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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN PENA et al., Defendants and Appellants	H023394 (Santa Clara County Super.Ct.No. CC091842)

In this case, we are called upon to apply the principles set forth in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] (*Crawford)*, in the context of the joint trial of five alleged gang members accused of an assault on a fellow jail inmate.

Defendants Castenada, Patlan, Pena and Perez contend that the admission of codefendant Carrasco's extrajudicial statement to Officer Tarabini violated their constitutional rights to confrontation and cross-examination. They also claim that the use of this statement by the gang expert, Officer Miranda, hindered their ability to determine the reliability of the expert opinion, and was prejudicial. We agree and reverse. Because we determine that the convictions and gang enhancements of several defendants must be reversed, we do not reach many of the issues raised in the original briefs.[1]

[1] Each defendant has also filed a petition for writ of habeas corpus which we ordered considered with this appeal. We dispose of the habeas petitions by separate orders filed this day. (H025848, In re Castenada; H026658, In re Pena; H026831, In re Patlan; H026875, In re Carrasco; H027215, In re Perez, see Cal. Rules of Court, rule 24(b).)

BACKGROUND

On October 27, 2000, Charlie Langenegger was serving time in Santa Clara County Jail, and housed in a 16-man cell, with four of the named defendants (Gustavo Castenada, Jerry Patlan, Steven Pena and Andres Perez) and others. Defendant Christopher Carrasco was housed in a four-person cell across the walkway. Langenegger worked as a barber in the jail and as such, was given certain privileges, including being allowed to go to different parts of the facility.

That night, Langenegger was asleep on his bunk, when he was awakened by someone calling his name. He went to the front gate of the cell and was hit multiple times from behind. According to his testimony at trial, he did not see who hit him, but he could tell that there was more than one person involved. Langenegger was hit and kicked numerous times, and eventually yelled to the guard, "Man down."

Correctional Officer Lee testified that he responded to the call and found Langenegger holding on to the cell gate and looking dazed. He reported that Langenegger said: " 'Chris called me to the gate. I got out of bed, and Norteños jumped me.' " Officer Lee took Langenegger to another location, and then investigated the incident. In the cell, he noticed defendant Patlan breathing rapidly.

At trial, Osvaldo Pascali, a cellmate who witnessed the attack, testified. He said that Carrasco called Langenegger to the gate, and Perez hit him in the head from behind. Pascali said that Pena, Patlan and Castenada joined the attack and kicked and punched Langenegger, as he fell to his knees and then to the ground. Pascali reported the same details to Officer Lee. Pascali also said he was afraid for his safety as a result of his testimony. He testified that he was currently in protective custody within the jail, but still did not feel adequately protected. He said that a person who is labeled a "snitch" is often killed.

Sergeant Marc Tarabini, a jail supervisor, called Langenegger after he was sent to the emergency room. When Sergeant Tarabini asked who had attacked him,

Langenegger refused to give names, saying he was afraid of the Norteños. Langenegger told Tarabini that the Norteños "run the tier and run the whole place." He said that he was being pressured by Norteños to run "kites" (messages passed by inmates) to the maximum security area and that he had refused.

When Langenegger returned from the hospital, Officer Lee contacted him and gave him the names of the defendants, and asked if they were the ones who attacked him. According to Officer Lee, Langenegger nodded his head and thanked him.

At trial, Langenegger denied making any of the statements about the attack as reported by Tarabini or Lee. He testified that his only statements were that he did not know who attacked him. He also admitted to a code of silence in prison, and said that an inmate testifying against another inmate would be stabbed. He said that protective custody does not provide protection from this type of retaliation. Langenegger also testified as to his injuries: his jaw was broken, it was wired shut for four months, and required several surgeries. He also suffered extensive bruising and a chipped hip bone.

Also at trial, Sergeant Tarabini testified about an interview he had with defendant Carrasco on the night of the incident. According to Tarabini, Carrasco admitted that he had called Langenegger to the gate because Langenegger had "[d]isrespected a Norteño gang member" and "had to be checked." Sergeant Tarabini also noticed that Carrasco appeared to be under the influence of a stimulant, and Carrasco admitted using methamphetamine that night.

Various law enforcement officers testified at trial concerning the evidence of gang membership accumulated on each of the defendants.

Sergeant David Miranda qualified as a gang expert with the Department of Corrections, and explained that "The Machine" is a regimented exercise program performed by Norteño gang members while in custody. Sergeant Miranda testified in detail about the origins of the Norteño gang especially in prison. He explained membership requirements, as well as specific tattoos and the color red as common

symbols. He further opined that, based on the facts of the case, he believed that the assault on Langenegger was carried out with the specific intent to promote and further Norteño gang activity. He also found significant defendant Carrasco's statement to Sergeant Tarabini, that Langenegger had "disrespected a Norteño gang member" and "had to be checked." This statement showed the attack was gang-related, according to Miranda.

Several defendants presented witnesses at trial. Defendant Perez testified himself and stated that he was not a Norteño gang member and did not know the defendants when he was first placed in cell 336. He also testified that he called Langenegger to the bars, and as Langenegger approached, Perez punched him in the mouth. As Langenegger staggered, Perez continued to punch him, and he denied that anyone else was involved in the assault. Perez explained that about 20 minutes before the assault, he learned that Langenegger had previously been convicted of rape. Perez's younger sister had been raped and he was upset that the rapist was released after only a year in custody. Perez's mother Alice testified, and confirmed the details surrounding the sister's rape. She also testified that she had never known Perez to be involved in a gang, and that before he was incarcerated, he was working 12 to 14 hours a day. Correctional Officer Dennis Cortez also testified that he was a long-time friend of Perez's and had never known him to be involved in a gang.

Defendant Patlan called Parole Agent Michelle Donovan as a witness to give details about Osvaldo Pascali's parole hearing on November 8, 2000. Agent Donovan testified that Pascali was returned to custody on a parole violation on October 10, 2000, and at his hearing on November 8, he received credit for time served and was released. She admitted that she had mentioned to the parole hearing officer that Pascali had cooperated in the investigation of five other inmates, but she did not believe that fact had any bearing on the result of the parole hearing.

