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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BOBBY STEVEN PENA et al., Defendants and Appellants.	E052558 (Super.Ct.Nos. RIF138739 & RIF138776) OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed in part; reversed in part with directions.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant, Bobby Steven Pena.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant, Louie Oscar Pena.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 2, 3 and 4 under Issues and Discussion.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, Gary W. Brozio and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants, brothers Bobby and Louie Pena, of attempted murder (Pen. Code, §§ 664/187, subd. (a)),[1] two counts of assault with a firearm (§ 245, subd. (a)(2)), discharging a firearm from a motor vehicle (§ 12034, subd. (c)) and actively participating in a criminal street gang (§ 186.22, subd. (a)). The jury found that during the attempted murder, a firearm was discharged (§§ 12022.53, subd. (c) & 12022.53, subds. (c) & (e)), during the assaults a principal was armed with a firearm (§ 12022.5, subd. (a)) and the attempted murder, the assaults and the discharge of a firearm from a motor vehicle were committed for the benefit of a criminal street gang. The defendants appeal, contending that members of their family should not have been excluded from the final portion of trial, the jury was misinstructed on attempted murder and the gang substantive offenses and enhancements, insufficient evidence supports the gang substantive offenses and enhancements, and sentencing error occurred. We agree with defendants that the jury was misinstructed on the gang substantive offenses and enhancements and we reverse those convictions and findings. On agreement of the parties, we also stay the defendant's sentences for discharging a firearm from a motor vehicle. We reject the defendants' remaining contentions and affirm the rest of the judgment.

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

FACTS

Bobby and Louie were members of the Brown Pride Crew (BPC) gang in Moreno Valley. On August 18, 2007, Louie drove by an associate of a rival gang (the first victim), who was walking with his friend (the second victim), and yelled insults at the first victim and asked him if he wanted to be shot. A short time later, Louie's car drove by the two again, this time followed by a car driven by the defendants' cousin, with Bobby in the back seat. Bobby shot at the first victim and the car he was in took off. The defendants' mother had been previously targeted by the rival gang in friction between the gangs.

ISSUES AND DISCUSSION

1. *Exclusion of Members of Defendants' Family*

On the first day evidence was taken, and during the first victim's testimony, the trial court told both defense attorneys to be sure to tell "the family" not to interact with the jury inadvertently. During the defense case, between the testimony of the defendants' cousin and Bobby, the trial court noted on the record, concerning "the family" that a lady in black appeared to be texting or doing something. Louie's attorney said that she had a notepad and pencil and was writing. The trial court noted that the lady's friend was doing the same thing. The court also noted that another person in the audience wanted to tell Louie's attorney something about a witness, and while they did this after the jury left the courtroom, they could not do this in court. The trial court added, "Tell them stone face, look ahead, pay attention."

During the People's rebuttal, while the case agent, the last witness to take the stand, was testifying, he was asked by Bobby's attorney if the case agent saw defendants' mother in the courtroom audience. The case agent said he did. Bobby's attorney said he was going to ask that she be excused because he intended to call her as a witness. The trial court told her to wait outside and not to talk about the case.

A short time later, the trial court conducted a hearing outside the presence of the jury. The court said it had observed two jurors pulling the court room clerk aside and talking. The court asked the clerk what they had said. The clerk reported, "They stated that the family of the defendants, they felt, were following them, sort of, wherever they were going, whether it would be at lunch or if they go into the jury room to get some water. Something to that effect; that they were going into the jury room, and it was making them uncomfortable." The prosecutor added that she had had a similar incident that morning with defendants' mother. She explained, "[The mother] was standing at the door waiting, and I said, 'Excuse me,' and she just kind of gave me a dirty look and wouldn't move. And I said, 'Excuse me' to get by to get in the courtroom, and she moved, like, a quarter of an inch. [¶] So I can see how they've been out there, you know, kind of being a little bit intimidating." The trial court asked Bobby's attorney if he was going to call the mother as a witness and he said, "No, I'm not going to now." The trial court then said, "Then tell mom to leave. They can't be here or around the courthouse anywhere." Louie's attorney asked the trial court how many spectators it wanted to exclude. The trial court said two rows, 10-12 people. Defense counsel objected to the exclusion of "the entire family." They said if the trial court wanted to

hold a hearing to find out who the offenders were and exclude them, that would be appropriate. The trial court responded, "[W]e're not going to delay the trial to have individual mini trials about who it was and put the juror on the spot to say who it was. That would totally skew this jury. I think it would be bad for the defense, and it's going to be a delay of time for all of us. [¶] They are all excluded." Thereafter, the case agent finished up his testimony, addressing only gang evidence and reports that had been made to the police on August 18, 2007.

