Filed 4/25/07 P. v. Rivas CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER RIVAS,

Defendant and Appellant.

F049840

(Super. Ct. No. MCR022307A)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Edward P. Moffat, Judge.

Michelle E. Guardado, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Mathew Chan, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On October 5, 2005, a second amended information was filed against appellant Christopher Rivas and codefendant Daniel Vera. Appellant was charged with count I,

assault by means of force likely to produce great bodily injury on Abel Martinez (Pen. Code,[1] § 245, subd. (a)(1)), and count II, criminal threats on "Jane Doe"[2] (§ 422). Codefendant Vera was separately charged with count III, resisting an officer by force or violence (§ 69). Appellant and codefendant Vera were both charged with count IV, active participation in a criminal street gang (§ 186.22, subd. (a)).

As to count I, it was alleged appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)), and personally used a deadly weapon, a knife (§ 12022, subd. (b)(1)). As to counts I and II, it was further alleged appellant committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); he suffered one prior serious felony conviction (§ 667, subd. (a)); and he suffered one prior strike conviction (§ 667, subds. (b)-(i)). Appellant pleaded not guilty and denied the special allegations.

At the preliminary hearing, the court dismissed the aggravated assault charge as to codefendant Vera. Vera subsequently pleaded guilty to misdemeanor resisting an officer (§ 148, subd. (a)(1)) as a lesser offense of count III, and was placed on probation for two years.

On October 5, 2005, appellant's jury trial began on counts I, II and IV; the court had bifurcated the prior conviction allegations. The court granted appellant's motion for acquittal as to the great bodily injury enhancement.

On October 6, 2005, appellant was convicted of counts I, II, and IV, and the jury found he personally used a knife in the commission of count I, and counts I and II were committed for the benefit of a criminal street gang. Appellant admitted the truth of the prior conviction allegations.

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[1] All further statutory references are to the Penal Code unless otherwise indicted.

[2] The victim in count II is referred to as "Jane Doe" in the lower court documents. We will refer to "Jane Doe" as "the victim" throughout this opinion.

On February 10, 2006, the court sentenced appellant to an aggregate term of 14 years in state prison: as to count I, the upper term of four years, doubled to eight years as the second strike term, with consecutive terms of one year for the personal use enhancement, and five years for the gang enhancements. The court imposed concurrent second strike terms of six years for counts II and IV, with a concurrent term of five years for the gang enhancement as to count II.

On February 21, 2006, appellant filed a timely notice of appeal.

FACTS

The victim owned a mini market on South C Street in Madera, and Rosendo Ramirez worked for her. Around 7:45 p.m. on July 15, 2005, the victim was standing outside the doorway talking to a customer, Abel Martinez, while Ramirez swept the sidewalk area. The victim testified that two Chicano men walked passed them and went toward a nearby liquor store. They did not say anything. The victim testified the two men walked by again, one of them said, "'We'll be back,'" and the victim replied, "'Okay.'" The victim had never seen these men before.

The victim testified the two men turned around and walked back to her store. One man was tall and thin, with a closely-shaved bald head, and she thought he had a "star" tattoo on his lip. He was not wearing a shirt. The victim thought he had tattoos on his back. The victim subsequently identified appellant Christopher Rivas as the tall and skinny man. The other man was short and heavy-set, with dark skin. He wore a hat, a dark shirt, blue Dickie pants, and had a piercing on his right eyebrow.

The victim testified she was still standing in the store's doorway with Martinez and Ramirez. Appellant and the other man approached them, and appellant stood very close to her face. Appellant spoke to the victim in English. The victim understands English, but Ramirez did not speak English and did not understand what appellant said to the victim. The victim testified appellant used a "rough" tone of voice, and said she "was not allowed to have my store there; that he was going to break the windows on my store."

Appellant said, "'This is my town and you have to ask me permission to have this store here.'" Appellant said "he was going to break my windows and he was going to beat me up and throw me to the street so the ambulance will pick me up." The victim testified that when appellant made the statements to her, she intentionally acted "strong" and "didn't show him fear" so they would not think she was weak, but she was actually afraid appellant was going to beat her up. She did not see a knife.

The victim testified the short man walked up to Martinez and started talking to him, but the victim could not hear the conversation. The short man punched Martinez on the left side, and there was an altercation between them. Appellant walked toward Ramirez, and the victim ran into the store and called 911. Ramirez saw appellant slash at Martinez, and appellant also tried to "scratch" Ramirez with something in his hand.

The victim testified she stayed in the store until the police arrived, because she was shaking and thought appellant was going to beat her up. The victim testified the two men did not act normal. Martinez walked into the store, and he was bleeding from a small cut, about two to three inches long, just above the right side of his beltline.

The victim testified the entire encounter in front of the store lasted about three minutes, but it seemed like a long time to her. The victim testified she was still shaking from the encounter when the police arrived about 10 minutes later.

Madera Police Officer Josiah Arnold responded to the market and interviewed the victim, who stated the tall man told her, "'I'm going to come back here and put you in the hospital.'" Deputy Arnold interviewed Ramirez, with the victim acting as the Spanish translator. Arnold testified that Ramirez said "the tall, thin Hispanic male was carrying a pocketknife, a folding knife." Arnold clarified that Ramirez said it was a folding pocket knife.

> "Q. And was he able to describe it?
>
> "A. He just said that he thought it had a 5 to 6-inch blade, and that it was a folding knife."

The tall man chased Ramirez, and Ramirez ran away. Ramirez said he looked back and the heavy-set man was striking Martinez. Ramirez said the tall individual "walked behind Mr. Martinez and stabbed him in the back."

Deputy Arnold also interviewed Martinez, and observed a six-inch cut on the left side of his back, with blood dripping through two inches of the cut. The wound was about eight to 10 inches above the beltline, on the left side of his back. Arnold believed the wound was consistent with a slashing-type motion. Arnold also believed it was a serious injury and was going to call emergency personnel, but Martinez said he did not want to be seen by anyone, and he just wanted to leave and go home.

Madera Police Officer Foss contacted Officer Jason Dilbeck, the gang liaison officer, advised him about the incident, and asked if he knew about any gang member with a tattoo on his lip. Based on his past contacts, Dilbeck reported that appellant had a tattoo on his lip.

Deputy Arnold prepared a photographic lineup and separately showed it to the victim and Ramirez. Both the victim and Ramirez identified appellant as the tall suspect. At trial, the victim testified she identified appellant because he was the man who confronted her, and not because he had a tattoo on his lip.

Also at trial, Ramirez testified through a Spanish interpreter, and identified appellant as the tall man. Ramirez testified appellant spoke to the victim in English, he did not understand what was said, but appellant used an aggressive voice. Ramirez testified appellant's "companion" hit "the client," referring to Martinez (the victim's customer).

> "Q. [¶] After the person was—the client was punched, what happened next?
>
> "A. The taller one got close to me and tried to scratch me, too, with the knife.
>
> "Q. Okay. [¶] So the tall person had a knife?

"A. I don't know what it was.

"Q. When you say he tried to scratch you, what do you mean by that?

"A. I don't know what he had in his hand.

"Q. Okay. [¶] But how did he try to scratch you? Using your term.

"A. The same way that he scratched the client.

"Q. And how was that, can you describe it?

"A. He went like this."

The prosecutor clarified that Ramirez "had his right hand from his left hip area across his body extending it out." Ramirez testified appellant "scratched" Martinez from behind, and Martinez was "bleeding a little."

On cross-examination, Ramirez was again asked about how Martinez was wounded:

"Q. [¶] And you didn't see anybody with a knife, did you?

"A. No."

Deputy Arnold testified he arrested appellant at his house on South D Street. Arnold advised appellant that he was under arrest for stabbing somebody in the back, and appellant replied, "'So.'" Arnold did not find a folding knife.

The Gang Expert's Testimony

Detective Jason Dilbeck testified as the prosecution's gang expert. Dilbeck had been the gang liaison officer for the Madera Police Department for four years, and received training and attended seminars about gang investigations through the California District Attorney's Association, the Department of Justice, the California Gang Investigators Association, the Central Coast Gang Investigators Association, and the Northern California Gang Investigators Associations. He was a member of the National Major Gang Task Force, the California Gang Task Force, the Northern California Gang

Investigators Association, the Central California Gang Investigators Association, and the California Investigators Association.

Officer Dilbeck had investigated 400 to 450 gang-related cases, and was regularly contacted by other law enforcement agencies in the area as to their gang investigations. Dilbeck had talked to gang members about their participation in different types of crimes, and cultural issues like their mode of dress, tattoos, hand signs, how someone joins a gang, the importance of respect within gangs and among rivals, and the rivalries between gangs.

Officer Dilbeck testified there were 56 gangs in Madera, including the Nortenos, Surenos, Bulldogs, Crips, Bloods, and various subsets of these gangs. The primary gangs in Madera County were the Nortenos and Surenos Dilbeck explained the Surenos' rivals are the Nortenos, North Star, Northern Structure, and the Bulldogs. Dilbeck had approximately 1,000 contacts with members of both the Nortenos and Surenos.

Officer Dilbeck testified the Surenos claimed the color blue, and the number 13 in different forms, such as "X111, X-3, 1-3" or "three dots," representing the 13th letter of the alphabet—"emme"—which is slang for the Mexican Mafia, the prison gang which Sureno members associate with when in prison. There are several subgroups of the Surenos in Madera, including Mi Vida Loca (MVL) and Vatos Locos Mexicanos (VLM). There were also small groups which identify themselves as part of the Surenos. While the subgroups may be affiliated with the Surenos, some of the Sureno subgroups had been known to have problems with each other.

Officer Dilbeck testified he had been in contact with three or more members of the Surenos. The primary activities of the Surenos "can be anything" from assaults with firearms or dangerous weapons, drive-by shootings, attempted murders, robberies, drug sales, and murder. There are different membership levels within the Surenos, including shot callers, who are like leaders, active members, and peripheral members who associate with the gang but do not claim active membership.

Officer Dilbeck testified about prior criminal acts performed by Sureno gang members, and the court admitted abstracts of judgment as to two offenses, both of which occurred in 2001 and resulted in convictions in Madera County in March 2002. In the first case, Mario "Mr. Sleepy" Solis pleaded guilty to assault with a firearm, with a personal use enhancement, and was sentenced to the upper term of four years, with 10 years for the enhancement. In the second case, Daniel Villarreal, Jr. pleaded to attempted voluntary manslaughter, with gang and personal use enhancements, and sentenced to the upper term of five years six months, plus 13 years for the enhancements. Dilbeck was familiar with both individuals and testified they were members of the Surenos.

