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S184212 2nd Petition for Review

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. XUE VANG, et al., Defendant and Appellant.	No. S_____ Court of Appeal No. D054343 San Diego County Superior Court No. SCD213306

PETITION FOR REVIEW

Appeal from the Judgment of the Superior Court
of the State of California for the
County of San Diego

Honorable Michael Wellington, Judge

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent case system

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PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT: Pursuant to Rule 8.500 of the California Rules of Court, Xue Vang petitions for review of the published decision of the Court of Appeal, Fourth Appellate District, Division One, filed on June 7, 2010, as modified on June 25, 2010. A copy of the opinion and the order modifying the opinion are attached as Exhibits A and B.

ISSUE PRESENTED

Did the Court of Appeal err, in violation of state law and appellant's federal due process and equal protection rights, when it evaluated prejudice from state law error based on "whether there is enough evidence . . . from which a reasonable jury could infer" the gang enhancement was true, rather than on the *Watson/College Hospital* test, namely, whether there was "a reasonable chance, more than an abstract possibility," of a better verdict absent the trial court error.

NECESSITY FOR REVIEW

This appeal concerns whether the gang enhancement attached to the assault charge can stand even though the Court of Appeal found that the trial court committed *Killebrew* error by letting the gang expert testify about appellant's subjective motivation for the assault. In its published opinion, the Court of Appeal employed an incorrect standard of review for prejudice, in conflict with the decisions of this court and several courts of appeal. To ensure uniformity of decision, and to clarify and settle the law regarding the proper parameters of prejudice analysis under the *Watson* test, this court should grant review.

The Court of Appeal held that the trial court violated the principles set forth in the line of cases beginning with *People v. Killebrew* (2002) 103 Cal.App.4th 644, when it permitted the prosecution's gang expert to testify that the assault by appellant Xue Vang and his three co-defendants was "gang-motivated." The Court of Appeal, however, found the error was not prejudicial. Although it cited *People v. Watson* (1956) 46 Cal.2d 818, the court incorrectly stated that the standard was "*whether there is enough evidence . . . from which a reasonable jury could infer* [Vang] committed the assault" with the specific intent to promote, further, or assist criminal conduct by gang members. (Opn. at 14, emphasis added.)

The standard for prejudice arising from state law error – the *Watson* test – focuses not on whether there was "enough evidence," but instead on whether, absent the inadmissible evidence, there was "a *reasonable chance*, more than an *abstract possibility*," of a better verdict [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original; see also *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [same]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [same].) Some courts of appeal have carefully followed the standard set forth in the *Watson* line of cases. (See, e.g., *People v. Ross*

(2007) 155 Cal.App.4th 1033, 1055; *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.) The published decision below, however, conflicts with these decisions because, despite its citation to the *Watson* case, its analysis is based on a different, weaker test – namely, whether there was "enough evidence" to support the finding. Thus, this court should grant review to ensure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).)

The Court of Appeal's published decision also creates a serious risk of confusion in the lower courts on this critical issue. That is because the *Watson* standard is materially different than the standard used by the Court of Appeal. The fact that a reasonable jury could infer from the admissible evidence that Vang had the requisite subjective intent (the standard used below) does not necessarily mean that without the inadmissible evidence there is no reasonable chance of a defense verdict on the gang enhancement (the *Watson* standard). Because the *Watson* standard is central to so many criminal and civil cases – the great majority of which involve state law error – this court should grant review to settle this important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE

On September 8, 2008, appellant Xue Vang and three co-defendants (Dang Ha, Danny Lê, and Sunny Sitthideth) were charged by an amended information with assault with a deadly weapon and with force likely to produce great bodily injury (§ 245, subd. (a)(1)), with allegations that each defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)); the crime was gang-related (§ 186.22, subd. (b)(1)); each defendant committed the assault with a deadly weapon (§ 1192.7, subd. (c)(31)); and each defendant personally inflicted great bodily injury (§ 1192.7, subd. (c)(8).) (1 CT 8-10).

On November 21, 2008, a jury found Vang guilty of assault with

force likely to cause great bodily injury and found the gang allegation true, but found the GBI and deadly weapon allegations not true. (1 CT 118-119; 10 RT 2505-2506.)[1] The jury returned the same verdict for the co-defendants. (1 CT 120-125; 10 RT 2502-2505.)

On December 23, 2008, the court sentenced Vang to a determinant term of 6 years – the middle term of 3 years on count 1 and the middle term of 3 years for the gang enhancement. (1 CT 70 [abstract], 126; 11 RT 2808-2809.)[2]

The Court of Appeal filed its opinion on June 7, 2010 (Exh. A), and in response to a petition for rehearing modified the opinion (but not the judgment) on June 25, 2010. (Exh. B.)

COURT OF APPEAL DECISION

The sole issue in Vang's appeal was that the gang enhancement must be reversed because the trial court committed prejudicial *Killebrew* error[3] when it permitted the prosecution's gang expert to testify that the crime was gang motivated.

The Court of Appeal agreed there was *Killebrew* error. (See Opn. at 9-14.)

> Although a bright line between gang expert testimony which is or is not admissible to show knowledge and intent may be elusive, we conclude that Detective Hatfield's testimony crossed it. We agree with the rule of *Killebrew* that an expert witness may not offer an opinion on what a particular

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[1] Before closing argument, the prosecution dropped the theory that each defendant committed an assault with a deadly weapon, and proceeded only on the theory that the assault was with force likely to cause GBI. (8 RT 1921.)

[2] The court sentenced Sitthideth to four years (1 CT 182; 12 RT 2828), and granted Ha probation after imposing and suspending execution of a four-year sentence. (2 CT 402-406; 12 RT 2837-2838.) The record does not reveal the sentence that Lê received.

[3] *People v. Killebrew* (2002) 103 Cal.App.4th 644.

> defendant is thinking. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 647.) And more importantly here, the prosecutor may not circumvent that rule by asking the expert a hypothetical question that thinly disguises the defendants' identity.

(Opn. at 9.)

> Here, the trial court abused its discretion by admitting Detective Hatfield's testimony regarding defendants' knowledge and intent based on its apparent belief that such testimony was admissible so long as it was presented in the form of a hypothetical. As we explain, the prosecution may not use a hypothetical question to conceal an expert's improper testimony on the real defendants' subjective knowledge and intent.

Opn. at 10.)

But, the Court of Appeal then held that the error was harmless. The court's entire analysis on this issue is as follows:

> The next question is whether the error was harmless, that is, *whether there is enough evidence*, including testimony that Detective Hatfield was *permitted* to offer concerning the general culture and habits of TOC [the Tiny Oriental Crips gang] (*Gardeley*, *supra*, 14 Cal.4th at p. 617), *from which a reasonable jury could infer* defendants committed the assault "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" within the meaning of section 186.22, subdivision (b)(1). (*Gardeley*, *supra*, 14 Cal.4th at p. 617.) The record reveals the following admissible evidence relevant to the issue of knowledge and intent. First, the phone call from an unidentified "familiar" voice, Vang's arrival and suggestion that they leave the garage to "hang out," and the assault by other known gang members at a nearby corner could support an inference that Phanakhon was "set up." Second, Phanakhon's two "guesses" for why he was assaulted – that he had disassociated himself from TOC or heard something he was not supposed to hear – linked the assault to the gang. Indeed, Phanakhon testified that although he was not afraid of the defendants, he was afraid of TOC. Third, Detective Collins observed that the victim of the assault did not fight back, consistent with the theory that the beating was some

> kind of group punishment rather than a simple fight between Phanakhon and Vang as portrayed by Sitthideth. Applying the *Watson* standard of prejudice – not the substantial evidence standard of review – we conclude on this record that it is not reasonably probable that an outcome more favorable to defendants would have resulted in the absence of the evidentiary error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

(Opn. at 14-15 [as modified], emphasis added.)

STATEMENT OF FACTS

On the evening of April 28, 2008, 20-year old William Phanakhon was watching television with his dad. (1 RT 157.) Around 10-11 p.m., someone – Phanakhon did not who – called Phanakhon and said he wanted to come over. Phanakhon said "sure." (*Ibid.*)

Appellant Xue Vang came to Phanakhon's house a little, while Phanakhon was in the garage cleaning his car. (1 RT 159-160.) Vang and Phanakhon had been good friends for several months. (1 RT 140; 2 RT 307.) After they talked casually for about five minutes, Phanakhon agreed to go "hang out" at the corner. (1 RT 160, 163-164; 2 RT 214-215.)

By coincidence, several San Diego police officers arrived in the area at about 11 p.m. to stake out Phanakhon's house; they were looking for a parolee-at-large. (2 RT 346; 3 RT 409, 520.) Detective Collins was parked such that he could see several young men – which included Phanakhon and at least two of the co-defendants – come around the corner from Phanakhon's house. (2 RT 376-379.)