Defendant Pena presented evidence that there were 16 people housed in cell 336 on the night of the incident, and that seven of them were believed to be gang members.

Defendants were all charged with assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count 1),[2] and battery with serious bodily injury (§§ 242, 243, subd. (d); count 2). The information also alleged personal infliction of great bodily injury and offenses committed for the benefit of a criminal street gang. (§§ 12022.7, 186.22, subd. (b)(1).) (Prior convictions and strikes were also individually alleged.) A jury found the defendants guilty as charged.[3]

DISCUSSION

I

Admission of Codefendant Carrasco's Statement

Background

Prior to trial, the prosecution moved to admit codefendant Carrasco's statement to Sergeant Tarabini that Langenegger had "disrespected a Norteño gang member" and "had to be checked." Carrasco refused to testify at trial. Defendants Castenada, Patlan, Pena, and Perez vigorously objected to the admission of Carrasco's statement, arguing that the statement both implicated them as alleged Norteños on trial for the assault, and informed the jury that the assault was committed for gang-related reasons. The defendants also requested severance of their trials. The court overruled defendants' objection, stating: "[I]f the evidence bears out what [the prosecutor] has indicated it would, the Court would

[2] All further statutory references are to the Penal Code unless otherwise specified.

[3] Defendant Pena was sentenced to an aggregate state prison term of 12 years. Defendant Castaneda was sentenced to an aggregate state prison term of 10 years. Defendant Perez was sentenced to an aggregate state prison term of 13 years. Defendant Patlan was sentenced to an aggregate state prison term of 26 years. Defendant Carrasco was sentenced to an indeterminate term of 33 years to life.

permit that statement to come in. It is a very general statement without specifying which defendant or which person might have been disrespected." The court denied the prosecutor's further request to broaden the admissibility of the evidence by instructing the jury that it could consider the statement for nonhearsay purposes as foundation for the gang expert's testimony concerning the gang motivation for the assault.

Before Sergeant Tarabini testified to Carrasco's statement, at the prosecutor's request, the court admonished the jury: "The statements of one defendant cannot be used against other defendants in this case. This applies specifically to what the Defendant Carrasco said to Sergeant Tarabini." After closing arguments, the court instructed the jury that: "Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted." (See CALJIC No. 2.09.)

Discussion

In *People v. Fletcher* (1996) 13 Cal.4th 451, our Supreme Court set forth the legal background to its consideration of a question concerning an out-of-court confession and the constitutional right of confrontation.

"The confrontation clause of the Sixth Amendment to the federal Constitution, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The right of confrontation includes the right of cross-examination. (*Pointer v. Texas* (1965) 380 U.S. 400, 404, 406-407.) [¶] A recurring problem in the application of the right of confrontation concerns an out-of-court confession [FN: The problem is not limited to confessions but extends also to partial admissions of guilt. We use the term 'confession' in the text, rather than the more cumbersome 'extrajudicial statement,' purely for convenience] of one defendant that incriminates not only that defendant but another defendant jointly charged. Generally,

the confession will be admissible in evidence against the defendant who made it (the declarant). (See Evid. Code, § 1220 [hearsay exception for party admissions].) But, unless the declarant submits to cross-examination by the other defendant (the nondeclarant), admission of the confession against the nondeclarant is generally barred both by the hearsay rule (Evid. Code, § 1200) and by the confrontation clause (U.S. Const., 6th Amend.). If the two defendants are tried together, the trial court may instruct the jury to consider the confession in determining the guilt only of the declarant, but it may be psychologically impossible for jurors to put the confession out of their minds when determining the guilt of the nondeclarant. The United States Supreme Court has held that, because jurors cannot be expected to ignore one defendant's confession that is 'powerfully incriminating' as to a second defendant when determining the latter's guilt, admission of such a confession at a joint trial generally violates the confrontation rights of the nondeclarant. (*Bruton v. United States* (1968) 391 U.S. 123, 126-137.) Earlier, this court had reached a similar conclusion on nonconstitutional grounds. (*People v. Aranda* (1965) 63 Cal.2d 518, 528-530.)

"More recently, however, the United States Supreme Court has stated that the positive authority of *Bruton v. United States, supra,* 391 U.S. 123 (holding that the admission, at a joint trial, of a nontestifying defendant's confession implicating a codefendant, even with an appropriate limiting instruction, violates the codefendant's rights under the confrontation clause) extends only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant. (*Richardson v. Marsh* (1987) 481 U.S. 200, 207-208.) The court held that a defendant's rights under the confrontation clause are not violated by the admission in evidence of a codefendant's confession that has been redacted 'to eliminate not only the defendant's name, but any reference to his or her existence,' even though the confession may incriminate the defendant when considered in conjunction with other evidence properly admitted against the defendant. (*Id.* at p. 211, fn. omitted.) The court expressly

declined to decide whether a codefendant's confession that had been redacted by replacing the nondeclarant's name with a symbol or neutral pronoun could be admitted in evidence at a joint trial without violating the nondeclarant's rights under the confrontation clause. (*Id.* at p. 211, fn. 5.)

"We granted review in this case to address the issue expressly reserved in *Richardson v. March, supra*, 481 U.S. 200—that is, whether it is sufficient, to avoid violation of the confrontation clause, that a nontestifying codefendant's extrajudicial confession is edited by replacing all references to the nondeclarant's name with pronouns or similar neutral and nonidentifying terms. Such a confession is 'facially incriminating' in the sense that it is sufficient by itself, without reference to any other evidence, to incriminate someone other than the confessing codefendant. It is not 'facially incriminating' only in the sense that it does not identify this other person by name.

