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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SAMUEL ELIAS VERDIN et al.,<br><br>Defendants and Appellants. | B183508<br><br>(Los Angeles County<br>Super. Ct. No. LA045733) |

APPEALS from judgments of the Superior Court for the County of Los Angeles. John Fisher and Katheryne Stoltz, Judges. Affirmed.

Alisa A. Shorago, under appointment by the Court of Appeal, for Defendant and Appellant Samuel Elias Verdin.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant Paymen Pat Parvizi.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

We reject Samuel Verdin's challenge to his conviction for the attempted murder of his cousin. We also reject Paymen Parvizi's challenge to his conviction for assault by means likely to produce great bodily injury (of Verdin's cousin), being a felon in possession of a firearm, and evading a police officer. Neither appellant demonstrates prejudicial error. We affirm both judgments.

## PROCEDURAL BACKGROUND

Initially, both Samuel Verdin and Paymen Parvizi were charged with the attempted murder of Ricardo Alvarez Ponza (Alvarez). It was further alleged that a principal personally and intentionally discharged a firearm within the meaning of Penal Code section 12022.53, subdivisions (b), (c), (d), and (e)(1) and that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1).[1] It also was alleged that the crime was committed for the benefit of a street gang within the meaning of section 186.22, subdivision (b)(1)(A).

It was alleged that Verdin suffered from two prior felonies within the meaning of section 1203, subdivision (e)(4) and that he did not remain free from prison within the meaning of section 667.5, subdivision (b). It also was alleged that Verdin suffered a prior serious or violent felony or juvenile adjudication.

The prosecution dismissed the attempted murder charge with respect to Parvizi. He was charged with assault by means likely to cause great bodily injury in violation of section 245, subdivision (a)(1), and it was alleged that crime was for the benefit of a gang as defined in section 186.22. Parvizi also was charged with evading an officer in violation of Vehicle Code section 2800.2, subdivision (a) and for possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). It was further alleged that Parvizi suffered four prior felony convictions, including two prior serious or violent felony convictions.

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[1] Undesignated statutory citations are to the Penal Code.

The jury found Verdin to be guilty of attempted murder. The jury found the premeditation allegation to be not true. It could not reach a verdict on the gang allegation, and the court declared a mistrial on that allegation. The jury found true that Verdin personally and intentionally discharged a handgun and that he inflicted great bodily injury. Verdin admitted he suffered one prior serious or violent felony within the meaning of the "Three Strikes" law. Verdin was sentenced to seven years for the attempted murder, which was doubled pursuant to the admitted strike allegation. Five years was added for the section 667, subdivision (a)(1) prior for a total 19 year determinate term. In addition, Verdin was sentenced to 25 years to life for the gun allegation.

The jury convicted Parvisi of evading an officer, possession of a firearm by a felon, and assault by means likely to produce great bodily injury. The jury further found that the assault was committed for the benefit of a criminal street gang as defined by section 186.22, subdivision (b)(1)(A). The jury found true the allegation that Parvizi suffered two prior serious or violent felonies. Parvisi was sentenced to 25 years to life for the assault by means likely to impose great bodily injury plus an additional five years for the section 667, subdivision (a)(1) prior. With respect to the other counts, the court struck both the strike priors and imposed a consecutive eight month sentence for evading an officer and a concurrent two year sentence for possession of a firearm by a felon.

Each appellant filed a timely notice of appeal.

## FACTUAL BACKGROUND

*Verdin's Trial*

On April 15, 2004, in an alley near Kester and Vanowen, Verdin, aka Heist, and two friends, Iglu and Skrapie, fought Ricardo Alvarez Ponza (Alvarez aka Risky), Verdin's first cousin. The fight occurred in an alley and ended when Verdin shot Alvarez twice, the second time in the head. Alvarez survived, but was severely injured.

When interviewed by police, Verdin admitted that he shot Alvarez first in the legs and then "because he was mad, shot him in the face." In that interview, Verdin described a conflict with Alvarez "for years . . . ." Verdin asked Alvarez to leave him alone.

Alvarez shot at Verdin's house. "They are like, I'll do it in front of your mom right there in your house. I'll shoot her and this and that." On April 14, 2004, Alvarez tried "to run me [Verdin] over" and threatened Verdin with a gun. On the 15th, Alvarez was initially fighting Iglu "basically what it is, it's jealousy." Then Verdin and Skrapie came. Sandman (Parvisi) was near the mouth of the alley.