As Vang and Phanakhon walked to the corner, Sitthideth and Ha, and possibly Lê, joined them. (1 RT 164-165.) Someone – not Vang – hit Phanakhon in the back of the head. When he fell, the others repeatedly punched him, knocking him unconscious. (1 RT 167-168; 2 RT 256, 299-300, 382-384; 3 RT 543-544.) Phanakhon did not know who hit him. (2

RT 219, 300.)[4]

The police quickly moved in (the entire fight lasted 10-15 seconds), and the assailants ran. (3 RT 481-482.) After a short foot chase, Vang and the co-defendants were arrested. (2 RT 396; 5 RT 1095, 1098, 1111-1112.)

The prosecution offered various theories for the assault. Phanakhon initially told the district attorney investigator that he had been beaten because he thought he might have "heard something" he was not supposed to hear. (2 RT 235, 248, 276-277.) He testified at trial that he might have been beaten because he had stopped hanging out with TOC members. (2 RT 240, 248, 276-277.) But he denied that was being "checked" – i.e., punished for dissociating himself from the gang. (2 CT 247-248.) In the end, he admitted that he was just "guessing" why he was assaulted that evening. (2 RT 322, 325-326.) The prosecution gang expert gave his opinion that the assault was a matter of internal gang discipline. (6 RT 1348; 7 RT 1607-1608.)

ARGUMENT

I. This Court Should Grant Review Because The Standard For Prejudice Set Forth In The Published Decision Of The Court Of Appeal Conflicts With This Court's Decisions And Creates A Substantial Danger Of Confusion.

Over defense objections, the gang expert testified about Vang's (and his co-defendants') subjective motivations – namely, that the assault was

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[4] Detective Collins was the only officer to see the assault. (3 RT 488.) He admitted that because he was parked 110 feet away and watching the fight through his side view mirror, he could not identify who was assaulting Phanakhon. (2 RT 379, 387-388, 392; 3 RT 414, 504.) Nonetheless, he claimed to have seen one of the assailants hit Phanakhon with a stick or a pipe. (2 RT 384-386; 3 RT 460-463.) The police, however, did not find a weapon on or near any of the co-defendants (3 RT 428; 4 RT 711; 5 RT 1096, 1102-1103, 1132-1133), and following a search both that night and the next day the police failed to find a weapon. (3 RT 430, 433-438, 469-470.) The jury rejected the detective's testimony regarding the weapon, returning a "not true" finding on the deadly weapon allegation. (1 CT 118.)

"gang motivated."[5] The Court of Appeal held that the trial court's ruling permitting this evidence violated the principles set forth in the line of cases beginning with *People v. Killebrew*, *supra*. (Opn. at 9-14.) The Court of Appeal then held that the error was harmless. In so holding, the court used the wrong standard to evaluate prejudice. In particular, the court found no prejudice because it concluded there was "enough evidence. . . from which a reasonable jury could infer" that Vang had the requisite specific intent to support the gang allegation. (Opn. at 7.)

A. Factual And Procedural Background.

Detective Daniel Hatfield testified as the prosecution's gang expert. Based on a lengthy hypothetical that exactly tracked the prosecution evidence in this case, the detective gave his opinion that the assault was for the benefit of, in association with, and at the direction of, TOC. (5 RT 1206-1210.) The court overruled a defense objection based on *People v. Killebrew*, *supra*. (5 RT 1208, 1210.)

The prosecutor revisited the issue during her redirect examination. She asked Detective Hatfield to recall the same hypothetical – again exactly tracking the evidence in the government's case, but altered to take account

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[5] Although Vang did not object to the gang expert's opinions challenged in this appeal, he did not forfeit the issue on appeal because the record demonstrates that an objection would have been futile. Ha's attorney specifically objected to the expert's opinions under the *Killebrew* line of cases. (5 RT 1208, 1210, 1394-1396; 6 RT 1370.) The court overruled the objections on the merits. (5 RT 1208, 1210; 6 RT 1370, 1398.)

Vang argued below that a "me too" objection by his counsel would have been futile, and thus that he was not required to object to preserve the issue for appeal. (See *People v. Hill* (1998) 17 Cal.4th 800, 820; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 422 ["No legitimate state interest would have been served by requiring repetition of a patently futile objection, . . . in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair."].) Neither respondent nor the Court of Appeal disputed this argument.

of evidence that Phanakhon was not a TOC member, but instead hung out with TOC members and was friends with the assailants. (6 RT 1368-1370.) Over a second *Killebrew* objection (6 RT 1370), the detective testified that "[i]t wasn't about friends fighting among one another. This was a gang-motivated incident." (6 RT 1371.)

Out of the presence of the jury, Ha's trial counsel explained the objection:

> When a hypothetical is crafted so carefully that it is transparent to everybody in the courtroom, including the jury, that we are talking about the facts of this very case, I think that crosses the line and it becomes *Killabrew* [*sic*] rather than an expert witness answering the general hypothetical. . . . And I think that what that does is pay lip service to the rule that you can offer a hypothetical, while in reality, as is perfectly apparent to every juror what you are really doing is asking the witness to opine on his objective thoughts and ideas of the defendants, and so I think *Killabrew* [*sic*] would control based on how carefully the hypothetical is drawn to mirror the facts of this case.

(6 RT 1395.) As the Court of Appeal noted, the gang expert's reference to the actual gang was so transparent that counsel heard "laughter or tittering from the jury." (Opn. at 14; 6 RT 1396.) The trial court stood by its earlier ruling. (6 RT 1398.)

B. The Court Of Appeal's Published Decision Articulated And Applied The Wrong Standard For Prejudice, In Conflict With This Court's Decisions And The Decisions Of Other Courts Of Appeal.

State law error is governed by the standard for prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, namely, that the appellant must show a "reasonable probability" that the error affected the verdict. The *Watson* standard, although more relaxed than the *Chapman* standard for federal constitutional error, is not toothless. Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]"

(*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.) Thus, prejudice must be found under *Watson* whenever the appellant can "'undermine confidence'" in the result achieved at trial. (*Ibid.*) This court has reiterated the "reasonable chance" standard in recent cases. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [same]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [same].) Some courts of appeal have been careful to use the "reasonable chance" standard in evaluating prejudice. (See, e.g., *People v. Ross* (2007) 155 Cal.App.4th 1033, 1055; *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.)

The Court of Appeal cited *Watson*, but its analysis employed a different standard – namely, "*whether there is enough evidence . . . from which a reasonable jury could infer* [Vang] committed the assault" with the specific intent to promote, further, or assist criminal conduct by gang members. (Opn. at 14, emphasis added.)

The decision below is not unique. In unpublished opinions, other courts also have applied the incorrect "enough evidence" standard. For example, in *People v. Belshaw* (2009) 2009 Cal.App.Unpub. Lexis 411, the Court of Appeal, Second Appellate District, Division Four, summarized the evidence and found no prejudice under *Watson* because "the jury could reasonably conclude that all the transactions in the trust accounts in evidence were related to the insurance fraud scheme." (*Id.* at *46.) In *People v. Borja* (2007) 2007 Cal.App.Unpub. Lexis 7811, the Court of Appeal, Second Appellate District, Division Seven, found no prejudice under *Watson* because "there was more than sufficient additional evidence from which the jury could reasonably infer the crimes were committed for the benefit of the Hurley Street gang." (*Id.* at *19, fn. 11.) Although the decision below is not unique, it is published. As a result, there is a serious risk that other courts will begin to adopt the "enough evidence" standard to

evaluate prejudice. This court should grant review to settle this important question of law.

The difference between a "reasonable chance" of a more favorable verdict and "enough evidence" to infer Vang's specific intent is substantial. The *Watson/College Hospital* formulation standard focuses on the entire record and asks whether, absent the inadmissible evidence, there is more than an abstract possibility that a single juror would not find that Vang had the necessary specific intent. Such a reasonable chance may exist even if the record contained enough evidence to support a true finding on the gang enhancement. That is because having enough evidence support a true finding for the gang allegation does not mean that the evidence compels a true finding. As articulated and applied by the Court of Appeal, a court employing the "enough evidence" standard would not look at all the admissible evidence and ask if there would have been a reasonable chance the jury would not find the gang enhancement was true, but instead would marshal the admissible evidence supporting the finding and ask if it would have been enough to support the true finding. Although in some cases – where the prosecution evidence was especially strong – the outcome of the prejudice analysis would be the same under the two standards, where the prosecution evidence was less compelling, the "reasonable chance" standard would require reversal whereas the "enough evidence" standard would result in an affirmance.

Thus, because the standard for prejudice actually used in the published decision below conflicts with other decisions, is substantially weaker than the *Watson/College Hospital* "reasonable chance" standard, and will create confusion among courts evaluating prejudice, this court should grant review.

C. The Court's Application Of The Wrong Standard Violated Federal Due Process And Equal Protection.

The arbitrary deprivation of a state law entitlement violates the due process clause of the Fourteenth Amendment, even if the state entitlement is not required by the federal constitution. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 672-673 [the trial court's failure to comply with state standards for determining "habitual offender" status and penalty violates federal due process]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 ["the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state"]; *Wilson v. Superior Court* (1978) 21 Cal.3d 816, 823 ["a substantial state-created right, even though not constitutionally compelled, may not be arbitrarily withheld"].) This principle applies equally to judicial holdings. (*Green v. Catoe* (4th Cir. 2000) 220 F.3d 220, 224-225 [finding a state-created liberty interest based on state supreme court decisions].)