"We conclude that whether this kind of editing—which retains references to a coparticipant in the crime but removes references to the coparticipant's name—sufficiently protects a nondeclarant defendant's constitutional right of confrontation may not be resolved by a 'bright line' rule of either admission or universal exclusion. Rather, the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial. The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (*People v. Fletcher, supra*, 13 Cal.4th at pp. 455-456.)

Defendants here assert that not only could they not explore the declarant Carrasco's credibility, but the spillover prejudice from the statement coming in ostensibly only against the declarant, but in fact tarring all the defendants alleged to be Norteños, was in violation of their rights to confront the witnesses against them.

The Attorney General responds that the statement itself did not name names and that the trial court limited its use by the jury in a specific instruction. The Attorney General further asserts that *Bruton* only applies to facially incriminating statements, while the statement here contained only an inference and was not directly accusatory of any of the codefendants.

However, the context of the question presented here is of great import. Crimes that arise from gang activity, and in which gang enhancements are alleged, differ distinctly from the cases in which the rules for admission of codefendant confessions were devised. For example, here, the defendants were all alleged to be Norteño prison gang members, the truth of which had to be proved beyond a reasonable doubt by the prosecutor. But the statement by a nontestifying codefendant, that the victim disrespected the Norteños and had to be checked, or in essence that the Norteños did it, therefore directly implicates that these specific defendants did it. And, in this specific situation, a limiting instruction may not protect any of the defendants from spillover prejudice, because the group context is an inextricable part of the charges and the evidence.

More importantly, during the pendency of these appeals, the United States Supreme Court decided the case of *Crawford, supra,* 541 U.S. 36 [124 S.Ct. 1354], which changed the focus in confrontation clause analysis. Thus, we requested and the parties submitted supplemental briefs addressing the relevance of *Crawford* to the issues at hand.

"Prior to *Crawford,* the admission of a hearsay statement under a firmly-rooted exception to the hearsay rule or when there were indicia of reliability did not violate a defendant's right of confrontation. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.)" (*People v. Corella* (2004) 122 Cal.App.4th 461, 467.) The Supreme Court had stated that "the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the evidence falls within a firmly rooted

hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability. [Citation.]" (*Lilly v. Virginia* (1999) 527 U.S. 116, 124-125; see also *Ohio v. Roberts, supra,* 448 U.S. at p. 66.) The particularized guarantees of trustworthiness must be based on the circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." (*Idaho v. Wright* (1990) 497 U.S. 805, 819.)

In *Crawford*, the United States Supreme Court concluded that an out-of-court testimonial statement made by a witness to law enforcement officials is barred by the Sixth Amendment's Confrontation Clause—even if there has been a judicial determination that the statement bears particularized guarantees of trustworthiness—unless the defendant had a prior opportunity to cross-examine the witness and the witness is unavailable to testify at trial. (See *People v. Pirwani* (2004) 119 Cal.App.4th 770, 774 (*Pirwani*).) In *Pirwani*, we described the facts of *Crawford*: "There, the defendant was charged with assault but claimed self-defense. The police interrogated both defendant and his wife, Sylvia. Sylvia's tape-recorded statement subtly undermined her husband's defense. At trial, Sylvia did not testify because defendant invoked the state marital privilege. [Citation.] The prosecution then offered her taped statement to police as a statement against her penal interest. The defendant objected on Confrontation Clause grounds, but the Washington state trial court found the statements trustworthy and admissible under *Ohio v. Roberts*. On appeal, the intermediate appellate court reversed, citing various factors that, in its view, rendered Sylvia's statement unreliable under *Ohio v. Roberts*. The Washington Supreme Court overturned the Court of Appeal, finding that Sylvia's statement did not fall under a 'firmly rooted' hearsay exception, but it was nonetheless reliable under *Roberts* because it 'interlocked' with the defendant's statement. [Citation.] The United States Supreme Court 'granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause.' [Citation.]

"After examining the historical origins of the Clause, the nation's high court repudiated the *Ohio v. Roberts* framework of 'open-ended balancing tests' in favor of a 'categorical' rule that requires 'unavailability and a prior opportunity for cross-examination' with respect to 'core testimonial statements that the Confrontation Clause plainly meant to exclude.' [Citation.]" (*Pirwani, supra,* 119 Cal.App.4th at p. 784.)

Although the *Crawford* court declined to spell out a comprehensive definition of testimonial, it declared: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Crawford, supra,* 541 U.S. at p. ___, 124 S.Ct. at p. 1374.) The Supreme Court explained: "That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands." (*Id.* at p. ___, 124 S.Ct. at p. 1372.)

Recently, in *People v. Song* (2004) 124 Cal.App.4th 973, the Third District concluded that convictions on certain charges must be reversed where extrajudicial statements by a codefendant to a police officer were introduced at trial, even though the jury was instructed to disregard the statements in determining the defendant's guilt or innocence. Defendant Song was convicted of several counts of kidnapping and sexual assault. Incriminating statements by two codefendants to police were introduced at trial. The trial judge then struck the statements from the record and admonished the jury to disregard them. The reviewing court entertained supplemental briefs on *Crawford*. With regard to the sexual assault charges, the court found that the statements did not speak directly to the charges, and thus, admission of the statements was harmless. However, with regard to the kidnapping charge, the statements regarding whether the victim went

with the defendant voluntarily go to the central issue of the charge, and the admission of the statements was prejudicial. The court explained: "[W]here there is both *Aranda-Bruton* error and *Crawford* error, the limiting instruction is insufficient to eliminate *Crawford* error. A limiting instruction is not always an adequate substitute for a defendant's constitutional right of cross-examination." (*People v. Song*, *supra*, 124 Cal.App.4th at p. 984.)