Officer Dilbeck testified appellant was a member of the Surenos, based upon several factors. Appellant had several Sureno tattoos—a "13" on the back of his head in large block numbers, three dots on his right wrist, signifying "1" and "3" or "13," and gang tattoos on the right and left side of his neck. Dilbeck clarified that appellant had a tattoo on his lip but it was the area code "805" from the Southern California area, it was not a star, and explained "it's really small and hard to see."

Officer Dilbeck also relied upon appellant's admissions on different occasions that he was a Sureno, that he claimed Sureno membership in custodial situations, and rival Norteno gang members had identified him as a Sureno. Appellant had been found in possession of gang paraphernalia, such as a blue belt with "13" on it, and worn gang clothing. Dilbeck testified appellant claimed membership in the Santa Paula Party Boy Surenos, a Sureno gang located in Southern California. Appellant was originally from Santa Paula, and Dilbeck believed he moved to Madera County in December 2002. Dilbeck explained it was common for gang members to move to another location and align with other Sureno groups in the area. Such a person was not required to rejoin or be jumped again into another Sureno gang. The Surenos started in Southern California, and a Sureno from that area has more prestige when he moves further north, "because of the reputation of their predecessors."

Officer Dilbeck testified his opinion about appellant's gang status was also based on appellant's prior contacts with law enforcement officers. Appellant's first contact with law enforcement in Madera occurred in January 2003, when appellant was living in an area mostly frequented by Norteno gang members and wearing blue clothing as the identifying color of the Surenos. He was approached by five members of the Nortenos, who threatened him, and an altercation resulted. At some point after that altercation, Parole Agent Frank Lewis contacted Dilbeck, and advised him that appellant was a Sureno gang member, he was on parole, and he was living in an area of Madera which was predominantly Norteno. Lewis provided Dilbeck with information gathered by the California Department of Corrections (CDC), which identified appellant as a member of the Surenos, he had Sureno tattoos, and his parole conditions prohibited him from associating with other gang members, wearing gang attire, and participating in gang-related crimes.[3]

Officer Dilbeck testified about another contact in September 2003, when appellant was booked into the Madera County Department of Corrections. Appellant was asked if he had any gang affiliations, and said, "'Yes, south,'" indicating his affiliation with the Surenos. His Sureno tattoos were also observed at that time. Dilbeck testified that in October 2003, appellant was again booked into the Madera County Department of Corrections, and identified as a member of the Surenos based on his tattoos.

Officer Dilbeck testified about another contact on October 31, 2004, when a gang-related homicide occurred at the Primavera Bar. Appellant and other Surenos in the VLM had been at the bar, and appellant jumped a fence and ran from the location when the police arrived. He was wearing blue gang attire and had been with other Sureno members.

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[3] As we will discuss in section III, *post*, appellant contends the court abused its discretion when it permitted Officer Dilbeck to testify about his parole status.

Officer Dilbeck's next contact with appellant was during an interview, when Dilbeck asked appellant how long he had been a gang member. Appellant said he had been a Sureno since he was 13 years old. Appellant displayed gang-related tattoos, and he was wearing a blue belt with "13" on it.

At the time of the instant case, appellant was living on D Street in Madera, which was Sureno territory. Officer Dilbeck testified to his opinion that appellant was an active participant in a gang, he was participating in a gang crime, he was associating with other known gang members, and documented having gang tattoos. Dilbert explained the basis for his opinion was that appellant was with other Sureno gang members at his house when he was arrested in this case, and he admitted to being a Sureno gang member when he was booked into custody. Appellant's house was one block away from the market.

Officer Dilbeck conceded the victims in this case were not associated with any type of gang, but explained about the concept of respect among gang members. It was very important for a gang member to have respect within his gang, and among rival gang members. He can earn respect and prestige through committing violent crimes, and work his way up the gang's leadership ladder.

> "When gang members commit acts of violence, it not only intimidates rival gangs, but it also intimidates the community in which gang members reside. Through investigating hundreds of gang related crimes, you can see how hesitant witnesses are to testify against gang members; they're scared. Most of the time they live in the communities in which the gang members live. They're scared of retaliation. Sometimes they work in areas that they know are contacted by gang members, and due to the fact that, you know, gangs have multiple people, they know that, you know, that even though that individual gang member being in custody, that other gang members can, you know, harm them."

Officer Dilbeck testified that appellant's conduct in this case benefited the Surenos.

> "Q. How so?
>
> "A. ... [I]n this incident, you had an individual that had no shirt on that was displaying gang tattoos, that went up to a store owner that was approximately a block from his house and was telling him that they had to have his permission to have a store in the area. He was saying that that's his gang's turf and he was protecting that turf and territory.
>
> "Q. And if the gang member is threatening physical action to a store owner in an area that he claims, does that accrue a benefit to that gang?
>
> "A. Yes.
>
> "Q. ... [H]ow so?
>
> "A. It accrues a benefit because the more violent the gang is, the more respect they get from other Sureño gang members. The more feared they are by rivals, which may not decide to go into their turf and territory to commit crimes against them, because they're scared of retaliation. And it also makes citizens more hesitant to testify against them and to contact us. We have some communities that are so afraid that when shots are fired, you know, in their neighborhoods, that they don't even call the police."

Officer Dilbeck testified that an "average gang member in [a] similar situation would accrue a benefit to the criminal street gang and they would know that" by threatening a store owner on their turf, and using a weapon to assault someone. The market was located in a relatively high crime area, mainly consisting of Sureno gang activity, and just one block away from appellant's house.

> "A threat can only instill so much fear in someone, and what better way to emphasize that point than with an act of violence. If I threaten to do something, you may believe that I am willing to do that and capable of doing that; however, if you see or hear about someone that actually did a violent act after they said they were going to, it leads someone to put a little bit more stock in what that individual is threatening and helps the violent reputation of the Sureños."

Officer Dilbeck further explained that such an act was for the benefit of the Surenos rather than one of the subgroups, such as VLM or MVL.

> "[T]here's two things that can happen when someone that's from a different area moves, they can either move in enough numbers where they can start their own click that they used to claim, or they can melt into, you know, what's already there.
>
> "With the fact that [appellant] was associating with other Sureño gang members that are from Madera, such as VLM, which is one of the largest Sureño clicks in Madera, which has embraced quite a few gang members from California, that leads me to believe there wasn't enough Santa Paula Party Boys to make their own click, so they're molding into what is commonly known as Sureño."

Appellant was convicted of count I, assault by means of force likely to produce great bodily injury on Martinez, count II, criminal threats on the victim, and count IV, active participation in a criminal street gang. The jury also found he personally used a deadly weapon, a knife, as to count I, and that he committed counts I and II for the benefit of a criminal street gang.

On appeal, appellant asserts his convictions must be reversed because his defense attorney admitted he was simultaneously representing the victim in an unrelated criminal proceeding. Appellant also contends the court had a sua sponte duty to instruct on simple assault as a lesser included offense of count I, aggravated assault, and the court abused its discretion when it permitted Officer Dilbeck to testify about his parole status.

Appellant contends there is insufficient evidence to support count IV, the substantive gang offense, and the gang enhancements found true as to counts I and II. Appellant also contends the personal use enhancement must be stricken as to count I, and the concurrent term imposed for count IV must be stayed pursuant to section 654.

Respondent asserts the court imposed an unauthorized sentence because it failed to impose a consecutive five-year term for the prior serious felony enhancement. We will

also address whether the court's imposition of the upper term violated *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*).

DISCUSSION

I.

CONFLICT OF INTEREST

Appellant contends his convictions must be reversed because his appointed defense counsel also represented the victim in an unrelated criminal matter, at the same time as the trial in this case. Appellant asserts he timely objected to this conflict of interest, and the court should have dismissed his appointed counsel and granted a mistrial.

A. Background

At the time of arraignment, the court appointed the public defender's office to represent appellant, and the alternate defender's office to represent codefendant Vera. At a confirmation hearing, appellant was represented by Craig Collins of Barker & Associates. Appellant said he wanted another defense attorney, and the court conducted a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). At the *Marsden* hearing, appellant complained Mr. Collins did not give him "paperwork" about his case and wanted to delay the trial until his parole hearing. Mr. Collins clarified that he discussed the possibility of delaying the jury trial until he learned the recommendation for the parole violation, in case there was some type of deal that would positively affect appellant's criminal charges, but nothing had been done yet. The court denied the *Marsden* motion and found Mr. Collins properly represented appellant.

All court documents in this case were redacted to identify the owner of the market as "Jane Doe," including the complaint, the information, and the amended information. The preliminary hearing was held on August 1, 2005, and appellant was represented by Mr. Collins. The victim did not testify at the preliminary hearing, but Officer Arnold testified about his investigation and referred to the victim by her real name.

Mr. Collins also represented appellant at trial. The victim appeared and testified as set forth *ante*. During the trial, Mr. Collins extensively cross-examined the victim and Ramirez as to their recollections of the incident, their descriptions of the suspects, the nature of Martinez's wound, and whether anyone saw a knife. Mr. Collins also cross-examined Officer Arnold about his investigation, and Officer Dilbeck as to the basis for his opinions about appellant's involvement with the Surenos, and whether the instant incident was for the benefit of the Surenos.

Appellant's jury trial began on October 5, 2005, and the case went to the jury just before noon on October 6, 2005. Later in the afternoon of October 6, 2005, the court reconvened to consider a question from the jury, the parties discussed the matter, and the court responded to the question. After the jury left the courtroom, Mr. Collins advised the court:

> "MR. COLLINS: Judge, it had come to my attention as I was going over the files set for tomorrow *that our office in this department represents the victim and witness [the victim] in a child abandonment*. She pled for a misdemeanor. She's set for sentencing. And I have disclosed that to my client and I apologize to the court.
>
> "THE COURT: Well, it's hard when you got, you know, when the person's Jane Doe is the person in the Complaint. That's one of the problems that they have when they do Jane Doe things that you're not aware of it. I mean, would that have affected I mean obviously did you –
>
> "MR. COLLINS: I been in court with her two times and I had and briefly and she's come into our office and discussed the case with another attorney in our office.
>
> "THE COURT: What I'm saying is that you know the facts that apparently you know that you represented her in the matter but the problem the other thing is that the fact that you represented her, I mean, then of course you had been put in the situation of revealing, you know, conflicting information. But apparently you didn't even remember, so there's no way that you'd use conflict information, you know, obtained for her for the purpose of impeaching her.

“MR. COLLINS: Her rap sheet indicates the [section] 12500 and has not been convicted of this crime.