California created such an entitlement when it established a mandatory standard for evaluating prejudice in connection with state law errors. (See Cal. Const., art. I, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."]; Pen. Code, § 1258 ["After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties."].) The Supreme Court construed these provisions in the *Watson/College Hospital*

line of cases to mean that the standard of prejudice is whether there is "a reasonable chance, more than an abstract possibility," of a more favorable verdict absent the state law error. The Court of Appeal, however, arbitrarily disregarded this mandatory standard and instead applied the much weaker "enough evidence" standard. The failure to apply the mandatory state standard for prejudice violated Vang's federal due process rights.

In addition, the disparate treatment of identically or similarly situated defendants violates the equal protection clause of the Fourteenth Amendment. (U.S. Const., 14th Amend.; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *People v Hofsheier* (2006) 37 Cal.4th 1185, 1199 ["The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner."], quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530, emphasis in *In re Eric J.*.) Here, the Court of Appeal decision treats Vang differently than identically situated appellants in other cases, where the courts of appeal review the state law error for prejudice under the *Watson/College Hospital* test.

D. Applying The Correct Standard For Evaluating Prejudice Would Have Resulted In A Different Outcome.

Although it is not essential in deciding whether to grant review, it is worth noting that applying the correct "reasonable chance" test would have made a difference in this case. Other than the expert's improper testimony that the offense was gang motivated, the evidence from which a jury could infer Vang's subjective thoughts, including his specific intent, was underwhelming. At a minimum, this court should grant review and remand for the Court of Appeal to evaluate prejudice using the correct standard in its analysis.

The Court of Appeal pointed to three pieces of evidence to establish harmless error under its "enough evidence" standard: (1) the assault was a "set up" based on the facts that Vang visited Phanakhon's house, that Vang suggested they go outside to hang out, and that the other defendants, who were gang members, then assaulted Phanakhon; (2) Phanankhon's speculative and inconsistent guesses as to why he was attacked "linked the assault to the gang"; and (3) according to Det. Collins, Phanakhon did not fight back, which purportedly showed that the assault was "group punishment." (Opn. at 15.) This evidence does not defeat Vang's argument that there was a reasonable chance of a more favorable verdict absent the inadmissible testimony that the offense was gang motivated.

First, even if there was evidence the assault was a set up, there was little evidentiary basis to infer the assault was gang motivated. The assailants did not shout gang slogans, show gang colors or gang insignia, or throw gang signs. There was no evidence they had put up gang graffiti in the area. Several cases have pointed to the absence of such evidence as a significant factor in holding the record lacked substantial evidence to support the gang enhancement finding. (See, e.g., *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662 [in holding there was insufficient evidence to support a gang enhancement, the Court of Appeal relied on the facts that the defendant "did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offenses. There was no evidence of bragging or graffiti to take credit for the crimes"]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [in holding there was insufficient evidence to support a gang enhancement, the Court of Appeal relied on the fact that "this shooting presented no signs of gang members' efforts in that regard – there was no evidence the shooters announced their presence or purpose – before, during or after the shooting.

There was no evidence presented that any gang members had 'bragged' about their involvement or created graffiti and took credit for it"].)

For the same reason, the absence of such evidence is a significant factor in a *Watson* analysis of prejudice resulting from *Killebrew* error. Because the usual indicia of a gang crime are absent, there was a "reasonable chance" that without the detective's improper and prejudicial opinion testimony the jury would have reached a different verdict.

Three of the co-defendants were gang members, but that fact is not sufficient evidence to support the gang enhancement, much less enough to refute the argument that without the improper opinion testimony about Vang's subjective motivations there was a reasonable chance the jury would not find Vang had the requisite specific intent. In *People v. Ramon* (2009) 175 Cal.App.4th 843, the Court of Appeal rejected the People's argument that a gang enhancement could be based on evidence that the defendant was a gang member, that he was with another gang member at the time of the offense, and that he was in gang territory at the time of the offense. "These facts, standing alone, are not adequate to establish that Ramon committed the crime with the specific intent to promote, further, or assist criminal conduct by gang members." (*Id.* at p. 851.) "Simply put, in order to sustain the People's position, we would have to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang. Such a holding would convert section 186.22(b)(1) into a general intent crime. The statute does not allow that." (*Id.* at p. 853.) If such evidence is insufficient to sustain a gang enhancement finding, it also is insufficient to hold that Vang was not prejudiced by the expert's improper opinion testimony about Vang's subjective motivations.

In addition, the evidence that Vang was a gang member was exceedingly weak. Although the detective gave his opinion that Vang was

a gang member, he admitted that Vang had never "claimed" gang membership. (5 RT 1181; 6 RT 1342). Indeed, Vang denied being a gang member, had no gang tattoos, was not on Ha's phone list (which included the phone numbers of numerous gang members), and did not appear in any gang photos. (2 RT 253; 7 RT 1341-1342, 1608-1609, 1671-1672.) Phanakhon – who testified that he and Vang were still friends (2 RT 253) – also testified that his friend Vang was not a gang member. (2 RT 258.) Moreover, it is well established that gang membership alone is insufficient to prove that the defendant's subjective motivations were gang related. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199; *People v. Martinez* (2004) 116 Cal.App.4th 753, 762; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.)

Second, the Court of Appeal's statement that Phanknon's testimony "linked" the assault to the gang is factually and legally wrong. Phanakhon testified that he *did not know why* he was attacked. Before trial, he had speculated that he had "heard" something he should not have heard, and during trial he speculated that he was attacked because he had stopped hanging around with TOC gang members. (2 RT 235, 240.) At trial, he denied that was being "checked" – i.e., punished for dissociating himself from the gang. (2 CT 247-248.) In the end, he admitted that he was just "guessing" why he was assaulted that evening. (2 RT 322, 325-326.) There is no factual or rational basis to conclude based on Phanakhon's speculation that there was no reasonable chance of a different verdict absent the improper testimony.

In its analysis, the Court of Appeal ignored the undisputed evidence that Phanakhon was guessing why he was assaulted, thereby further illustrating that the court did not faithfully apply the *Watson* test. The reason, once again, is that the "enough evidence" test looks only at the evidence favoring the verdict, whereas the *Watson* test requires the

reviewing court to look at all of the evidence to see if there is a reasonable chance of a more favorable verdict absent the error.

Third, the fact that Phanakhon did not fight back could just as easily reflect the fact he was hit on the head at the beginning of the assault, and that two of the defendants held him as he was hit. Although this evidence might support an inference that the offense was gang motivated, it falls far short of showing that, absent the detective's prejudicial opinion that the assault was gang motivated, there was no reasonable chance the jury would have failed to find Vang had the necessary specific intent.

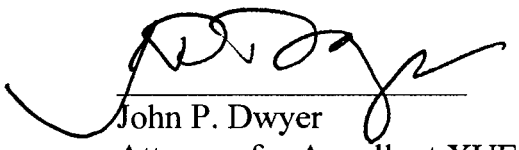
Because the evidence from which a jury could infer Vang's specific intent was weak, there is a reasonable chance that, but for the error in admitting evidence of Vang's subjective thoughts, the jury would have reached a different verdict on the gang enhancement.

CONCLUSION

For the reasons discussed, this court should grant review.

DATED: July 8, 2010

Respectfully submitted,

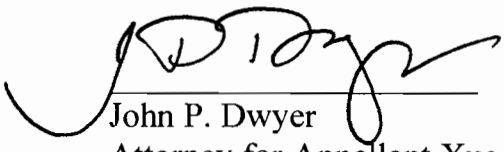


John P. Dwyer
Attorney for Appellant XUE VANG

CERTIFICATE PURSUANT TO CRC RULE 8.504(d)(1)

I, John P. Dwyer, counsel for appellant Xue Vang, certify pursuant to the California Rules of Court that the word count for this document is 5,254 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Francisco, California, on July 8, 2010.



John P. Dwyer
Attorney for Appellant Xue Vang

Exhibit A

Filed 6/7/10

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. XUE VANG et al., Defendants and Appellants.	D054343 (Super. Ct. No. SCD213306)
THE PEOPLE, Plaintiff and Respondent, v. DANNY LÊ, Defendant and Appellant.	D054636

CONSOLIDATED APPEALS from an order of the Superior Court of San Diego County, Michael D. Wellington, Judge. Affirmed as modified.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant Xue Vang.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant Dang Ha.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant Sunny Sitthideth.

Sachi Wilson, under appointment by the Court of Appeal, for Defendant and Appellant Danny Lê.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Steve Oetting, Supervising Deputy Attorney General and Eric Swenson, Deputy Attorney General, for Plaintiff and Respondent.