Other courts have reached similar conclusions.[4] In *Hale v. State* (Tex.App. 2004) 139 S.W.3d 418, the court concluded that an accomplice's written inculpatory testimonial statement made in the course of custodial interrogation was inadmissible in defendant's trial, and required reversal of defendant's convictions. "The admission of a testimonial statement by an accomplice or codefendant as evidence of guilt of the defendant on trial, absent opportunity by the defendant to cross examine the declarant, is 'sufficient to make out a violation of the Sixth Amendment.' [*Crawford*, *supra*, 124 S.Ct. at pp 1374-1375.] . . . Because the Sixth Amendment right of confrontation is a fundamental right, and because a violation of that right constitutes constitutional error, we must reverse a trial

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[4] In *People v. Combs* (2004) 34 Cal.4th 821, 840-844, our Supreme Court addressed *Crawford* in the context of adoptive admissions. Combs involved codefendants tried separately, but interviewed jointly by the police. One defendant's statements inculpated the other defendant and he did not protest. The Supreme Court concluded the statements were adoptive admissions. As such they were admitted for a non-hearsay purpose and thus the defendant's Sixth Amendment right to confrontation was not implicated.

The California Supreme Court has also granted review in several cases dealing with post-*Crawford* confrontation clause issues, primarily cases involving 911 calls (*People v. Caudillo*, previously published at 122 Cal.App.4th 1417, review granted January 12, 2005, S129212; *People v. Lee*, previously published at 124 Cal.App.4th 483, review granted March 16, 2005, S130570) or victim statements (*People v. Cage*, previously published at 120 Cal.App.4th 770, review granted October 13, 2004, S127344; *People v. Adams*, previously published at 120 Cal.App.4th 1065, review granted October 13, 2004, S127373; *People v. Kilday*, previously published at 123 Cal.App.4th 406, review granted January 19, 2005, S129567).

court's judgment when Confrontation clause error is present unless we can determine beyond a reasonable doubt that the error did not contribute to the conviction. [Citations.]" (*Hale, supra,* at pp. 421-422; see also *Davis v. Alaska* (1974) 415 U.S. 308, 318, holding that denial of effective cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.")

In *Davis v. U.S.* (D.C. 2004) 848 A.2d 596, the court concluded that the codefendant's confession should not have been admitted in defendant's perjury trial. The statement was taken during police interrogation and was not subject to cross-examination. The declarant refused to testify. As the admission was a violation of the defendant's Sixth Amendment rights, the court considered whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) "On balance we think the evidence heard by the jury was not sufficiently weighty that we can confidently say that, without Daniels's confession, the jury would have reached the same result." Phrased differently, the court stated it could not conclude that it had the requisite degree of assurance that the verdict was unaffected by the statements. (*Davis v. U.S., supra,* 848 A.2d at p. 600.)

In the present case, defendant Carrasco's statement to Sergeant Tarabini was definitely testimonial, and as such required full rights of confrontation under the Sixth Amendment. (*Crawford, supra,* 541 U.S. at p. ___, 124 S.Ct. at p. 1374.) Whether ostensibly admitted only against the declarant, the statement reflected against the group as a whole and thus each defendant alleged to be a member.[5] Each defendant's rights to confrontation were violated. "Where, as in this case, there has been a violation of an appellant's constitutional right to confrontation, reversal is required unless we can conclude that the error was harmless beyond a reasonable doubt." (*People v. Archer,*

[5] We note that the prosecutor actually used the statements against all defendants during closing argument.

supra, 82 Cal.App.4th at p. 1394.) Certainly this statement reflected on the motive element of the gang enhancement. Although the Attorney General continues to argue that the statement was not facially incriminating and was only admitted against Carrasco himself, we find this argument particularly unavailing in the present joint trial criminal street gang context. We cannot conclude the erroneous admission of the statements was harmless beyond a reasonable doubt.

As to the assault itself, we are unable to say with confidence that the erroneous admission and use of Carrasco's statement (by both the prosecutor and the expert witness[6]) is harmless beyond a reasonable doubt. At trial, Langenegger repudiated his earlier statements to a correctional officer and denied knowing who attacked him. The erroneous admission of Carrasco's statement supported Officer Lee's version and thus undercut Langenegger's trial testimony. The other identification testimony at trial was provided by Pascali, a confirmed informant, whose credibility and motives were in question. The admission of Carrasco's statement which may have been made in questionable circumstances and was definitely made without the benefit of cross-examination, made it easier for the jury to determine guilt by association or merely because the defendants were alleged to be members of the Norteño gang. The lesson of *Crawford* is that the right of confrontation is vital. Thus, we cannot say with the requisite degree of assurance that the verdict was unaffected by the statement.

The convictions of defendants Castenada, Patlan, and Pena are reversed. The gang enhancement on the conviction of defendant Perez is stricken.

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[6] See Note, Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington* (2004) 55 Hastings L.J. 1539.

DEFENDANT CARRASCO

II

Specific Intent for Gang Enhancement

Defendant Carrasco asserts that insufficient evidence supported the gang enhancement because the prosecutor failed to prove the requisite specific intent. We disagree.

The gang enhancement, section 186.22, subdivision (b)(1) provides for a sentence enhancement for "any person who is convicted of a felony committed 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, . . ." Defendant reads this provision to mean that the person convicted of a felony must intend by that felony to promote, further, or assist additional criminal conduct by gang members. He argues that the assault was carried out to punish Langenegger for refusing to run kites, but no evidence was presented that running kites was criminal conduct or that he (Carrasco) knew running kites was criminal conduct. Thus, he reasons, there was insufficient evidence to prove the further criminal conduct.

Defendant relies on the general definition of specific intent: "A specific intent is an intent to accomplish some additional consequence by commission of the proscribed act." (*People v. Lyons* (1991) 235 Cal.App.3d 1456, 1458.) From this, defendant extrapolates that section 186.22, subdivision (b)(1) "expressly requires the prosecution to prove that the defendant undertook the charged offense with the intent to promote further, additional conduct which he *knew* was criminal."

The Attorney General responds that defendant misreads the statute, in that no additional conduct is required, but simply the felony itself must have been committed with the specific intent to promote, further, or assist, i.e., to aid criminal conduct by the

gang. The Attorney General further contends that the testimony from the gang experts adequately supported the specific intent requirement.