“THE COURT: Okay. That’s noted for the record. I don’t see any reason. *I assume you’re not moving for mistrial or anything like that based on that, you’re not asking to be relieved as attorney of record at this time*?

“MR. COLLINS: *I was leaving it up to the court. I just wanted to make the court aware and I don’t know.*

“THE COURT: Well—

“MR. COLLINS: I don’t know if you’d like some sort of waiver from my client or.” (Italics added.)

At this point, the court turned to appellant and addressed him:

“THE COURT: ... [Y]ou understand apparently Mr. Collins represented or still continues to represent the victim, Jane Doe, and was unaware of that either prior to the trial or during the trial until just recently when he was reviewing his file for tomorrow. *Do you have any problem with him continuing to represent you in this matter?*

“[APPELLANT]: No.

“THE COURT: Okay. *So do you waive any conflict issues in relationship to the fact that he represented her*, uh, she hasn’t been convicted, she hasn’t but through the pretrial proceedings of her case which apparently is set for tomorrow, pardon me.

“MR. COLLINS: Do you waive any conflict of interest?

“[APPELLANT]: Yeah.

“THE COURT: That’s ‘yes’?

“[APPELLANT]: *Yes.*

“THE COURT: Okay, thank you.” (Italics added.)

The court then called for a recess. Neither appellant nor Mr. Collins raised this issue again, and Mr. Collins continued to represent appellant through the verdicts and the sentencing hearing.

B. **Analysis**

Appellant contends that when Mr. Collins advised the court of his representation of the victim, that exchange was the equivalent of a timely objection to Mr. Collins's continued representation, and appellant's subsequent waiver was invalid because it was not knowing and intelligent.

"Under the federal and state Constitutions, a criminal defendant has the right to the assistance of counsel. [Citations.] These constitutional guarantees entitle a defendant 'not to some bare assistance but rather to *effective* assistance.' [Citation.] That entitlement includes the right to representation that is free from conflicts of interest. [Citations.]" (*People v. Jones* (1991) 53 Cal.3d 1115, 1133-1134, italics in original.)

People v. Bonin (1989) 47 Cal.3d 808 (*Bonin*) extensively addressed the nature of conflicts of interest, and summarized United States and California Supreme Court authorities on the matter. "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. [Citation.]" (*Bonin, supra,* 47 Cal.3d at p. 835; *People v. Sanchez* (1995) 12 Cal.4th 1, 45 (*Sanchez*).)

> "Conflicts may also arise in situations in which an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a person who is a witness in that matter. [Citations.] [¶] Such a conflict springs from the attorney's duty to provide effective assistance to the defendant facing trial and his fiduciary obligations to the witness with whom he has or had a professional relationship. [Citation.] 'An attorney is forbidden to use against a [present or] former client any confidential information ... acquired during that client relationship. [Citations.] Moreover, the attorney has a duty to withdraw, or apply to a court for permission to withdraw, from representation that violates those obligations. [Citation.] So important is that duty that it has been enforced against a defendant's attorney at the instance of his former client (who was also a codefendant) even at the expense of depriving the defendant of his choice of counsel. [Citation.]' [Citation.] In a word, a conflict based on the attorney's obligations to a criminal defendant and to a present or former client, 'as well as conflicts arising out of simultaneous

> representation of codefendants, may impair a defendant's constitutional right to assistance of counsel.' [Citation.]" (*Bonin, supra,* 47 Cal.3d at p. 835.)

Bonin also summarized the court's duty to act when it learns about a potential conflict of interest, based on the guidelines set forth in *Holloway v. Arkansas* (1978) 435 U.S. 475, *Cuyler v. Sullivan* (1980) 446 U.S. 335, and *Wood v. Georgia* (1981) 450 U.S. 261 (*Wood*). "In order to safeguard a criminal defendant's constitutional right to the assistance of conflict-free counsel and thereby keep criminal proceedings untainted by conflicted representation, the United States Supreme Court has laid down certain essentially prophylactic rules in this area." (*Bonin, supra,* 47 Cal.3d at p. 836.)

> "When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter. [Citations.] It is immaterial how the court learns, or is put on notice, of the possible conflict, or whether the issue is raised by the prosecution [citation] or by the defense [citation].
>
> "The trial court is obligated not merely to inquire but also to act in response to what its inquiry discovers. [Citation.] In fulfilling its obligation, it may, of course, make arrangements for representation by conflict-free counsel. [Citation.] Conversely, it may decline to take any action at all if it determines that the risk of a conflict is too remote. [Citation.] In discharging its duty, it must act '" ... with a caution increasing in degree as the offenses dealt with increase in gravity."' [Citation.]
>
> "After the trial court has fulfilled its obligation to inquire into the possibility of a conflict of interest and to act in response to what its inquiry discovers, the defendant may choose the course he wishes to take. If the court has found that a conflict of interest is at least possible, the defendant may, of course, decline or discharge conflicted counsel. But he may also choose not to do so: 'a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests.' [Citations.]" (*Bonin, supra,* 47 Cal.3d at pp. 836-837.)

Bonin further addressed the type of waiver which must be obtained from the defendant:

> "To be valid, however, 'waivers of constitutional rights must, of course, be "knowing, intelligent acts done with sufficient awareness of the relevant

> circumstances and likely consequences[,]" ... [and] must be unambiguous and "without strings."' [Citations.]
>
> "Before it accepts a waiver offered by a defendant, the trial court need not undertake any 'particular form of inquiry ..., but, at a minimum, ... must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.' [Citations.]" (*Bonin, supra,* 47 Cal.3d at p. 837; *People v. McDermott* (2002) 28 Cal.4th 946, 990.)

The trial court commits error under *Wood* when it fails to inquire into the possibility of a conflict of interest, or adequately act in response to what that inquiry reveals. (*Bonin, supra,* 47 Cal.3d at p. 837.)

Bonin explained, however, that error under *Wood* is not subject to automatic reversal. (*Bonin, supra,* 47 Cal.3d at p. 842; *Mickens v. Taylor* (2002) 535 U.S. 162, 172-174 (*Mickens*).)

> "To obtain reversal for *Wood* error, the defendant need not demonstrate specific, outcome-determinative prejudice. [Citation.] But he must show that an actual conflict of interest existed and that that conflict adversely affected counsel's performance. [Citations.]" (*Bonin, supra,* 47 Cal.3d at pp. 837-838; *Sanchez, supra,* 12 Cal.4th at p. 47.)

Thus, *Wood* error is subject to reversal only if the defendant shows an adverse effect on counsel's performance resulting from the alleged conflict. (*Bonin, supra,* 47 Cal.3d at pp. 837-838, 842-843; *Sanchez, supra,* 12 Cal.4th at p. 47; see also *Mickens, supra,* 535 U.S. at pp. 172-174.)

In the instant case, Mr. Collins clearly advised the trial court about his inadvertent failure to realize his office simultaneously represented the victim in an unrelated criminal matter. It is unclear, however, whether Mr. Collins personally represented the victim in her criminal case. Mr. Collins initially stated his office represented the victim, she had not been tried or convicted yet, and that she had "come into our office and discussed the

case with another attorney in our office," which seems to infer that another attorney from Barker & Associates represented her in the other case. But Mr. Collins also said he had been in court "with her two times." Mr. Collins might have meant that he had been in court with her on two occasions when she appeared as a prosecution witness *in appellant's case*, rather than appearing in court as her defense attorney in her separate criminal matter. At the most, it appears that Mr. Collins might have appeared with her on two occasions. The court later explained that Mr. Collins had appeared with the victim in pretrial proceedings, so his appearances could have been limited to pretrial settings in her own criminal case. Mr. Collins also said she had talked to another attorney in his office about the case, thus inferring that he may not have engaged in any direct communications with the victim about her criminal case. Mr. Collins discovered the conflict, however, while reviewing the files for the next day, so he was apparently assigned her case at some point.

In any event, the court was on notice of the potential conflict which existed because Mr. Collins and/or Barker & Associates represented both appellant and the victim at the same time, albeit in unrelated criminal cases. As the court noted, Mr. Collins's failure to recognize this problem was understandable given the redaction of the victim's true name from the complaint and information in this case. While Officer Arnold referred to her true name during the preliminary hearing, it is not clear whether Mr. Collins and/or his office represented the victim at that time. It is also not clear if the victim's true name was contained in any discovery documents received by Mr. Collins.

Nevertheless, Mr. Collins's disclosure triggered the court's duties under *Holloway*, *Cuyler*, and *Wood*, as summarized *ante* in *Bonin*. The court made that inquiry and learned that Mr. Collins (or another attorney in Barker & Associates) also represented the victim in an unrelated child endangerment case, and that she had been charged but not yet convicted in that case. Mr. Collins was not sure about his

responsibilities in such a situation, and stated that he advised the court about the potential conflict so it could handle the matter.

The court turned to appellant, explained that Mr. Collins "represented or still continues to represent" the victim, that he was unaware of it until that moment, and whether appellant had "any problem" if Mr. Collins continued to represent him. Appellant said no. The court asked if he waived any conflict issues because of Mr. Collins's representation of the victim, and that the victim's case was set for the next day. Appellant again said yes. While appellant was clearly familiar with the *Marsden* process, based on his pretrial motion, he never raised any further objections to Mr. Collins's representation.

Respondent asserts appellant's waiver was valid and his failure to object to the conflict requires this court to evaluate the situation pursuant to *People v. Kirkpatrick* (1994) 7 Cal.4th 988 (*Kirkpatrick*):

> "To establish a violation of the right to unconflicted counsel under the federal Constitution, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348, fn. omitted.) To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an 'informed speculation' that counsel's representation of the defendant was adversely affected by the claimed conflict of interest. (*People v. Cox* (1991) 53 Cal.3d 618, 654; *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612-613.)" (*Kirkpatrick, supra*, 7 Cal.4th at p. 1009; *Sanchez, supra,* 12 Cal.4th at p. 45.)

Respondent thus submits that appellant can only obtain reversal on this issue, based on his waiver and failure to object, if this court finds an actual conflict existed that adversely affected Mr. Collins's performance. Respondent argues such a finding cannot be made on this record. Appellant counters that when Mr. Collins advised the court about the conflict, such an act amounted to an objection, and appellant's waiver is invalid because it was not knowing and voluntary.