The principal issue in this appeal is whether the court erred in admitting the gang expert's opinion regarding defendants' knowledge and intent in committing the underlying assault over defense objections that the testimony exceeded the limits set forth in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). One or more defendants also raise evidentiary issues, dispute the sufficiency of the evidence to support the verdicts, ask that we review the police officer personnel records viewed in camera by the trial court pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), challenge a probation condition, and assert that any failure to make timely and specific objections or motions should be deemed ineffective assistance of counsel. We conclude that the court erred in admitting expert opinion on defendants' knowledge and intent in response to two hypothetical questions, but the error was harmless. We modify item 12G of the probation order for one defendant as agreed by the parties, and affirm the judgment as modified.

PROCEDURAL BACKGROUND

Police arrested Xue Vang, Sunny Sitthideth, Dang Ha and Danny Lê after breaking up a street fight in which William Phanakhon was knocked out, but not

seriously injured. The jury convicted the four defendants of assault by means of force likely to cause great bodily injury, and found true the gang enhancement allegation. The jury found *not true* the special allegations that defendants personally inflicted great bodily injury and used a deadly weapon in the commission of the assault.

Vang, Sitthideth and Ha received prison sentences which included two or three years for the gang enhancement imposed under the Street Terrorism Enforcement and Prevention Act (STEP Act). (Pen. Code, § 186.20 et seq.; undesignated statutory references are to the Penal Code.) The court sentenced Vang to a total of six years, Sitthideth to four years, and Lê to 12 years based on his admission that he had one prior strike. It suspended execution of Ha's sentence and placed him on probation with various conditions, including one year of jail custody. All four defendants appeal. Sitthideth and Lê expressly join in relevant arguments presented by their codefendants.

FACTUAL BACKGROUND

The victim, 20-year-old William Phanakhon, lived with his family in Mira Mesa. After graduating from high school, Phanakhon began hanging out with members of the Tiny Oriental Crips or "TOC" criminal street gang. At trial, Sitthideth, Ha and Lê stipulated to being members of TOC. However, Vang denied any gang connections. Phanakhon also denied gang membership. He stated he committed no crimes, and simply went out to eat, drink or hang around with people who were TOC members. Phanakhon met the four defendants in the fall and winter of 2007. Sitthideth, Ha and Vang were often present when Phanakhon was with members of TOC. However, Phanakhon recalled meeting Lê on just one occasion. Eventually, Phanakhon began declining

invitations to go out with gang members because "[t]his is not where [he] wanted [his] life to go."

Phanakhon was at home watching television between 10:00 and 11:00 on the night of April 28, 2008, when he received a phone call. The caller, whose voice sounded familiar, asked to come over. Phanakhon thought it was a neighbor and agreed. He went to his garage and Vang arrived a short time later. Phanakhon also saw Lê peek inside the garage. About five minutes later, Vang asked Phanakhon if he wanted to go hang out. Phanakhon followed Vang down the street. He also saw Ha and Sitthideth walking towards the corner. When Phanakhon rounded the corner, someone struck him in the back of the head from behind. He fell down and tried to protect his head from continued punches. Phanakhon was unable to describe anything about the assault because he lost consciousness until assisted by police and paramedics.

By coincidence, members of the San Diego Police Department gang unit were conducting surveillance near the scene of the assault. Detective Dave Collins was seated in an unmarked car watching the intersection through his side rear view mirror. Detective Collins was the only officer with a clear view of the incident, being situated approximately 110 feet away from the corner which was illuminated by a street light. There was a second street light approximately 10 to 20 feet away from Detective Collins.

Detective Collins watched as four males approached the corner. Suddenly, three of the men began beating the fourth, but the victim did not fight back. At one point, the victim fell to the ground, but two of the assailants pulled him up and hit him again. Detective Collins observed two of the men back up while the third pulled out a stick or

pipe and used it to strike the victim on the head. The victim fell to the ground a second time. Detective Collins broadcast that he was witnessing a "beat down." Officer Michael Dewitt, also part of the surveillance team, responded and was the first to arrive on the scene. He saw four men beating the victim.

As additional members of the surveillance team moved in, the assailants fled. Detective Collins arrested Vang after a short chase. Ha, Sitthideth and Lê were arrested nearby. However, a search of the scene failed to locate anything resembling the stick or pipe that Detective Collins described.

When Officer Jacob Resch arrived, he saw Phanakhon sitting upright on the curb. Detective Collins, who arrived after Officer Resch, observed that Phanakhon was nonresponsive to questioning even after Detective Collins worked to revive him. Detective Collins also observed that the left side of Phanakhon's face had begun to swell. Paramedics transported Phanakhon to the hospital where he was examined for head injuries, then released.

Phanakhon offered at least two "guesses" for why he was assaulted by the defendants. First, he believed he was attacked for "disassociating" himself from TOC, even though he testified that he had never been a member of the gang. Second, Phanakhon suggested that he got "checked" because he heard something he was not supposed to hear. Phanakhon stated that he was not afraid of the defendants. He was, however, afraid of TOC and what might happen to him or his family if he testified at trial.

The prosecution called Detective Daniel Hatfield as its expert witness on criminal street gangs. Detective Hatfield testified about the culture and habits of gangs, including member-on-member discipline for no longer hanging out with the gang or not "putting in work." Turning to TOC, he described it as a predominantly Laotian group that split off from a larger gang set in the early 1990's and claimed Linda Vista as its territory. Detective Hatfield identified three separate predicate offenses committed by its members and opined that TOC was a criminal street gang. Given the stipulation, there was no dispute that Ha, Sitthideth and Lê were members of TOC. Detective Hatfield believed that Vang and the victim Phanakhon were also gang members. He described the Department of Justice guidelines and San Diego Police Department guidelines for documenting "contacts" with suspected gang members. He testified that although Vang had not identified himself as a gang member, he met all the Department of Justice guidelines. As to Phanakhon, Detective Hatfield stated that he met the San Diego Police Department guidelines based on his association with TOC. On cross-examination, Detective Hatfield testified that the three "contacts" with Phanakhon included: (1) the April 28, 2008 incident at issue here; (2) a traffic stop in March 2008 in which San Diego police officers found a picture of a gang member in his passenger's purse, but no one in the car was identified as a gang member; and (3) the discovery in October 2007 of Phanakhon's number along with at least 50 others on Ha's cell phone. Detective Hatfield acknowledged that the San Diego Police Department guidelines for documenting gang members might differ from those the gang used to define its membership.

Over defense objection, Detective Hatfield responded to two hypothetical questions from the prosecution that tracked the facts of the case. Detective Hatfield opined that if a "young baby gangster" in TOC was not putting in work or hanging out with TOC members, a physical assault on that "young baby gangster" was designed to put the person "in check" and bring him back in line with the gang's expectations. He stated that the assault would benefit TOC and was committed in association with TOC and at the direction of TOC members. Detective Hatfield also opined that, based on a second hypothetical that included Detective Hatfield's opinions as to the hypothetical parties' gang membership, the attack on the "young baby gangster" was gang motivated. When questioned further by the prosecution, Detective Hatfield responded that the hypothetical facts told him that "this is a gang-motivated incident. It wasn't about friends fighting among one another."

Vang testified at trial against the advice of his attorney. The court warned Vang that in addition to allowing impeachment with prior felony convictions, his testimony might open the door to questioning that could cause unnecessary damage to his own defense and that of the other defendants. Thereafter, Vang briefly testified that he was not a member of TOC, had no tattoos, and was not in any of the gang photos introduced at trial. On cross-examination, Vang acknowledged his priors. He also acknowledged that he hung out with members of TOC. Over defense objection that the question exceeded the scope of direct, Vang testified that he was hanging out with members of TOC on April 28, 2008. The court cautioned the prosecutor about the scope of direct examination and there were no further questions about the events of that date.

However, Sitthideth did testify about events that occurred in Phanakhon's garage before the fight on the street. Contrary to Phanakhon's testimony, Sitthideth stated that he, Vang, Ha and Lê went to Phanakhon's house around 9:00 p.m., where they all ate pizza in the garage. When Phanakhon brought "something" out of his pocket, he and Vang started calling each other names. Phanakhon challenged Vang to a fight, and the group went outside to watch the one-on-one fight between Phanakhon and Vang at the corner.

DISCUSSION

I. *The Gang Enhancement*

A. Admission of the Gang Expert's Opinion on Defendants' Knowledge and Intent

As we explained, the information included the special allegation that defendants committed the assault "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 criminal conduct by gang members within the meaning of" section 186.22, subdivision (b)(1). Defendants argue that the trial court abused its discretion when it allowed Detective Hatfield to testify in response to a hypothetical question that the assault on Phanakhon, thinly disguised in the hypothetical as "young baby gangster," was for the benefit of TOC and was gang motivated. Defendants contend Detective Hatfield's testimony was mere speculation and the ultimate issues of knowledge and intent were for the jury to decide.