Verdin used Alvarez's gun to shoot Alvarez. Verdin was not armed. Verdin explained: "[w]e started fighting . . . I was just . . . beating him up . . . bad." "I was mad . . . I was high . . . I shot like at his leg. . . . Then I shot him in the face." When they were fighting, Alvarez's gun fell. . . . " Alvarez just stood there after Verdin fired a shot at the ground. Verdin agreed that he was mad so he fired one more shot. Verdin said "Ain't no snitching off because I did it . . . I did it." "I shot him." After shooting Alvarez, Verdin gave the gun either to Skrapie or Iglu, and told him to get rid of it.

Benjamin Densmore, who lived near the alley, observed five or six people beating up one person. Densmore then heard two or three shots and called 911. Deon Lofton also saw one person being beaten up in the alley. Someone then picked the victim up and held him against a fence. Lofton then heard a gunshot. The person who was beat up never fought back.

Verdin did not testify in his defense. Verdin's mother testified that Verdin said he acted in self-defense. She also testified that Alvarez told her nothing would have happened if "it weren't for his own fault." Ada Escobar testified that the night before the shooting Alvarez was using methamphetamine and gave his gun to a girl.

*Parvisi's Trial*

On April 15, 2005, officer John Ewald found Alvarez in an alley barely breathing. He had a gunshot wound to his head.

Erica Sayler lived in the area of Kester and Vanowen. She noticed five or six men walking down the street together. They escorted someone into the alley. Sayler called the police because she thought someone was going to get beat up. One person who was similar in height and weight to Parvisi was walking back and forth at the end of the ally and looking around. The person who was beaten was not fighting back. Sayler heard

shots and then saw the group of men run out of the alley. Deon Lofton also could see the fight from his window. He saw five guys beating up one guy. He never saw a one-on-one fight.

Alvarez testified that, on the day he was shot, Parvisi was acting as a lookout. Parvisi had told Alvarez that he wanted to talk to him. According to Alvarez, Parvisi was not a member of the DSM gang but Parvisi's son, Robert Rios aka Iglu, was a member of the gang.[2] According to Alvarez, he did not have a gun, but Verdin had one. Officer Luis Alarcon testified that Alvarez previously stated Parvisi displayed a gun before accompanying Alvarez into the alley.

Verdin testified for the defense. According to him, on April 15, 2004, he saw Alvarez and Iglu (Parvisi's stepson) fighting. Parvisi told Verdin not to get involved in the fight. Verdin ignored Parvisi's request. Alvarez started fighting with Verdin and pulled out a gun. Verdin managed to get a hold of Alvarez's gun and shot Alvarez in self-defense. Verdin first shot a warning shot but then when Alvarez came after him shot him in the face.

Parvisi testified in his defense. He testified that he asked Alvarez to fight his stepson in order to jump his son out of the DSM gang. Alvarez agreed to fight Iglu. Verdin later appeared with Skrapie and Parvisi told them to stay out of the fight. A girl gave Alvarez a gun and Alvarez said "I'm going to smoke somebody." Parvisi did not know that Verdin or Skrapie would be there. Officer Luis Alarcon testified that Alvarez said the fight was initially between him and Iglu.

Parvisi also testified with respect to the counts of evading a police officer and being a felon in possession of a firearm. He testified that he did not hear the police siren and did not know the police were pursuing him. As soon as he understood that he was being pursued, he pulled over his motorcycle and stopped. Parvisi testified that when he was stopped by police he was not in possession of a gun. Parvisi's wife testified that

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[2] There was evidence that Iglu was actually Parvisi's stepson, but Alvarez referred to him as Parvisi's son.

Parvisi had attempted to remove gang tattoos from one of his stepsons and did not want his children involved with gangs.

Officer Mathew Garza pursued Parvisi and testified that Parvisi accelerated at a high speed away from a marked police vehicle. According to Garza, Parvisi reached speeds of 60 to 70 miles per hour in residential neighborhoods, ran several red lights, and drove on the wrong side of the road. Garza testified that he recovered a loaded semiautomatic weapon from Parvizi's waistband. Officer Luis Alarcon had previously unsuccessfully tried to catch Parvisi.