Neither party addresses *Bonin*, and the trial court's minimal advisement duties to a defendant in such a situation. As explained *ante*, the trial court is not required to "undertake any 'particular form of inquiry'" in accepting a defendant's waiver of a potential conflict of interest. (*Bonin, supra,* 47 Cal.3d at p. 837.) However, the court's minimum duties are to determine that "(1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.' [Citations.]" (*Ibid*.) It would seem that the court's limited exchange with appellant fails to satisfy its minimum duties of inquiry. Appellant was clearly aware of the nature of the conflict—Mr. Collins just realized that he represented the victim in an unrelated criminal case which was scheduled to begin the next day. However, there is no evidence that appellant had discussed "'the potential drawbacks'" of the potential conflict with Mr. Collins, if he was advised of "'the dangers and possible consequences'" of Mr. Collins's continued representation, or that he knew "'of his right to conflict-free representation.'" (*Ibid.*)

Even if the court failed to obtain the appropriate waiver, any error does not require reversal. Contrary to appellant's arguments, a trial court's failure to adequately act in response to learning about a potential conflict is not subject to automatic reversal. "To obtain reversal for *Wood* error, the defendant need not demonstrate specific, outcome-determinative prejudice. [Citation.] But he must show that an actual conflict of interest existed and that that conflict adversely affected counsel's performance. [Citations.]" (*Bonin, supra,* 47 Cal.3d at pp. 837-838; *Sanchez, supra,* 12 Cal.4th at p. 47.) Thus, *Wood* error is subject to reversal only if the defendant shows an adverse effect on counsel's performance resulting from the alleged conflict. (*Bonin, supra,* 47 Cal.3d at

pp. 837-838, 843; *Sanchez, supra,* 12 Cal.4th at p. 47; see also *Mickens, supra,* 535 U.S. at pp. 172-174.)

Bonin is instructive in this situation. In *Bonin*, the defendant moved to substitute his appointed counsel with the law firm of Charvet & Stewart. The prosecutor objected because of a potential conflict of interest since the firm previously represented a key prosecution witness, Munro. (*Bonin, supra,* 47 Cal.3d at pp. 825-828.) The trial court conducted a lengthy hearing on the potential conflict and denied the substitution. A series of motion and writ petitions followed, and the trial court ultimately allowed the substitution but failed to obtain an appropriate waiver from the defendant. (*Id.* at pp. 830-835.) Mr. Charvet represented the defendant at trial. On appeal, however, the defendant argued the trial court violated *Wood* and failed to adequately inquire or properly act as to the existence of the conflict of interest arising from the firm's previous representation of the witness. (*Id.* at pp. 824-825, 837-839.)

As set forth *ante*, *Bonin* extensively addressed a trial court's duties in such a case, and concluded the court violated *Wood* when it "inexplicably" failed to obtain the necessary waiver from the defendant prior to allowing the substitution. (*Bonin, supra,* 47 Cal.3d at pp. 838-839.) But *Bonin* concluded the court's *Wood* error did not require reversal, even though the defense firm had represented the witness, Munro.

> "Having considered the matter closely, we believe that reversal is not required on this record. We shall assume for argument's sake that defendant has shown an actual conflict of interest burdening Charvet & Stewart. But we conclude that he has not shown, and cannot show, any adverse effect on counsel's performance resulting from the alleged conflict. Our review of the record reveals that Charvet's attack on Munro's credibility was broad and deep. We cannot find or even conjecture any failing on Charvet's part that could be attributed to any information he or his partner Stewart could conceivably have received from Munro when they discussed the possibility of representation. Accordingly, we hold that the *Wood* error in this case does not warrant reversal." (*Bonin, supra,* 47 Cal.3d at p. 843, fn. omitted.)

A similar analysis applies in the instant case. Even assuming an actual conflict of interest, there is no evidence that Mr. Collins's representation of the victim had an adverse effect on his representation of appellant. As set forth *ante*, Mr. Collins vigorously represented his client, and subjected the prosecution witnesses, including the victim, to extensive cross-examination as to their descriptions of the suspects and the incident at the mini market. He also subjected the officers to intensive cross-examination, particularly Officer Dilbeck's testimony as to gang culture and habits, and whether appellant was actually a member of a gang in Madera County. Mr. Collins also ably represented appellant at the sentencing hearing, and argued the gang evidence was tenuous and urged the court to impose the midterm. The entirety of the record thus demonstrates that the purported conflict did not adversely affect Mr. Collins's representation of appellant.

II.

INSTRUCTIONS ON LESSER OFFENSES

Appellant contends the court had a sua sponte duty to instruct on simple assault as a lesser included offense of count I, assault by means of force likely to produce great bodily injury.

A. Background

After the prosecution rested, the court discussed the instructions with the parties. Appellant was charged in count I with assault by means of force likely to produce great bodily injury, in violation of section 245, subdivision (a)(1). The court stated the prosecution had provided a verdict form for a violation of section 240, simple assault, as a lesser included offense of count I, but it was not sure whether there was evidence to support that offense. The prosecutor clarified he was not requesting that instruction, but provided the form "in an abundance of caution." The court agreed:

> "Normally I put all those things in here, but in this case, it doesn't make any sense to put it in there, because it was—a simple assault would mean

> that there was no touching, and obviously there was a touching, so it would be a battery. It's either assault with a deadly weapon or battery, which is a lesser related offense."

Defense counsel asked for an instruction on battery (§ 242), but the court replied it did not have to instruct on a lesser related offense. The court decided not to instruct on simple assault as a lesser included offense of count I because it was not supported by the evidence.

Thereafter, appellant moved for acquittal on the great bodily injury and personal use enhancements, and argued Ramirez said he did not see a knife and Martinez's small wound did not constitute great bodily injury. The prosecutor argued that Ramirez gave conflicting evidence on whether he saw a knife, and Martinez's wound was consistent with a slashing knife attack. The prosecutor also argued that Officer Arnold believed Martinez's injury was serious.

The court denied the motion as to the personal use enhancement, and found there was conflicting evidence on whether a knife was used and it was an issue for the jury's determination. However, the court granted the motion to dismiss the great bodily injury enhancement, and found the witnesses testified Martinez's wound was trivial.

B. <u>Analysis</u>

Appellant now contends the court committed reversible error when it refused to instruct on simple assault as a lesser included offense of count I, assault by means of force likely to produce great bodily injury.

A trial court has a sua sponte duty to instruct on all necessarily included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) An offense is necessarily included if either the elements of the greater offense, or the allegations in the accusatory pleading, are such that the lesser offense is necessarily committed if the greater offense is committed (elements test and pleadings test, respectively). (*People v. Birks* (1998) 19 Cal.4th 108, 117-118.)

"Section 245, subdivision (a)(1) speaks in the alternative, specifying two forms of prohibited conduct. The statute can be violated by assaulting a person with a deadly weapon other than a firearm *or* by means of force likely to produce great bodily injury. [Citation.] Hence, section 245, subdivision (a)(1) can be violated without necessarily using a deadly weapon. [Citations.]" (*People v. McGee* (1993) 15 Cal.App.4th 107, 114 (*McGee*), italics in original.) Thus, a conviction of assault by means of force likely to produce great bodily injury does not require that the prosecution establish the actual infliction of great bodily injury. (*People v. Covino* (1980) 100 Cal.App.3d 660, 667.)

A simple assault under section 240 is "'an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery ....'" (*People v. Elam* (2001) 91 Cal.App.4th 298, 308.) An assault may be committed without making actual physical contact with the victim. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) An assault is an attempted battery that is a general intent offense. (*People v. Williams* (2001) 26 Cal.4th 779, 784-785; *People v. Ausbie* (2004) 123 Cal.App.4th 855, 860, fn. 2, overruled on other grounds by *People v. Reed* (2006) 38 Cal.4th 1224, 1228.)

Simple assault is a lesser included offense of assault with a deadly weapon (*People v. Jones* (1981) 119 Cal.App.3d 749, 754), and assault by means of force likely to produce great bodily injury (*People v. Buice* (1964) 230 Cal.App.2d 324, 345-346; *People v. Yeats* (1977) 66 Cal.App.3d 874, 879 (*Yeats*)). However, battery is not a lesser included offense of assault by means of force likely to produce great bodily injury since an assault may be "committed without 'any willful and unlawful use of force or violence

upon the person of another' [citation] and thus without a battery. [Citations.]" (*In re Robert G.* (1982) 31 Cal.3d 437, 441; *Yeats, supra,* 66 Cal.App.3d at p. 879.)[4]

A trial court "'may properly refuse to instruct upon simple assault where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the higher offense.'" (*Yeats, supra,* 66 Cal.App.3d at p. 879.) "[I]t is possible for an accused to be found guilty of violating section 245, subdivision (a)(1) by assaulting the victim with means of force likely to produce great bodily injury and also be found to have used a deadly weapon within the meaning of section 12022, subdivision (b). Where the accused has simply displayed a deadly weapon to cause the victim not to resist an assault by some other force likely to produce great bodily injury, the menacing display of the weapon would be sufficient to prove use of a deadly weapon under section 12022, subdivision (b) but not necessarily sufficient to prove assault with a deadly weapon under section 245, subdivision (a)(1). [Citation.]" (*McGee, supra,* 15 Cal.App.4th at p. 115.) However, if the defendant commits an assault by means of force likely to produce great bodily injury by stabbing the victim with a deadly weapon, the defendant's use of the knife "was not an additional factor, above and beyond the elements of section 245, subdivision (a)(1)" to permit imposition of a personal use enhancement. (*McGee, supra,* at p. 116.)

The instant case presents an arguable question as to whether the court should have instructed on simple assault as a lesser included offense. One witness described Martinez's wound as small, just above the beltline, with a small amount of blood seeping through it. On the other hand, another witness described the wound as a "6-inch cut on his back, two inches of the cut was seeping blood." As appellant notes, there was

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[4] A trial court has no duty to instruct on an uncharged lesser related offense when requested to do so by the defendant. (*People v. Schmeck* (2005) 37 Cal.4th 240, 291-292.) Appellant does not contend the court should have given a battery instruction.

conflicting evidence as to whether the witnesses saw appellant with a knife, and the nature of Martinez's wound could have been consistent with being made by scratching at him with a set of keys, instead of slashing at his midsection with a knife.

In any event, the court's failure to instruct on simple assault was necessarily harmless based on the nature of the jury's verdicts. "'[I]n some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury.' [Citations.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1028; *People v. Elliot* (2005) 37 Cal.4th 453, 475.)