Resolution of the question requires us to consider the gang testimony in light of rules that usually permit experts to testify on ultimate issues through hypothetical questions (Evid. Code, § 801; *People v. Gardeley* (1996) 14 Cal.4th 605, 618

(*Gardeley*)), but disallow expert testimony on a specific defendant's knowledge and intent that "'amounts to no more than an expression of his general belief as to how the case should be decided . . . .' [Citation.]" (*Killebrew*, *supra*, 103 Cal.App.4th at pp. 647, 651.) We are also mindful of the common use of a fiction which Ha's defense counsel aptly described when objecting to Detective Hatfield's testimony:

> "[W]hen a hypothetical is crafted so carefully that it is transparent to everybody in the courtroom, including the jury, that we are talking about the facts of this very case, I think that crosses the line and it becomes [*Killebrew* error] rather than an expert witness answering the general hypothetical. . . . And I think that what that does is pay lip service to the rule that you can offer a hypothetical, while in reality, as is perfectly apparent to every juror what you are really doing is asking the witness to opine on his [subjective] thoughts and ideas of the defendants . . . ."

Although a bright line between gang expert testimony which is or is not admissible to show knowledge and intent may be elusive, we conclude that Detective Hatfield's testimony crossed it. We agree with the rule of *Killebrew* that an expert witness may not offer an opinion on what a particular defendant is thinking. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 647.) And more importantly here, the prosecutor may not circumvent that rule by asking the expert a hypothetical question that thinly disguises the defendants' identity. We also conclude that the error in admitting Detective Hatfield's responses to the hypothetical questions was harmless in the circumstances of this case.

Under California law, a person with "special knowledge, skill, experience, training, or education" in a particular field may qualify as an expert witness and give testimony in the form of an opinion. (Evid. Code, §§ 720, 801.) However, expert testimony is admissible only if it relates to a subject "sufficiently beyond common

experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801.) The culture and habits of criminal street gangs are appropriate subjects for expert testimony and therefore admissible. (*Gardeley, supra,* 14 Cal.4th at p. 617.) Expert opinion on a specific defendant's subjective knowledge and intent is not. (*Killebrew, supra*, 103 Cal.App.4th at pp. 647, 651.)

The trial court has "considerable discretion" to control how the expert is questioned "'to prevent the jury from learning of incompetent hearsay.' [Citation.]" and "'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.' [Citation.]" (*Gardeley, supra,* 14 Cal.4th at p. 619.) We review the trial court's rulings on the admissibility of expert testimony for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) Here, the trial court abused its discretion by admitting Detective Hatfield's testimony regarding defendants' knowledge and intent based on its apparent belief that such testimony was admissible so long as it was presented in the form of a hypothetical. As we explain, the prosecution may not use a hypothetical question to conceal an expert's improper testimony on the real defendants' subjective knowledge and intent.

The prosecution typically offers expert testimony on criminal street gangs in two forms: (1) the expert's description of a particular gang's colors, territory, typical crimes, and other matters relating to gang culture or psychology based on "material not admitted into evidence" as long as it is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" (Evid. Code,

§ 801; see e.g., *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1545 [prison activities of the "Mexican Mafia"]) and (2) the expert's opinion in response to a hypothetical question based on facts shown by the evidence which asks the expert to assume their truth (*Gardeley, supra,* 14 Cal.4th at p. 618). On direct examination, the expert may describe the reasons for his or her opinion and the matter on which the opinion is based. (Evid. Code, § 802.) As long as that material meets a threshold requirement of reliability, "matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony." (*Gardeley, supra,* 14 Cal.4th at p. 618, italics in original.)

"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.) However, courts cannot allow experts to express *any* opinion they may have about gangs and gang activities. (*Killebrew, supra,* 103 Cal.App.4th at pp. 651, 654.) The defendant in *Killebrew* was one of several men arrested in connection with a drive-by shooting. He was not inside any of the three cars police suspected were involved, but was standing on a nearby corner when police stopped one of the cars. The discovery of a handgun at a nearby taco stand and in at least one of the cars formed the basis for Killebrew's prosecution for conspiring to possess a handgun. (*Id.* at pp. 647-649.) The court reversed his conviction on appeal. (*Id.* at p. 647.) The error identified in *Killebrew* was that "in response to hypothetical questions, the People's gang expert exceeded the permissible scope of expert testimony by opining on 'the subjective *knowledge and intent* of each' of the gang members involved in the crime. [Citation.]" (*People v. Gonzalez, supra,* 126 Cal.App.4th at pp. 1550-1551, italics in original.)

Specifically, the expert testified that each of the individuals in a caravan of three cars knew there were guns in two of the cars and jointly possessed the guns with everyone else in the three cars for mutual protection. (*Id.* at p. 1551.) However, "*Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial. [Citation.]" (*Ibid.*)

With two exceptions, post-*Killebrew* jurisprudence has been left entirely in the hands of the intermediate appellate courts. The Supreme Court distinguished *Killebrew* in *People v. Ward* (2005) 36 Cal.4th 186, 210, noting that the expert opinions at issue fell within the gang culture and habit evidence approved in *Gardeley*. *Killebrew* received slightly more than a passing reference in *People v. Gonzalez* (2006) 38 Cal.4th 932, where the Supreme Court again distinguished the circumstances of the case. In rejecting the defendant's claim of *Killebrew* error in the guilt phase, the Supreme Court noted that the challenged testimony was "quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 945.) "[W]ithout deciding" whether *Killebrew* was correct "in this respect," the *Gonzalez* court read the case as "merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 946.) The Supreme Court attempted to clarify its comments in dicta included in a footnote: "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be

incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*Id.* at p. 646, fn. 3.) Neither *Ward* nor *Gonzalez* addressed the issue presented here - whether an expert witness can offer an opinion in response to a hypothetical question as to a defendant's mental state where he cannot testify *directly* regarding a specifically named defendant's mental state.

Reversal was required in *Killebrew* because the gang expert's testimony was the only evidence offered by the prosecution to establish the elements of the crime and there was no other evidence from which a reasonable jury could infer intent. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658; see also *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-662 (*Ochoa*) [nothing in the circumstances of the carjacking sustained the expert witness's inference that it was gang-related]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 850-851 [no facts from which the expert could discern whether the defendants were acting on their own behalf or on behalf of the gang]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*) [no evidence apart from expert testimony to establish that the minor possessed a knife for the benefit of the gang].) "'[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.' [Citation.]" (*Ochoa*, *supra*, 179 Cal.App.4th at p. 657.) "To allow the expert to state the minor's specific intent . . . without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank S.*, *supra*, 141 Cal.App.4th at p.

1199.) However, prejudicial error does not result in every case in which a gang expert offers testimony on an ultimate issue such as knowledge or intent - at least not in cases where there is other evidence to support an inference that the alleged crime was committed for the benefit of the gang. (See, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931 ["Undoubtedly, the expert's testimony alone would not have been sufficient to find the drug offense was gang related"].)

Here, Detective Hatfield's testimony in response to the two hypothetical questions violated the rule in *Killebrew*. The only apparent difference between the trial testimony and the hypothetical was the names of the parties. In the hypothetical question, the prosecution called the victim "young baby gangster" instead of Phanakhon and called the four defendants "three baby gangsters and one O.G.," that is, "original gangster." Indeed, one of the defense attorneys reported hearing "laughter or tittering from the jury" when Ha's defense attorney objected to the use of the hypothetical at an earlier stage in Detective Hatfield's testimony.

The next question is whether the error was harmless, that is, whether there is enough evidence, including testimony that Detective Hatfield was *permitted* to offer concerning the general culture and habits of TOC (*Gardeley*, *supra*, 14 Cal.4th at p. 617), from which a reasonable jury could infer defendants committed the assault "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" within the meaning of section 186.22, subdivision (b)(1). (*Gardeley*, *supra*, 14 Cal.4th at p. 617.) The record reveals the following admissible evidence relevant to the issue of

knowledge and intent. First, the phone call from an unidentified "familiar" voice, Vang's arrival and suggestion that they leave the garage to "hang out," and the assault by other known gang members at a nearby corner could support an inference that Phanakhon was "set up." Second, Phanakhon's two "guesses" for why he was assaulted - that he had disassociated himself from TOC or heard something he was not supposed to hear - linked the assault to the gang. Indeed, Phanakhon testified that although he was not afraid of the defendants, he was afraid of TOC. Third, Detective Collins observed that the victim of the assault did not fight back, consistent with the theory that the beating was some kind of group punishment rather than a simple fight between Phanakhon and Vang as portrayed by Sitthideth. Based on this record, we conclude the error in admitting Detective Hatfield's opinions as to the defendants' subjective state of mind was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Sufficiency of the Evidence To Support the True Finding

Our conclusion that the error in admitting Detective Hatfield's testimony on defendants' knowledge and intent was harmless also supports the conclusion there was sufficient evidence to support the jury finding that the special gang allegation was true. (§ 186.22, subd. (b)(1).)

When a defendant challenges the sufficiency of the evidence, we "must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - evidence that is reasonable, credible and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053 (*Kraft*), citing *People v. Johnson*

(1980) 26 Cal.3d 557, 578.) We presume in support of the judgment existence of every fact the jury could reasonably deduce from the evidence. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237 (*Pensinger*).) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1053-1054.)