Officer Joshua Ordonez testified as a gang expert. He testified that Parvisi is not a member of the DSM gang but associates with the gang. Verdin, Skrapie, and Iglu were members of the DSM gang. According to Ordonez, if Parvisi asked Alvarez to jump Iglu out of the gang, that is inconsistent with Alvarez being beaten up. However, Ordonez opined that the fight was gang related because Parvisi was acting as a lookout to assist the criminal conduct of gang members in assaulting Alvarez and had helped in getting Alvarez to the alley. According to Ordonez, beating up Alvarez would assist the gang because it "would get rid of the weakest link in that gang in order for that gang to stay strong."

## DISCUSSION

Parvisi contends: (1) he was prejudiced when the court conducted a hearing on a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)) outside his presence; (2) the court should have instructed the jury on self-defense; (3) evidence that Sayler was afraid to testify was improperly admitted; (4) his counsel rendered ineffective assistance; (5) the prosecutor committed misconduct; and (6) cumulative error requires reversal.

Verdin contends: (1) the prosecutor committed misconduct; (2) evidence of Alvarez's fear was improperly admitted; (3) documents related to the gang allegation were improperly admitted; and (4) cumulative error requires reversal.

*I. Pitchess Motion (Parvisi)*

There was not sufficient notice of the *Pitchess* motion for Parvisi to catch the bus to go to court. The court indicated it would proceed preliminarily in Parvisi's absence. On appeal, Parvisi argues that he was denied his constitutional and statutory right to be present when the court held a hearing with respect to his *Pitchess* motion.

At the hearing outside of Parvisi's presence, the prosecutor argued that the motion, filed a few days before trial, was untimely. Defense counsel explained that he had just recently been informed by Parvisi that the officers planted the gun on him. According to defense counsel, he had focused primarily on the attempted murder charge (which eventually was dismissed) not the evasion of an officer charge. The court denied the *Pitchess* motion as untimely, in part reasoning that it did not make sense Parvisi would wait until just before trial to inform counsel that the police planted a gun on him.

In a subsequent *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)), Parvizi disputed counsel's recollection of events. According to Parvisi, he told counsel "since day one that, 'I did not have a gun and the police officer planted this gun.' " Parvisi indicated that he told his attorney, "He planted a gun and . . . please to do a *Pitchess* motion." Counsel responded to Parvisi's statements, and the court then gave Parvisi a second opportunity to present his version of events. The court did not believe Parvisi's account and expressly found that he lacked credibility.

Subsequently, in the presence of Parvisi, the court summarized the *Pitchess* motion and elaborated on its findings. The court stated that defense counsel indicated he had recently been told the gun was planted and therefore filed a *Pitchess* motion. The court stated that at the *Marsden* hearing it made a credibility finding that it "did not believe the defendant." "I'm going to also now incorporate that finding in my ruling on the *Pitchess* hearing that I don't believe the defendant. That's independent of a secondary or separate reason why I denied the *Pitchess* motion then and why I continue to deny it."

Parvisi argues that he was harmed by the initial hearing outside his presence because "[b]y the time appellant finally had an opportunity to learn what his counsel had

said, the court had already decided that appellant was not credible." His subsequent "ability to alter the court's impression of his credibility was substantially impaired, as the court had already made up its mind, before hearing from appellant, that counsel's explanation of the delay in filing the *Pitchess* motion was correct."

The record does not support Parvisi's argument. Although Parvisi was not present at the initial hearing, the court twice revisited the issues surrounding the *Pitchess* motion in Parvisi's presence. When Parvisi was available, the court afforded him an opportunity to dispute counsel's version of events and to describe his view of the situation. Parvisi attempted to persuade the court that he immediately informed counsel that the gun was planted. The court's ultimate finding that Parvisi lacked credibility does not show the court was unwilling to consider his version of events.

*II. Self-defense Instruction (Parvisi)*

When it instructed the jury, the trial court omitted the following paragraph from CALJIC No. 9.00: "A willful application of physical force upon the person of another is not unlawful when done in lawful [self-defense] [or] [defense of others]. The People have the burden to prove that the application of physical force was not in lawful [self-defense] [defense of others]. If you have a reasonable doubt that the application of physical force was unlawful, you must find the defendant not guilty."

