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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. AUSTEN ROBERT MANUEL NUNES et al., Defendants and Appellants.	C060871 (Super. Ct. Nos. 072135/054185)

APPEAL from a judgment of the Superior Court of Yolo County, Timothy Fall, Judge. Affirmed in part and reversed in part.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Austen Robert Manuel Nunes.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant Pauliton Recardo Nunes.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Bonge.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, only the Introduction, Factual and Procedural Background, part VIII of the Discussion, the Disposition, and the concurring and dissenting opinions are certified for publication.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In April 2007, defendants Austen Nunes, Pauliton Nunes, and Daniel Bonge[1] went with several others to the train tracks in West Sacramento to drink some stolen beer. When an Amtrak train came by, slowing as it approached Sacramento, one of the group stood on the tracks, and Austen threw a rock at the train. The train stopped and the angry engineer got off the train. A vicious assault on the engineer followed.

Defendants (and two others not before us) were prosecuted for multiple felonies, including attempted murder and assault with a deadly weapon on a public transit employee with great bodily injury and criminal street gang enhancements. The jury found defendants guilty of most of the charges and found most of the great bodily injury enhancement allegations true, but found the gang enhancement allegations were not true. The jury did, however, find defendants guilty of the offense of criminal street gang activity (sometimes called street terrorism).

On appeal, defendants contend: (1) it was error to qualify Police Officer Kenneth Fellows as a gang expert; (2) Officer Fellows's testimony improperly invaded the province of the jury;

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[1] Because they have the same last name, we refer to Austen and Pauliton Nunes by their first names. We will refer to all three defendants collectively as defendants.

(3) there was insufficient evidence to support their convictions of criminal street gang activity; and (4) in any event the trial court should have stayed the sentence for criminal street gang activity pursuant to Penal Code[2] section 654. Austen and Pauliton further contend the trial court erred in failing to instruct the jury that the testimony of Bonge's girlfriend, C. S., had to be corroborated because she was an accomplice. In addition, Austen contends there was insufficient evidence he personally inflicted great bodily injury. The People concede defendants' three remaining contentions: (1) their convictions for assault with a deadly weapon (counts 2 through 4) should be reversed because those offenses are lesser included offenses of assault with a deadly weapon on a public transit employee, of which defendants were also convicted (counts 5 through 7); (2) the great bodily injury enhancements to their convictions for battery with serious bodily injury (count 8) must be stricken; and (3) the amount of their court security fees must be corrected.

We agree with those of defendants' claims the People have conceded and reverse defendants' convictions for assault with a deadly weapon (counts 2, 3, and 4) and the great bodily injury enhancements on their battery convictions (count 8). We also correct the amount of the court security fees. Otherwise, however, we affirm the judgment. As we will explain, the gang

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[2] Further unspecified section references are to the Penal Code.

expert was properly qualified and his testimony did not exceed the permissible scope for a gang expert. There was substantial evidence of criminal street gang activity, and there was no evidence C. S. was an accomplice. Moreover, her testimony provided substantial evidence that Austen personally inflicted great bodily injury.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Crimes

On April 16, 2007, several people, including defendants, was hanging out and drinking at the Pickwick Motel in West Sacramento. Among the group was Bonge's girlfriend, C. S., and her brother Ernie, a self-proclaimed Broderick Boys gang member. The group took multiple photographs at the motel that were later found on Pauliton's cell phone, which was discovered at the scene of the attack on the train engineer. The photographs showed defendants and some others making gang signs outside the motel. In particular, they were forming the letter "N" and the number "14" or "XIV," which symbolize the Norteño gang (N being the 14th letter of the alphabet), and the letter "B," which symbolizes the Broderick Boys, a subset of the Norteño gang in West Sacramento.

After spending a while at the motel, a smaller group that included C. S. and defendants went swimming in the Sacramento River. After that, Austen suggested a beer run, and the group stole beer from a market. The group then went to the train tracks to drink the stolen beer.

At some point, after one of the group (Javier Ramos) went up on the tracks, an Amtrak passenger train approached on its way to Sacramento. The crew had received information that there were trespassers on the tracks, and as the train slowly approached the I Street Bridge the engineer, Jacob Keating, saw a person on the tracks waving his hands. As Keating stopped the train to avoid hitting the person (Ramos), Austen threw a rock at the train. Keating flinched and cursed as the rock struck the window frame near his head.

Angry, Keating got off the train and yelled at the group to get off the tracks. The group started throwing rocks at him and he threw a rock back. Keating then saw Bonge approaching him with a big rock in his hand. Keating asked Bonge if Bonge was going to hit him, but then, in self-defense, Keating punched Bonge first. After Keating hit Bonge a second time, Bonge fell to the ground and pulled Keating with him, where Keating continued to punch Bonge. Pauliton intervened, kicking Keating in the ribs. Keating then began fighting with Pauliton, and a third person came up and hit Keating in the face a couple of times.

Meanwhile, the train's conductor, William Ray, Jr., had followed Keating off the train, grabbing a fire extinguisher before he stepped off because he heard yelling. After the group began throwing rocks at him, Ray discharged the fire extinguisher, then threw rocks back at them. At some point he set the fire extinguisher down and was rushed by several

individuals. Eventually Ray managed to get back on the train amidst a barrage of rocks and bottles.

Richard D'Alessandro was a student engineer on the train. He also got off of the train and found it hard to see; things happened fast and it was "almost like a dream." Rocks and bottles were being thrown. D'Alessandro was not hit, but he reeked of beer. He returned to the train and called dispatch, requesting police assistance. A service attendant on the train had also called 911.

In the midst of the attack, Keating managed to get back on the train. When he saw that D'Alessandro was still outside and "in a bad situation," he got back off the train. He eventually ran into "the trespassers on the tracks" and ended up fighting with five of them. Someone tackled him from behind, and then he was struck in the back of the head with a Grey Goose vodka bottle.[3] Austen also struck Keating in the back of the head with the fire extinguisher. Keating begged his attackers not to kill him, but they continued attacking him. Eventually Keating was bleeding so profusely that everyone ran.

As Keating tried to get back on the train, Austen and another person returned and punched him, and Austen demanded his wallet and cell phone. When Keating told them, "'It is on the train,'" they hit him again, but then ran away when they determined the police were coming.

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[3] Austen had stolen the vodka earlier.

When Keating finally made it back onto the train, D'Alessandro drove the train into Sacramento. There was blood, broken glass, stones, and fire extinguisher dust everywhere. D'Alessandro described the scene as "pretty horrific."

Keating suffered serious injuries from the assault. He spent two and one-half days in the hospital and required staples to close the cuts on his head. In addition, he had numerous cuts and bruises and had to use a cane for two or three months. About a week after the attack, Keating returned to the hospital with severe postconcussive symptoms.

B

The Charges

The indictment charged defendants and two others (including Ramos) with 12 felonies and two misdemeanors: specifically, one count of attempted murder (count 1); three counts of assault with a deadly weapon (the fire extinguisher, the vodka bottle, and the stones) (counts 2, 3, and 4); three counts of assault with a deadly weapon on a public transit employee (the fire extinguisher, the vodka bottle, and the stones) (counts 5, 6, and 7); one count of battery with serious bodily injury (count 8); one count of attempted second degree robbery (count 9); one count of throwing a missile at a vehicle of a common carrier (count 10); one count of vandalism (count 11); one count of criminal street gang activity (count 12); and two misdemeanor counts of assault on transportation personnel (counts 13 and 14). All of the felony charges included great bodily injury enhancement allegations, and all of the felony charges except

the criminal street gang activity charge (§ 186.22, subd. (a)) included enhancement allegations for criminal street gang activity under section 186.22, subdivision (b).

