‘a jury composed of reasonable [persons] *could* . . . *conclude*[]’ that the lesser, but not the greater, offense was committed. [Citations.]” (*Breverman*, *supra*, 19 Cal.4th at p. 177.) “Appellate review under *Watson*, on the other hand, takes an entirely different view of the evidence. Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. Application of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless.” (*Id.* at pp. 177-178, fn. omitted.)

In this case, the evidence supporting the jury's verdict of guilt for the attempted premeditated murder of Lopez was so strong, and the evidence supporting a manslaughter conviction based on imperfect self-defense was so comparatively weak, that there is no reasonable probability that the claimed instructional error affected the result. At trial, Lopez testified that he was walking down the street with defendant and Chavez when he was shot. But he did not know which one of them shot him. This was consistent with his statements to the police, both of which placed defendant at the scene of the shootings. Chavez testified that defendant sent him to pick up a gun, gave him dark clothing before they left for the park, and that he (Chavez) understood they were going to shoot Lopez. He also testified that defendant placed fresh bullets in Chavez's gun and while doing so, covered his hand with a sock to make sure no fingerprints were left behind. All of this showed premeditation. Both Chavez and Gonzalez testified about the tensions between defendant and Lopez and the events at the meeting the night before the shooting. In addition, Gonzalez testified that defendant was angry after that meeting and asked other gang members whether he should "handle" Lopez, which Gonzales testified could include shooting him. Gonzalez also corroborated Chavez's testimony about events on the day of the shooting: taking Chavez to pick up the gun, the type of gun Chavez had, confirming that defendant and Chavez wore dark clothing to the park, picking up Lopez and Barragan, driving everyone to the park, the events that led up to the shooting, Chavez jumping into his car, and fleeing after the shootings. Both Chavez and Gonzalez also testified about events the following day: spending the day with defendant in a garage, defendant wiping down Gonzalez's car to get rid of fingerprints, defendant offering them both tickets to Texas. The fact that Gonzalez corroborated so many of the details that Chavez testified about was key to the relative strength of the prosecution's case. Some of the statements in the kite also supported the prosecution's case: defendant admitted (1) he was upset with Lopez and was "going to get at him," (2) he was carrying his .357,

(3) he went to the park with Lopez, Barragan, Chavez, and Gonzalez, and (4) he shot Lopez. That the jury deliberated for three hours and fifteen minutes or less, underscores the relative strength of the prosecution's case.

In contrast, the only evidence that supported giving an instruction on imperfect self-defense was the kite. There was no evidence that corroborated the assertions in the kite that Lopez pulled a gun on defendant or that defendant shot Lopez in self-defense. Not one witness said Lopez had a gun. Given the relative strength of the evidence of attempted first degree murder, and the relative weakness of the evidence to the contrary, we do not find it reasonably probable that had the jury been instructed on imperfect self-defense, it would have concluded defendant attempted to kill Lopez without malice. (*People v. Beames, supra*, 40 Cal.4th at pp. 929-930.)

Defendant acknowledges that appellate courts generally evaluate the trial court's failure to give a lesser included offense instruction under the state law prejudice standard from *Watson*. He argues, however, that "when the court fails to instruct sua sponte on voluntary manslaughter, it should be viewed as federal constitutional error because the absence of unreasonable [self-]defense is an element the prosecution must prove, not a question for the jury to answer after it has unanimously rejected a murder conviction." He argues the failure to instruct on unreasonable self-defense presents federal constitutional error because it relieves the prosecution of the burden to prove malice beyond a reasonable doubt. Defendant relies on Justice Kennard's dissent in *Breverman* and the Court of Appeal's decision in *People v. Thomas* (2013) 218 Cal.App.4th 630, 641-643 (*Thomas*).

As we have explained, in *Breverman*, our Supreme Court applied the *Watson* standard in assessing a trial court's failure to give sua sponte a heat-of-passion instruction in a noncapital case. (*Breverman, supra*, 19 Cal.4th at pp. 148-149, 165.) In broad language, the court "reject[ed] any implication that the alleged error at issue in this