Both Lê and Sitthideth assert that Phanakhon disclaimed membership in TOC and, after excluding the improper opinion testimony, there was no other evidence to support Detective Hatfield's opinion to the contrary. Lê argues that the evidence showed only that Phanakhon was an acquaintance of the defendants and there was no other evidence to show the purported retaliatory assault on him was for the benefit of or with the intent to promote TOC. The record does not support these arguments.

As we explained, there was evidence apart from Detective Hatfield's inadmissible testimony from which a reasonable jury could infer the facts necessary to prove the gang enhancement. (*Ante*, pp. 14-15.) In addition, the presence of Lê at the scene, whose tattoos led Detective Hatfield to opine he was an "Original Gangster" or "shot caller," also supports the retaliation theory. Regardless of whether Phanakhon was an actual member of TOC or merely an associate with some knowledge of gang activities, a reasonable jury could conclude that the purpose of the attack was the same, that is, to maintain discipline for the benefit of the gang. Thus, we conclude that evidence *apart*

from Detective Hatfield's inadmissible opinion on defendants' knowledge and intent, and the inferences reasonably drawn from that evidence, were sufficient to sustain the true findings.

II. *Motion to Bifurcate Trial of the Gang Enhancement*

Defendants moved in limine to bifurcate the gang enhancement allegations from the trial of the underlying assault. Alternatively, Ha represented that he would stipulate that TOC met the statutory definition of a criminal street gang, and that he was a gang member, thereby obviating the need for prejudicial expert testimony on the details of defendants' involvement in the gang. Defendants argue that the court abused its discretion in denying the motion. We conclude the ruling was proper.

In *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*), the Supreme Court described the possible prejudice where a gang enhancement allegation is tried at the same time as the substantive crime. "The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Hernandez, supra,* at p. 1049.) At the same time, evidence of gang culture, habits and membership is often relevant and admissible as to the charged offense. Thus, "[e]vidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the

like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.) The Supreme Court concluded that "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation." (*Hernandez, supra,* at p. 1050.) As with motions for severance, the burden is on the defendant to persuade the court that considerations favoring a single trial "are outweighed by a substantial danger of undue prejudice," and the decision to bifurcate is left to the trial court's discretion. (*Id.* at pp. 1048-1049.)

Here, the court observed that even without the gang enhancement allegation, gang evidence would likely come in to show defendants' motive for assaulting Phanakhon, and it wondered how much time would actually be saved by bifurcation. Based on the considerations identified in *Hernandez*, the court carefully questioned the prosecutor about the evidence she intended to introduce, including evidence on the predicate offenses. It then expressed concern that one of the predicate offenses involved a gang member with the same last name as defendant Danny Lê, but unrelated to him, who pleaded guilty to assault with a deadly weapon. The court ultimately ruled that as long as someone was prepared to provide a non-hearsay factual summary of that predicate

offense which omitted reference to the victim being shot eight or nine times, it would not bifurcate trial of the gang enhancement allegations. On this record, we conclude there was no abuse of discretion.

III. *Exclusion of Defense Evidence*

Defendants challenge two evidentiary rulings apart from those we already considered in connection with the gang expert's opinion testimony. They assert that the trial court erred in excluding: (1) Phanakhon's methamphetamine use and (2) a defense video of the crime scene at night. We conclude that both rulings were correct.

A. Evidence of Phanakhon's Methamphetamine Use

Sitthideth asserts that the court's exclusion of evidence of Phanakhon's methamphetamine use violated his due process right to present a complete defense and the right to confront and cross-examine witnesses. Specifically, he contends the court improperly precluded him from questioning Phanakhon about his prior drug-related arrest and the role of methamphetamine in the fight with Vang, and therefore prevented Sitthideth from fully presenting his version of events to the jury. Sitthideth maintains that the excluded evidence would have provided a non-gang-related motive for the fight, explained Phanakhon's apparent loss of consciousness and difficulty speaking, and undermined Phanakhon's credibility and the prosecution's case against Sitthideth. We conclude: (1) Sitthideth failed to preserve the issue of Phanakhon's methamphetamine use; (2) in any event, the court did not abuse its discretion in excluding evidence of past and current drug use; and (3) defense counsel's failure to preserve Sitthideth's claim of error did not constitute ineffective assistance of counsel.

The prosecution moved in limine to exclude evidence of Phanakhon's prior drug use. At the same time, Sitthideth filed an in limine motion to allow the defense to cross-examine Phanakhon about a March 28, 2008 drug-related arrest. The trial court observed at the hearing that the victim's *prior* drug use was irrelevant, and continued: "If there was a basis to believe that he had drugs in his system at the time of the incident, then that would be something we should talk about." Lê's counsel responded that Phanakhon's vital signs after the assault were consistent with methamphetamine use, but noted that no "tox screens" were done on the victim. Vang's counsel added that there was a "possibility" that his client could testify that Phanakhon admitted ingesting methamphetamine the night of the attack. The court rejected that suggestion as speculative, and responded that Phanakhon's elevated vital signs were also consistent with his having just been attacked. Contrary to Sitthideth's representation on appeal, no one argued at the in limine hearing that there was evidence that a dispute over drugs precipitated the fight. The court ruled that pending Vang's decision to testify, and absent any solid evidence of Phanakhon's drug use the night of the attack, references to past or present methamphetamine use would be excluded as irrelevant. It also ruled the misdemeanor drug charge was inadmissible for purposes of impeachment.

Vang testified in compliance with the court's rulings, avoiding any reference to Phanakhon's past or present drug use. Sitthideth's testimony for the defense moved closer to the line. On direct examination he stated that while defendants were in the garage, Phanakhon brought "something" out of his pocket. Sitthideth did not elaborate on the nature of the "something," but continued: "I don't know if I can say it or not here." The

prosecutor objected, saying: "I think there has been a prior ruling in this regard." Without ruling on the objection, the court asked defense counsel to restate the question. The following exchange took place:

> "[DEFENSE COUNSEL]: I think the question was what happened next?
>
> "THE COURT: What happened next?
>
> "[SITTHIDETH]: After he brought the stuff out of his pocket?
>
> "THE COURT: Yes.
>
> "[SITTHIDETH]: They started arguing, calling each other names and stuff."

At no time did defense counsel proffer new evidence of Phanakhon's drug use the night of the attack, argue its relevance in precipitating the fight, or otherwise challenge the court's in limine rulings. Accordingly, Sitthideth forfeited his challenge to the exclusion of evidence of Phanakhon's drug use. (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3.) "The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*Ibid.*) For the same reason, we reject Sitthideth's argument that any objection or offer of proof would have been futile.

Sitthideth blames trial counsel for his failure to make "timely and specific objections" regarding admissibility of evidence showing Phanakhon's present or past methamphetamine use. In reviewing a claim of ineffective assistance, we begin with the presumption "that counsel rendered adequate assistance and exercised reasonable

professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) To prove ineffective assistance, Sitthideth must show that: (1) counsel's performance fell below an objective standard of reasonableness based on the performance expected of a reasonably competent attorney and (2) he was prejudiced in that there is a reasonable probability the result would have been different absent counsel's unprofessional errors. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*); *People v. Berryman* (1993) 6 Cal.4th 1048, 1081 (*Berryman*), overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800, 822-823.) Sitthideth fails to establish either prong of the *Strickland* test.

The record does not reveal the reasons trial counsel failed to renew his objection to the in limine rulings and/or argue the relevance of drugs in Sitthideth's account of the event. The point where the prosecutor reminded the court of the ruling regarding Phanakhon's current drug use would have been an appropriate time to do so. Absent more, we can only presume that Sitthideth's counsel had no new, relevant and non-speculative evidence to offer, or had tactical reasons for not pursuing the matter. If the record on appeal fails to show why counsel acted or failed to act in the manner challenged, we will affirm unless counsel was asked for an explanation and failed to provide one, or there "'simply could be no satisfactory explanation.' [Citation.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) And where the record is silent on these points, a claim of ineffective assistance is more appropriately pursued in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)

In any event, Sitthideth fails to show that he was prejudiced by the court's decision to exclude references to Phanakhon's methamphetamine use or evidence suggesting that the drugs precipitated the argument that lead to the fight. The trial court was correct in ruling that Phanakhon's prior drug use was irrelevant. After speculating at the hearing on in limine motions that Phanakhon's vital signs were consistent with *current* methamphetamine use, defendants never made an offer of proof at trial that methamphetamine could cause a person to fall in and out of consciousness or that Phanakhon was under the influence of methamphetamine at the time of the attack. Moreover, Sitthideth's account of the events of the night was unconvincing in the face of other evidence introduced at trial. His testimony that all the defendants were hanging out in Phanakhon's garage contradicted Phanakhon's testimony that only Vang and Lê were present. And his testimony that the fight was between Vang and Phanakhon was inconsistent with Detective Collins's and Officer Dewitt's observations that Phanakhon never threw a punch and was assailed by the four others who were present. Sitthideth exaggerates the potential impact of Phanakhon's drug use in the face of this and other evidence that supports the verdicts. And it was irrelevant whether Vang and Phanakhon argued over drugs, women or who would pay for the pizza, inasmuch as the jury rejected Sitthideth's testimony that it was only a fight between the two of them and not gang-related.