In denying defendants' post-verdict motions for a new trial on the basis of this ruling, the trial court said, "[T]his [happened] the day before closing arguments. [¶] . . . [¶] [T]he options as presented by the parties were have a hearing where you ask the jurors what happened, and then you ask the jurors to help distinguish which family members, was it all or some, that participated in this activity. Or the other option was just to excuse the family and go forward, which is the option that I chose. And I did that, because I didn't want to delay the jury. [¶] We were getting towards the end, and the jurors, when they do complain, frequently complain about things going longer than anticipated, and, you know, what they consider undue delays. And second, and as I said on the record at the time, I didn't want to have mini trials where we cross-examine in what would seem to the jurors like cross-examination, on exactly who did this, and have a line of the family where the jurors would point out who was the exact one. [¶] And I felt that would truly prejudice the trial, and against the defendant[s] . . . . But it would prejudice the trial and create a mini trial. . . . So I excluded the entire family so we wouldn't have to go through that lineup kind of procedure. . . . [¶] . . . I did exclude the

family, but [the courtroom] was still open to the public, reporters, other people could have come in. So I don't think that's a ground [for a new trial]. And I don't think it prejudiced the jury at all, because we never brought it to their attention. People come and go, so people aren't here. The jurors don't know why they're not here. And they were never informed, so it couldn't prejudice the jurors."

The defendants here contend that the trial court committed error in excluding members of defendants' families during what was probably the last 30 minutes of the evidence portion of the trial and this error requires reversal of all their convictions. We disagree.

" . . . [T]he United States Supreme Court 'has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial . . . . Such circumstances will be rare, however, and the balance of interest must be struck with special care.' (*Waller* [*v. Georgia* (1984)] 467 U.S. [39,] 45 [(*Waller*)].) Consequently, both the defendant's and the public's right may be subjected to reasonable restrictions that are necessary or convenient to the orderly procedure of trial, and the trial court retains broad discretion to control courtroom proceedings in a manner directed towards promoting the safety of witnesses. (*Alvarado* v. *Superior Court* (2000) 23 Cal.4th 1121 . . . .) [¶] . . . In the case of a partial closure [where some, but not all, spectators are asked to leave], the Sixth Amendment public trial guarantee creates a '"presumption of openness"' that can be rebutted only by a showing that exclusion of the public was necessary to protect some '"higher value"' such as the defendant's right to a fair trial . . . . (See *Waller, supra,* 467 U.S. at pp. 44-45.) When such a 'higher value'

is advanced, the trial court must balance the competing interests and allow a form of exclusion no broader than that necessary to protect those interests. (*Ibid*.) Specific[2] . . . findings are required to enable a reviewing court to determine the propriety of the exclusion. (*Id*. at p. 45.) . . . [¶] The identity of the spectator sought to be excluded is highly relevant in a partial closure situation. . . . The application of the above principles and the issue whether an accused has been denied his constitutional right to a public trial cannot be determined in the abstract, but must be determined by reference to the facts of the particular case. [Citation.]" (*Esquibel, supra*, 166 Cal.App.4th at pp. 552-553 (*Esquibel*), accord, *People v. Prince* (2007) 40 Cal.4th 1179, 1279.)

Defendants agree with *Esquibel*'s conclusion that the temporary exclusion of select supporters of the accused does not create an automatic violation of the constitutional right to a public trial. (Accord, *People v. Bui* (2010) 183 Cal.App.4th 675, 688.) However, defendants assert, here, the trial court erred in excluding their entire family from the last 30 minutes of testimony, closing argument and jury instruction.

The trial court identified three interests that, in its opinion, required the exclusion of the defendants' family members, i.e., the right of both defendants to a fair trial, the right of the jurors to feel free from intimidation and the right of jurors to an undelayed

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2 Although *People v. Esquibel* (2008) 166 Cal.App.4th 539 included the word "written" here, citing to page 45 of *Waller*, no such requirement of *written* findings exists on page 45 or any other page of *Waller*. When the United States Supreme Court had a later opportunity to hold that written findings were required, i.e., in *Presley v. Georgia* (2010)__U.S.__[130 S.Ct. 721] it did not do so.

conclusion of their duty at this late point in the trial.[3] The trial court was required to balance the defendants' rights to a public trial and to the support of their family against these interests. However, it must be kept in mind that defendants' public trial and support rights were not infringed throughout the trial, but at the very end, when the only witness testifying was one who had testified previously in the presence of their family members. (See *People v. Woodward* (1992) 4 Cal.4th 376, 385, 386 [a de minimis exclusion does not rise to a level of a constitutional violation where, inter alia, it did not include any evidentiary portion of the trial and lasted only one and one-half hours].)

The exclusion of defendants' family at this late stage of the trial must have been no broader than that which was necessary to protect the interests identified above. At this juncture, we examine the alternatives available to the trial court. The court could have merely concluded that it did not know whether the complaints of two jurors that members of defendants' family had been following them to lunch and into the jury room were true and instructed either the jury not to have any contact with members of the defendants' family, or instruct members of the family not to have any contact with jurors. However, instructing the jury not to have any contact with family members would surely have frustrated those two jurors who felt they were being followed by family members. They, i.e., the jurors, were not having improper contact with family members. Rather, family members were committing inappropriate acts with them. Alternately, the trial court counseling the defendants' family not to have contact with the jury would have been less

[3] Contrary to the assertion of appellate counsel for Bobby at oral argument, the latter interest was not the only one the trial court mentioned.

than effective. First, members who were following jurors could simply have concluded that since they were merely following jurors and not having contact with them, they would not be disobeying the court's directive by continuing with such conduct. Further, the fact that this was not the first problem the trial court encountered with the family[4] suggests that such a directive would have been ineffectual.