case—the failure to instruct sua sponte on an uncharged lesser included offense, or any aspect thereof—is one which arises under the United States Constitution.” (*Id.* at p. 165.) “This discussion would seem to have resolved the question whether a failure to give sua sponte a heat-of-passion instruction implicates the federal Constitution. But another portion of *Breverman* makes clear that it did not. In a footnote, the court expressly declined to decide whether such a failure to instruct could constitute a federal constitutional error on the theory that it presented to the jury an incomplete definition of malice, which is an element of the charge of murder, and thus relieved the prosecution’s burden of proving all elements of an offense beyond a reasonable doubt. (*Breverman*, *supra*, 19 Cal.4th at p. 170, fn. 19 [observing that “[t]he issues presented by such a claim must properly await a case in which they have been clearly raised and fully briefed”]; *id.* at pp. 189–190 (dis. opn. of Kennard, J.) [arguing that the instructional error violated the federal Constitution for this reason].) Our Supreme Court has subsequently reaffirmed that this issue remains open. (See [*People v.*] *Moye* [(2009)] 47 Cal.4th [537,] 558, fn. 5 [declining to decide the issue because the defendant had not properly preserved the claim of federal constitutional error]; see *People v. Lasko* [(2000)] 23 Cal.4th [101,] 113)” (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1144-1145 (*Millbrook*).

In *Thomas*, the First District Court of Appeal held that the federal constitutional standard for assessing prejudice from *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) applied to a defendant’s claim that the trial court erred by not giving a requested heat-of-passion instruction. (*Thomas*, *supra*, 218 Cal.App.4th 633, 643-644.) The familiar, more stringent *Chapman* standard requires reversal unless it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict. (*Chapman*, *supra*, at p. 24.) Defendant suggests the holding in *Thomas* applies to the error here: the trial court’s failure to instruct *sua sponte* on imperfect self-defense. We acknowledge that heat of passion and imperfect self-defense are both forms of voluntary

manslaughter. Both theories reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice and are both considered a lesser and necessarily included offense of murder. (*Breverman, supra*, 19 Cal.4th at pp. 153-154.) But as the court explained in *Millbrook*, whether trial courts ever have a duty under the federal Constitution to give *sua sponte* heat-of-passion instruction in a noncapital murder case is unresolved. (*Millbrook, supra*, 222 Cal.App.4th at pp. 1143.) Indeed, the *Thomas* court distinguished *Breverman*, stating: “this case concerns the court’s duty to give a requested instruction, not the *sua sponte* duty to instruct at issue in *Breverman*.” (*Thomas, supra*, at p. 644.) *Millbrook* reviewed the procedural history of *Thomas* in detail and concluded that the “full import of *Thomas* is . . . unclear.” (*Millbrook, supra*, at p. 1146.) *Millbrook* also questioned whether *Thomas*’s holding applies when the defendant claims error based on a *sua sponte* failure to instruct on a lesser included offense, which is the issue presented here, as opposed to the failure to give a *requested* instruction, which was at issue in *Thomas*. (*Id.* at pp. 1145-1146.)

We need not decide whether *Thomas* applies to the court’s failure to instruct *sua sponte* in this case because any error was also harmless under the stricter *Chapman* standard. We again note strength of the evidence supporting the attempted first degree murder conviction as compared to the paucity of evidence supporting an imperfect self-defense theory. Multiple witnesses corroborated the facts that supported attempted first degree murder. In addition, Gonzalez testified that the day after the shooting, he heard defendant tell others how he shot Lopez. Defendant said that when Lopez asked him for his gun, he pulled down his ski mask, pulled out the gun, and shot Lopez, saying “[h]ere you go.”

In addition, the court instructed the jury: “If you find defendant guilty of attempted murder . . . , you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation

and premeditation.” The court explained that defendant “acted willfully if he intended to kill when he acted,” that he “acted deliberately if he carefully weighed the considerations for and against his choice and knowing the consequences decided to kill,” and that he acted with “premeditation if he decided to kill before acting.” The court explained that a “decision to kill made rashly, impulsively or without careful consideration of the choice and its consequences is not deliberate and premeditated.” A decision to kill made impulsively would include the imperfect self-defense scenario described in the kite. The court also instructed the jury that “The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.” The jury specifically found that the attempted murder was committed willfully, and with deliberation and premeditation, which is inconsistent with the claim that defendant acted impulsively in imperfect self-defense. “ ‘Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions.’ ” (*People v. Peau* (2105) 236 Cal.App.4th 823, 830 [finding no prejudice under *Chapman*], quoting *People v. Lewis* (2001) 25 Cal.4th 610, 646.) Since the jury found the attempted murder of Lopez was willful, deliberate, and premeditated, and in view of the strength of the evidence supporting that finding, we conclude the failure to instruct the jury on imperfect self-defense in this case was harmless beyond a reasonable doubt.