Contrary to Parvisi's argument, the court correctly omitted the foregoing paragraph describing self-defense. There was evidence in Parvisi's trial that Verdin acted in self-defense. Specifically, Verdin testified that he wrestled the gun from Alvarez and then shot Alvarez in self-defense. But, there was no evidence that Parvisi acted in self-defense or in defense of another. Parvisi testified that he did not know that Verdin would participate in the fight and that he told Verdin not to fight. If his testimony is believed, it shows that Parvisi did not have the mens rea to aid and abet the assault of Alvarez. It does not provide any evidence that Parvisi acted in self-defense.

The fact that Parvisi was not charged with the attempted murder of Alvarez further supports the trial court's conclusion that the self-defense instruction was inappropriate. Verdin's testimony was that he acted in self-defense when he shot Alvarez, not when he

initially entered the fight. There was no evidence that the assault, for which Parvizi was charged, was in self-defense.

*III. Testimony Regarding Fear (Parvizi and Verdin)*

Our high court has held that "[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) When evidence is admitted for that purpose, the jury should be instructed that the evidence is admitted for a limited purpose. (See *id*. at p. 870 [noting the "jury was promptly and correctly instructed as to the limited purpose of the evidence"].)

*A. Parvisi's Trial*

When Erica Sayler took the stand, the prosecutor's first question was "Ms. Sayler, is it fair to say you'd rather not be testifying here today?" Defense counsel objected. That objection was overruled and Sayler answered affirmatively. Objections to subsequent similar questions were sustained. Subsequently, without objection, Sayler testified that she was scared for her safety at the time she witnessed the fight. Sayler did not specifically identify Parvisi and the prosecutor asked her if she was scared to identify anyone. Sayler answered negatively. Then the prosecutor asked "[d]id you earlier tell me you were scared to come to court and testify?" and "Do you have some fear?" No objection was made and Sayler answered those questions affirmatively.

With one exception, the court sustained objections to the prosecutor's questions of whether Sayler would rather not be testifying. No objection was made to the questioning of Sayler regarding her fear of testifying. The objection to those questions is therefore forfeited. (*People v. Samuels* (2005) 36 Cal.4th 96, 113.)

In any event, even if we consider Parvisi's argument on the merits, it is not persuasive. Parvisi argues the evidence of Sayler's fear was irrelevant. He argues that "[t]he risk that the jury will interpret a witness's fear as due to intimidation by the defendant requires the exclusion of testimony about fear where that testimony is not needed to preclude erroneous inferences from a witness's change in testimony." He further argues that the improper testimony "contributed to the image of appellant as a

dangerous man, which aided the prosecution's portrayal of him as someone with continuing gang ties rather than as a father seeking to get his stepson out of a gang."

Under *People v. Burgener*, *supra*, 29 Cal.4th 833, 869 the evidence was properly admitted but should have been accompanied with a limiting instruction. The absence of a limiting instruction did not prejudice Parvisi. Sayler's testimony about a general fear did not in any manner intimate that Parvisi had threatened her or otherwise attempted to suppress her testimony. Sayler's testimony without any reference to gangs did not, as Parvisi argues, suggest that he is "someone with continuing gang ties." The prosecutor did refer to Sayler as "an objective, third-party witness who didn't want to be here." But that statement did not suggest that Parvisi had threatened Sayler or otherwise portray Parvisi negatively. In addition, as the Attorney General points out, the other eye witness Leon's testimony was consistent with Sayler's testimony.

*B. Verdin's Trial*

In Verdin's trial, there was testimony that Alvarez was afraid of testifying and that he had applied to be in a witness protection program. Verdin argues that there was no evidence that threats occurred or that he had any role in them. He argues that the evidence "was likely to improperly create sympathy for Alvarez with the jurors. . . ."[3]

The evidence was properly admitted to show Alvarez's state of mind. However, as Verdin argues, the court should have instructed the jury that the evidence was admitted for a limited purpose. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 870.) The absence of the limiting instruction did not deprive him of a fundamentally fair trial. The evidence in Verdin's trial, including his own confession, was overwhelming. In his own trial, Verdin did not testify in his defense. The record provides no basis for his speculation that the jury could have improperly considered Alvarez's fear of testifying to render him a sympathetic witness and therefore convict Verdin of attempted murder. The prosecutor

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[3] Contrary to the Attorney General's argument, this contention was not forfeited. Counsel objected to the admission of the evidence in the trial court sufficiently to preserve the issue for review.

expressly told the jury, albeit in another context, that the instruction "directs you to, you know, make your decision in this case not based on an emotional argument or on prejudice or on sympathy for somebody or dislike for somebody else. We want you to make this decision on the facts of this case and the evidence that came out."