Another alternative would have been for the trial court to have a full hearing and determine whether, in fact, the acts of apparent intimidation had occurred and who had committed them, then excusing those offending family members. However, as the trial court reasonably pointed out, this would have delayed the trial at a point where most jurors were anticipating the end of their service and it would have put jurors in the untenable position of having to identify, from all of defendants' family members, those who had engaged in the conduct that made them uncomfortable. Delaying the trial had the potential of angering all the jurors, to the detriment of the defendants, whose family members had engaged in the conduct.[5] Expecting two of the jurors to act as witnesses against the defendants' family members and subjecting those jurors to cross-examination

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[4] The fact that trial counsel for Bobby changed his mind about calling the defendants' mother to the stand after hearing the prosecutor's account of her encounter with the mother demonstrates that even defense counsel found it credible. Additionally, we doubt that trial counsel for Bobby failed to tell the mother that she needed to stay out of the courtroom until he called her to the stand. Therefore, the implication can be made that she disobeyed counsel's directive and remained in the audience before being called to testify.

[5] At least two of the jurors would have known that it was defendants' family members' conduct that precipitated the delay, which might have prejudiced them against the defendants.

by defense counsel would have necessitated their removal from the jury. To imagine that the trial could have proceeded, from that point, to a successful conclusion, is folly. A mistrial would have been necessary.

The alternative chosen by the court was a reasonable one under the circumstances. Without informing other jurors, who were not, at that point, aware of the asserted conduct, and without giving the accusation its imprimatur, the court simply removed anyone who might have participated in it. This was a gang case, which necessitated service by jurors above and beyond that required in non-gang cases. The fact that not one, but two, jurors reported acts of intimidation made it much more likely that the accusation was not the result of misunderstanding or mentally unsound thinking on the part of the jurors. Because of this, and because of the untenable position the targeted jurors would have been placed in by having to identify who in the defendants' family engaged in this conduct and be subject to cross-examination by defense counsel, we cannot agree with defendants that the trial court was obliged to conduct a hearing to determine, in fact, if the acts of intimidation occurred and by whom they were committed.

Although defendants invite us to rely on two out of state cases in concluding that what the trial court did here was improper, those cases are distinguishable. In *State v. Ortiz* (1999) 91 Haw. 181, the Supreme Court of Hawai'i concluded that the exclusion of defendant's *entire* family, *including his girlfriend*, from five days of trial was broader than necessary in the face of allegations that defendant's mother, sister and brother-in-law were being investigated for possible jury tampering and the exclusion remained in

place after the trial court had questioned each juror and satisfied itself that tampering had not occurred. (*Id*. at p. 192.) Further, the record did not show that the trial court had considered any alternatives to exclusion, even one proposed by the defense, and the Supreme Court suggested that it and other alternatives could have worked. Finally, the trial court made no findings other than one that was too broad and general to support the exclusion. In *State v. Ndina* (2007) 306 Wis. 2d 706, also cited by defendants, the defendant failed to object to the removal of his entire family, except for his mother, during the evidentiary portion of a trial of an intrafamily stabbing, after family members twice created disturbances in the courtroom during proceedings by talking loudly and animatedly while witnesses were on the stand and shaking their heads in agreement or disagreement at testimony. (*Id*. at pp. 710-712.) Because the defendant had failed to object to the exclusion, the issue was analyzed as one of incompetency of trial counsel, which, of course, required defendant to demonstrate prejudice, unlike the situation, as here, where the defendants objected. (*Id*. at p. 713.) The Wisconsin court concluded that defendant could not show that he would have received a more favorable outcome had his relatives not been excluded from the courtroom because the jury was not aware of their exclusion and sufficient evidence supported the verdict. (*Id*. at p. 718.) Because, due to the unique procedural context of *Ndina*, prejudice had to be demonstrated, there is nothing in the opinion that is relevant to our discussion here.

Finally, we disagree with defendants that the court failed to make an adequate record of its reasons for the exclusion as required by *Waller v. Georgia* (1984) 467 U.S.

39, 45—the above cited comments by the trial court, both at the time of the ruling and after trial, prove otherwise.

2. *Jury Instructions on Attempted Murder*

The jury was instructed, "For you to find a person guilty of specific intent crimes . . . [the defendant] must not only intentionally commit the prohibited act . . . but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime. . . . [T]he specific-intent crime is Count 1, attempt [murder] . . . " The jury was further instructed, "Defendants are charged in Count 1 with attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove that one, the defendant took at least one direct, but ineffective step towards killing another person. Two, the defendant intended to kill that person. A direct step requires more than merely planning or preparing to commit murder. . . . A direct step is one that goes beyond planning and preparation and shows that a person is putting his or her plan into action. *A direct step, indicating an* [*sic*] *definite, unambiguous intent to kill*.[6] It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion, so that the plan would not have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] . . . [¶] If you find the defendant guilty of attempted murder in Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation. . . .

[6] In the written version of the instructions, which were sent into the deliberation room, this sentence is, "A direct step indicates a definite and unambiguous intent to kill."