C

The Gang Expert

Before trial, Bonge moved to limit the testimony of any gang expert the People intended to call. The trial court denied that motion. Subsequently, during trial, Austen and Pauliton moved to exclude any gang expert testimony on the ground there was insufficient evidence the crimes were gang related. Bonge joined that motion.

The court held a hearing on the motion to exclude gang expert testimony. Pauliton's attorney complained about late discovery and the late notice that Officer Kenneth Fellows would be substituted as the People's gang expert in place of the officer who had testified before the grand jury. The trial court ruled the defense could impeach Officer Fellows with the grand jury testimony of the other officer and limited Officer Fellows to giving opinions based on the reports defendants currently had. The court also limited Officer Fellows to the theory of gang involvement advanced before the grand jury.

Subsequently, Officer Fellows testified he had been a West Sacramento police officer for approximately nine years. He was currently assigned to the community response team, which dealt with gang, narcotic, and prostitution crimes and other quality of life issues. Before this assignment, he had been on patrol for approximately seven years.

Officer Fellows had 250 hours of formal training on gangs. His last training was a 16-hour FBI course a week before he testified. In addition to formal training, he had received training from field training officers and the gang investigator who had testified before the grand jury. Of his 250 hours of formal training, approximately 100 hours were devoted to Hispanic gangs, including the Norteños.

Officer Fellows had attended a debriefing of a lieutenant of the Nuestra Familia, a prison gang. The Norteño gang is a division of the Nuestra Familia, and the Broderick Boys is a division (or subset) of the Norteños. Officer Fellows was a member of the California Gang Task Force, the Northern California Gang Investigators Association, and the California Gang Investigators Association. He had experienced no fewer than 700 gang contacts, mostly with Norteños, including the Broderick Boys, while working with gang members in West Sacramento. In his conversations with gang members, they had discussed the lifestyle, philosophy, membership, dress, hairstyles, signs and tattoos, graffiti, rivalries and alliances, and turf of the gang. They also discussed the gang concept of respect.

Officer Fellows had investigated no fewer than 20 gang crimes and had assisted in other investigations. He reviewed reports of gang-related crimes and consulted the database of gang-related crime members and suspects. He also read literature on gangs. Other officers asked him questions about

gangs. Officer Fellows had previously been qualified as a gang expert in three preliminary hearings.

Defendants objected to Officer Fellows testifying as a gang expert, but the trial court overruled their objections.

Officer Fellows testified there are over 300 validated gang members in West Sacramento; 167 of them are members of the Broderick Boys. The Broderick Boys identify with the number 14 and the color red. They also identify themselves with the letter B.

There are several ways to become a member of the Broderick Boys. One can be "jumped in" through a fight. Another method is generational, by which members are accepted into the gang because there are already gang members in their family. Others join as walk-ins by hanging around gang members. Although Norteños are primarily Hispanic, in West Sacramento, whites and blacks are also accepted as members of the Broderick Boys.

Officer Fellows explained that gang members are expected to put in work or "earn [their] bones" to show they are "down for the gang." They do this by committing crimes or backing up fellow gang members who are confronted by rivals. They then earn loyalty or status within the gang and earn the right to a gang tattoo, such as four dots.

Turf is very important and the gang protects it. The turf of the Broderick Boys is north of Highway 50 to the Sacramento River and east of Harbor Boulevard, within the old neighborhoods of Broderick and Bryte. The railroad tracks where the attack on the engineer occurred were within the turf claimed by the

Broderick Boys. There was a substantial amount of Broderick Boys graffiti in the area.

Officer Fellows testified that the primary activities of the Broderick Boys are assaults, theft, vehicle theft, burglary, narcotics sales, weapons violations, and homicides. The assaults often involve weapons and are violent, with multiple members attacking a single victim. Officer Fellows identified different levels of participation in a gang: "hanging around associates," who do not commit crimes; active gang members, who commit crimes and recruit; and old gangsters or "OG's," who are older and out of prison. "OG's" are less likely to be actively involved; they use younger members to commit crimes.

Officer Fellows gave his opinion that Bonge was an active participant in the Broderick Boys. He based his opinion in part on the various photographs showing Bonge and others making the signs "N," "XIV," and "14." Officer Fellows noted the pictures had been taken in public and there would be adverse consequences for displaying gang signs if one was not a member.

Officer Fellows also based his opinion on evidence that Bonge had a prior police contact in which he was issued a STEP Act[4] notice for hanging out with gang members. Specifically, Bonge was caught shoplifting at a Walgreens drug store in 2006 with Pauliton and Rolando Venegas, a validated Norteño and Broderick Boy.

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[4] The STEP Act is the Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.).

Officer Fellows also relied on the theft of the beer on the day of the attack on the train engineer to support his opinion that Bonge was an active participant in the Broderick Boys gang. Fellows noted that Bonge associated with others to conspire to steal the beer and to engage in the gang activity of drinking beer and celebrating.

Officer Fellows also gave his opinion that Austen was an active participant in the Broderick Boys. He based his opinion in part on the fact that items seized from the Nunes residence -- which included a piece of notebook paper with "SAC," "916," "Norte," and "409" on it; two red bandanas; and a shirt with the character from the movie *Scarface* on it -- showed gang affiliation. *Scarface* is a violent movie about a gangster that glamorized the mentality that gang members idolize. The red clothing showed the residents were "gang related for the Norteños."

Also, when Austen was admitted to juvenile hall in 2005, he asked if it was filled with "scraps," a derogatory term Norteño gang members use for members of the rival Sureño gang. According to Officer Fellows, this showed Austen was a Norteño. Fellows also relied on another incident in 2006, in which Austen was documented wearing a red belt, and on the fact that Austen was shown making gang signs in the photographs taken on the day of the incident.

For similar reasons, Officer Fellows gave his opinion that Pauliton was an active member of the Broderick Boys.

It was also Officer Fellows's opinion that Ramos and the fifth charged defendant (R. R.) were active gang participants. Ramos had admitted he was a Norteño, claiming he was "jumped in" but had not yet put in the work to get his dots. Like Austen, Ramos used a derogatory term for Sureños ("sewer rats") while in juvenile hall. For his part, R. R. displayed his alignment with the Norteños by putting four dots and the number 14 on his sandals while in juvenile hall.

Officer Fellows explained the concept of respect as it pertains to gang members. A gang member can earn respect quickly by an act of violence since respect is associated with fear in a gang. The more violence a gang commits, the more it cripples the community and makes citizens less likely to stand up and report gang crimes. Fear and intimidation are a gang's ultimate power over the community. Even if gang members do not shout out the name of their gang during an attack, in a small community word of gang violence spreads fast.

Officer Fellows also testified about three members of the Broderick Boys who had been convicted of gang-related crimes.

On cross-examination, Officer Fellows admitted it was not a crime to belong to a gang. Also, he testified the Broderick Boys were disorganized, with no "shot caller."

In response to a direct question by defense counsel, Officer Fellows testified it was his opinion that the assault on the railroad tracks was a gang crime because numerous gang members were associating and came to the aid of their friend who was being beaten in the fight and "turned the tables."