*IV. Ineffective Assistance of Counsel (Parvizi)*

Parvisi argues that his counsel was ineffective in (1) failing to file a timely *Pitchess* motion; (2) diluting the standard of reasonable doubt; (3) failing to object to evidence that he was a murder suspect; and (4) failing to object to prosecutorial misconduct. We discuss the first three arguments in this section and consider the last in the next section.

To show ineffective assistance of counsel, a defendant must demonstrate (1) counsel's performance fell below an objective standard of reasonableness and (2) absent the deficiency, it is reasonably probable the defendant would have achieved a more favorable outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) A reasonable probability is one sufficient to undermine confidence in the outcome of trial. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 218.)

In assessing a claim of ineffective assistance of counsel, counsel's reasonable tactical decisions are afforded great deference. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) Counsel's decision making must be evaluated in the context of the available facts. (*Id*. at p. 926.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*Ibid*.)

*A. Alleged Failure to File a Timely Pitchess Motion*

In explaining the delay in filing a *Pitchess* motion, defense counsel indicated that he initially focused on the attempted murder charge originally filed against Parvisi and subsequently dismissed, not on the charge of evading an officer. Defense counsel believed there was a strong defense to the attempted murder charge and no similar

defense to the charge of evading an officer. Parvisi argues that his counsel's failure to focus on any charge other than the attempted murder charge constituted ineffective assistance of counsel.

Parvisi implies but does not show that counsel was deficient in his investigation. While Parvisi states that counsel should have questioned him immediately about the circumstances of his arrest, there is no evidence that counsel failed to conduct an adequate investigation. The trial court specifically rejected Parvisi's statement that he told counsel from the start that the gun was planted and the delay in filing a *Pitchess* motion was therefore a result of Parvisi's conduct, not of counsel's conduct. Counsel's decision must be considered in the light of the available facts, and when viewed in that light, Parvisi has shown no error.

*B. Alleged Dilution of Reasonable Doubt Standard*

Parvisi argues his counsel was ineffective for diluting the reasonable doubt standard through the following example provided at voir dire:

"And every time the D.A. puts on some evidence that leads you to believe he's guilty, you drop a penny on one side of the scale, and every time you hear something that leads you to believe maybe the person is not guilty, you drop a penny on the other side of the scale. [¶] And you wind up at the end of the case with five pennies on each side of the scale, and the scale is perfectly balanced. [¶] Do all of you have the feeling that guilt has not been shown beyond a reasonable doubt?"

Defense counsel continued: "Now, you've all been asked questions about prior jury experience, and you've heard the judge question as to whether or not the experience was civil or criminal, and do all of you realize that the standard is different in a civil case than it is in a criminal? [¶] For example, let's get back to my example with the balance and you've got five pennies on each side of the balance, and then the person or plaintiff drops a penny in one side of the scale and it goes down just a little bit. In civil law, we call that the preponderance of the evidence or one side weighs a little bit more than the other and, therefore, you can vote in favor of that side. [¶] Now, in a criminal case, you might not feel that that one penny on that side of the scale is proof beyond a reasonable

doubt. It may be that it may require many, many more pennies on one side, and maybe just a few more, but that's the difference."

Parvisi argues "[o]ne of the problems with counsel's analogy to a scale is that it implies that if the prosecution presents evidence suggestive of guilt and the defendant does not present evidence suggestive of innocence, the defendant must be found guilty, for in that case the scale tips towards the prosecution." That hypothetical possibility is not relevant to this case because Parvisi presented evidence in his defense. He testified in his defense, his wife testified, and Verdin testified.

Parvisi also worries that counsel suggested that "a guilty verdict may rest upon a trivial difference in the weight of the evidence[.]" But the jury was appropriately instructed as follows: "The defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. [¶] This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." Defense counsel did not tell the jury that it should rely only on the weight of the evidence, and Parvisi does not show that defense counsel's example (assuming it was error) prejudiced him.