Bobby . . . acted willfully if he intended to kill when he acted. . . . Bobby . . . deliberated if he carefully weighed the consideration for and against his choice and knowing the consequences decided to kill. . . . Bobby premeditated . . . if he decided to kill before acting." Both of these requirements, i.e., of a direct but ineffective step toward killing a person and that defendant intended to kill when he acted, were repeated in connection with the instructions on attempted voluntary manslaughter as a lesser included offense of attempted murder due to imperfect self-defense.

During argument to the jury, the prosecutor said of the attempted murder charge, "[W]hat's required for the People to prove beyond a reasonable doubt is that . . . Bobby took, one, an ineffective step toward killing a person. What does that mean? [¶] It means I was trying to kill you, I took a step towards doing it, but it didn't work. . . . So if I fire a gun at you and I'm a bad shot and I miss, I still took that step, but because . . . I'm a bad shot, you were able to live. [¶] You heard [the first victim] say that he ducked. What if Bobby shot and [the first victim] ducked down? So Bobby took the step, he pulled the trigger, . . . that round was fired, but it didn't happen because [the first victim] ducked. That's taking a step towards killing the person . . . that he shot at. What evidence do we have that Bobby intended to kill? [¶] He took . . . a real working firearm . . . [¶] . . . with live rounds of ammunition, and he fired it at [the first victim], and . . . the gun was pointed at [the first victim] at about his shoulder level, chest level. . . . That's a vital area of the body. If you get hit with a bullet in your chest, shoulder area, your heart, your lung, what is going to happen? When you shoot a gun, you shoot to kill. You don't shoot to scare. You don't shoot to injure. You shoot to kill.

[¶] So the difference between a murder and an attempted murder is the fact that you tried to kill him, but for some reason, other than you stopping your plan, it didn't happen. . . . [¶] . . . [¶] [Y]ou're going to be asked to make an additional finding. . . . [Y]ou're going to have this additional finding for premeditation and deliberation. [¶] And what [premeditation] means is . . . [y]ou thought about killing before you did it, before you acted. Before you took that step that didn't work, you thought of it. . . . [¶] . . . [¶] . . . [P]eople can make a rational decision to intend to kill someone in an instant. [¶] So this has to be there. . . . [¶] . . . [¶] . . . [T]here was already a plan set in motion where Louie had threatened [the first victim], 'Do you wanna get smoked?' And a few minutes later, Bobby has that gun loaded on his lap ready to go looking for his target, and when he sees him, he points it out the window and he pulls the trigger."

Bobby's lawyer argued to the jury that Bobby was not guilty of attempted murder, thusly, "[T]he prosecution's theory, . . . Bobby and Louie . . . were roaming the neighborhood looking to kill [the first victim] is ludicrous. . . . [I]f Bobby wanted to kill [the first victim], Bobby had a gun, . . . [h]e had Louie in the car ahead of him. He had [the cousin]. And he had [her fiancé]. So he had the four of them. . . . Louie didn't stop. [The cousin] didn't stop. Bobby wanted to murder. If the plan was Louie and Bobby were going to murder [the first victim] . . . what do you do? Louie pulls up, stops, gets out. [The cousin] pulls up, Bobby gets out, Bobby and Louie go up to [the first victim] as if they're going to fight, Bobby goes bang, bang, bang. He empties his gun. You're dead. That's intent to kill. [¶] What's not intent to kill is taking a pot shot over your shoulder from a moving car after you see [the first victim] reach for something in

his waistband. And [the cousin] . . . says, 'He's got a gun. I think he's got a gun. He's going for something . . . .' So where's the intent to kill? He conceded that Bobby was guilty of shooting from a motor vehicle, adding, "This doesn't require any intent to kill and we know that Bobby didn't have an intent to kill." He then repeated his argument that if Bobby had intended to kill the first victim, he would have gotten out of his cousin's car, and with Louie, accosted the first victim and shot him, adding, "That would be intent to kill. That's not what we have here. [¶] . . . [¶] . . . He didn't intend to murder anyone. . . . Attempted murder, no way. He didn't intend to kill. . . . [¶] . . . [¶] . . . [I]f you were going to convict [Bobby] of attempted murder, you would have to believe beyond any reasonable doubt that Bobby . . . intended . . . to kill [the first victim]. . . . [¶] . . . [¶] [A]ttempted murder . . . [was not] there, because there was never an intent to kill . . . . [¶] . . . [¶] . . . [Bobby] didn't intend to kill [the first victim]."

During her closing argument, the prosecutor said, "The only defense they have available is to say, . . . '[F]ind them not guilty of . . . attempted murder . . . because you have to have that intent to kill. . . . [¶] . . . [¶] . . . [W]hen you point a gun at someone and you intend to kill them, you do not have to kill them execution style for it to count as an attempted murder."