"Multiple subjects, that's gang mentality, that's a gang attack, it is a gang assault." The assault was a gang crime because of the association of the gang members, their prior documentation as gang members, their prior contacts with law enforcement, and the photographs showing them acting like gang members by throwing gang signs. Defendants did not just pull a friend away from a fight; they used numerical supremacy to turn the tables.

In response to defense counsel claiming Officer Fellows did not know the whole picture because he had not reviewed all the reports of the incident, Fellows responded he knew that the engineer was assaulted, that defendants are gang members, that the assault benefited the gang, and that defendants acted in association for the benefit of the gang.

D

Verdict And Judgment

The jury acquitted Bonge of attempted murder, attempted voluntary manslaughter (a lesser included offense of attempted murder), and attempted robbery, but found him guilty of the remaining charges. The jury acquitted Austen of attempted murder but found him guilty of attempted voluntary manslaughter and all of the remaining charges. The jury acquitted Pauliton of attempted murder and attempted robbery but found him guilty of attempted voluntary manslaughter and all of the remaining charges.

As for the sentencing enhancement allegations, the jury found all of the criminal street gang enhancement allegations not true but found the great bodily injury enhancement

allegations true as to the charges of the assault with the fire extinguisher (counts 2 and 5), the battery charge (count 8), and the criminal street gang activity charge (count 12).[5]

For each defendant, the trial court designated the assault with a deadly weapon on a public transit employee using the fire extinguisher (count 5) as the principal term and imposed a seven-year prison sentence for the conviction and the associated great bodily injury enhancement. Additionally, the court imposed a consecutive eight-month term on each defendant for the vandalism conviction and a consecutive eight-month term on each defendant for the criminal street gang conviction (although the court stayed the additional term for the associated great bodily injury enhancement). The court also imposed a consecutive eight-month term on Austen for the attempted robbery conviction. The court stayed the terms or sentenced concurrently on all other convictions and enhancements. Thus, the court sentenced Austen to an aggregate term of nine years in prison, Pauliton to a term of nine years and four months (which included a year for a prior charge), and Bonge to a term of eight years and four months.

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[5] The parties stipulated the jury should disregard the great bodily injury enhancement allegation on the charge of throwing a missile at a vehicle of a common carrier (count 10).

DISCUSSION

I

Qualification Of The Gang Expert

Defendants contend the trial court abused its discretion in qualifying Officer Fellows as a gang expert because "he lacked expertise in gangs." We disagree.

"'[A] person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Whether a person qualifies as an expert in a particular case, however, depends upon the facts of the case and the witness's qualifications. [Citation.] The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion i[s] shown. [Citations.]' [Citation.] This court may find error only if the witness '*clearly lacks* qualification as an expert.'" (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1377.)

Under this deferential standard, we must reject defendants' challenge to Officer Fellows as a gang expert. It is true, as Austen points out, that Officer Fellows lacked the amount of experience in working with and investigating gangs that officers qualified as gang experts in other cases have had. For example, in *People v. Williams* (1997) 16 Cal.4th 153, one expert had been a gang investigator since 1973 and had investigated more than 100 gang homicides; another had worked with gangs for 10 years, specializing in them for four years and giving lectures on the

subject; and the third was a member of the gang unit and had been involved with gangs for seven years. (*Id.* at pp. 177, 195.)

While Officer Fellows's experience was not as extensive as the experience of these other officers, he nonetheless had sufficient gang training and experience for the trial court to reasonably find that he was qualified to testify as an expert on the subject. He had 250 hours of formal training on gangs, as well as additional training with the gang investigator who had testified before the grand jury. Also, he had investigated at least 20 gang cases and assisted on others, had hundreds of contacts with gang members, including a debriefing with a lieutenant of the Nuestra Familia, and had read gang reports and other literature on gangs.

Defendants complain that before this case Officer Fellows "had never . . . qualified or testified as an expert [on gangs] in a jury trial." That fact is irrelevant, however, because, in and of itself, the lack of previous qualification in court does not prove a lack of sufficient experience to qualify as an expert. Indeed, every expert has to qualify as an expert for the first time *some time*. In any event, Officer Fellows *had* qualified as a gang expert at three preliminary hearings.

Defendants also complain that Officer Fellows's training was not specific to the Broderick Boys gang, but they make no showing there is any significant distinction between the Broderick Boys and other Norteño gangs. Indeed, Officer Fellows testified that the Broderick Boys "are different from Norte[ñ]os

[only] in the sense that the Broderick Boys are a set of Norte[ñ]os [that] function within the community of West Sacramento." Further, while Officer Fellows's formal classroom training may not have embraced the Broderick Boys in particular, he had significant practical experience with the Broderick Boys in his more than 700 gang contacts.

On this record, the trial court did not abuse its discretion in finding Officer Fellows qualified to testify as a gang expert.

II

Scope Of The Gang Expert's Testimony

Defendants contend Officer Fellows's testimony invaded the province of the jury because he testified to his opinion that defendants were active gang participants and that the crimes were gang related. They contend this testimony was tantamount to giving the opinion that defendants were guilty. They further contend they were denied effective assistance of counsel because defense counsel failed to object to this improper testimony.[6]

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658, the court held testimony of a gang expert on the subjective knowledge and intent of a specific, individual gang member was impermissible. In reaching this conclusion, the court surveyed

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[6] To the extent defendants also argue under this heading that Officer Fellows's opinion testimony was speculative and thus an improper basis for finding they were active participants in a criminal street gang, we address that argument hereafter as one going to the sufficiency of the evidence.

case law that found expert opinion proper on certain aspects of gangs. The list of permissible gang topics included "the 'culture and habits' of criminal street gangs [citation], including testimony about the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant's membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citation], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations]." (*Id.* at pp. 656-657, fns. omitted.)

The testimony of Officer Fellows fell within these established parameters for proper testimony of a gang expert. In particular, Officer Fellows was entitled to testify about the gang membership of the various defendants, i.e., that they were active participants in a gang. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463-1464 [expert testimony was sufficient to prove gang membership].) Furthermore, because a violation of section 186.22, subdivision (a) requires more than active membership in a gang, Officer Fellows did not give an improper opinion on defendants' guilt simply by expressing an opinion on their active participation in a gang.

Because Officer Fellows's testimony about defendants' active participation in the gang was proper, we reject defendants' argument that their counsel were ineffective for

failing to object to that testimony. "Defense counsel does not render ineffective assistance by declining to raise meritless objections." (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674, fn. 8.)

As for Officer Fellows's testimony that the assault on the train engineer was gang related, we find no reversible error or ineffective assistance of counsel with respect to that testimony either. In *People v. Ochoa* (2009) 179 Cal.App.4th 650, 664, the court stated that it was "impermissible" for the prosecutor to ask the gang expert whether the crimes were committed to benefit the gang, rather than posing a hypothetical question to the expert. While Officer Fellows testified here that it was his opinion the assault was a gang crime, this opinion was elicited not by the prosecutor, but by defense counsel on cross-examination. More importantly, the jury's verdicts reveal that the jurors did not credit this aspect of Officer Fellows's testimony, as the jury found all of the criminal street gang enhancement allegations were not true. Under these circumstances, defendants cannot demonstrate prejudice from Officer Fellows's testimony, even if we were to conclude defense counsel fell below an objective standard of reasonableness in eliciting it. (See *People v. Boyette* (2002) 29 Cal.4th 381, 430 [setting forth standards for ineffective assistance of counsel claim].)