II. Ineffective Assistance of Counsel

Defendant contends his trial counsel failed to provide effective assistance under the Sixth Amendment because counsel failed to object when the prosecution misstated the necessary findings to support the gang enhancements at two points in his opening argument.

A. Background

Defendant asserts that the following statements by the prosecutor were objectionable. In discussing the gang enhancement on count 2, the attempted murder charge, the prosecutor argued: “What are the elements? The first one is was the crime done in association with or for the benefit of. Any one of those two. Doesn’t have to be both. Any one of those two. [¶] Second element, he intended to assist, further or promote criminal conduct by the Norteño gang. Any one of those three. Doesn’t have to be all three. Any one of those three. [¶] You have two elements and you can choose. It has different choice in each element. Let’s go through that.”

The prosecutor continued: “Was the shooting—and I think commonsensically you can ask yourself was this done for the gang. Was it done for the gang. And more importantly, would it have been done without the gang. Would it have been done if these guys weren’t in the Norteño gang. And . . . I think we all know the answer, because of the evidence, That it’s no, it would not have been done.” Later, the prosecutor stated: “[W]ould the defendant have attempted to kill Angel Lopez if they weren’t in this Norteño gang? Answer that question. And you come to the conclusion that this was for the benefit of the gang. This is why this happened.” Defendant contends his counsel was ineffective because he failed to object to these statements.

Defendant argues the prosecutor’s statement were “improper because the prosecution simply made up its own standard. Telling the jury that the gang enhancement is proved if it finds that ‘This wouldn’t have happened if appellant weren’t a Norteño?’ jumps right over the actual statutory elements the Legislature crafted, and substitutes a vague, fuzzy, ‘but for’ formulation that has no basis in law.” He asserts that in “this very unusual case where . . . the shootings were unsanctioned by the Norteños and violated Norteño rules, it is reasonably probable that a jury that had not heard this confusing and inaccurate argument would have refused to find the gang enhancement

true” and that his counsel was ineffective for failing to object, which requires reversal of the gang enhancement.

B. Legal Principles

A criminal defendant’s constitutional right to the assistance of counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) entitles the defendant not simply to “ ‘bare assistance’ ” but rather to effective assistance. (*People v. Jones* (1991) 53 Cal.3d 1115, 1134.) To demonstrate ineffective assistance of counsel on appeal, the defendant “bears the burden of showing by a preponderance of the evidence that (1) counsel’s performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficiencies resulted in prejudice.” (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694, (*Strickland*); *People v. Ledesma* (2006) 39 Cal.4th 641, 746; and *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.)

“Unless a defendant establishes the contrary, we shall presume that ‘counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.’ ” (*People v. Ledesma, supra*, 39 Cal.4th at p. 746, quoting *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) “When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ‘ ‘no conceivable tactical purpose’ ” for counsel’s act or omission. [Citations.]’ ” (*Centeno, supra*, 60 Cal.4th at p. 675, citing *People v. Lewis, supra*, 25 Cal.4th 610, 675.) “ ‘[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one’ [citations], and ‘a mere failure to object to evidence or argument seldom establishes counsel’s incompetence’ [citation]. [¶] Nonetheless, deference to counsel’s performance is not the same as abdication.

[Citation.] ‘[I]t must never be used to insulate counsel’s performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions.’ [Citation.]” (*Centeno*, at p. 675.)

The first element of an ineffective assistance claim “requires a showing that ‘counsel’s representation fell below an objective standard of reasonableness.’ [Citations.]” (*In re Marquez* (1992) 1 Cal.4th 584, 602-603, quoting *Strickland, supra*, 466 U.S. at p. 688.) “ ‘In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny . . .’ and must ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) “[T]here is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 437, quoting *Strickland, supra*, 466 U.S. at p. 689.) And the California Supreme Court has stated that if “the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged,” we must reject the claim on appeal “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The second element—the prejudice element—requires a showing that “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome.” (*In re Ross* (1995) 10 Cal.4th 184, 201.) Prejudice requires

a showing of “a ‘demonstrable reality,’ not simply speculation.’ [Citations.]” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

In deciding an ineffective assistance claim, the reviewing court need not inquire into the two components (deficient performance and prejudice) in any particular order; in the event the defendant’s showing on one component is insufficient, the court need not address the remaining component. (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

C. Analysis

“Attorneys are not required to make every conceivable objection. Litigation is a series of tactical choices about which there are no absolute rules.” (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 394-395.) The record does not shed any light on why defense counsel failed to object to the comments complained of on appeal. In appropriate circumstances, defense counsel “could reasonably have decided it was better to let the comment stand than risk irritating the jury by objecting.” (*Id.* at p. 395.) And defense counsel may have decided to forego an objection, since the court had properly instructed the jury regarding the gang enhancement and his own argument addressed the elements of the enhancement.