Defendants assert that the italicized portion of the instructions on attempted murder permitted the jury to find the element of intent to kill merely because they had taken a direct step towards killing the first victim. Not only do we find that there is no reasonable likelihood that the instructions, in and of themselves (see *People v. Huggins*

(2006) 38 Cal.4th 175, 192), would have been understood by the jury to permit them to do this (*People v. Frye* (1998) 18 Cal.4th 894, 957 [disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22]), but, when considered with the argument of counsel (*Middleton v. McNeil* (2004) 541 U.S. 433, 434-438; *People v. Gonzales* (2011) 51 Cal.4th 894, 939), there was *no possibility* the jury so understood the portion of the instruction at issue. Moreover, the jury's finding that the attempted murder was premeditated and deliberate necessitated, under the instructions given, that there was an intent to kill. Finally, as the defendant's correctly point out, in *People v. Lawrence* (2009) 177 Cal.App.4th 547, 557, the appellate court held that the instruction at issue here is a correct statement of the law.[7] We agree with *Lawrence's* reasoning and adopt it as our own.

During deliberations, the jury asked the trial court, "We would like the legal definition and clarification of intent and of intent to kill. Does intent mean knowing the consequences and acting anyway?" The court answered the question about intent with the following, "Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases have been specifically defined for you in these instructions. [¶] Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings. [¶] An example of a word that is to be applied using its ordinary, everyday meaning is

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[7] We reject the defendants' contention that because the jury asked for the legal meaning and clarification of the words "intent" and "intent to kill" as discussed below, that this made *Lawrence's* holding that the instruction at issue was legally correct inapplicable.

the word 'intent.' [¶] The most common dictionary definition is: 'something that is intended; purpose; design; intention.'" As to intent to kill, the trial court said it wanted to give only the afore-mentioned instruction and to reread the standard instruction on attempted murder, adding, "We don't want to say too much, because attempted murder, you cannot have implied malice. It has to be express malice. I guess I could define the difference between express and implied, but that's bringing in a term that isn't within their thought process right now of implied malice. [¶] . . . [¶] . . . [I]ntent to kill . . . [is] the phrase that they're hung up on. Did you intend for a person to die? . . . And I can't go there, because that brings in implied malice. [¶] . . . [¶] Here's what they want to hear. 'The defendant acted with implied malice if the natural and probable consequences of the act were dangerous to human life. He deliberately acted with conscious disregard for human life.' This is what they want to hear, this is what they can't hear, that's implied malice. That's why [I was] hesitant to take any additional steps that would lead me to the road that might imply that I'm implying there is implied malice." After Bobby's attorney suggested that the trial court give the jury more synonyms or analogous words for the word "intent" similar to the words in the instruction reiterated above, the trial court declined, saying, " . . . I . . . [want to] bring them back to everyday common sense. . . . It's just an ordinary word 'intent.' . . . [M]y intent is to keep it simple."

The defendants assert that the foregoing proves that the jury was interpreting the instruction at issue in an unconstitutional way, i.e., that the jurors believed that the instruction permitted them to convict of attempted murder not if Bobby intended to kill the first victim but if Bobby knew the consequences of shooting at the first victim and

acted anyway. First, there was nothing in the disputed instruction or any of the other pertinent instructions given that would have led the jury to believe that what was required was anything other than the intent to kill. Second, as the trial court observed, the jury had no basis upon which to assume that the legal definition of implied malice would have been a sufficient substitute for the clearly stated and repeated requirement of the intent to kill. The jury asked if intending is the same as knowing the consequences. The consequences of shooting at someone are hitting the target and not fatally injuring the target, hitting the target and killing the target or missing the target. By the trial court giving the "common sense" definition of intent as "something that is intended; purpose; design; intention" and re-reading the standard instruction on attempted murder, the trial court was making clear that defendant had to have the purpose, design or intention of killing the victim. This was entirely proper. Nothing more was required, contrary to defendants' contentions. If the trial court's response did not give the jury the information it wished, it was free to send another inquiry, which it did not do.

Finally, the defendants contend that the trial court had a sua sponte obligation to instruct on perfect self-defense in connection with the attempted murder and the failure to do so requires reversal of their convictions of that crime. The jury was instructed that an attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if defendant acted in unreasonable self-defense or defense of another. As part of that instruction, the jury was told, "If you conclude the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and

imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable. The defendant acted in imperfect self-defense if, one, the defendant took at least one direct but ineffectual step toward killing a person; two, the defendant intended to kill when he acted; three, the defendant believed that he was in imminent danger of being killed or suffering great bodily injury. Four, the defendant believed that the immediate use of deadly force was necessary to defend against the danger. And five, the . . . defendant's beliefs were unreasonable."

Bobby had testified that when he first saw the victims, the first victim had his hands up, then moved them towards his waistband. When asked what he thought was going on, defendant said, "I don't know what he was doing, . . . maybe he was putting something back [in his waistband]. I don't know. . . . [¶] . . . [¶] I don't know . . . [what he was doing.] It could have been a gun. . . . I don't know." He said of his cousin, "I guess she got scared or something. I don't know. She said, 'He has a gun' or something." He said that when she said this, he had already started pulling out his gun. He denied pointing his gun at the first victim, saying he could not have even if he wanted to because they had already driven past the first victim and the car window was only halfway down. Asked how he felt at the time, defendant said, "[A]t first, I didn't feel nothing. I . . . guess you could say nervous or something. [¶] . . . [¶] . . . I didn't want to get hit . . . I guess it was protection or something." Bobby also testified that he did not know the first victim had a gun, although it looked like he did. He also said the first victim did not have time to pull the gun out of his waistband before Bobby shot him and he never pulled it out or pointed it at Bobby. He also testified that he had no reason

to think that the first victim was carrying a gun and no reason to be afraid of him. During his interview with police following his arrest, he mentioned no facts that would support a claim of self-defense.