III

Sufficiency Of The Evidence: Criminal Street Gang Activity

Defendants contend there was insufficient evidence to support their convictions for criminal street gang activity (count 12). At least one defendant challenges the sufficiency of the evidence as to every element of the crime: that is, they contend there was insufficient evidence that the Broderick Boys qualified as a criminal street gang, that they were active participants in the gang, that they knew the gang engaged in a pattern of criminal conduct, and that they intended to promote or assist the gang in any felonious conduct. Additionally, defendants contend Officer Fellows's testimony was speculative and thus an improper basis for finding they were active participants in a criminal street gang. We address, and reject, each of these contentions in turn.

A

Governing Law

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the

credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

Subdivision (a) of section 186.22 provides as follows: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

A "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) The term "pattern of criminal activity" requires proof that gang members committed two or more predicate offenses. (§ 186.22, subd. (e).) The qualifying predicate offenses include assault with a deadly

weapon or by means of force likely to produce great bodily injury. (§ 186.22, subd. (e)(1).)

B

Primary Activities Of The Gang And Pattern Of Criminal Activity

Defendants contend there was insufficient evidence the Broderick Boys qualified as a criminal street gang. Specifically, they contend that there was insufficient evidence that one of the primary activities of the Broderick Boys is the commission of statutory gang offenses or that its members engage or have engaged in a pattern of criminal activity.

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, italics omitted.) Expert testimony on the subject may also be sufficient. (*Ibid.*)

Here, sufficient evidence of both the primary activities of the gang and its pattern of criminal activity was provided by expert testimony. Officer Fellows testified the primary activities of the Broderick Boys were assaults, thefts, burglary, narcotics and weapons violations, and homicide. Officer Fellows further testified to several serious assaults committed by members of the Broderick Boys gang. Two members of the Broderick Boys, Raymond Corona and Robert Montoya, brutally attacked a citizen in 2003, resulting in a conviction. Also, Officer Fellows personally investigated Caeser Lara Morales for conspiracy to commit assault with a deadly weapon arising out of

a shooting in West Sacramento, which resulted in his conviction in 2007, along with a gang enhancement. Officer Fellows also knew that Jessie Garcia, another Broderick Boy, was convicted of assault with a deadly weapon likely to produce great bodily injury.

Defendants contend the foundation for Officer Fellows's testimony was insufficient because he personally knew of only the Morales case. It is well established, however, that a gang expert may base his opinions on personal observations and experience, the observations of other law enforcement officers, police reports, and conversations with gang members. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 967.) Personal knowledge is not required. Here, Officer Fellows testified that he based his opinion regarding the primary activities of the Broderick Boys on his "experience working in the City of West Sacramento, responding to calls of that nature, reviewing reports, and investigating them." That was sufficient.

C

Active Participation

Defendants contend there was insufficient evidence they were active participants in the Broderick Boys gang. According to Pauliton, "[o]ther than the expert's opinion, the prosecution's evidence [of active participation] was sparse and limited to a few photos of some defendants throwing gang signs, captured on a cell phone camera at the party, a red bandana in those pictures, an 'association' with one police-identified validated gang member a year before, which occurred during a

suspected petty theft investigation, a red shirt found in a common area of [the Nunes] home, whose ownership was never established, and a writing seized from somewhere in the home, also without attribution."

Active participation in a criminal street gang requires involvement "that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) Active participation in a criminal street gang can be shown by contacts with members of the gang, bragging about gang association or membership, and assisting or promoting felonious conduct by the gang. (*Id.* at p. 753.)

Here, the evidence established that earlier on the day of the assault, defendants and others, including a validated Broderick Boys gang member, gathered at a motel in West Sacramento. While there, defendants posed for several photographs throwing gang signs: variations of "N," "14," and "XIV," which are symbols associated with the Norteño gang (of which the Broderick Boys is a subset), as well as the letter "B," which is a symbol associated specifically with the Broderick Boys. Pauliton displayed a red bandana, another Norteño symbol. Although it is possible to interpret these poses as "horsing around" and "mimick[ing] gang members," the jury was certainly under no obligation to draw that conclusion, particularly in light of Officer Fellows's testimony that "[i]f a gang member was to see somebody was throwing up the Norte[ñ]o or Broderick [Boys] gang sign knowing that individual was not

part of that gang it would be their obligation and duty to attack and assault that individual."

"It is the province of the trier of fact to decide whether an inference should be drawn and the weight to be accorded the inference." (*People v. Massie* (2006) 142 Cal.App.4th 365, 374.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Here, it was for the jury, not us, to decide what inference to draw from the photographs. Moreover, based on all of the evidence, it was eminently reasonable for the jury to infer that by posing for photographs throwing gang signs in public view, defendants were proudly announcing and bragging about their gang affiliation and not just "horsing around."

Other evidence also supports the jury's finding that defendants were active participants in the Broderick Boys gang. They were in the presence of a validated gang member (Ernie S.) when they posed for photographs at the motel making gang signs. Bonge and Pauliton had been in the company of Rolando Venegas, another validated Broderick Boys gang member, during a shoplifting incident. Clothing and writing indicative of a gang affiliation was found at the Nunes residence. Austen had referred to "scraps," a derogatory term for Sureño gang members, while at juvenile hall and also had worn a red belt.

The jury could also rely on defendants' charged conduct to support the finding of active gang participation. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) Significantly, the assault, one of the gang's primary activities, took place on the "turf" of the Broderick Boys, and defendants acted together in committing the crime, displaying a gang mentality. Further, they also acted in concert when stealing the beer, and Officer Fellows identified theft as another primary activity of the Broderick Boys.

Taken as a whole, and in the light most favorable to the jury's verdicts, the evidence was sufficient to prove that defendants were active participants in a criminal street gang.

D

Knowledge Of The Gang's Criminal Activity

Defendants contend there was insufficient evidence they knew the Broderick Boys engaged in a pattern of criminal gang activity. According to Austen, "[n]o evidence showed [he] knew about any other criminal activities of the gang or its members, other than the offenses on trial."

For purposes of section 186.22, subdivision (a), knowledge that members of a gang engage in or have engaged in a pattern of criminal gang activity requires only general knowledge of the gang's criminal purposes; it "does not require a defendant's subjective knowledge of particular crimes committed by gang members." (*People v. Carr* (2010) 190 Cal.App.4th 475, 488, fn. 13.) "[J]ust as a jury may rely on evidence about a defendant's personal conduct, as well as expert testimony about gang culture

and habits, to make findings concerning a defendant's active participation in a gang or a pattern of gang activity, it may also rely on the same evidence to infer a defendant's knowledge of those activities." (*Id.* at p. 489, fn. omitted.) Here, defendants' association with known gang members, including Pauliton and Bonge's presence with Venegas at the Walgreens shoplifting incident, and defendants' conduct in stealing beer and assaulting the train engineer (and related crimes on the train tracks) shortly after their brazen display of gang association, coupled with the expert testimony about the culture and habits of the Broderick Boys gang, provided sufficient evidence of the knowledge element of section 186.22, subdivision (a).

E

Willful Promotion, Furtherance, Or Assistance In Felonious Conduct By Gang Members

Defendants contend there was insufficient evidence they intended to promote or assist the gang in any felonious conduct. Bonge contends there was no evidence, except his gang affiliation, that he "willfully intended to facilitate or promote felonious *gang-related* criminal conduct." (Italics added.) For his part, Austen contends the court committed instructional error by failing to instruct that the felonious conduct assisted must be gang related, and the jury's "not true" findings on the criminal street gang enhancement allegations under subdivision (b) of section 186.22 show that the jury found the felonious conduct was *not* gang related.