Finally Parvisi argues that counsel "diluted" the reasonable doubt standard when he argued that a juror would know he or she had attained an abiding conviction if "after you make your decision, you go home a week from now, you say, I made the right decision. [¶] If you go home a week from now and say . . . I'm really beginning to wonder if I made the right decision, you may not have been convinced beyond a reasonable doubt." As explained above, the jury was expressly instructed as to the definition of reasonable doubt and the jury was also instructed that "If anything concerning the law said by the attorneys in their arguments or at any other time during

the trial conflicts with my instructions on the law, you must follow my instructions." Thus, even assuming defense counsel did not accurately describe the reasonable doubt standard, Parvisi suffered no prejudice from this assumed error.

*C. Failure to Object To Evidence That Parvisi Was a Murder Suspect*

The prosecutor asked Officer Matthew Garza why he drew his weapon at the end of a police chase of Parvisi. Garza responded as follows: "[W]e had prior knowledge that he was possibly the murder suspect. As he was down on the ground, it appeared to me he was going for his waistband. So with the prior knowledge of him being a murder suspect, it was a gang murder with numerous suspects involved, the gun was used in the murder, and with his actions of reaching for his waistband when he was down on the ground, I proceeded to draw my weapon." Parvisi argues that his counsel was ineffective for failing to move to strike the testimony or move for a mistrial. Parvisi correctly points out that there was no murder charge in his trial.

The question was not relevant. Why the officer drew his weapon does not assist the trier of fact in determining whether Parvisi evaded police. The testimony was inflammatory because it referred to a gang murder. Defense counsel, however, did not object to the question.

Even if we assume that there was no tactical reason for failing to object, Parvisi does not show prejudice. Parvisi's defense was that the shooting followed his request that Alvarez jump Iglu, Parvisi's stepson, out of the gang. Substantial relevant testimony regarding the DSM gang was properly admitted. The jury found true the gang allegation. In this context, Officer's Garza's brief reference to a gang murder does not undermine confidence in the outcome of the trial.

*VI. Prosecutorial Misconduct (Parvisi and Verdin)*

Parvisi argues the prosecutor committed misconduct by (1) referring to a search warrant in opening statement; (2) arguing the prosecution gave Parvisi the benefit of the doubt in charging him; (3) asking Parvisi's wife about his feigned suicide; and (4) arguing that Parvisi was responsible for Alvarez's injuries. Parvisi's arguments are forfeited because he failed to raise them in the trial court. (*People v. Fierro* (1991) 1

Cal.4th 173, 207.) Parvisi argues that an objection would have been futile but the record does not support his contention. Parvisi also argues that his counsel rendered ineffective assistance in failing to object, and we consider his argument in that light.

Verdin argues that the prosecutor committed misconduct in mischaracterizing the law on heat of passion. Verdin's trial counsel objected to the argument Verdin challenges on appeal.

" ' " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

*A. Opening Statement (Parvisi)*

During opening statement the prosecutor told the jury: "Now, subsequent to the shooting and the assault, the police did a number of search warrants, which basically means they go into the homes of the defendants or the perpetrators of this assault and eventual shooting and look for evidence to see if they can connect anybody to this gang or to some criminal activity, and search warrants are signed by judges, and judges give the police, after having probable cause shown to them, permission to go and search for evidence."

Parvisi argues that this statement constituted misconduct because, in describing the process for obtaining a search warrant, the prosecutor argued facts not supported by the evidence. There was no evidence that a judge found probable cause to support the search warrant. But the brief reference to the process for obtaining search warrant in no manner prejudiced Parvisi. Assuming that the statement was improper, Parvisi cannot show ineffective assistance of counsel because there was no harm resulting from defense counsel's failure to object.

*B. Closing Argument – Benefit of the doubt (Parvisi)*

During closing argument, the prosecutor argued Parvisi "went there to lure Ricardo Alvarez out of his apartment and then, all of a sudden, Ricardo Alvarez is swarmed by these people in the alley, okay? [¶] Now, I give the defendant the benefit of the doubt. I don't know if this defendant knew Ricardo Alvarez was going to get shot."