B. Rulings on Pictures of the Scene of the Assault

Sitthideth next contends that the court abused its discretion and violated his due process rights by *excluding* a video of the crime scene at night and *admitting* daylight

photos of the same location. He argues that the rulings resulted in the jury having a one-sided and misleading impression of what Detective Collins could see through his side view mirror the night of the assault. We conclude there was no abuse of discretion in either ruling, and reject Sitthideth's argument that the combined rulings warrant reversal.

Ha's defense counsel asked an investigator to prepare a video to recreate what Detective Collins would have seen through his side view mirror the night of the assault. It was offered to help the jury understand what the lighting would have been like and to cast doubt on Detective Collins's description of the events. At the Evidence Code section 402 hearing, Detective Collins testified that the video was too dark and out of focus, and did not accurately depict what he saw that night. Detective Collins described the location of the street lights and testified that the scene was back-lit. In response to further questioning by the court, Detective Collins stated that the street lights allowed him to distinguish figures but not faces of those involved in the assault. At the close of Detective Collins's testimony, the prosecutor argued that the video was not relevant because it did not accurately depict the lighting conditions at scene of the crime. She also asserted that the video's depiction of the street lights as specks was misleading based on common experience that street lights illuminate an area, and maintained the video should be excluded under Evidence Code section 352. The court agreed with the prosecution and excluded the video as "fundamentally misleading."

At trial, Detective Collins testified that the group of guys was backlit. He determined they were males, but he could not see anyone's face. Detective Collins stated that the victim and two of the assailants were wearing hoodies, but he could not

distinguish any other details of their appearance. Later in Detective Collins's testimony, the prosecutor sought to introduce three daylight photographs taken of the crime scene *two days before* from Detective Collins's actual vantage point. She argued there was no prejudice because the photographs were substantially similar to photographs previously provided. Ha's defense counsel objected on grounds the prosecution was attempting to create new evidence after the close of discovery in response to what was going on at trial. The court overruled the objection, stating there was no discovery violation because the evidence was obtained in response to matters that developed during defense cross-examination. At the point in redirect when the prosecution questioned Detective Collins about the new photographs, Lê's defense counsel made an unspecified objection and requested a sidebar, but the court overruled the objection. Counsel did not put the basis for his objection on the record.

We begin with the rule that only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court has broad discretion in deciding whether challenged evidence is relevant and therefore admissible. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) In exercising its discretion to admit or exclude evidence, the court must at times consider the constraints of Evidence Code section 352, under which evidence is excluded if its probative value is outweighed by undue prejudice. In this context, the term "prejudice" refers to evidence "which uniquely tends to evoke an emotional bias against one party as an individual and which has very little effect on the issues." (*People v. Wright* (1985) 39

Cal.3d 576, 585.) "Prejudicial" is not synonymous with "damaging." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) We review rulings on relevance and undue prejudice for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Cain* (1995) 10 Cal.4th 1, 33.)

In *People v. Gonzalez, supra*, 38 Cal.4th 932, the Supreme Court upheld exclusion of the defendant's videotape of the crime scene. (*Id.* at p. 952.) It explained that "'To be admissible in evidence, an audio or video recording must be authenticated. [Citations.] A video recording is authenticated by testimony or other evidence "that it accurately depicts what it purports to show." [Citation.]' [Citation.] 'In ruling upon the admissibility of a videotape, a trial court must determine whether: (1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them.' [Citation.]" (*Ibid.*) Here, the testimony at the Evidence Code section 402 hearing supports the court's determination that the video proffered by the defense did not accurately depict what Detective Collins would have seen the night of the assault. For that reason, it was not relevant and would not assist the jury in deciding the facts of the case. The investigator had attempted in the first part of the video to replicate Detective Collins's view through the side view mirror. As Detective Collins testified, the first part of the video was dark and "so blurry you can't even see down the street." The court noted that "it doesn't take an expert to know that the problem there is that the picture was being taken through a mirror and the auto focus doesn't know whether to focus on the image in the mirror or the bezzle around the mirror, and so it is totally out of focus." The camera

angle shifted in the second half of the video, but the scene was still darker than it appeared in real life. The court again noted the difference between a video camera and the human eye. "[T]he camera can't see the range of contrast the human eye can. So a simple answer to this is anybody who's ever been in a residential street at night knows that you can see more than what can be seen in this picture." The court concluded that it was not "fair or accurate" to say that "this faithfully shows what the scene would look like to a human being on the scene . . . ."

As to the three photographs introduced during redirect examination of Detective Collins, the defense unsuccessfully objected on grounds they violated discovery rules. Because the defense never objected to the photographs on grounds they were "much more 'misleading' than anything offered by the defense," the issue is forfeited. (Evid. Code, § 353; See *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) There can be no serious argument that admission of the three photographs prejudiced defendants, and therefore we also reject Sitthideth's claim that failure to object constituted ineffective assistance of counsel.

IV. *Sufficiency of the Evidence of Assault*

Defendants contend there is insufficient evidence to support two additional aspects of the verdicts: (1) Lê's conviction of assault in the face of evidence he was a bystander and (2) defendants' conviction of assault with force likely to produce great bodily injury. Applying the standard of review set forth in *Kraft*, *supra*, 23 Cal.4th at page 1053, we conclude there is substantial evidence to support the guilty verdicts.

A. Lê's Conviction for Assault

The information charged defendants with assault "with a deadly weapon or instrument . . . or by any means of force likely to produce great bodily injury . . . ." (§ 245, subd. (a)(1).) Lê contends there is no evidence to show he was involved in the beating of Phanakhon and therefore the evidence did not support his conviction for assault. He notes that the officers who witnessed the assault indicated that Lê was on the sidewalk in the shadows along a fence away from where his codefendants were assaulting Phanakhon in the street. Thus, the only evidence to suggest he was an aider and abettor in the assault was Detective Hatfield's testimony that, based on his tattoos, he was an "O.G." and "shot-caller." Lê adds that "the court's errors with respect to the gang enhancement also render invalid [his] conviction for the assault." We disagree.

The prosecutor argued that Lê was criminally liable for the assault as a direct participant based on Officer Dewitt's testimony that he saw four men beating Phanakhon when he drove up to the scene. Although the court instructed the jury on aider and abettor liability, the prosecutor did not present that theory in her closing remarks and there is no indication the prosecution argued anything other than Lê's direct physical involvement in the crime. The jury was left with the task of resolving the conflict in the number of assailants and the jury resolved it against Lê. We conclude there is sufficient direct and circumstantial evidence, including the admissible testimony of Detective Hatfield, to support the verdict.

B. Assault With Force Likely to Produce Great Bodily Injury

Next, Sitthideth contends there is insufficient evidence to support defendants' conviction of assault "by any means of force likely to produce great bodily injury" (§ 245, subd. (a)(1)), because the prosecution failed to prove that "the force used *was* likely to cause *great* bodily injury . . . ." (Italics in original.) In support of this argument, he notes that the jury found *not true* the special allegations that defendants used a deadly weapon and personally inflicted great bodily injury in the commission of the assault. Alternatively, Sitthideth contends the court had a duty to clarify the meaning of "great bodily injury" when asked by the jury. Neither argument has merit.

1. Elements of the Crime

Section 245, subdivision (a)(1) punishes an assault committed "by any means of force likely to produce great bodily injury . . . ." No weapon or instrument is required and the criminal force often consists of kicks or blows by the fist. (See *People v. Tallman* (1945) 27 Cal.2d 209, 212.) "Although neither physical contact nor injury is required for a conviction, if injuries result, the extent of such injuries and their location are relevant facts for consideration." (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086.) The question at trial is whether the force was *likely* to produce great bodily injury, and whether the victim actually suffered harm is immaterial. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Thus, in *People v. Hahn* (1956) 147 Cal.App.2d 308, the court found sufficient evidence of aggravated assault under section 245, where the defendant struck the victim on the head four times with a beer can. The victim never lost consciousness and the cuts on his head did not require sutures or follow-up treatment.

(*Id.* at pp. 309-311.) The court explained: "While the wounds on [the victim's] head did not appear to be incurable, they were such as to require medical attention and because life-long nervous disorders are known to have resulted from no more violence than was applied to [the victim], it required no great strain of the deductive processes to infer that the force used upon him was 'likely to produce great bodily injuries.'" (*Id.* at p. 312.) Whether or not the force used was likely to produce great bodily injury is a question of fact based on all the evidence, including but not limited to evidence of the injury actually inflicted. (*People v. Chavez* (1968) 268 Cal.App.2d 381, 384.)

2. The Record Supports the Verdicts

Sitthideth cites the testimony of various officers along with hospital records to support his claim that Phanakhon's injuries were "simple injuries" and "not the type of great or serious injury" contemplated by section 245, subdivision (a)(1). He also argues there was no evidence that he personally hit Phanakhon or actively aided and abetted anyone else's assault on Phanakhon. Sitthideth's argument does not directly address the question whether there was evidence from which a jury could reasonably infer the defendants' actions were *likely* to produce great bodily injury.