Defendants' contentions are answered by the recent case of *People v. Albillar* (2010) 51 Cal.4th 47. There, the California Supreme Court held there is no requirement under section 186.22, subdivision (a) that the felonious conduct that is promoted, furthered, or assisted be gang related. (*Albillar*, at pp. 51, 56.) Because defendants' arguments are based on a premise our Supreme Court has rejected, those arguments have no merit.

F

Speculative Expert Testimony

Defendants contend "[t]he expert opinion offered here was about the generalities of gang behavior and was without substantive foundation in the facts of this case" and thus was "not a proper basis for a gang finding or conviction." Just which of Officer Fellows's opinions defendants intend to challenge by this argument is not clear, because they do not say. Nevertheless, we believe the discussion above adequately shows that to the extent defendants' convictions for the offense of criminal street gang activity were premised on Officer Fellows's opinions, those opinions were, in fact, rooted in the evidence of this case and not merely based on "the generalities of gang behavior." For this reason, defendants' argument is without merit. The evidence was sufficient to support their convictions for violating section 186.22, subdivision (a).

IV

Sufficiency Of The Evidence:

Great Bodily Injury Enhancement As To Austen

Austen contends there is insufficient evidence to support the great bodily injury enhancements as to counts 2 through 5, 8, and 12. Specifically, he contends there was no evidence he personally inflicted great bodily injury on Keating. Austen is mistaken, both as to the counts on which the jury found the great bodily injury enhancement true and as to whether there was evidence he personally inflicted such injury.

As to Austen, the jury found the great bodily injury enhancement allegations true only as to the charges of assault with the fire extinguisher (count 2), assault with the fire extinguisher on a public transit employee (count 5), battery with serious bodily injury (count 8), and criminal street gang activity (count 12).

As for the evidence supporting those findings, Austen contends "no substantial evidence ever identified [him] as one of the participants in the group beating of Keating" and "[a]t most the evidence showed [he] personally threw a rock and personally demanded Keating's wallet and/or cell phone." (Italics omitted.) But Austen ignores evidence that he personally struck Keating twice with the fire extinguisher. In a statement to the police that was admitted into evidence, C. S. said Austen grabbed the fire extinguisher, came up behind Keating, and struck him twice in the head with it. C. S. testified similarly at trial. This evidence was sufficient to

support the great bodily injury enhancement as to counts 2, 5, and 12. (We discuss count 8 separately hereafter.)

V

Failure To Instruct That C. S. Was An Accomplice

Austen and Pauliton contend the trial court erred in failing to instruct the jury that C. S. was an accomplice and thus her testimony required corroboration. Austen contends the error was prejudicial because only the testimony of C. S. established that he was part of the assault, as Keating identified Austen "only as to the attempted robbery." We find no error.

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

"'"[W]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice,"' the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice. [Citation.] If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. [Citation.]

In either case, the trial court also must instruct the jury, sua sponte, '(1) that the testimony of the accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated . . . .'" (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Here, the court was not required to instruct on the law of accomplice testimony because there was no evidence C. S. was an accomplice. To be an accomplice, one must "'act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) In arguing C. S. was an accomplice, Austen and Pauliton do not cite any evidence that would have supported a finding of the foregoing elements. Instead, they assert only in general terms, without reference to any evidence, that C. S. "could have been charged as a defendant under the prosecution's aiding and abetting theory" and that she "could have been another defendant." That is plainly not sufficient to carry their burden of demonstrating trial court error on the issue of accomplice testimony.

VI

Lesser Included Offenses

Defendants contend their convictions on the charges of assault with a deadly weapon (counts 2, 3 and 4) must be reversed because the offense of assault with a deadly weapon is a lesser included offense of assault with a deadly weapon on a

public transit employee, and thus counts 2, 3, and 4 were lesser included offenses of counts 5, 6 and 7. The People concede this point.

Multiple convictions cannot be based on necessarily included offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) "[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Lopez* (1998) 19 Cal.4th 282, 288.)

The only distinction between assault with a deadly weapon (§ 245, subd. (a)) and assault with a deadly weapon on a public transit employee (§ 245.2) is the identity of the victim. Both crimes require an "assault with a deadly weapon or instrument" or "by any means likely to produce great bodily injury." (§§ 245, subd. (a), 245.2.) Section 245.2 requires the victim of the assault be a public transit employee, as specified in the statute. Section 245, subdivision (a), on the other hand, applies to an assault simply "upon the person of another." Just as "assault with a deadly weapon upon a peace officer includes the lesser offenses of assault with a deadly weapon as well as simple assault" (*People v. Hood* (1969) 1 Cal.3d 444, 449), so too does assault with a deadly weapon on a public transit employee include assault with a deadly weapon.

Because counts 2, 3, and 4 are lesser included offenses of counts 5, 6, and 7, defendants' convictions on the latter offenses must be reversed.

VII

Great Bodily Injury Enhancement On Charge Of Battery With Serious Bodily Injury

Defendants contend the great bodily injury enhancement on the charge of battery with serious bodily injury (count 8) must be stricken because great bodily injury is an element of the offense. The People concede the point.

Section 243, subdivision (d) provides that when a battery is committed "and serious bodily injury is inflicted," the crime may be punished as either a misdemeanor or a felony. Subdivision (f)(4) of section 243 defines "[s]erious bodily injury" as "a serious impairment of physical condition." Section 12022.7, subdivision (a) provides a three-year enhancement for the infliction of "great bodily injury" during commission of a felony. For purposes of the enhancement, "'great bodily injury' means a significant or substantial physical injury." (§ 12022.7, subd. (f).) This enhancement "shall not apply if infliction of great bodily injury is an element of the offense." (§ 12022.7, subd. (g).)

"The terms 'serious bodily injury' and 'great bodily injury' have substantially the same meaning . . . ."[7] (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375.) The *Hawkins* court concluded, "great bodily injury, as defined in section 12022.7,

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[7] Thus, the trial court's ad hoc instruction to the jury here that great bodily injury is *not* the same as serious bodily injury was erroneous.

is an element of the crime of battery under section 243, subdivision (d)." (*Hawkins*, at p. 1376.) Because the enhancement is an element of the offense, the enhancement cannot be imposed. (§ 12022.7, subd. (g).)

We recognize that the court in *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1096, affirmed a trial court's refusal to strike a great bodily injury enhancement in similar circumstances. We decline to follow *Jose H.*, however, because the court there did not consider subdivision (g) of section 12022.7, which clearly provides that the great bodily injury enhancement "*shall not apply* if infliction of great bodily injury is an element of the offense." (Italics added.) (Accord *People v. Hawkins* (2003) 108 Cal.App.4th 527, 531 [disagreeing with *Jose H.*].) Thus, the great bodily injury enhancement on the charge of battery with serious bodily injury (count 8) must be stricken.

VIII

Section 654

Defendants contend section 654 bars separate punishment for the crime of criminal street gang activity and the underlying felonies used to prove the "felonious conduct" element of that offense because the underlying felonies for which defendants were already separately punished -- assault with a deadly weapon (the fire extinguisher) and vandalism -- were the acts that transformed their membership in a gang into the substantive gang activity offense. We disagree.

In pertinent part, subdivision (a) of section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance." (*People v. Beamon* (1973) 8 Cal.3d 625, 636.) Nevertheless, our Supreme Court has set forth some basic principles for applying the statute.