Although defendants' cousin testified that the first victim grabbed something from his waist and it looked like he was pulling out a weapon she did not say she told Bobby that she thought the first victim had a gun. She admitted that she pled guilty to attempted murder in that she aided and abetted the shooting by Bobby, who tried to murder the first victim, and she did this for the benefit of BPC.

First, we do not believe that the foregoing constituted substantial evidence (*People v. Breverman* (1998) 19 Cal.4th 293, 303) to support perfect self-defense. Second, the jury was instructed as to perfect self-defense and was told that if defendant acted in perfect self-defense, he was not guilty of any crime. They were given all the requirements of imperfect self-defense and were told that the only difference between it and perfect self-defense was the reasonableness of defendant's belief that he had to use deadly force. Defendants do not state what more information about perfect self-defense could have been conveyed to the jury. Obviously, they rejected this defense in convicting defendant of these crimes. The jury even rejected the option of convicting defendants of attempted voluntary manslaughter on a finding that all of the elements of perfect self-defense were present except the reasonableness of defendant's belief in the need to use deadly force.

Given all the foregoing, even if it was error for the trial court not to instruct on perfect self-defense, we would find this error to be non-prejudicial because, beyond a

reasonable doubt, the absence of such an instruction did not contribute to the jury's verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Flood* (1998) 18 Cal.4th 470, 494.)

3. *Gang Enhancements and Active Participation in Criminal Street Gang Substantive Offense*

a. *Sufficiency of the Evidence*

For purposes of the substantive crime of actively participating in a criminal street gang, the enhancement attached to the attempted murder charged against Louie that a principal discharged a firearm and the crime was committed to benefit a criminal street gang and the enhancements that all the crimes, except for the first mentioned were committed for the benefit of a criminal street gang, the jury was told that a criminal street gang, inter alia, "has as one or more of its primary activities, the commission of thefts, vehicle thefts, vandalism . . . [and] shooting from a vehicle[.]"[8]

Defendants contend that there was insufficient evidence to establish the BPC's primary activities were the commission of thefts, vehicle thefts, felony vandalism and shooting from a vehicle. We disagree.

The case agent said on the stand that he had testified in 100-120 gang cases. He had arrested and interviewed members of BPC, had investigated cases in which members were either victims or perpetrators of shootings and had learned of some criminal activity BPC members committed. He testified that as of August 18, 2007, some of the primary

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[8] The oral version of the instruction omitted the word "and."

activities of BPC, which he defined as "crimes that are consistently and most commonly committed by members" were vehicle theft, making terrorist threats, the shootings that were discussed during trial and vandalism. The case agent was shown photographs of eight different taggings in various locations in Moreno Valley, which he identified as having been made by members of BPC. Two of the eight were specifically identified as being made around May 2007. He said that his opinion that one of the primary activities of BPC was vandalism was based on these taggings. He added that what these photos depicted were only half of the tagging made by the gang—that he had filed 10 counts of felony vandalism against another member of BPC, and he had at least 10 additional photos of tagging for which he knew this member was responsible. The case agent noted that during his interview with Bobby, defendant had admitted doing "a bunch" of the tagging depicted in the photos that were admitted as exhibits in this case. Bobby admitted that he and the other gang member against whom the case agent had filed 10 counts of *felony* vandalism had gone "crazy" around May 2007 with tagging.[9] The case agent testified that another member of BPC committed vehicle theft in October 2005, for which he was convicted of grand theft auto.[10] He said that Bobby had sustained a conviction for a second degree commercial burglary in 2006 and Louie had been adjudicated in juvenile court to have committed a grand theft in 2006. He testified that

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[9] The jury could reasonably infer from this testimony that the other taggings also constituted *felony* vandalism.

[10] This offense had also been used as a "predicate" to establish a pattern of criminal gang activity.

these three crimes additionally supported a finding that theft-related crimes were a primary activity of BPC. He pointed to the shooting in this case as indicating that another primary activity of BPC was shooting from a car. He also testified that on July 28, 2007, either Bobby or Louie shot at the home of the member of a rival gang from their car. In fact, in his interview with the case agent, Louie admitted that he shot at this person's house, using the same gun that had been used in the instant case. Louie testified to the same at trial.

Although far from overwhelming, we cannot conclude that no reasonable jury could have found that the foregoing did not constitute sufficient evidence to support a finding that one of more of BPC's primary activities was the commission of thefts, vehicle thefts, felony vandalism and shooting from a vehicle. (See *People v. Cravens* (2012) 53 Cal.4th 500, 508.)

b. *Instructions*

As stated before, the jury was instructed that it had to find that one or more of BPC's primary activities was the commission of thefts, vehicle thefts, vandalism (without specifying that it had to be *felony* vandalism) and shooting from a vehicle. The parties agree that the vandalism must be *felony* vandalism. However, the jury was never given an instruction as to what constituted felony vandalism. The parties here agree that this was error but disagree whether it was reversible.