The parties herein vigorously disputed whether appellant used a knife to inflict the wound on Martinez. Ramirez was extensively questioned on whether he saw a knife, and testified that he did not see a knife that day. Deputy Arnold, however, testified that when he interviewed Ramirez at the scene, Ramirez said appellant used a knife to slash Martinez, and described it as a folding pocket knife with a five- to six-inch blade. The jury resolved this disputed factual question because it not only convicted appellant of count I, assault on Martinez by means of force likely to produce great bodily injury, but separately found the enhancement true beyond a reasonable doubt, that appellant personally used a knife in the commission of the offense. While we will conclude that the enhancement must be stricken for other reasons, we cannot ignore the jury's finding that appellant personally used a knife, which essentially rejected the defense theory that appellant might have swiped at Martinez with something other than a knife. Indeed, appellant concedes that "[a] stabbing blow with a knife can cut through flesh and jeopardize internal blood vessels and organs and is clearly a force likely to inflict great

bodily injury." Based on the jury's finding on the personal use enhancement, it is clear it would have found appellant guilty of assault by means of force likely to produce great bodily injury even if it had been instructed on the lesser included offense simple assault, since the factual question posed by the omitted instruction was necessarily resolved adversely to appellant under other, properly given instructions. (*People v. Elliot, supra,* 37 Cal.4th at p. 475; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1028.)

III.

EVIDENCE OF APPELLANT'S PAROLE STATUS

Appellant next contends the court improperly overruled his objections and permitted Officer Dilbeck to refer to his parole status when he testified about the basis for his opinion that appellant was a member of a criminal street gang. Appellant admits the fact that he had been deemed a gang member by CDC was relevant to Dilbeck's opinion but contends it was "cumulative" to the other information relied upon by Dilbeck, and could have been sanitized to avoid references to his parole status. Appellant contends this testimony "irreparably damaged" his case and requires reversal because it revealed he had "previously been convicted and strongly suggested that he had previously been convicted of gang crimes."

A. Background

On the first day of trial, defense counsel moved to exclude any reference to appellant's parole status. Counsel believed Officer Arnold was going to testify that when appellant was arrested, appellant denied being on parole. Counsel argued any evidence of appellant's parole status, whether offered by Officer Arnold or Officer Dilbeck, would be extremely prejudicial pursuant to Evidence Code section 352.

The prosecutor agreed to limit Officer Arnold's testimony and exclude any reference to appellant's parole status when he was arrested. However, the prosecutor argued appellant's parole status was relevant to Officer Dilbeck's expert opinion as to whether appellant was a validated gang member, it was one of Dilbeck's criteria, and "to

basically take that away from him would be crippling his ability to do what he's here to do."

The court granted appellant's motion as to Officer Arnold's testimony, but found Officer Dilbeck's testimony as to appellant's parole status was admissible and extremely probative. "It's necessary as part of the determination as to whether or not he is a gang member and that's essential to his opinion, and that probative value outweighs any undue prejudice."

As set forth *ante*, Officer Dilbeck testified about the basis for his opinion that appellant was an active member of the Surenos, including appellant's repeated claim in various custodial situations that he was a Sureno, and information he received from a parole officer that CDC had identified appellant as a member of the Surenos, he had Sureno tattoos, and his parole conditions prohibited him from associating with other gang members, wearing gang attire, and participating in gang-related crimes. When Dilbeck testified to this evidence, the court admonished the jury accordingly:

> "For the record, ladies and gentlemen, you're admonished that when we have some of these statements that the officer receives from other people, they're not necessarily admitted for the truth of the matter, but they're admitted to establish the basis for his expertise testimony. It should not be considered by you for any other purpose other than the limited purpose of the fact that it helps him form his opinion."

B. Evidence Code section 352

Appellant contends Officer Dilbeck's references to his parole status was prejudicial under Evidence Code section 352, the court abused its discretion when it overruled his objections, and the introduction of such evidence also violated his due process rights.

We begin with the well-settled principles of relevance and prejudice. "… Only relevant evidence is admissible [citations], and all relevant evidence is admissible, unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant

evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.)

Evidence Code section 352 gives the trial court broad discretion when weighing the probative value and prejudicial effect of relevant evidence. (*People v. Gurule* (2002) 28 Cal.4th 557, 654.) Evidence is prejudicial within the meaning of Evidence Code section 352 if it encourages the jury to prejudge defendant's case based upon extraneous or irrelevant considerations. (*People v. Rogers* (2006) 39 Cal.4th 826, 863.)

"'"Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice.…'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 286, italics in original.) "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Callahan* (1999) 74 Cal.App.4th 356, 371.)

We review the trial court's ruling on prejudice for abuse of discretion. (*People v. Holloway* (2004) 33 Cal.4th 96, 134.) "A trial court has broad discretion in determining whether to admit or exclude evidence objected to on the basis of section 352 [citation], and rulings under that section will not be overturned absent an abuse of that discretion [citation]. '[T]he term judicial discretion "implies absence of arbitrary determination, capricious disposition or whimsical thinking."' [Citation.] '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) The erroneous admission of evidence under Evidence Code section 352 does not warrant reversal unless it is reasonably probable that a more favorable result would have occurred had the evidence been excluded. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

A defendant may also argue that "the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) "But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair.*" (*Id.* at p. 439, italics in original.)

C. <u>Expert Testimony</u>

The court permitted Officer Dilbeck to testify about appellant's parole status as part of the basis for his expert opinion that appellant was an active member in a criminal street gang. It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 (*Ferraez*); *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196 (*Frank S.*).) The subject matter of the culture and habits of street

gangs meets the criteria for the admissibility of expert opinion because such evidence is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *Frank S., supra,* 141 Cal.App.4th at pp. 1196-1197.) Such areas include "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]." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657, fns. omitted.)

Evidence Code section 802 provides, in pertinent part, that "[a] witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter ... upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." Expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions" and is reliable. (*Gardeley, supra,* 14 Cal.4th at p. 618.) If the threshold requirement of reliability is met, "even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*Ibid.,* italics omitted; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463 (*Duran*).) Since Evidence Code section 802 permits an expert witness to "'state on direct examination the reasons for his opinion and the matter ... upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Gardeley,* supra, 14 Cal.4th at p. 618.)

Thus, an officer testifying as a gang expert, just like other experts, may give testimony that is based on hearsay, including conversations with gang members as well

as with the defendant. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *Gardeley, supra,* 14 Cal.4th at p. 620; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) A gang expert's opinion may also be based upon the expert's personal investigation of past crimes by gang members, and information about gangs learned from the expert's colleagues or other law enforcement agencies. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324; *Gardeley, supra,* 14 Cal.4th at p. 620; *People v. Vy, supra*, 122 Cal.App.4th at p. 1223, fn. 9.)

Evidence that a defendant is on parole is admissible when relevant to show motive or intent. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1020, fn. 2; *People v. Powell* (1974) 40 Cal.App.3d 107, 155; *People v. Durham* (1969) 70 Cal.2d 171, 189.) However, "[t]here is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial. [Citations.]" (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581.)

It is arguable as to whether the court should have excluded Officer Dilbeck's references to appellant's parole status. Appellant's status was clearly relevant as the basis for Dilbeck's opinion about appellant's active membership in a gang, especially the parole conditions that he could not associate with other gang members or wear gang paraphernalia. Such evidence was also relevant to show appellant's knowledge that the members of his criminal street gang engaged in a pattern of criminal activity, as required by the substantive gang offense alleged in count IV (§ 186.22, subd. (a)). Dilbeck could have properly relied upon the parole agent's information in forming his opinion about appellant's active membership.

Appellant argues such evidence was highly prejudicial, as it effectively amounted to introducing evidence that he suffered prior gang-related convictions, even though he did not testify. Officer Dilbeck, however, did not testify that appellant's parole status was based on his prior commission of a gang-related offense. Moreover, appellant did

not object to other aspects of Dilbeck's testimony—that appellant repeatedly claimed Sureno membership when he was booked into the Madera County Department of Corrections. Dilbeck's testimony on this point was based on the same issue, yet appellant did not object below and has not challenged this evidence on appeal. In addition, the jury herein was instructed as to the limited purpose of Dilbeck's testimony, and we presume the jury followed the court's instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Even if the court's ruling was erroneous, any error is necessarily harmless based upon the entirety of the record. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611-612.) Both the victim and Ramirez positively identified appellant as the man who threatened the victim and slashed at Martinez, causing the wound above his beltline. As discussed *ante*, there is overwhelming evidence that appellant was a member of the Surenos, and that he acted with the specific intent to benefit the gang when he threatened the victim that she could not have her store in his town without his permission.

While a harmless error analysis necessarily takes care of this issue, appellant's parole status was introduced to support Officer Dilbeck's expert opinion that appellant was an active member of a criminal street gang, as charged in count IV. As we will explain in section IV, *post*, appellant's parole status constituted key evidence that he knew members of his criminal street gang engaged in a pattern of criminal activity, as required by the substantive gang offense alleged in count IV (§ 186.22, subd. (a)).

IV.

SUBSTANTIAL EVIDENCE OF ACTIVE PARTICIPATION IN A GANG

Appellant was charged and convicted in count IV with the substantive offense of active participation in a criminal street gang, in violation of section 186.22, subdivision (a). The jury separately found as to count I, aggravated assault, and count II, criminal threats, that he committed the offenses for the benefit of a criminal street gang, pursuant to the section 186.22, subdivision (b) enhancement.

Appellant contends the substantive gang offense in count IV must be reversed because there is insufficient evidence that he knew the Surenos were engaged in a pattern of criminal activity, or the specific predicate offenses relied upon by the prosecution to prove the pattern element. The Street Terrorism Enforcement and Prevention Act (STEP Act, §§ 186.20-186.33) creates both a substantive offense under section 186.22, subdivision (a), and a sentence enhancement under section 186.22, subdivision (b)(1). (*In re Jose P.* (2003) 106 Cal.App.4th 458, 466 (*Jose P.*).) Section 186.22, subdivision (a) defines the substantive offense and states:

> "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 [as specified]."

"… A person need not be a gang member to be guilty of violating section 186.22(a). [Citation.] But he or she must have had more than a nominal or passive involvement with the gang, knowing of the gang's pattern of criminal activity, and must have aided and abetted a separate felony committed by gang members. [Citation.]" (*Jose P., supra,* 106 Cal.App.4th at p. 466.) "The provision 'punishes active gang participation where the defendant promotes or assists felonious conduct by the gang. It is a substantive offense whose gravamen is the participation in the gang itself.' [Citation.] Thus, it 'applies to the perpetrator of felonious gang-related criminal conduct ....' [Citation.]" (*Ferraez, supra,* 112 Cal.App.4th at p. 930.)