Our review for sufficient evidence is conducted according to well established principles: "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Evidence of statements from Langenegger himself as well as the statement of defendant Carrasco established that Langenegger was assaulted because he would not run kites for the Norteños. Other evidence showed Norteño membership or connection for defendants. Sergeant Miranda testified that such an assault could remove Langenegger as an obstacle, and could intimidate others to perform the gang's requests. Miranda opined, based on the facts of the case that the assault was carried out with the specific intent to promote and further the gang activity of the Norteños. This satisfies the statute.

We also reject defendant's interpretation of the statutory language. In *People v. Loeun* (1997) 17 Cal.4th 1, 8-9, our Supreme Court explained the applicable principles of statutory construction: "In construing the relevant provisions of the STEP Act [i.e., the Street Terrorism Enforcement and Prevention Act, particularly section 186.22], as with any statute, we strive to ascertain and effectuate the Legislature's intent. [Citations.] 'In undertaking this determination, we are mindful of this court's limited role in the process of interpreting enactments from the political branches of our state government. In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, " ' "whatever may be thought of the wisdom, expediency, or policy of the act." ' " ' [Citation.] We give the words of the statute ' "their usual and

ordinary meaning." ' [Citations.] ' "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." [Citation.] Interpretations that lead to absurd results or render words surplusage are to be avoided. [Citations.]' [Citation.] If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." [Citations.] "Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.' [Citations.]" ' "

Defendant insists that the statute must be interpreted to require some additional criminal conduct. He points to cases, such as *In re Ramon T.* (1997) 57 Cal.App.4th 201 [assault and battery committed to free gang member from arrest by police officer], *People v. Gardeley* (1996) 14 Cal.4th 605 [assault on victim committed to frighten residents and secure gang's drug-dealing stronghold], and *People v. Ortiz* (1997) 57 Cal.App.4th 480 [robbery/murder committed with specific intent to frame rival gang members]. But nothing in those cases mandates a requirement that there be specific additional criminal conduct intended.

We disagree with defendant's criticism of *People v. Olguin* (1994) 31 Cal.App.4th 1355 and *People v. Gamez* (1991) 235 Cal.App.3d 957 (overruled on another ground in *People v. Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10), as wrongly decided. In *Olguin*, the gang enhancement was applied when the defendant killed a rival gang member because he disrespected defendant's gang. In *Gamez*, the defendant shot at cars and people in a rival gang's territory, triggering possible retaliatory conduct, and thus the gang enhancement was appropriate.

The plain meaning of the statute requires a defendant to commit a felony in association with a gang with the specific intent to assist the gang in criminal activity. Here, substantial evidence supported the finding that defendants committed the assault on Langenegger with the specific intent to punish him for not violating prison regulations to

aid the gang and to demonstrate the gang's power in the face of disobedience or disrespect.[7]

III

Jury Instructions on Aiding and Abetting

Defendant Carrasco[8] also claims the trial court erred and violated his right to due process by giving erroneous or incomplete instructions on the principles of aiding and abetting.

Over defense objections, the trial court agreed to the prosecutor's request to give aiding and abetting instructions "for the natural and probable consequences of the commission of the lesser act . . . ." But the court noted that "[t]his instruction particularly is addressed to the conduct of the Defendant Carrasco." The court then gave the standard jury instructions on aiding and abetting, CALJIC Nos. 3.01 and 3.02.[9] Defendant

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[7] It would indeed be incongruous, as suggested by the Attorney General, if a defendant who commits an assault in order to help another gang member escape from police custody (see *In re Ramon T., supra,* 57 Cal.App.4th 201), would be punished more severely than a defendant who commits murder in order to avenge a prior act of disrespect (see *People v. Olguin, supra,* 31 Cal.App.4th 1355).

[8] The argument was originally made by defendant Patlan in his opening brief, and joined by defendants Carrasco and Pena.

[9] The court instructed the jury as follows: "A person aids and abets the commission or attempted commission of a crime when he: [¶] One. With knowledge of the unlawful purpose of the perpetrator; and [¶] Two. With the intent or purpose of committing or encouraging or facilitating the commission of the crime; and [¶] Three. By act or advice aids, promotes, encourages, or instigates the commission of the crime. [¶] A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. [¶] One who aids and abets in the commission of a crime or crimes is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by the principal which is a natural and probable consequence of the crimes originally aided and abetted. [¶] In order to find the defendant guilty of the crimes as charged in Counts 1 or 2, you must be satisfied beyond a reasonable doubt that:

complains that in the context of the aiding and abetting instructions, the court failed to define "misdemeanor assault," "felony assault," or "felony battery." The court also failed to limit these instructions to defendant Carrasco.

It is well established that "[a] trial court is required to instruct sua sponte only on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 442.) The United States Supreme Court has held that jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) Similarly, lightening the prosecution's burden of proof violates the defendant's due process rights under the state Constitution. (*People v. Flood* (1998) 18 Cal.4th 470, 479-480.)

The trial court has no sua sponte duty to give amplifying instructions in the absence of a request if the terms given are commonly understood, but it does have a duty to define where the term has a technical meaning peculiar to the law. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [instruction necessary on legal definition of extortion].)

Defendant cites to several cases where the trial court erred in failing to instruct the jury on the definition of assault: *People v. Sheldon* (1989) 48 Cal.3d 935, 961 [trial court failed to instruct on the definition of assault when assault with a deadly weapon was a lesser offense of the robbery charged, and the People conceded error], and *People v.*

[¶] One. The crime or crimes of misdemeanor assault and/or battery was or were committed; [¶] Two. That the defendant aided and abetted those crimes; [¶] Three. That a coprincipal in that crime committed the crime of felonious assault or battery; [¶] Four. The crimes of felonious assault and/or battery were a natural and probable consequence of the commission of the crimes of misdemeanor assault and/or battery." (See CALJIC Nos. 3.01, 3.02.)