For Bobby, the gang enhancement attached to the attempted murder resulted only in a minimum 15 year sentence for the life term imposed for the attempted murder. Therefore, the instructional error with regard to that particular enhancement should be

reviewed under *People v. Watson* (1956) 46 Cal.2d 818 and we must determine whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction defined felony vandalism. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 320, 321.) As to the remaining enhancements and the substantive offense for both defendants, the *Chapman* standard applies, i.e., whether there is proof beyond a reasonable doubt that the error did not contribute to the jury's verdict (*Sengpadychith*, at p. 320).[11] We conclude that under either standard, the error here requires reversal.

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in [section 186.22] Also sufficient might be expert testimony . . . based on conversations [the expert] had with [the defendant] and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" The latter has been referred to as "[e]xpert testimony based on an adequate factual foundation . . . ." (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 611.) Consistent with the case agent's definition of "primary activity" during his testimony, the

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[11] The defendants also assert that yet a third standard might apply across the board—because one of the theories of liability for the offense and enhancements presented to the jury was legally inadequate, i.e., based on non-felony vandalism, reversal is required unless it is impossible to determine from other portions of the verdict that the jury necessarily made its finding on a proper theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Green* (1980) 27 Cal.3d 1, 69.) Because we reverse the findings due to instructional error, we will apply the standards more favorable to the losing party, i.e., the People.

jury here was instructed that it was "one of the group's chief or principal activities rather than an occasional act committed by one or more" gang members.

Although the expert here said that he had testified in more than a hundred gang cases, had interviewed and arrested members of BPC, had investigated shootings where BPC members were victims and perpetrators and learned of some criminal activity BPC members were involved in, when asked the basis for his opinion of what some of BPC's primary activities were, he responded that it was "the research looking at cases committed by members of" the gang. The case agent went on to specify what those cases were and, as is apparent from a reiteration of his testimony above, most of them related to tagging. Without a definition of felony vandalism, the jury had no basis to determine that the tagging constituted felony vandalism.[12] Because the bulk of the evidence of BPC's primary activities rested on evidence of, supposedly, felony vandalism, and because this term was not defined for the jury, under either standard, reversal is required.

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[12] The fact that the case agent had (somehow) charged the other gang member with *felony* vandalism for other tagging was based on the case agent's conclusion that the damage done by those taggings exceeded $400. More importantly, the agent opined that vandalism was one of the primary activities of BPC based on other taggings, i.e., the tagging depicted in the photographs admitted as evidence, and not on these acts of asserted *felony* vandalism.

During a discussion of this instruction, the prosecutor suggested that all the taggings could be combined together to make one felony vandalism, i.e., one where the damage exceeded $400. Of course, this depends on who did the tagging and when they were done, information that was not presented at trial as to most of them. Additionally, one act of vandalism, even when combined with the other offenses, does not necessarily add up to a gang's primary activities. Finally, the jury was not told of this interesting theory by the prosecutor.

The People assert that because the vehicle theft was proven by a conviction and evidence of "the shootings" was "never meaningfully contested," the evidence was sufficient to show BPC's primary activities regardless of the taggings. However, there was evidence of only two shootings from a car—the one in the instant case and one on July 28, 2007. Evidence of one other shooting committed by the defendants did not establish that the shots were fired from a car. Moreover, evidence of three crimes, vehicle theft and two shootings from a car, does not a primary activity make.[13]

Alternatively, the People argue that there was evidence that the taggings on which the case agent relied constituted felony vandalism. They assert that the case agent knew that section 186.22 required the vandalism to have caused damage in excess of $400 and we should *assume* from his knowledge that he would not have cited the taggings in the photographs as the basis for his conclusion that a primary activity was vandalism if, in his opinion, those taggings did not cause damage in excess of $400. Aside from our disagreement with the premise of this argument,[14] the real sticking point is that it focuses

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[13] Of course, the People are overlooking the two other theft offenses committed by the defendants.

[14] The People base this on the following colloquy:

"Q [Bobby's Attorney]: . . . [I]f a tagging crew has three or more members and they call themselves a certain name and members are out doing felony vandalism, then that would qualify as a criminal street gang[?]

"A [Case agent]: How many times do they have to do this felony vandalism?

[¶] . . . [¶]

"Q [Case agent]: You have to show that the group exists and . . . that part of its primary activity is the commission of certain felony crimes.

"A [Bobby's Attorney]: So I've got a group of ten friends. We call ourselves the Colmer group or something. Two and a half years ago one of us—one of the

[footnote continued on next page]

on conclusions supposedly reached by the case agent that each tagging caused damage in excess of $400 without giving *the jury* the opportunity to make this determination itself. The People make our point for us by saying, "The prosecution was not asking the jury to make a determination that the vandalisms were felonies. Rather, the prosecution was asking the jury to believe [the case agent's] opinion that BPC was a criminal street gang and that one of its primary activities was vandalism." We note the absence of the all-important modifier "felony" in front of the word "vandalism" in the People's assertion. The case agent never testified that one of BPC's primary activities was *felony* vandalism. Asking us to accept that because the case agent was familiar with section 186.22, we should *assume* that each of the taggings constituted felony vandalism, based on no evidence whatsoever, just the case agent's inferred assumption, is insufficient to overcome the fact that it should have been *the jury* making this determination, *based on*

[footnote continued from previous page]
members defaces, you know—makes a big—puts a big graffiti tag up on something over $400 worth, getting up to felony status; right?