The prosecutor continued: "The defendant is not charged with attempted murder as Samuel Verdin was. There is no evidence here to say he knew Samuel Verdin had a gun. So the . . . way he's charged, he's been given the benefit of the doubt. He may not have known that Ricardo Alvarez was going to get shot, but the evidence has been clear he knew, based on standing there in the alley, based on the fact this guy was being pushed in there, this guy is going to get beat up."

Similarly, the prosecutor argued Parvisi is "getting the benefit of a doubt on not possibly knowing there was a gun with one of these gang members, but he's responsible for the group beating, as a lookout, okay?" Finally in his rebuttal, the prosecutor again referred to giving Parvisi "the benefit of the doubt" as follows: Defense counsel "said something like, I'm trying to pin the shooting on him knowing the shooting would happen on Heist. I'm not. That is why [Parvisi] is not charged with attempted murder. If he could be connected with the shooting, he would be charged with attempted murder. He's not. He's being given the benefit of a doubt. [¶] What he's being charged with is assisting in the beating up. . . ."

It would have been better if the prosecutor had not reiterated that Parvisi was given "the benefit of the doubt" when he distinguished the charge of assault from the charge of attempted murder. The prosecutor was not, however, implying the existence of a factual basis for attempted murder as Parvisi argues. Instead he was explaining why Parvisi's lack of knowledge regarding Verdin's gun was irrelevant to the charge at issue. Contrary to Parvisi's argument, the prosecutor's statements do not reflect a pattern of conduct that infected trial with unfairness or reprehensible conduct. Even assuming that this argument constituted misconduct, Parvisi was not prejudiced by it. The prosecutor did not suggest that Parvisi "may have been guilty of more crimes than those with which

he was charged." The prosecutor argued that Parvisi was responsible for the beating and may not have known that Verdin had a gun. This argument actually bolstered Parvisi's testimony that he did not know of the gun.

*C. Cross-Examining Parvisi's wife (Parvisi)*

When Parvisi's wife testified, the prosecutor asked "[d]id the defendant have a friend of his come over to your house and tell you he committed suicide?" Defense counsel objected. The prosecutor then asked "and Michael Cox came over sometime after April 15, 2003 and told you that[.]" Defense counsel again objected. The trial court found the evidence to be irrelevant. Subsequently the prosecutor asked "after you learned that he [Parvisi] was on the run from the police, did you believe the defendant was dead." The court sustained defense counsel's objection. The court also sustained an objection to the prosecutor's next question "who is Michael Cox?"

Parvisi argues that "[b]y informing the jury, through these questions, that appellant had arranged for his wife to be told, falsely, that he had committed suicide, the prosecutor made it likely that the jury would punish appellant for the uncharged conduct 'regardless whether it considered him guilty of the charged offenses' "

Contrary to Parvisi's argument, there was no evidence that Parvisi falsely had his wife informed that he committed suicide. The jury was instructed that it should not "assume to be true any insinuation suggested by a question asked of a witness because the question is not evidence and may be considered only as it helps you to understand the answer." In addition, to the extent this is a prior bad act, it is qualitatively different from the acts for which Parvisi was being tried. The record belies Parvisi's claim that he was harmed in any manner from the questioning even though the prosecutor should not have continued after the court found the evidence to be irrelevant.

*D. Closing Argument – Alvarez's Injuries (Parvisi)*

During closing argument the prosecutor argued Alvarez "has injuries that are going to be with him for the rest of his life. He got shot in the face. He got beat up. I ask you for justice on his regard as well, because, you know what? He was basically so beaten that he could no longer resist by that fence. [¶] What Mr. Lofton told you is after

he was beaten, the shooter waves the other guys off, hits him once more, and shoots him, okay? He was so beat up, he could no longer even stand up, and he was shot in the face, all right? [¶] There's some justice -- despite Mr. Alvarez being in a gang, there's some justice that is owed to him as well. He got beat up and shot in the face, and people that are accountable for it, should be held responsible by you, and justice should be served by each and every one of you."

Parvisi argues that this argument was improper because he was not charged with aiding and abetting the shooting. According to Parvisi "[t]he prosecutor thus encouraged the jury to punish appellant for a crime appellant did not commit." Although the harm described by Parvisi is hypothetically possible, it could not have occurred in this case. As explained in discussing Parvisi's prior contention of prosecutorial misconduct, the prosecutor repeatedly reiterated that Parvisi was not charged with attempted murder. The record provides no basis for Parvisi's speculation that the jury could have punished him for a crime he did not commit based on the prosecutor's reference to Alvarez's injuries.