The substantive gang offense of active participation in a criminal street gang under section 186.22, subdivision (a) requires proof that the defendant (1) actively participated in a criminal street gang with *knowledge* that its members engaged in, or have engaged in, a pattern of criminal gang activity, and (2) willfully promoted, furthered, or assisted in felonious criminal conduct by members of the gang. (*People v. Bautista* (2005) 125

Cal.App.4th 646, 656, fn. 5; *People v. Robles* (2000) 23 Cal.4th 1106, 1111, 1115 (*Robles*); *Jose P., supra,* 106 Cal.App.4th at p. 466.)

By its plain terms, section 186.22, subdivision (a) applies only to a defendant who has knowledge that the members of his or her criminal street gang "engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (a).) Under section 186.22, subdivision (e), a "'pattern of criminal gang activity'" is established by two statutorily enumerated offenses occurring within a three-year period, so long as at least one offense occurred after 1988, "and the offenses were committed on separate occasions, or by two or more persons." Thus, to violate section 186.22, subdivision (a), a defendant must be aware that his or her gang members participated in at least two offenses meeting the statutory requirements within a three-year time frame. The charged offense can serve as one of the predicate offenses. (*People v. Loeun* (1997) 17 Cal.4th 1, 8.) However, the prosecution need not prove the defendant had actual knowledge of the specific predicate offenses relied upon by the People. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 975-976, disapproved on other grounds in *Gardeley, supra,*14 Cal.4th at p. 624, fn. 10.)

In *Robles,* the court held the prosecution failed to prove the defendant was an active participant in a criminal street gang. The defendant had been standing on a street corner with a group of people in gang attire when police observed him look at a marked police car and then discard an object into a planter. (*Robles, supra,* 23 Cal.4th at p. 1109.) The police retrieved a loaded .22-caliber revolver from the planter and arrested the defendant. The defendant told police he was a member of "La Mirada Locos," a local street gang. A detective testified that members of that gang had committed a series of armed robberies a month before the defendant's arrest, and two gang members had stabbed a high school student on a bus the year before. (*Id.* at pp. 1109-1110.) The detective testified, however, that he had no reason to believe that the defendant knew about the crimes. (*Id.* at p. 1110.) *Robles* held the evidence failed to establish the

defendant was an "active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22" (§ 12031, subd. (a)(2)(C)) because no evidence was introduced to show that the defendant knew members of the gang engaged in a pattern of criminal activity. (*Robles, supra,* 23 Cal.4th at p. 1115.)

"When determining whether the evidence was sufficient to sustain a criminal conviction, we review the entire record in the light most favorable to the judgment to determine '"whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citations.] 'We draw all reasonable inferences in support of the judgment. [Citation.]' [Citations.] Reversal is not warranted unless it appears '"that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' [Citation.]" (*Duran, supra,* 97 Cal.App.4th at pp. 1456-1457.)

We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.) "'"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."' [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 933.) We do not reweigh evidence or re-determine issues of credibility. (*Ferraez, supra,* 112 Cal.App.4th at p. 931.)

To prove a state of mind such as knowledge, "'[r]eliance on circumstantial evidence is often inevitable when ... the issue is a state of mind such as knowledge.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 379.) "Knowledge, like intent, is rarely susceptible of direct proof and generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise." (*People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495.) "A requirement of knowledge is not a requirement that the act be done with any specific intent. [Citations.] The word 'knowing' as used in a

criminal statute imports only an awareness of the facts which bring the proscribed act within the terms of the statute. [Citation.]" (*People v. Calban* (1976) 65 Cal.App.3d 578, 584.)

As explained *ante*, it is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. (*People v. Valdez, supra*, 58 Cal.App.4th at p. 506; *Ferraez, supra,* 112 Cal.App.4th at p. 930; *Frank S., supra,* 141 Cal.App.4th at p. 1196.) The subject matter of the culture and habits of street gangs meets the criteria for the admissibility of expert opinion because such evidence is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*Gardeley, supra,* 14 Cal.4th at p. 617; *Frank S., supra,* 141 Cal.App.4th at pp. 1196-1197.)

At trial, the question of appellant's knowledge was hotly contested. In closing argument, the prosecutor argued there was evidence appellant knew the gang engaged in a pattern of criminal activity.

> "You have to ask yourself, well, how do we show the knowledge of the defendant. And as evidenced by the tattoos he had. Tattoo on head 13. The fact that he is in admitted to being a gang member since he was 13. He has … long ties to this gang. And has to have knowledge of thier [*sic*] ongoing criminal enterprise. It would be inferred by the circumstances surrounding its existence of the actions of the defendant."

Defense counsel disputed the prosecutor's summary of the evidence, and argued there was no evidence appellant was connected to the Madera Surenos, or that he knew anything about the criminal activities of the Sureno gang in Madera County. The prosecutor returned to this subject on rebuttal, and asserted that appellant knew of the criminal activities of the Surenos:

> "The reason why this is important because the defense makes a big point about this. That he's from Santa Paula and we didn't show that it was a Santa Paula Party Boys announced it. And I don't think the Surenos would come to the point where they're so sophisticated that when they do a crime and quickly jump on the Internet and announce it to everybody. Hey, guys

> this is what I did. It's not that requirement. There is no requirement. The jury instructions are read to you that the Defendant needs to broadcast to everybody and tell everybody this is what I did and notify all his rivals."

Appellant asserts there is no evidence he knew the Surenos in Madera engaged in a pattern of criminal activity, because Officer Dilbeck testified to predicate offenses committed by Madera Surenos in 2001, which resulted in criminal convictions in March 2002, prior to appellant's arrival in Madera County. Contrary to appellant's argument, the prosecution was not required to prove appellant had actual knowledge of the specific predicate offenses relied upon the prosecution to prove the gang substantive offense and enhancement. (*People v. Gamez, supra*, 235 Cal.App.3d at pp. 975-976.)

There is overwhelming evidence that appellant was an active member of the Surenos based on his tattoos and repeated claims of Sureno membership. It is a closer question as to whether there is evidence that appellant knew the members of the Surenos engaged in a pattern of criminal activity. As explained in *Robles*, there must be substantial evidence that appellant knew members of the Surenos engaged in a pattern of criminal activity. (*Robles, supra,* 23 Cal.4th at p. 1115.) The entirety of the record strongly infers appellant had such knowledge. Appellant admitted to being a member of the Surenos since he was 13 years old. Officer Dilbeck testified the primary activities of the Surenos "can be anything" from assaults with firearms or dangerous weapons, drive-by shootings, attempted murders, robberies, narcotic sales, and murder. Officer Dilbeck testified appellant was a member of the Santa Paula County Boys Surenos, in Southern California. Dilbeck believed appellant moved to Madera in December 2002 or January 2003, because his first contact with appellant occurred in January 2003 when appellant was confronted by Nortenos. Dilbeck further testified appellant had associated with the Sureno gangs in Madera County, he was not required to be jumped into the gang again since he was already a member of the Surenos in Southern California. Dilbeck explained the Surenos started in Southern California, and a Sureno from that area has more prestige when he moves further north, "because of the reputation of their predecessors."

Appellant was seen with members of the Madera Sureno gang, the VLM, when a gang-related homicide occurred at a bar, he was wearing gang attire, and he fled from the scene when the police arrived. Moreover, appellant was with other Sureno gang members at his house when he was arrested in this case, and again admitted to being a Sureno when he was booked into custody.

While Officer Dilbeck explained the relationship between the Sureno gangs of Southern California and Madera County, he failed to testify as to the specific criminal activities of appellant's original gang in Santa Paula. Officer Dilbeck also failed to address whether appellant's codefendant in this case was also a member of the Surenos. Such evidence would have been helpful to support the circumstantial inference that appellant knew the Surenos engaged in criminal activity.

Officer Dilbeck's testimony about appellant's parole status, further supports the jury's findings on count IV. Officer Dilbeck testified appellant's parole conditions prohibited him from associating with other gang members, wearing gang attire, and participating in gang-related crimes. Such conditions carry the strong inference that appellant knew his gang engaged in a pattern of criminal activity.

We conclude the evidence was sufficient to permit the jury to rationally infer that appellant knew gang members engaged in or had engaged in a pattern of criminal gang activity, to support his conviction in count IV for violating section 186.22, subdivision (a).

V.

SUBSTANTIAL EVIDENCE TO SUPPORT GANG ENHANCEMENT

Appellant next challenges the gang enhancements found true as to counts I and II, and argues there is insufficient evidence (1) he committed the offenses for the benefit of his gang, and (2) he had the specific intent to benefit the gang when he committed the offenses.

The same substantial evidence standard applies when determining whether the evidence was sufficient to sustain a jury's finding on a gang enhancement. (*Duran, supra,* 97 Cal.App.4th at pp. 1456-1457; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322 (*Villalobos*).) The trier of fact may rely upon expert testimony about gang culture and habits to reach a finding on the gang allegation. (*Ferraez, supra,* 112 Cal.App.4th at p. 930; *Frank S., supra,* 141 Cal.App.4th at p. 1196.)

"A gang enhancement does not apply unless the crime was '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 ....' (§ 186.22, subd. (b)(1).)" (*Villalobos, supra,* 145 Cal.App.4th at p. 322; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1197.) As to the second prong of the enhancement, "specific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members ....'" (*People v. Morales, supra*, at p. 1198., italics in original; *Villalobos, supra,* 145 Cal.App.4th at p. 322.) Gang membership alone cannot prove the requisite specific intent. (*Gardeley, supra,* 14 Cal.4th at p. 623.)

There is substantial evidence to support the jury's finding on both aspects of the gang enhancement. Appellant admitted he had been a member of the Surenos since he was 13 years old. He relocated to Madera, associated with other Surenos in Madera, and repeatedly claimed he was a Sureno after he moved to Madera. He was not required to be jumped into the Madera gang because of his status as a Sureno from Southern California. Officer Dilbeck explained that a Sureno from Southern California carried more prestige because of the reputation of the southern gangs. Appellant displayed multiple Sureno tattoos, including a large "13" on the back of his head. The victim's market was located in a relatively high crime area, mainly consisting of Sureno gang activity, just one block from appellant's house. Appellant walked up to the victim, stood very close to her face and, in a rough tone of voice, said she "was not allowed to have my

store there; that he was going to break the windows on my store." Appellant said, "'This is my town and you have to ask me permission to have this store here.'" Appellant said "he was going to break my windows and he was going to beat me up and throw me to the street so the ambulance will pick me up." The second man confronted and punched Martinez. Appellant turned to Ramirez and the victim ran into the store to call the police. Ramirez ran away, and turned around to see appellant stab Martinez in the back.