In *Neal v. State of California* (1960) 55 Cal.2d 11, the court explained "'[i]t is the singleness of the act and not of the offense that is determinative.' Thus the act of placing a bomb into an automobile to kill the owner may form the basis for a conviction of attempted murder, or assault with intent to kill, or malicious use of explosives. Insofar as only a single act is charged as the basis for the conviction, however, the defendant can be punished only once." (*Id.* at p. 19.)

But our Supreme Court has also explained that "section 654 refers not to *any* physical act or omission which might perchance be common to all of a defendant's violations, but to a defendant's *criminal* acts or omissions." (*In re Hayes* (1969) 70 Cal.2d 604, 607.) "The proper approach, therefore, is to

isolate the various *criminal* acts involved, and then to examine only those acts for identity." (*Ibid.*)

In *Hayes*, a majority of our Supreme Court concluded that a defendant who "drove a motor vehicle for some 13 blocks" while under the influence of intoxicating liquor and with knowledge that his driver's license was suspended engaged simultaneously in two distinct criminal acts -- "driving with a suspended license and driving while intoxicated" -- and could be punished for both, even though both criminal acts had in common the noncriminal act of "driving." (*In re Hayes*, *supra*, 70 Cal.2d at pp. 605, 607-608.) Thus, even in a case in which two offenses are based entirely on the same physical act, section 654 may not prohibit punishing the defendant for both offenses. The pertinent question is whether both offenses are based on the same criminal act.

To complicate matters further, even when more than one criminal act is shown, section 654 still may bar multiple punishment in some circumstances. This is so because "'[s]ection 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.' [Citation.] [¶] Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to

one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 19.) And "[j]ust as it is the *criminal* 'act or omission' to which section 654 refers, it is the *criminal* 'intent and objective'" to which Neal refers. (*In re Hayes*, *supra*, 70 Cal.2d at p. 610.)

With these principles in mind, we turn back to the present case. As we have explained, under subdivision (a) of section 186.22, it is a crime to actively participate in a criminal street gang with knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity, and to willfully promote, further, or assist in any felonious criminal conduct by members of the gang. Here, in instructing the jury on the "felonious criminal conduct" element of the crime, the trial court instructed that "[f]elonious criminal conduct means committing or attempting to commit any of the following crimes: [¶] Attempted murder, assault with a deadly weapon, battery with serious bodily injury, throwing missiles at the vehicle of a common carrier, attempted robbery or vandalism."

Thus it is clear the charge of criminal street gang activity was based -- at least as far as the "felonious criminal conduct" element of that crime is concerned -- on the other felonies with which defendants were charged arising from their attack on the train engineer and their vandalism of the train. The question is whether this relationship between the charges precluded separate punishment under section 654.

California courts have developed two distinct approaches to applying section 654 in this type of situation. In *People v. Herrera* (1999) 70 Cal.App.4th 1456, the defendant personally used a firearm in a gang-related, drive-by shooting and was convicted of (among other things) two counts of attempted murder and one count of criminal street gang activity. (*Id.* at pp. 1460-1462.) On appeal, Division Three of the Fourth District Court of Appeal concluded the defendant could be separately punished for criminal street gang activity (street terrorism) and attempted murder based on the following analysis:

"The characteristics of attempted murder and street terrorism are distinguishable, even though aspects of one may be similar to those of the other. In the attempted murders, Herrera's objective was simply a desire to kill. For these convictions, the identities (or gang affiliations) of his intended victims were irrelevant. The fact he repeatedly shot a gun on two separate occasions--the interval between the two being brief but distinct--striking cars, occupied apartments and bystanders, is sufficient to establish the specific intent to kill required for both counts of attempted murder. [Citations.]

"In contrast, section 186.22, subdivision (a), encompasses a more complex intent and objective. It is part of the Street Terrorism Enforcement and Prevention Act which was enacted by emergency legislation in 1988. [Citations.] The Legislature passed these criminal penalties and strong economic sanctions as a response to the increasing violence of street gang members throughout the state. Previously, there was no existing law

that made the punishment for crimes by a gang member separate and distinct from that of the underlying crimes. [Citation.]

"Section 186.22, subdivision (a) punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the *participation in the gang itself*. Hence, under section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense. For example, this subdivision would allow convictions against both the person who pulls the trigger in a drive-by murder *and* the gang member who later conceals the weapon, even though the latter member never had the specific intent to kill. Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,]' thereby precluding application of section 654. [Citation.]

"Herrera's active participation in [his gang]'s 'payback' against [a rival gang] falls squarely within the provisions of section 186.22, subdivision (a), street terrorism. It requires the defendant to actively participate in a criminal street gang,

have knowledge that its members engage in criminal activity, and have the intent and objective to further the gang's felonious conduct. (§ 186.22, subd. (a).) Independent of that, Herrera had the simultaneous although separate objective to actively participate in and promote his gang when he attempted to murder [the rival] gang members. Herrera's membership in [his gang] was well established at trial, including expert testimony regarding what such a membership entailed. Herrera testified he got into the Mustang to 'back up' or support the gang. He had told his girlfriend that his gang was going to retaliate against [the rival gang]. The gang experts explained that gang warfare uniformly involved guns. The evidence supports the finding that Herrera intended to aid his gang in felonious conduct, irrespective of his independent objective to murder.

"Finally, if section 654 were held applicable here, it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. '[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." [Citation.]' [Citation.] We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1466-1468, fns. omitted.)

In *People v. Ferraez* (2003) 112 Cal.App.4th 925, the defendant was convicted of possessing cocaine base for sale and criminal street gang activity on the theory he was selling the

rock cocaine for the criminal street gang to which he belonged. (*Id.* at pp. 927-929.) On appeal, another panel from Division Three of the Fourth District Court of Appeal followed *Herrera* and concluded that "the trial court was not required to stay defendant's sentence for the gang crime" because "defendant possessed the drugs with the intent to sell, and he also intended to commit that felony to promote or assist the gang. While he may have pursued both objectives simultaneously, they were nonetheless independent of each other." (*Id.* at p. 935.)

In *People v. Vu* (2006) 143 Cal.App.4th 1009, the defendant was convicted of conspiracy to commit murder and criminal street gang activity for a gang-related revenge shooting. (*Id.* at pp. 1012-1013.) On appeal, another panel of Division Three of the Fourth District Court of Appeal concluded the sentence for criminal street gang activity should have been stayed under section 654 because "the acts of conspiracy and street terrorism constituted a criminal course of conduct with a single intent and objective. That single criminal intent or objective was to avenge [a fellow gang member]'s killing by conspiring to commit murder. Although that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent. Each intent was dependent on, and incident to, the other." (*Id.* at p. 1034.)

Rather than disagree with *Herrera* and *Ferraez*, the *Vu* court claimed those cases were distinguishable. (*People v. Vu*, *supra*, 143 Cal.App.4th at p. 1034.) The court claimed *Herrera* was distinguishable "because the defendant was charged with a course

of criminal conduct involving two gang-related, drive-by shootings in which two people were injured," and *Ferraez* was distinguishable "because under the facts of that case, the trial court could have found independent objectives." (*Vu*, at p. 1034.)

In *People v. Garcia* (2007) 153 Cal.App.4th 1499, the defendant was convicted of carrying a loaded unregistered firearm in public and street terrorism on the theory that he was carrying the firearm for the benefit of a criminal street gang. (*Id.* at p. 1502.) On appeal, another panel of Division Three of the Fourth District Court of Appeal, without mentioning *Vu*, followed *Herrera* and *Ferraez* and determined that defendant could be punished for both crimes because he "knew he was in possession of a firearm in public, and intended to commit that crime to promote or assist the gang. While he might have pursued these objectives simultaneously, they were independent of each other." (*Id.* at p. 1514, fn. omitted.)