*E. Closing Argument Heat of Passion (Verdin)*

Verdin argues that the prosecutor committed misconduct by arguing to the jury as follows: "the victim has been disarmed. He doesn't have a gun. The defendant has a gun. . . . He shoots once at the ground. The guy's not coming at him. And then he shoots at his face. That is not self-defense. . . . It's not self-defense because when somebody's disarmed and you've just beaten him with the help of two other guys, you cannot continue beating on somebody after they have been disabled. Okay? This is not reasonable conduct. It has to be reasonable to be heat of passion. Heat of passion specifically says you cannot set your own standard for conduct and claim that defense." Defense counsel objected stating that the argument misstates the law.

On appeal, Verdin argues that "[t]elling the jury it had to find appellant's conduct reasonable to find manslaughter was an attempt to absolve the prosecution from its burden of overcoming reasonable doubt on the element of whether appellant acted with malice." Verdin argues that the prosecutor misstated the law with respect to heat of passion because the "reasonableness" requirement describes the reasonable person not

reasonable conduct. He argues that the "reasonable likelihood" of juror confusion requires reversal of his conviction.

Our high court explained the requirements for heat of passion in *People v. Manriquez* (2005) 37 Cal.4th 547, 584. " '[T]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, "this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances," because "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." [Citation.]' [Citations.]"

The jury was instructed extensively on heat of passion and the correctness of those instructions is not challenged.[4] Although the prosecutor's argument was incomplete, the

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[4] The jury was instructed "Voluntary manslaughter is the unlawful killing of a human being without malice aforethought. There is no malice aforethought if the killing or attempted killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself or another person against imminent peril to life or great bodily injury." "The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. The defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because . . . his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of an ordinarily reasonable person faced with the same situation."

The jury was further instructed that "[t]he distinction between attempted murder and attempted manslaughter is that attempted murder requires malice while attempted manslaughter does not. When the act causing the attempted death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, or in the actual but unreasonable belief in the necessity to defend against

jury was correctly instructed. The prosecutor's argument did not constitute deceptive or reprehensible methods to persuade a jury as Verdin argues. Indeed, the case he cites, *People v. Cole* (2004) 33 Cal.4th 1158, summarizes the law regarding voluntary manslaughter in a manner similar to the prosecutor's argument: " 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' " (*Id.* at pp. 1215-1216.) While the prosecutor's argument was not ideal, it did not constitute misconduct.

*VII. Alleged Improper Admission of Documents (Verdin)*

It was alleged that Verdin committed the attempted murder for the benefit of a gang within the meaning of section 186.22. Ordonez testified as a gang expert. Two documents were admitted describing predicate acts that other gang members had committed. The evidence was relevant to prove the gang allegation under section 186.22. However, the jurors hung on that allegation and a mistrial occurred. Because the court declared a mistrial on the enhancement, Verdin suffered no prejudice from the alleged error in admitting documents. The objected to documents concern crimes committed by other people, not Verdin. The jury was instructed that evidence was introduced for the purpose of showing criminal street gang activities by gang members other than Verdin and that the jury could consider it only for the limited purpose of determining whether the

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imminent peril to life or great bodily injury, the offense is attempted manslaughter. . . . To establish that an attempted killing is attempted murder and not attempted manslaughter, the burden is on the prosecution to prove beyond a reasonable doubt each of the elements of attempted murder, and that the act which caused the attempted death was not done in the heat of passion or upon a sudden quarrel or in the actual, even though unreasonable belief, in the necessity to defend against imminent peril to life or great bodily injury." "A person who attempts to kill another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury attempts to kill unlawfully, but does not harbor malice aforethought and therefore is not guilty of attempted murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief."

crimes charged were committed for the benefit of a gang. Therefore, even if we assume those documents should have been excluded, such error does not require the reversal of Verdin's conviction.

Finally, there was no cumulative prejudice in either trial requiring reversal. The alleged cumulative prejudice requires the existence of prejudice from multiple errors. We have found neither appellant demonstrated any prejudicial error.

**DISPOSITION**

The judgments are affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.