This case is also distinguishable from *Centeno*, where the court found no reasonable tactical purpose for defense counsel’s failure to object to the prosecution’s misleading argument regarding the beyond a reasonable doubt standard of proof. (*Centeno, supra*, 60 Cal.4th at pp. 672-674, 676.) The improper argument in *Centeno* came in the prosecution’s rebuttal argument and defense counsel in that case had “no opportunity to counter it with argument of his own.” (*Id.*, 60 Cal.4th at p. 676.) “His only hope of correcting the misimpression was through a timely objection and admonition from the court.” (*Ibid.*) Unlike *Centeno*, the allegedly improper argument in this case was in the prosecution’s opening argument and defense counsel had an opportunity to counter it with argument of his own. Indeed, as defendant states in his

opening brief, defense counsel “argued vigorously that the offenses were not gang[-]related. . . . He tracked the enhancement elements, and argued that the prosecution had not proved them, urging that there could be no association between gang member[s] for the acts because they were acting outside” of the gang’s rules. In light of these points, we are not persuaded that defendant has met his burden of demonstrating that defense counsel’s performance was deficient.

In addition, we conclude that defendant was not prejudiced by his counsel’s failure to object to the prosecutor’s comments in his opening argument. The court instructed the jury with CALCRIM Nos. 1400 and 1401 regarding the elements the prosecution was required to prove to obtain a guilty verdict on the substantive crime of participation in a criminal street gang and a true finding on the gang enhancements. The court also instructed the jury with CALCRIM No. 222 that nothing the attorneys say, including in closing arguments, is evidence. The court also instructed the jury with CALCRIM No. 200, which stated in part” “I will now instruct you on the law that applies to this case,” and “[i]f you believe the attorney’s comments on the law conflict with my instructions, you must follow my instructions.” In addition, the prosecutor told the jury to “[f]ollow the law that was just given to you by the Judge” and to “[a]pply the facts to the law to reach your verdict.”

Defendant’s claim is belied by reviewing the entirety of the prosecution’s argument on the gang enhancements. In addition to the comments defendant relies on, which we quote above, the prosecutor accurately described the elements it was required to prove more than once. He then argued how the specific facts of this case proved the elements of the gang enhancement. The prosecutor argued that defendant committed the attempted murder of Lopez in association with another gang member (Chavez) and summarized the evidence that supported his alternative contention that the shooting also benefitted the gang, thereby addressing the first element of the enhancement. The

prosecutor then discussed the evidence that in his view supported a finding that defendant intended to assist, further, or promote criminal conduct by the gang, the second element of the enhancement. Even if the jury was misled by the prosecution's earlier comments, this portion of his argument expounded on the elements that the court had told the jury the prosecutor was required to prove, thereby diluting the effect of the prosecutor's earlier, more general comments.

Our review of the evidence of defendant's guilt, the prosecutor's entire argument, defense counsel's argument, and the jury instructions on the gang participation offense and the gang enhancements, leaves us convinced that defense counsel's failure to object to the comments defendant complains of on appeal did not adversely affect the outcome of the trial. (See *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1010-1011.) We therefore conclude that defendant has failed to carry his burden of demonstrating prejudice—a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different—based on his counsel's in failure to object to portions of the prosecution's argument regarding the gang enhancement.

III. The Abstract of Judgment in the Firearm Case Must Be Corrected

At sentencing, the court sentenced defendant to eight *months* in the firearm case, consecutive to his sentence in the murder case. The abstract of judgment, however, erroneously recorded the sentence as eight *years*. Defendant asks us to order the trial court to correct the abstract of judgment to reflect the sentence actually imposed. The Attorney General agrees that the abstract of judgment must be corrected.

When an abstract of judgment does not accurately reflect the oral judgment imposed by the sentencing court, as is the case here, an appellate court may order the abstract corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-187.) We will

therefore accept the Attorney General's concession and order the clerk of the superior court to correct the abstract of judgment.

DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting that the sentence imposed in case No. SS092281 on the concealed firearm count (§ 12025, subd. (a)(2)) was eight months, not eight years. With this correction, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

GROVER, J.

People v. Criado
H042151