McElheny (1982) 137 Cal.App.3d 396, 403-404 [trial court error when no definition of assault given in prosecution for aggravated assault]. (See also *People v. Shoals* (1992) 8 Cal.App.4th 475, 489-490 [duty to define "maintaining" for purposes of crime of maintaining a place for drug sales].)

Defendant then reasons that the jury was thus allowed to convict based on proof that an unspecified felonious assault or battery was committed with no requirement of force likely to produce great bodily injury or infliction of serious bodily injury. However, he concedes that the jury was instructed as to the elements of assault, assault by means likely to produce great bodily injury, and battery with serious bodily injury.[10] Defendant complains that the court did not identify any of these crimes as misdemeanors or felonies.

However, immediately before defining each crime charged in count 1 and count 2, the court had instructed the jury that "[t]he Information in this case alleges that each defendant committed two felonies . . . ." And immediately after instructing the jury on the principles of aiding and abetting the court instructed the jury that "[t]he crime of assault, in violation of Penal Code Section 240, a misdemeanor, is a lesser crime included in the crime charged in Count 1. . . . [¶] Assault has been previously described for you following the elements of assault by means of force likely to produce great bodily

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[10] The jury was instructed: "Each defendant is accused in Count 1 of having violated Section 245[, subdivision] (a)(1) of the Penal Code, a crime. [¶] Every person who commits an assault upon the person of another by means of force likely to produce great bodily injury is guilty of a violation of Section 245[, subdivision] (a)(1) of the Penal Code, a crime. [¶] . . . [¶] Each defendant is accused in Count 2 of having committed the crime of battery with serious bodily injury, a violation of Section 243[, subdivision] (d) of the Penal Code. [¶] Every person who willfully and unlawfully uses any force or violence upon the person of another resulting in the infliction of serious bodily injury is guilty of the crime of battery with serious bodily injury, in violation of Penal Code section 243[, subdivision] (d) of the Penal Code."

injury." The court had previously instructed on simple battery and identified it as a misdemeanor.

Defendant suggests that the jury could have misinterpreted the aiding and abetting instructions to provide an exception to the necessity for the felony assault and battery to encompass the requisite great or serious bodily injury specifications. But no evidence is provided, and we find this suggestion highly speculative at best. We find no reasonable likelihood that the jury misunderstood these instructions. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

IV

Instructions on Predicate Offenses

Defendant Carrasco[11] further contends the jury may have used an erroneous legal theory to find the two predicate offenses required for the gang enhancement finding.[12] Defendant theorizes that the jury may have mistakenly used the current offense as committed by an aider and abettor, due to incomplete jury instructions, or that the jury might have used the current offense admitted to by defendant Perez when he was only a gang associate, not a full-fledged member.

Background

At trial, the prosecutor used two theories for proving the pattern of criminal activity by showing two predicate crimes had been committed. The first theory was based on defendant Patlan's prior conviction and defendant Perez's admitted assault here; the second theory utilized the present offense as committed by the four alleged gang members.

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[11] This argument was originally made by defendant Castenada in his opening brief, and joined by defendants Carrasco and Pena.

[12] The term "predicate offenses" is used to describe the component crimes that constitute the statutorily required "pattern of criminal gang activity." (See *People v. Gardeley*, *supra*, 14 Cal.4th at p. 610, fn. 1.)

The trial court instructed the jury with CALJIC Nos. 3.00, 3.01 and 3.02 [on aiding and abetting]. The court did not limit these instructions to defendant Carrasco.

Legal Principles

As noted above, under the STEP Act, a defendant's sentence may be enhanced for crimes committed "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b)(1).) The statute defines "criminal street gang" as "[A]ny 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, of [section 186.22,] 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).) A "pattern of criminal gang activity" is defined as "the commission, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

"Thus, a gang otherwise meeting the statutory definition of a 'criminal street gang' . . . is considered a criminal street gang under the STEP Act only if its members 'individually or collectively engage in or have engaged in a pattern of criminal gang activity' (§ 186.22, subd. (f)) by 'the commission, attempted commission, or solicitation of *two or more*' (italics added) of the statutorily enumerated offenses within the specified time frame (§ 186.22, subd. (e); . . .)." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 621.) Moreover, the crime charged can constitute one of the statutorily required predicate offenses to establish the requisite " ' "pattern of criminal gang activity." ' " (*Id.* at p. 625.) But the *Gardeley* court also concluded that: "Nothing in this statutory language

suggests an intent by the Legislature to require the 'two or more' predicate offenses to have been committed 'for the benefit of, at the direction of, or in association with' the gang, . . ." (*Id.* at p. 621.) However, the court cautioned: "Our holding here that the 'two or more' statutorily enumerated offenses that establish the 'pattern of criminal gang activity' described in section 186.22, subdivision (e) need not be 'gang related' does not absolve the prosecution of proving that the charged offense is gang related. (§ 186.22, subd. (b)(1) [providing enhanced penalties only for crimes committed 'for the benefit of, at the direction of, or in association with' the gang].) Thus whenever the prosecution relies on the charged offense to establish one of the 'two or more' offenses necessary to show a pattern of criminal gang activity (§ 186.22, subd. (e)), the prosecution must prove that the offense was gang related." (*Id.* at p. 625, fn. 12.)

In explaining that the current crime or crimes may be considered in assessing the pattern of gang activity, the Supreme Court also stated: "[T]he prosecution can establish the requisite 'pattern' exclusively through evidence of crimes committed contemporaneously with the charged incident." (*People v. Louen*, *supra*, 17 Cal.4th at p. 11.) The Supreme Court has further determined that a crime committed by an aider and abettor does not qualify as a separate crime and thus may not be used to satisfy the statutory requirement of two or more predicate offenses to establish the "pattern of criminal gang activity" under the STEP Act. (§ 186.22, subd. (e); *People v. Zermeno* (1999) 21 Cal.4th 927, 932.)