Appellant makes much of the fact that he was not displaying gang colors, the victims in this case were not involved in any gangs, he could have been speaking for himself rather than his gang, and the gang enhancement was found true simply because he confronted the victims and had gang tattoos on his body. But such facts do not dispel the equally strong inference that appellant committed the offenses for the benefit of the Surenos, with the specific intent to promote, further, or assist in the criminal conduct of gang members. Officer Dilbeck conceded the victims in this case were not associated with any type of gang, but explained about the concept of respect among gang members and rivals, that a gang member can earn respect through the commission of violent crimes, and such acts of violence "intimidates the community in which gang members reside." Appellant's words and conduct demonstrated his claim over the mini market as being within his gang's turf, the market's owner needed his permission to operate on the Sureno's turf, and he was prepared to, and did use, physical force to make his threats realistic. Dilbeck explained the benefit which accrued to the gang from such conduct:

> "It accrues a benefit because the more violent the gang is, the more respect they get from other Sureño gang members. The more feared they are by rivals, which may not decide to go into their turf and territory to commit crimes against them, because they're scared of retaliation. And it also makes citizens more hesitant to testify against them and to contact us. We have some communities that are so afraid that when shots are fired, you know, in their neighborhoods, that they don't even call the police."

Officer Dilbeck testified that an "average gang member in [a] similar situation would accrue a benefit to the criminal street gang and they would know that" by threatening a store owner on their turf, and using a weapon to assault someone.

> "A threat can only instill so much fear in someone, and what better way to emphasize that point than with an act of violence. If I threaten to do something, you may believe that I am willing to do that and capable of doing that; however, if you see or hear about someone that actually did a violent act after they said they were going to, it leads someone to put a little bit more stock in what that individual is threatening and helps the violent reputation of the Sureños."

Appellant's threatening and assaultive conduct in this case, his claim that the victim needed his permission to operate on Sureno turf, and his admitted active membership in the Surenos since he was 13 years old, demonstrate that he committed the aggravated assault and criminal threats to benefit the Surenos, and with the specific intent to promote the gang's criminal conduct.

VI.

COUNT I AND THE PERSONAL USE ENHANCEMENT

In count I, appellant was charged and convicted of assault by means of force likely to produce great bodily injury on Abel Martinez, in violation of section 245, subdivision (a)(1), and the jury found the enhancement true, that appellant personally used a deadly weapon, a knife, in the commission of count I, within the meaning of section 12022, subdivision (b)(1).

Appellant contends, and respondent concedes, that the personal use enhancement must be stricken because it is an inherent element of count I. In *McGee*, the court explained that when a violation of section 245, subdivision (a)(1) is perpetrated by use of a deadly weapon, a personal use enhancement under section 12022, subdivision (b)(1) cannot be imposed. (*McGee, supra,* 15 Cal.App.4th at pp. 110, 115-116.)

While the personal use enhancement must be stricken, this determination does not affect the analysis set forth in section II, *ante*, that the jury's finding that appellant used a

knife in the commission of the assault rendered harmless any error by the court in failing to instruct on simple assault as a lesser included offense of count I.

VII.

SECTION 654 AND COUNT IV

Appellant next contends the court should have stayed the term imposed for count IV, the substantive gang offense, because it was based on the same conduct which was the basis for the gang enhancements.

A. Background

Appellant was charged with count I, aggravated assault against Abel Martinez (§ 245, subd. (a)(1)), count II, criminal threats against the victim (§ 422), and count IV, the substantive criminal gang offense (§ 186.22, subd. (a)), with the special allegations as to counts I and II, that he committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). As to count IV, the court instructed the jury pursuant to CALJIC No. 6.50 as to the elements of the substantial gang offense:

> "In order to prove this crime each of the following elements must be proved. One, a person actively participated in a criminal street gang. Two, the members of that gang engaged in or have engaged in a pattern of criminal gang activity. Three, that person knew the gang members engaged in, or have engaged in a pattern of criminal gang activity. And four, that person either directly or actively committed or aided and abetted another member of that gang in committing the crimes of Penal Code [section] 245(a)(1) and/ or Penal Code [section] 422."

Appellant was convicted of all counts and the gang enhancements were found true. At the sentencing hearing, as to count I, aggravated assault, the court imposed the upper term of four years, doubled to eight years as the second strike term, with consecutive terms of one year for the personal use enhancement, and five years for the gang enhancements. The court imposed concurrent second strike terms of six years for count II, criminal threats, and count IV, the substantive gang enhancement, with a concurrent term of five years for the gang enhancement as to count II. The court agreed the offenses

were "all part of one transaction" but explained, "I can't really make a finding that it happened at separate times and places so as to not indicate a single period of abberant [*sic*] behavior. So I'm going to end up giving concurrent terms on Counts Two and Four."

B. <u>The Gang Offense and Enhancements</u>

Appellant contends the concurrent term imposed for count IV, the substantive gang offense, must be stayed pursuant to section 654 because the court already imposed terms for the gang enhancements and count IV was based on the same intent to commit counts I and II.

Section 654, subdivision (a) states in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one ...." Section 654 applies to sentencing both for crimes flowing from a single act and for crimes resulting from an indivisible course of conduct which violates more than one statute. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Multiple punishment may be imposed, however, where the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466 (*Herrera*).) "'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 ... not for more than one [of the offenses].' [Citation.]" (*People v. Latimer, supra,* 5 Cal.4th at p. 1208, italics in original, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "Multiple punishment is permissible if [the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other. [Citation.] A defendant's criminal objective is 'determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if

there is any substantial evidence to support it.' [Citation.]" (*People v. Braz* (1997) 57 Cal.App.4th 1, 10.)

Appellant and respondent agree the issue as to whether section 654 applies to enhancements is currently pending before the California Supreme Court. (*People v. Palacios* (2005) 126 Cal.App.4th 428, review granted May 11, 2005, S132144). We will address appellant's contentions pending further clarification by the Supreme Court. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1392-1393.) Assuming section 654 applies, however, it only precludes punishment for an enhancement when the basis for the enhancement is an element of the underlying crime. (See *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314.) In other words, when "'the underlying crime and the enhancement are not identical, there is and can be no double punishment under section 654.' [Citation.]" (*Ibid.*)

"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." (*Herrera, supra,* 70 Cal.App.4th at p. 1467, italics in original, fns. omitted.) In contrast, the gang enhancement imposes additional punishment for 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 ...." (§186.22, subd. (b)(1).)

In *Herrera*, the defendant and a fellow gang member drove past the house of the mother of a rival gang member, firing each time and injuring two people. (*Herrera, supra,* 70 Cal.App.4th at p. 1461.) Defendant was convicted of conspiracy to commit murder, two counts of attempted murder, various firearm violations, receiving stolen property, and the substantive gang offense. (*Id.* at p. 1462 & fn. 6.) On appeal, he argued section 654 barred a separate sentence on the substantive gang offense. The court

found the gang offense was divisible from the murder counts because it required a different intent and objective. (*Id.* at p. 1466.) While the murder counts required simply an objective to kill, the intent and objective for street terrorism was more complex; the defendant must have the intent to actively participate in a criminal street gang. (*Id.* at p. 1467.) Finally, the court noted that if section 654 were applicable, it would render the crime of street terrorism a nullity whenever a gang member committed a substantive offense, and it did not believe the Legislature intended to exempt the most culpable parties from punishment under the street terrorism statutes. (*Herrera, supra,* 70 Cal.App.4th at p. 1468.)

In *Jose P.*, the juvenile court imposed nine years for a home invasion robbery with 10 years for a section 186.22, subdivision (b) gang enhancement, and eight months for the section 186.22, subdivision (a) substantive gang offense. (*Jose P., supra,* 106 Cal.App.4th at p. 461.) The juvenile argued the terms for the gang offense and enhancement were barred by section 654. *Jose P.* assumed the robbery was the basis for the juvenile's section 186.22, subdivision (a) liability, and held that section 654 did not apply. (*Jose P., supra,* at p. 470.) The court explained:

> "'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.... [S]ection 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.]'" (*Jose P., supra,* 106 Cal.App.4th at pp. 470-471, italics in original, quoting *Herrera, supra,* 70 Cal.App.4th at pp. 1467-1468.)

Jose P. thus concluded section 654 was not applicable because the juvenile had two separate objectives in committing the robbery and the gang offense. (*Jose P., supra,* 106 Cal.App.4th at p. 471.)

> "… The minor's intent and objective in violating section 186.22[, subdivision] (a) necessarily must have been participation in the gang itself. Evidence of that intent was abundant.... [¶] His intent and objective in committing the robbery was to take the property located in the home. Application of the enhancement does not alter the fact that he must also have had the intent to take the property. While he may have pursued the two objectives simultaneously, the objectives were nevertheless independent of each other. Therefore, section 654 does not bar punishment for both the gang crime and the robbery." (*Jose P., supra,* 106 Cal.App.4th at p. 471.)

In *Ferraez*, the defendant was convicted of possession of cocaine base for sale and the substantive gang offense. The defendant claimed the court should have stayed the sentence for the gang offense because he had one intent and objective for both crimes. (*Ferraez, supra,* 112 Cal.App.4th at p. 935.) *Ferraez* relied on *Herrera* and rejected the defendant's argument, and held he had simultaneous but independent objectives of possessing drugs with the intent to sell, and committing that felony to promote or assist the gang. (*Ibid.*)

As in *Jose P.*, the trial court herein could reasonably have concluded that independent of his intent to participate in a gang, appellant harbored the separate, albeit simultaneous, intent to benefit his gang when he assaulted Abel Martinez and threatened the victim. As Officer Dilbeck explained, in carrying out this crime appellant was not just participating in the gang lifestyle, he was benefiting his gang by furthering its reputation for violence and toughness. Such an intent is sufficient justification to impose separate punishment under subdivisions (a) and (b) of section 186.22. The intents and objectives at issue in the gang enhancement and substantive gang offense may have been simultaneous, but they were nevertheless independent of one another. (*Herrera, supra,* 70 Cal.App.4th at pp. 1465-1468.)

However, while appellant committed different criminal acts, these acts constituted a single course of conduct, with the single intent and objective of gaining respect within his gang by threatening and assaulting civilians who were on Sureno turf. Indeed, Officer Dilbeck explained that gang members gain respect among their own members and rivals by claiming control over a particular area. While appellant's intent and objectives could be parsed into separate intents, to assault and threaten, and to promote the gang, those intents were not independent based upon the facts and circumstances of this case. Each intent was dependent on, and incident to, each other. Indeed, the instructions for count IV specifically stated that appellant sought to benefit the gang through his commission of the offenses of aggravated assault and criminal threats. Thus, the concurrent term imposed for count IV must be stayed pursuant to section 654.