"A [Case Agent]: Yes.

"Q [Bobby's Attorney]: I'm just wondering. When we're talking about a criminal street gang, could it be something as simple as a group of guys—you know, we call ourselves some name. Two and a half years ago one of them—one of us does some vandalism, and then today I do a vandalism. We don't have any gun, any weapons. We don't fight other people. Are we a criminal street gang?

"A [Case Agent]: Yes. You have three or more members and you use a common name, and your members have committed that pattern of criminal activity and we can establish it through the review of police reports, convictions, arrests, and you meet that legal requirement, then, yeah, you would be a criminal street gang."

We do not interpret the foregoing as proof that the case agent was aware that the damage that had to be done by the tagging had to exceed $400 in order for the acts to form the basis for his conclusion that the "vandalism" necessary to establish that BPC was a criminal street gang was felony vandalism.

evidence. But the jury was deprived of that opportunity, due to the instruction that was given. Even if the jury accepted the case agent's inferred opinion, and, as the People suggest, we should construe it as meaning that one of BPC's primary activities was *felony* vandalism, there was no evidentiary basis for his opinion.

Our holding in *People v. Williams* (2009) 170 Cal.App.4th 587 and similar cases is distinguishable. In *Williams*, the issue was whether a pattern of gang activity had been established for purposes of determining whether the organization to which the defendant belonged was a criminal street gang. (*Id.* at p. 627.) The pattern had to be established by evidence of any combination of two or more of enumerated crimes. The jury was improperly instructed that one of those crimes could be assault, although section 186.22 required that the assault be aggravated. (*Ibid*.) We noted that the prosecutor elicited evidence of three aggravated assaults and "no evidence was introduced that any [gang] member had been arrested for or convicted of simple assault." (*Ibid*.) Therefore, we concluded that the instructional error was harmless beyond a reasonable doubt because "[t]here simply was no evidence to which the jury could have misapplied the instruction." (*Ibid.*) (Accord, *People v. Fiu* (2008) 165 Cal.App.4th 360, 388; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401.) Here, in contrast, there was evidence to which the jury could have misapplied the instruction. Moreover, there is a big difference between having to find the existence of only two offenses and having to determine that some of the primary activities of a gang were the commission of certain crimes.

4. *Sentencing*

a. *Count 4*

The parties agree that defendants' sentences for discharging a firearm from a motor vehicle (count 4) should be stayed pursuant to section 654 because they are being punished for attempting to murder the first victim and assaulting the second victim with a firearm.

b. *Consecutive Sentence on Count 3*

As to Bobby, the sentencing court imposed a 15-years-to-life term for the attempted murder, plus 20 years for the enhancement for discharging a firearm (§ 12022.53, subd. (c)), which the court said "ha[d] to be consecutive." Believing that the aggravated assault in count 2 involved the second victim, the court imposed a consecutive term. When the prosecutor pointed out that it involved the first victim, the court stayed it. The court initially chose the aggravated assault in count 3 (which involved the second victim) as the principal term and imposed the midterm and a full consecutive enhancement. The court then discovered that the sentence for discharging a firearm from a motor vehicle (count four) was longer than the sentence for count 3 and made count 4 the principal term and imposed one-third the midterm on count 3 and its enhancement. The court added up the determinate portions of the sentences, noted that a 15-years-to-life sentence had been imposed on the attempted murder and said, "he has to serve them consecutive to each other. So serve the determinate term, then serve the 15 [years] to life."

Bobby asserts that the sentencing court did not understand that it had discretion to run the terms for counts 3 and 4 concurrent to the 15-years-to-life term for the attempted murder. We do not agree that the court's remark that defendant "had to serve them consecutive to each other" meant that it believed that by operation of law, it had to impose consecutive terms for count 3.[15] Bobby asserts that the fact that the court did not state a reason for imposing a consecutive sentence on count 3 suggests that it was unaware of its discretion to impose a concurrent sentence. However, the court found that count 3 involved the second victim, which is a proper reason for imposing a consecutive term. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 459; *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365 [Fourth Dist, Div. Two].) The same analysis applies to Louie, for whom the court imposed a one-third consecutive term for count three, also noting "that's a different victim."

DISPOSITION

The enhancements under section 186.22, subdivision (b) for counts 1 through 4 and the convictions of section 186.22, subdivision (a) (count 5) for both defendants and the enhancement for count 1 pursuant to section 12022.53, subdivisions (c) & (e) for Louie are reversed due to instructional error. If the People opt not to retry defendant for those enhancements and substantive offenses, the trial court is directed to vacate the 15 year minimum term on Bobby's life sentence for attempted murder, the 20 year enhancement on Louie's life sentence for attempted murder, and the stayed section

[15] Since we are staying count 4 under section 654, we do not need to discuss it.

186.22, subdivision (b) enhancements on counts 2, 3 and 4 and the stayed two year term for count 5 for both defendants. The trial court is directed to stay the term for count 4 pursuant to section 654. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RAMIREZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.