The record in this case shows that defendants beat Phanakhon. Although Phanakhon was crouching on the curb when Officer Dewitt arrived at the scene, his condition appeared to worsen as the other officers arrived. Officer Resch described Phanakhon as "out of it" and "slipping in and out of consciousness" when he placed handcuffs on Phanakhon. Detective Collins approached to find Phanakhon handcuffed, on the ground, nonresponsive, and breathing heavily. After Detective Collins applied a

sternum rub, Phanakhon partly revived, but was unresponsive to questions and provided only garbled responses. Detective Collins observed that the left side of Phanakhon's face had already begun to swell. Photos taken at the hospital revealed cuts and bruises on Phanakhon's head and face.

Although Phanakhon's actual injuries did not turn out to be severe, defendants' beating left him unconscious. Whether defendants used a pipe or stick or their fists, we conclude there is substantial evidence to support the jury's determination that they used force *likely* to produce great bodily injury. Moreover, the jury's findings that defendants did not *personally* inflict great bodily injury within the meaning of sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8) are *not* inconsistent with the guilty verdict on count 1 given the different statutory language in those enhancements.

3. Response to Jury's Request for Clarification

The court instructed on the elements of section 245 in accordance with CALCRIM No. 875, including proof that "[t]he force used was likely to produce great bodily injury." The instruction provided the following additional points for guidance of the jury: "No one needs to actually have been injured by defendants' act. But if someone was injured, you may consider that fact, along with all the other evidence in deciding whether the defendant committed assault. And if so, what kind of assault. [¶] *Great bodily injury means significant or substantial physical injury. It's an injury that is greater than minor or moderate harm.*" (Italics added.) The court also instructed the jury with CALCRIM No. 3160 which includes the same definition of great bodily injury, this time in the context of the section 1192.7 and section 12022.7 enhancements. During deliberations,

the jury inquired: "Is there any further clarification on what is great bodily injury? What is considered mild or moderate vs. something greater?" Counsel agreed with the court's proposed response which the court then read to the jury:

> "The law provides no more specific definition of Great Bodily Injury than what is in your instructions. The words 'minor,' 'moderate' and 'great' as well as 'significant' and 'substantial' as used in the instruction (number 3160) have no special legal meaning. They are to appl[y] using their ordinary, everyday meanings.
>
> "Whether the injuries are 'great' as opposed to 'minor' or 'moderate' is a factual judgment for you to make. In order for you to find the allegation true, you must unanimously find that it has been proved beyond a reasonable doubt."

Sitthideth contends that the court had a mandatory duty to define "great bodily injury" in response to the jury's request for clarification. He argues that the court was mistaken in saying the law gives no special meaning to the term, and continues: "Had the jury known simple injury is that requiring special medical attention and 'great bodily injury' is substantially greater than that, it is reasonably likely [Sitthideth] would have been found not guilty of the charge in Count 1 or of only the lesser-included simple assault charge."

Sitthideth forfeited any claim of error by agreeing to the court's written response. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 373, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) We nonetheless consider and reject his argument on the merits in light of his claim of ineffective assistance of counsel.

The trial court has a duty to instruct sua sponte on "general principles of law that are closely and openly connected with the facts presented at trial" (*People v. Ervin* (2000)

22 Cal.4th 48, 90), including terms that have a "technical meaning peculiar to the law" (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 779, overruled in part on a different ground in *People v. Flood* (1998) 18 Cal.4th 470, 480.) The duty to elaborate or clarify does not extend to non-technical terms such as "great bodily injury." (*People v. La Farque* (1983) 147 Cal.App.3d 878, 886-887 (*La Farque*).) Moreover, if "the original instructions are themselves full and complete," the question whether additional explanation is required "to satisfy the jury's request for information" is a matter left to the trial court's discretion. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213.) Indeed, "'comments diverging from the standard are often risky.' [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015 (*Solis*); see *People v. Montero* (2007) 155 Cal.App.4th 1170, 1179 [court did not abuse its discretion in advising the jury to re-read the form instruction].) At the same time, courts have cautioned that "'[a] definition of a commonly used term may nevertheless be required if the jury exhibits confusion over the term's meaning. [Citation.]' [Citation.]" (*Solis, supra,* 90 Cal.App.4th at p. 1015; see, e.g., *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047 [where self-defense at issue in prosecution for assault and battery, court erred in failing to instruct on the meaning of "mutual combat"].)

"Great bodily injury," the term at issue here, "has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration." (*La Farque*, *supra*, 147 Cal.App.3d at pp. 886-887.) Our courts have also rejected the claim that the term "great bodily injury" is unconstitutionally vague and overbroad as used in sections 245

and 12022.7. (See *People v. Guest* (1986) 181 Cal.App.3d 809, 812; *People v. Roberts* (1981) 114 Cal.App.3d 960, 962-963 (*Roberts*).) In *Roberts*, which also rejected the claim that the court should have instructed sua sponte on the meaning of "great bodily injury," the court explained:

> "In our case, the kicking on the head and torso of a largely defenseless man on the ground appears to us to be unmistakably an assault which a jury could reasonably find was likely to produce great bodily harm. And here, of course, the injuries inflicted bear out that fact. In addition to the cuts and bruises and the unconsciousness produced, the victim received a blow to the forehead which produced a large welt. If this blow had struck the nearby eye, it might well have produced blindness in that eye, surely a great bodily injury.
>
> "We do not believe that any instructional amplification on the words 'likely' or 'great bodily injury' would have significantly enlightened the jury. In the last analysis, it is the jury's province to determine what the ultimate product of the assault might have been. It was clearly within the jury's province to determine that appellant intended to kick his victim with whatever force was required to permit appellant to accomplish his purpose, the robbery of his victim. No amount of 'hair splitting' would or should have deterred the jury from its task of deciding whether the assault as the jury heard it described was likely to have resulted in 'great bodily injury.'" (*Roberts, supra,* 114 Cal.App.3d at p. 965.)

Based on the foregoing, we conclude the court did not abuse its discretion in responding to the jury's request for clarification of "great bodily injury" in this case by directing it to consider the "ordinary, everyday" meaning of the term as set forth in the "full and complete" instructions on assault. Accordingly, counsel's performance did not fall below that expected of a reasonably competent attorney, and Sitthideth did not receive ineffective assistance. (*Strickland, supra,* 466 U.S. at pp. 687-688, 693-694; *Berryman, supra,* 6 Cal.4th at p. 1081.)

V. *Ha's Probation Condition*

Ha's probation order included the following condition: "Not be in possession of any cell phone or paging device except in course of lawful employment." Ha contends the condition is facially overbroad and therefore unconstitutional. The Attorney General responds that Ha is challenging the condition *as applied* and forfeited it by failing to object on that ground at sentencing. However, the parties nonetheless agree that we can resolve the issue by modifying the probation condition to read: "Not use a cell phone to communicate with any known gang member, or a paging device, except in the course of lawful employment." We agree that modification is appropriate.

VI. *Review of Pitchess Materials*

Before trial, Ha filed a *Pitchess* motion in which he sought discovery of the personnel records of Officer Scott Holden and Officer Michael Dewitt. The court reduced the scope of the request in response to the People's opposition, and reviewed the records in camera to determine whether there were any discoverable files, specifically: (1) as to Officer Holder, files showing "excessive force, aggressive conduct, unnecessary violence, unnecessary force . . . [or] false statements in reports" and (2) as to Officer Dewitt, files showing "false statements in reports." The court determined that nothing was discoverable as to Officer Dewitt, but ordered release of the names, addresses and phone numbers contained in one file pertaining to Officer Holden.

On appeal, Ha asks that we review the materials in camera to determine whether the court followed the procedures set forth in *People v. Mooc* (2001) 26 Cal.4th 1216,

1226-1229, and made the required-on-the record inquiry. We reviewed the officers' personnel records in camera and are satisfied that the court complied with *Mooc*.

DISPOSITION

Ha's probation order is modified and the court is directed to amend item 12G of that order to read: "Not use a cell phone to communicate with any known gang member, or a paging device, except in the course of lawful employment." The judgment is affirmed as modified.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

Exhibit B

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

XUE VANG et al.,

Defendants and Appellants.

D054343 & D054636

(Super. Ct. No. SCD213306)

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

[No Change in Judgment]

THE COURT:

It is ordered that the opinion filed herein on June 7, 2010, be modified as follows:

On page 15, line 6, delete the sentence beginning "Based on this record . . . " and replace it with a new sentence, which reads:

> Applying the *Watson* standard of prejudice—not the substantial evidence standard of review—we conclude on this record that it is not reasonably probable that an outcome more favorable to defendants would have resulted in the absence of the evidentiary error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

There is no change in the judgment. Appellants' petitions for rehearing are denied.

McConnell

McCONNELL, P. J.

Copies to: All parties

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 601 Van Ness Ave., Suite E-115, San Francisco, CA 94102. On the date shown below, I served the within **PETITION FOR REVIEW** to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct.

Executed this 8th day of July 2010 at San Francisco, California.

John P. Dwyer