VIII.

THE PRIOR SERIOUS FELONY ENHANCEMENT

Respondent contends the court imposed an unauthorized sentence because it failed to add a consecutive five-year term for appellant's prior serious felony enhancement. Appellant asserts respondent cannot raise this issue on appeal, and he cannot receive a higher term as a result of his appeal.

The amended information alleged a prior serious felony conviction and one prior strike conviction. After the jury returned the convictions, appellant admitted the prior conviction allegations. The probation report addressed the potential second strike term, but did not list the prior serious felony enhancement within the recommended sentencing range. At the sentencing hearing, the court imposed the second strike term but did not address the prior serious felony enhancement.

The imposition of the five-year enhancement required by section 667, subdivision (a) is mandatory, even though the defendant is also sentenced under the three strikes law. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 395 (*Ayon*), disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see also *People v. Purata* (1996) 42

Cal.App.4th 489, 498.) A trial court lacks discretion to stay or strike the prior serious felony enhancement under section 667, subdivision (a). (*People v. Askey* (1996) 49 Cal.App.4th 381, 389.) The failure to impose the mandatory prior serious felony enhancement results in an unauthorized sentence which is correctable on appeal. (*Ayon, supra,* 46 Cal.App.4th at pp. 395-396 & fn. 7.)

"…'An appellate court may "correct a sentence that is not authorized by law whenever the error comes to the attention of the court." [Citation.]' [Citation.] An unauthorized sentence is just that. It is not subject to a harmless error analysis. Nor does it ripen into a sentence authorized by law with the passage of time. Imposition of an unauthorized sentence is an act which is in excess of a court's jurisdiction and may be the subject of later review even after affirmance of the judgment on direct appeal. [Citations.]" (*In re Birdwell* (1996) 50 Cal.App.4th 926, 930.) An unauthorized sentence cannot be deemed waived for failure to object, nor is it subject to the invited error doctrine. (*Id.* at p. 931.) This court may correct the error even though the People have not filed an appeal. (*Ayon, supra*, 46 Cal.App.4th at pp. 395-396 & fn. 7.) "[I]t is well established that when a defendant lays his cause on our doorstep, he subjects himself to a thorough review of the proceedings below, and an unauthorized sentence must be vacated and a proper sentence imposed whenever such a mistake is discovered. [Citation.]" (*Id.*, at p. 395, fn. 7.)

Appellant was sentenced to an aggregate term of 14 years. We have already concluded that the consecutive one-year term for the personal use enhancement must be stricken. Thus, appellant's aggregate term must be further modified to add a consecutive five-year term for the prior serious felony enhancement, for a new aggregate term of 18 years.

IX.

IMPOSITION OF UPPER AND CONSECUTIVE TERMS

The trial court herein imposed upper and consecutive terms. In light of the United States Supreme Court's recent ruling in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), we will review the record to determine if the matter must be remanded for resentencing.

A. Background

Appellant was convicted of count I, assault by means of force likely to produce great bodily injury on Abel Martinez, count II, criminal threats on the victim, and count IV, active participation in a criminal street gang. Appellant admitted the special allegations, that he suffered one prior serious felony conviction and one prior strike conviction.

The probation report listed appellant's juvenile and adult record. Appellant was born in 1982. In January 1998, appellant was subject to a juvenile adjudication and made a ward for violating section 242 in Santa Paula. In June 1999, he was continued as a ward based on juvenile adjudications in Santa Paula for violating section 245, subdivision (a), section 182, and section 186.22, subdivision (b), placed in juvenile hall for 30 days. In November 1999, he was found in violation of parole in Ventura, continued as a ward, and placed in juvenile hall for 72 days.

Appellant's adult record began in June 2000 in Santa Paula, when he was convicted of a misdemeanor violation of section 602, subdivision (*l*), and placed on probation. In August 2001, he was convicted of a felony violation of section 246 in Santa Paula, and sentenced to three years in state prison. In February 2003, appellant was convicted of a misdemeanor violation of section 148.9, subdivision (a) in Oxnard, and placed on 36 months probation. In November 2003, he was returned to custody for violating parole.

The probation report identified the aggravating circumstances as follows: appellant's prior juvenile adjudications and adult convictions were numerous; appellant served a prior prison term; and appellant's prior performance on juvenile probation, adult probation, and parole was unsatisfactory, based upon his multiple violations of probation and parole, and commission of new offenses while on probation and parole. There were no mitigating factors. The probation report recommended consecutive terms because the crimes and their objectives were predominantly independent of each other, and the crimes involved separate acts of violence or threats of violence.

At the sentencing hearing, the court stated it had read and considered the probation report. Defense counsel argued appellant's first adult conviction occurred in Santa Paula, this case represented his second felony conviction, and his record was not so egregious to warrant the aggravated term. Counsel urged the court to consider lower or midterms for the counts, and concurrent rather than consecutive sentences. Counsel argued the offenses were not independent of each other, even though there were separate victims, because everything happened at the same time. Counsel acknowledged the jury found the gang charges true, but argued there was no evidence appellant was involved in a gang in Madera, and asked the court to dismiss the prior strike conviction.

The prosecutor agreed with the probation report's recommendation for imposition of the upper terms. The prosecutor argued appellant's criminal record began with gang activities as a juvenile, and continued with a violation of section 242 in 1997, a violation of section 245, subdivision (a)(1) with a gang enhancement in 1998, and a violation of section 246 in 2001, and he was on parole when he committed the instant offenses. The prosecutor argued the facts of the instant case supported consecutive terms.

The court denied probation and stated:

> "As to Count One the court has looked at the circumstances in aggravation, mitigation find there are no mitigating factors and the Court[] [will] impose the aggravated term finding the circumstances in aggravation to

> preponderate. That's eight years state prison, which is the four years doubled under [section] 667(e)(1) of the Penal Code.
>
> "I think you're right in terms of it's all part of one transaction. I can't really make a finding that it happened at separate times and places so as to not indicate a single period of abberant [*sic*] behavior. So I'm going to end up giving concurrent terms on Counts Two and Four.…"

The court imposed the upper term of four years as to count I, doubled to eight years as the second strike term, with consecutive terms of one year for the personal use enhancement, and five years for the gang enhancement. The court also imposed doubled upper terms for counts II and IV, and found "the circumstances in aggravation preponderate," with the terms and enhancements to run concurrent to count I.

**B.	*Cunningham/Blakely*[5]**

In *Blakely, supra,* 542 U.S. 296, the United States Supreme Court reaffirmed the rule announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*): "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 542 U.S. at p. 301, quoting *Apprendi, supra*, 530 U.S. at p. 490.) One year later, the United States Supreme Court reiterated the right to a jury trial requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker* (2005) 543 U.S. 220, 244.)

In *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) (cert. granted *sub nom. Black v. California* (2007) ___ U.S. ___ [127 S.Ct. 1210], the California Supreme Court considered the effect of *Apprendi* and *Blakely* on this state's determinate sentencing law and held that the imposition of upper terms does not constitute an increase in the penalty

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5	*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

for a crime beyond the statutory maximum, and therefore "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence ... does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black, supra*, 35 Cal.4th at p. 1244.)

In *Cunningham, supra,* 549 U.S. ___ [127 S.Ct. 856], the court held California's Determinate Sentencing Law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent it permits a trial court to impose an upper term based on facts—other than the fact of a prior conviction—found by the court rather than by a jury beyond a reasonable doubt.

> "As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey,* 530 U.S. 466 … (2000); *Ring v. Arizona,* 536 U.S. 584 … (2002); *Blakely v. Washington,* 542 U.S. 296 … (2004); *United States v. Booker,* 543 U.S. 220 … (2005). '[T]he relevant "statutory maximum,"' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' *Blakely,* 542 U.S., at 303-304 … (emphasis in original).... [¶] ... [¶]
>
> "… Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL [Determinate Sentencing Law] authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra,* 549 U.S. ___ [127 S.Ct. at pp. 860, 871, fn. omitted].)

In the instant case, the probation report identified multiple aggravating circumstances based on appellant's prior convictions. There were no mitigating factors. At the sentencing hearing, the court did not address the individual aggravating factors, but repeatedly stated the aggravating factors were predominant and there were no mitigating factors, and imposed the upper terms. The trial court's imposition of the upper

term does not require reversal of the sentence. It is settled that only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) Here, the trial court relied on appellant's prior convictions and recidivism to impose the upper term, as permitted by *Cunningham* and *Blakely.* Even if we were to assume error under *Cunningham*, the error was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) __ U.S.__ [126 S.Ct. 2546, 2553] ["Failure to submit a sentencing factor to the jury ... is not structural error" and is subject to harmless error rule]; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Sengpadychith, supra,* 26 Cal.4th at p. 327.) On this record, we have no doubt that appellant's jury, applying the reasonable doubt standard, would have reached the same conclusion as the trial court, and found true beyond a reasonable doubt the aggravating factors that appellant's prior juvenile adjudications and convictions were numerous, appellant served a prior prison term, and appellant's prior performance on juvenile probation, adult probation, and parole was unsatisfactory, based upon his multiple violations of probation and parole and commission of new offenses while on probation and parole.

The trial court herein also imposed consecutive terms, but *Black* held that "a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences." (*Black, supra,* 35 Cal.4th at p. 1262.) That holding was not overturned by *Cunningham*, which did not address the distinct issue of imposition of consecutive sentencing for separate crimes, although we note the United States Supreme Court has granted certiorari in *Black*. Our Supreme Court has held that a judge's imposition of consecutive sentencing does not impermissibly increase the penalty for a crime beyond the prescribed statutory maximum. (*Black, supra,* 35 Cal.4th at pp. 1262-1264; see also *People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1269, 1270-1271.); accord *State v. Kahapea* (Hawaii 2006) 141 P.3d 440, 451-453 [collecting cases].) Our Supreme

Court's holding is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The one year personal use enhancement pursuant to Penal Code section 12022, subdivision (b) is stricken. The concurrent term imposed in count IV is stayed pursuant to Penal Code section 654. A consecutive term of five years for appellant's prior serious felony conviction (found true by appellant's admission thereof) is ordered imposed. In all other respects the judgment is affirmed. Appellant's net aggregate prison term is thus modified to 18 years. The trial court is directed to prepare and serve as appropriate an amended abstract of judgment reflecting the foregoing modifications.

____
HARRIS, Acting P.J.

WE CONCUR:

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LEVY, J.

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GOMES, J.