Defendant registers two specific complaints: (1) the jury could have mistakenly found the predicate offenses by considering the current assault committed by aiding and abetting, or (2) the jury could have found one of the predicate offenses was the assault admitted to by defendant Perez, who was not a full-fledged gang member but only an associate.

As to the first complaint, we have concluded above that the aiding and abetting instructions were correctly given. However, we must conclude that using the assault on

Langenegger, as committed by either two defendants or as committed by Perez (with the second crime committed earlier by Patlan) cannot fulfill the statutory requirement for two predicate offenses committed by gang members, because of our conclusion above that the use of Carrasco's statement violated *Crawford*. As the gang enhancements have been stricken as to defendants Castenada, Patlan, Pena, and Perez, the predicate offenses are not supported by substantial evidence. Thus, the gang enhancement as to defendant Carrasco must be reversed.

V

Denial of *Romero* Motion

Defendant Carrasco contends the trial court abused its discretion in denying his motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), to strike his prior convictions.[13] He claims that the trial court did not recognize that he did not fall within the spirit of the "Three Strikes" law.

According to the Supreme Court in *Romero*, section 1385, subdivision (a) permits a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law. (*Romero, supra,* 13 Cal.4th at pp. 529-530.) A court's discretion to strike a prior conviction is subject both to strict compliance with the provisions of section 1385 and to review for abuse of discretion. (*Romero, supra,* at p. 504.)

The standards for the trial court to follow in determining whether to strike a prior conviction were set forth in *People v. Williams* (1998) 17 Cal.4th 148, 161: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice'

[13] Defendant moved to reduce the charges to misdemeanors (§ 17) or to strike one or both of his strikes (§ 1385). The court refused to reduce the charges and implicitly denied the motion to strike.

pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

In *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, the Supreme Court discussed the standard by which an appellate court should determine whether there has been an abuse of discretion in sentencing. " '[O]n appeal, two additional precepts operate: "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." . . . Concomitantly, "[a] decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'. . ." ' (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at pp. 977-978, citations omitted.)" as quoted in *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250-1251, fn. omitted.)

Defendant insists that his prior strikes were remote (13 years earlier) and arose from one incident (see *People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8),[14] that most of his prior convictions were not violent but were drug-related, that his current crime involved no personal violence, and that a sentence of 33 years to life was not justified.

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[14] In *People v. Benson, supra,* 18 Cal.4th at page 36, footnote 8, the Supreme Court explained that it was not determining whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.

However, a review of the record, including the probation report, shows no arbitrary or irrational decision by the trial court. In fact, defendant's prior strikes were convictions for vehicular manslaughter in which two people were killed. Although these two convictions may have arisen from a single vehicle accident, it is doubtful that the Supreme Court was referring to such circumstances where a single act causes multiple deaths in its footnote in *Benson*. Defendant's record consisted of nine felonies and 11 misdemeanors and he had spent most of his life in prison since he was 21 years old, frequently returning to prison on parole violations. We cannot conclude that defendant led a crime-free life during the period between his strike priors and his current crimes, a factor which would give significance to the remoteness in time of those strikes. (See, e.g., *People v. Gaston* (1999) 74 Cal.App.4th 310, 321; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) The current offense obviously occurred while defendant was in custody,[15] and he continued to deny any responsibility for the assault.

In summary, we agree with the conclusion of the court in *People v. Barrerra* (1999) 70 Cal.App.4th 541, 555: "On this record, where the trial court considered the relevant criteria, including appellant's lengthy criminal history and the timing and nature of his offenses, none of which reflect well upon his prospects, we find no abuse of discretion in the trial court's refusal to strike one or both of appellant's prior felony convictions. [Citation.]" (See also *People v. Strong* (2001) 87 Cal.App.4th 328 [reviewing court reversed trial court ruling striking one assault with a deadly weapon conviction when defendant had long criminal record even if all nonviolent]; *People v. Gaston*, *supra*, 74 Cal.App.4th 310 [continuing life of crime, unsatisfactory performance on parole, even if prior strike was remote in time]; *People v. Barrera*, *supra*, 70

[15] The Attorney General points out that defendant was in custody awaiting sentencing on a charge of possession of narcotics for sale. He was then sentenced to a nine-year prison term on that case, which had originally been charged as a three strikes case, with one strike dismissed as a part of defendant's plea.

Cal.App.4th 541 [even though defendant had two convictions arising out of one case 14 years earlier, trial court's refusal to strike was justified by long criminal history, including numerous probation and parole violations, even if many crimes arose from drug addiction].)

DEFENDANT PEREZ

V

CALJIC NO. 17.20

Defendant Perez challenges the true finding on the great bodily injury enhancement as the product of an incorrect jury instruction, CALJIC No. 17.20, specifically the second alternative theory.

Defendant was charged with an enhancement for the personal infliction of great bodily injury pursuant to section 12022.7.[16] At trial, he testified that he punched Langenegger in the mouth, and then kept hitting him. Osvaldo Pascali testified he saw Langenegger walk to the gate, where defendant Perez punched him in the face and knocked him down. Both Langenegger and Pascali testified that the others then joined in, hitting and kicking Langenegger. His injuries were severe, including a broken jaw which required several surgeries.

The jury was instructed with CALJIC No. 17.20, as follows: "When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he may have been found to have inflicted great bodily injury upon the person if: [¶] One. The application of unlawful physical force upon the victim was of such a nature that, by itself it could have caused the great bodily injury suffered by the

[16] Section 12022.7, subdivision (a) provides, in pertinent part: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

victim; or [¶] Two. That at the time that the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim."

In *People v. Cole* (1982) 31 Cal.3d 568, the Supreme Court held that the phrase "personally inflicts" in section 12022.7 is unambiguous and means what it says: "[T]he individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*People v. Cole, supra,* at p. 572.) The court further stated: "[T]he Legislature intended the designation 'personally' to limit the category of persons subject to the enhancement to those who directly perform the act that causes the physical injury to the victim." (*Id.* at p. 579.)