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297, the defendant was convicted of robbery and criminal street gang activity (gang participation). (*Id.* at p. 1301.) On appeal, Division Two of the Fourth District Court of Appeal concluded that "section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang,' and (2) the underlying felony that is used to satisfy this element of gang participation." (*Sanchez*, at p. 1301.) In reaching

this conclusion, the court considered both *Herrera* and *Vu* at some length. (*Sanchez*, at pp. 1310-1313.) The court noted that "*Vu*'s effort to distinguish *Herrera* was less than satisfying" and concluded that "*Herrera* simply cannot be reconciled with *Vu*." (*Sanchez*, at pp. 1312-1313.) Then, after discussing "a number of problems" (*id.* at p. 1313) the court found with *Herrera*, the *Sanchez* court explained why section 654 barred separate punishment for gang participation in the case before it:

"Here, the underlying robberies were the act that transformed mere gang membership--which, by itself, is not a crime--into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. . . .

"In our view, the crucial point is that, here, as in *Herrera* and *Vu*, the defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself." (*People v. Sanchez*, *supra*, 179 Cal.App.4th at p. 1315.)

The *Sanchez* court concluded that "the robberies--even if not gang motivated--were necessary to satisfy an element of the gang participation charge. . . . Accordingly, almost by definition, defendant had to have the same intent and objective in committing all of these crimes." (*People v. Sanchez*, *supra*, 179 Cal.App.4th at p. 1316.)

The foregoing cases do not reveal a consistent line of reasoning for applying section 654 to cases, like the present one, where the defendants are convicted both of criminal street gang activity and one or more other felonies, where the other felonies are the "felonious criminal conduct" of the gang that is used to establish the charge of criminal street gang activity. For the reasons that follow, however, we believe the result reached in *Herrera* and its progeny is the correct one here.

The first question under section 654 is whether the two offenses involved the same criminal act or distinct criminal acts. We believe that when the two offenses are a charge of criminal street gang activity that is based on an underlying felony committed by the defendant and that underlying felony, two distinct criminal acts are involved. This is so because the charge of criminal street gang activity is not based only on the underlying felony that serves as the "felonious criminal conduct" the statute requires, but is also based on the defendant's "active[] participat[ion] in [the] criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (a).) Indeed, as the *Herrera* court observed, participation in the gang is the gravamen of the crime of street terrorism. (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1467.) Our Supreme Court agrees. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 55 ["The gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang"].)

Under this reasoning, the charges of assault with a deadly weapon and vandalism here were based on criminal acts distinct from the charge of criminal street gang activity. It does not necessarily follow from that conclusion, however, that defendants can be punished separately for all three crimes because we must still examine their criminal "intent and objective" under *Neal*.

In *Neal*, the defendant was convicted "of one count of arson and two counts of attempted murder [based] upon [his] act of throwing gasoline into the bedroom of [a married couple] and igniting it." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 18.) In concluding that the defendant could not be separately punished for arson, the Supreme Court wrote as follows:

"If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. [¶] . . . [¶] In the instant case the arson was the means of perpetrating the crime of attempted murder . . . . [Separate punishment for the arson] violated . . . section 654, since the arson was merely incidental to the primary objective of killing [the couple]." (*Neal v. State of California*, *supra*, 55 Cal.2d at pp. 19-20.)

In effect, the court in *Neal* concluded the defendant had only one criminal objective -- murdering the couple. Because the crime of arson was merely the means by which the defendant sought to accomplish that single objective, the defendant could

not be punished for both attempted murder and arson under section 654.

We do not believe the reasoning from *Neal* compels the conclusion here that defendant can be punished only for the crimes of assault with a deadly weapon and vandalism and not for the crime of criminal street gang activity as well. Unlike in *Neal*, where the arson was merely "the means of perpetrating the crime of attempted murder," here one crime was not merely the means of perpetrating the other. On this point, it is important to emphasize that criminal street gang activity requires not only the commission of "felonious criminal conduct by members of [a] gang," but also "active[] participat[ion] in [the] gang" separate and apart from that felonious conduct. (See *People v. Castenada* (2000) 23 Cal.4th 743, 752 [describing "section 186.22(a)'s plainly worded requirements" as "criminal knowledge, willful promotion of a felony, and active participation in a criminal street gang"].) Thus, while the attack on the train engineer and/or the vandalism of the train were part of the crime of criminal street gang activity, the crimes were not coextensive, and thus the attack and/or the vandalism were not simply the means by which defendants committed the crime of criminal street gang activity, as the arson was the means by which the defendant committed attempted murder in *Neal*. Under this circumstance, the trial court was not bound to conclude the crime of criminal street gang activity involved the same objective as the assault and the vandalism, such that separate punishment could not be imposed for the gang crime.

In reaching this conclusion, we echo the *Herrera* court's observation that "if section 654 were held applicable here, it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang," which would tend "to exempt the most culpable parties from the punishment under the street terrorism statutes." (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1468.) Such a result would be inconsistent with the laudable legislative purpose behind section 186.22, which is to punish criminal conduct by gang members more harshly.[8] As our Supreme Court recently observed in concluding that the "felonious criminal conduct" required for a conviction of criminal street gang activity does not have to be "gang related," "there is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related. Gang members tend to protect and avenge their associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 55.)

Because the criminal street gang sentence enhancement under subdivision (b) of section 186.22 requires that the felony to

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[8] We grant the People's request for judicial notice of the legislative history of the STEP Act.

which it attaches be gang related -- that is, "committed for the benefit of, at the direction of, or in association with a[] criminal street gang" -- that enhancement will not always apply to concerted criminal conduct by members of a gang. In fact, that is exactly what happened here. The jury concluded that defendants did not attack the train engineer or vandalize the train for the benefit of, at the direction of, or in association with the criminal street gang to which they belonged (the Broderick Boys). Nonetheless, defendants did willfully promote, further, or assist felonious criminal conduct by their gang when they jointly engaged in the attack and the vandalism. The Legislature's intent that gang members be punished more severely for their criminal conduct would be subverted if section 654 were construed to prevent separate punishment for the offense of criminal street gang activity and the felonious conduct that constitutes an element of the gang activity offense. Although the additional punishment in a case like this is relatively small (eight months), we do not believe the Legislature intended to exempt gang members from that punishment by creating a crime that -- if subject to section 654 as applied in *Vu* and *Sanchez* -- would almost never result in any punishment.

For the foregoing reasons, we conclude the trial court did not err in failing to stay the sentence on the charge of criminal street gang activity pursuant to section 654.

IX

Court Security Fee

In 2008, the year of defendants' convictions, section 1465.8 required a court security fee of $20 be imposed on every conviction for a criminal offense. (Stats. 2007, ch. 302, § 18.) The Legislature intended to impose the fee on all convictions after the statute's operative date.[9] (*People v. Alford* (2007) 42 Cal.4th 749, 754.)

The abstracts of judgment indicate a court security fee of $280 for Austen, $260 for Pauliton , and $280 for Bonge. Bonge contends the amount of his fee is incorrect because he was convicted of only 12 counts, having been acquitted of attempted murder and attempted voluntary manslaughter (count 1) and attempted robbery (count 9). Since we reverse the three convictions for assault with a deadly weapon as to all defendants, the amount of the fee must be corrected for all defendants. The People properly concede a correction in the amount of the fee is appropriate.