Several years later, in the case of *People v. Corona* (1989) 213 Cal.App.3d 589, the Fourth District expanded the concept of personal infliction to include those participants in a group beating where the victim's injuries could not be traced to a specific act by the defendant, but the defendant had engaged in conduct which could have caused the injuries. The court declined to set forth a universally applicable test for distinguishing accomplices from direct participants in the infliction of great bodily injury, but concluded "only that when a defendant participates in a group beating and when it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a great bodily injury enhancement if his conduct was of a nature that it could have caused the great bodily injury suffered." (*Id.* at p. 594.)

CALJIC No. 17.20 sets forth the group beating concept developed in *Corona*, but it further expands the concept to include as an alternative: "(2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would

apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim." Defendant insists that this alternative is an incorrect statement of the law, and because it is impossible to tell which alternative the jury relied on in finding he personally inflicted great bodily injury as a result of a group beating, the true finding on the enhancement must be reversed.

We agree that the second alternative in CALJIC No. 17.20,[17] as quoted above, is facially inconsistent with the statutory language that requires a finding that the defendant personally inflicted great bodily injury. Instead, the "clear and unambiguous" statutory language "limit[s] the category of persons subject to the enhancement to those who directly perform the act that causes the physical injury to the victim." (*People v. Cole, supra,* 31 Cal.3d at p. 579.) The second alternative theory is erroneous to the extent that it permits the jury to substitute a knowledge finding for a finding that the defendant directly performed the act that caused physical injury to the victim.

However, we must still determine whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Frye* (1998) 18 Cal.4th 894, 957.) We view the instruction in the context of the entire charge to the jury. (*Ibid.*) Defendant maintains that where, as here, the jury is instructed on alternate theories, one of which is legally inadequate, reversal is required unless the record reflects that the jury's finding was not based on the legally invalid theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130.) Because such a sentence enhancement increases defendant's penalty for the underlying crime, any misinstruction must be reviewed under the standard of *Chapman* v. *California, supra,* 386 U.S. 18. In other words, the finding on the enhancement must be

[17] This question is currently before the Supreme Court in *People v. Modiri*, review granted December 23, 2003, S120238.

reversed unless we are satisfied beyond a reasonable doubt that the jury's finding was not based on the legally erroneous second alternative theory in CALJIC No. 17.20. In making this determination, we examine the evidence, arguments of counsel, any communications from the jury, and the verdict. (*People v. Guiton, supra,* 4 Cal.4th at p. 1130.)

Here, defendant himself admitted that he punched Langenegger in the mouth, and then kept hitting him. Osvaldo Pascali testified he saw Langenegger walk to the gate, where defendant punched him in the face and knocked him down. Both Langenegger and Pascali testified that others then joined in, hitting and kicking Langenegger. His injuries were severe, including a broken jaw which required several surgeries.

However, the prosecutor argued that it could not be determined who inflicted the injury, and encouraged the jury to find all defendants guilty regardless of which blows inflicted the broken jaw.[18] Thus, the jury was directed to find guilt based on the erroneous part of CALJIC No. 17.20. In this circumstance, even though defendant Perez admitted hitting the victim in the mouth, we cannot say beyond a reasonable doubt that the jury's finding was not based on this erroneous alternative.

Therefore, we must reverse the great bodily injury enhancement as to defendant Perez.

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[18] The prosecutor argued: "We really don't know when Charlie got his jaw broken, okay. Was it the first punch? Was it when he blacked out? Was it when he was down on his hands and knees getting pummeled by these four individuals? [¶] You will receive an instruction that says that in a group assault like this when you don't know—and that's what I submit, we really don't know who inflicted the broken jaw—when you don't know, then they're all guilty, because that is no fair. It's not fair to let them slide on a group assault when you don't know or can't tell who did it. [¶] . . . If you don't know, you can't determine who did it, then all four of these individuals who participated would be guilty."

VI

Former CALJIC No. 17.41.1

Defendant Perez also contends the trial court's instruction with former CALJIC No. 17.41.1 (1998 new) (6th ed. 1996)[19] improperly violated his state and federal constitutional rights to an impartial and unanimous jury because it chilled the jury's ability to freely deliberate and intruded on the secrecy of jury deliberations. We disagree.

In *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*), our Supreme Court held that former CALJIC No. 17.41.1 "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict." (*Engelman, supra,* at pp. 439-440.) The Supreme Court explained: "[W]e are not persuaded that, merely because CALJIC No. 17.41.1 might induce a juror who believes there has been juror misconduct to reveal the content of deliberations unnecessarily (or threaten to do so), the giving of the instruction constitutes a violation of the constitutional right to trial by jury or otherwise constitutes error under state law." (*Id.* at p. 444.)

Defendant claims his situation is different, because here the trial court actually told the jury before the trial began that if any of the court's admonishments were disobeyed, they could be punished and that jurors should report any incidents. But we see no prejudice. The Supreme Court has upheld the constitutionality of the instruction,

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[19] The trial court instructed the jury: "The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law, or to decide the case based on the penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." According to Supreme Court directive in *Engelman*, the instruction has been deleted from the standard jury instructions. (*Engelman, supra*, 28 Cal.4th at p. 440.)

and the trial court's paraphrasing of the instruction at the beginning of trial engendered no legal harm.

DISPOSITION

The convictions of defendants Gustavo Castenada, Jerry Patlan and Steven Pena are reversed.

The true finding on the gang enhancement, pursuant to section 186.22, subdivision (b)(1) and the true finding on the great bodily injury enhancement, pursuant to section 12022.7 as to defendant Andres Perez are reversed.

The true finding on the gang enhancement, pursuant to section 186.22, subdivision (b)(1) as to defendant Christopher Carrasco is reversed.

As to all other counts, the convictions are affirmed.

Rushing, P. J.

WE CONCUR:

Premo, J.

Elia, J.

People v. Pena et al.
No. H023394

Trial Court:	Santa Clara County Superior Court No. CC091842
Trial Judge:	Hon. Paul R. Teilh
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