The proper amount of the court security fee is $220 for Austen ($20 times 11 convictions), $200 for Pauliton ($20 times 10 convictions), and $180 for Bonge ($20 times 9 convictions). We order the abstracts of judgment amended accordingly.

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[9] Because of this legislative intent, subsequent amendments increasing the amount of the court security fee after the date of defendants' convictions do not apply.

DISPOSITION

The convictions for assault with a deadly weapon (counts 2, 3, and 4) and the great bodily injury enhancements on the conviction for battery with serious bodily injury (count 8) are reversed. The amount of the court security fee is corrected as follows: Austen Nunes, $220; Pauliton Nunes, $200; and Daniel Bonge, $180. In all other respects, the judgments are affirmed. The trial court is directed to prepare amended abstracts of judgment showing these changes and to forward certified copies to the Department of Corrections and Rehabilitation.

ROBIE, J.

Nicholson, Acting P.J., Concurring

I concur in the opinion, except as to part VIII. As to that part, I concur in the result, but my reasoning differs.

Penal Code section 654 (hereafter, section 654) and the Supreme Court's gloss on that statute in *Neal v. State of California* (1960) 55 Cal.2d 11 have created a nearly unnavigable collection of factors to consider when deciding whether a defendant can be punished separately for two offenses. It seems that each court picks and chooses its desired destination and then finds a course to follow to get to that destination, relying on the wording of section 654, the Supreme Court's language in *Neal*, or the language of subsequent cases discussing the defendant's act, criminal act, intent, objective, goal, course of conduct, transaction, or some combination of those considerations. Application of section 654 has become a judicial exercise in creativity.

In my opinion, the best course to follow in applying section 654 is to go back to the most basic tenet of statutory interpretation -- what did the Legislature intend? (*People v. Robinson* (2010) 47 Cal.4th 1104, 1138 [ascertain Legislature's intent to effectuate law's purpose].)

The Supreme Court has helped us out with that question: "The purpose of [section 654's] protection against punishment for more than one violation arising out of an 'act or omission' is to insure that a defendant's punishment will be commensurate with his culpability. (See *Neal* v. *State of California, supra*,

55 Cal.2d at p. 20.) 'Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance.' [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 550-551.)

I believe, therefore, that the determination of whether a defendant can be punished for two crimes or, on the other hand, must be punished for only one of them rests on the simple question of whether punishing the defendant for just one of those crimes "insure[s] that [the] defendant's punishment will be commensurate with his culpability." (*People v. Perez, supra,* 23 Cal.3d at p. 551.)

Most often, the application of this principle is straightforward and uncontroversial. For example, a person shoots at a uniformed police officer. That person has committed at least two crimes: (1) assault with a firearm (Pen. Code, § 245, subd. (a)(2); punishable by up to four years in state prison) and (2) assault with a firearm on a peace officer (Pen. Code, § 245, subd. (d)(1); punishable by up to eight years in state prison). Sentencing is straightforward: the court sentences on the crime with the longer sentence (assault with a firearm on a peace officer) and stays the sentence on the crime with the shorter sentence (assault with a firearm). Application of section 654 is required in this hypothetical case because a sentence for assault with a firearm on a peace officer covers the extent of the defendant's culpability. In other words, he

is not more culpable because technically he also committed an assault with a firearm. Also, in this simple hypothetical, all of the elements of the assault with a firearm are subsumed in the assault with a firearm on a peace officer.

Here, imposing the sentence on the assault and vandalism counts and staying the sentence on the gang participation count would fail to insure punishment commensurate with the defendant's culpability. Legislation dictates that participation in a gang is independently culpable, yet there would be no punishment with respect to that culpability if the defendant were punished for assault and vandalism only. Put another way, a person who commits assault and vandalism while participating in a criminal street gang is more culpable than a person unassociated with a gang who commits assault and vandalism. Stepping back from all of the gloss that has been slathered on section 654, we cannot say that the Legislature intended those two hypothetical individuals to be punished equally.

One further observation: the section 654 difficulty arises here because the street gang participation count is a separate crime and not an enhancement. (And I recognize that the jury found the enhancement not true, which is irrelevant to sentencing.) Nonetheless, I see no defensible reason to allow additional punishment for a gang enhancement while barring additional punishment if the gang participation is a separate crime. The Legislature could not have intended that result.

I therefore agree that the sentence is proper.

NICHOLSON, Acting P. J.

Duarte, J., Dissenting

I begin with a question: If the *gang* charge were assigned the "longest potential term of punishment," would we question the application of section 654 to stay sentence for *assault and vandalism* on the facts of this case?

I have pored over this question at length, and have concluded that I, at least, would not.

Here we have a jury specifically instructed that it could consider *only* the assault and vandalism charges to prove an essential element of the gang charge. There was no special verdict form; we must presume the jury considered both the assault and vandalism charges in finding the third element of the gang charge.

Under these specific circumstances, I fail to see how imposing sentence on the assault and vandalism, as well as the gang charge, of which the underlying charges of assault and vandalism are an integral part, is not punishing the assault and vandalism charges twice, in clear violation of Penal Code[1] section 654.

Therefore, I am compelled to dissent from Part VIII.

The majority opinion focuses on the extra elements, activities, associations, and culpabilities associated with the gang charge, as does the concurrence. I do not think that any of these "extras," although certainly not unimportant, are

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[1] Further statutory references are to the Penal Code.

actually *criminal acts*, but I save that discussion for another day. The focus of my disagreement is not the gang charge but rather the assault and vandalism. In this particular case, because of the manner in which the case was charged, prosecuted, and instructed, the assault and vandalism charges are, in and of themselves, the *entirety* of the third element of the gang charge. Punishing these defendants for the gang charge in addition to punishing them for the assault and vandalism charges punishes them under *two provisions of law* for the criminal acts that constitute assault and/or vandalism. We need not even address defendants' intent and objective, because section 654 applies by its plain language to the facts of this case, given the manner in which it was prosecuted.

I recognize that applying section 654 in this case mandates a counterintuitive result. This is because, here, the gang charge, while the more culpable behavior, carries a lesser sentence than assault, and certainly a lesser sentence than assault and vandalism combined. Thus, the underlying acts of the gang charge are also those acts that "provide[] for the longest potential term of imprisonment." (§ 654, subd. (a).) This creates the anomalous result of sentencing only on the underlying conduct, the assault and vandalism charges, rather than on the gang charge--a result that appears to thwart the goal of punishment commensurate with culpability.[2]

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[2] I do not agree, however, that applying section 654 here renders the gang charge a nullity. First, had the jury been

As I agree that this is an important goal, I understand and share the consternation created by this anomalous result. But I simply cannot agree to disregard the otherwise proper application of section 654 merely because of the anomaly created by the particular set of circumstances that present themselves here.

I therefore respectfully dissent from Part VIII, and concur in the remainder of the majority opinion.

DUARTE, J.

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permitted to consider the stealing of the beer as felonious criminal conduct, or had the People charged the case differently, the application of section 654 would not be at issue. Further, even where section 654 bars a separate sentence, the conviction is not inconsequential to a defendant should he reoffend. In a subsequent prosecution, the gang conviction could be charged as a serious felony prior within the meaning of section 1192.7, and could result in an additional five-year sentence. There are other ramifications of conviction as well. The conviction itself is not without consequence.