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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE JAVIER MAGANA, Defendant and Appellant.	B281616 (Los Angeles County Super. Ct. No. BA416716)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith Meyer, Judge. Affirmed.

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A Los Angeles jury convicted defendant Jose Javier Magana (defendant) of attempted premeditated murder, assault with a deadly weapon, and aggravated mayhem. The jury heard evidence defendant armed himself with a baseball bat and attacked two other men, including one who was lying face up on the ground and trying to cover his face and head. The injuries defendant inflicted to the heads of the victims were severe and life-threatening. We are asked to decide whether substantial evidence supports defendant's convictions, whether the prosecution (without contemporaneous objection) misstated the evidence during closing argument, and whether defendant had a sufficient opportunity under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) to make a record at sentencing for a future youth offender parole hearing.

I. BACKGROUND

A. The Charges

The Los Angeles County District Attorney charged defendant and two other men, Marlon Orellana (Marlon) and Vasquez Chacon (Chacon), with attempted premeditated murder. Defendant was also charged with assault with a deadly weapon and aggravated mayhem. The district attorney alleged as to all counts that defendant personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)[1]) and committed the charged crimes for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

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[1] Undesignated statutory references that follow are to the Penal Code.

B. The Offense Conduct, as Established by the Evidence at Trial[2]

Urias Rodriguez (Rodriguez), Oscar Orellana (Oscar; no relation to Marlon), and Jose Portillo (Portillo) worked at a Korean BBQ restaurant in Los Angeles. In the early morning hours on September 20, 2013, they were drinking beer outside the restaurant. A man later identified as Marlon approached the three men and asked for a beer. Oscar handed Marlon a drink, and he left. Ten minutes later, Marlon returned and asked the men for more drinks and, if not, some money. Oscar and Portillo refused, and an argument ensued.

As they argued, a woman and a man wearing a sleeveless white tank top (later identified as defendant and his girlfriend, Adriana Olague) walked by. Marlon approached defendant and greeted him. Marlon told defendant he "was having a little issue with the fellas there" and asked defendant to stand behind him and "see what happens."[3] Defendant agreed.

Marlon and defendant approached Rodriguez, Oscar, and Portillo and continued the argument. Rodriguez heard either

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[2] Defendant was tried twice; the first trial ended in a mistrial after the jury was unable to reach a verdict. Our background summary is taken from the evidence at the second trial, from which defendant appeals.

[3] As we later explain, defendant knew Marlon was a member of MS-13, a criminal street gang. Defendant belonged to a "tagging crew" going by the initials S.C.K. that was affiliated with MS-13. Specifically, some S.C.K. members would use the crew as a stepping stone to join MS-13, but to do so, they would have to show they were willing to assist or back MS-13 members at any time.

defendant or Marlon say that "if they [the three men] were looking for something, [Marlon and defendant] were going to send MS-13."

After this initial confrontation, defendant ran across the parking lot of a nearby 7-Eleven and armed himself with an aluminum baseball bat he found in the back of a pickup truck. He told acquaintance and fellow tagging crew member Chacon, plus another person who was nearby, that Rodriguez, Oscar, and Portillo had been disrespectful, and he (defendant) was going to go back.

Chacon and the other man agreed to accompany defendant and Marlon back to the area of the restaurant. Defendant—in possession of the bat and in the company of Marlon, Chacon, and the other man—returned to the restaurant. One of the men accompanying defendant asked Rodriguez and his friends, "What is your hood?" Rodriguez responded, "We are nobody. We don't want to get into any trouble." Rodriguez began to walk away as the others were arguing. One of the men exclaimed "Mara Salvatrucha" (the full name represented by the letters "MS" in MS-13) and said, "Out here, we rule."

Defendant and his confederates attacked Oscar and Portillo; Rodriguez had fled to a sidewalk some distance away. Marlon threw a bottle at Oscar and Portillo and Chacon pepper-sprayed Oscar in the face. Defendant struck Portillo with the bat, and Portillo attempted to get up after being hit but fell twice as he tried to run. Defendant then moved toward Oscar, who (already having been pepper-sprayed) was lying face up on the

ground. Defendant kicked Oscar and defendant struck Oscar with the baseball bat multiple times around his head.[4]

At the time defendant was pummeling Oscar in the head with the bat, a woman in a nearby apartment yelled out that she was calling the police, which prompted defendant and his companions to take off running. Defendant dropped the bat as he ran away.

Rodriguez called the police. He told the 911 operator "these Salvatrucha cholos" attacked them with bats and bottles. Rodriguez said Portillo and Oscar were unconscious and "bleeding badly."[5]

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[4] Investigating officers obtained surveillance video footage from the Korean BBQ restaurant. The video, which was played during trial, shows a man identified as defendant running and holding a bat, Oscar rubbing his face (apparently after being pepper sprayed), and Marlon throwing a bottle on the ground in front of the victims.

[5] Defendant testified in his own defense at trial. He told the jury he was on his way to 7-Eleven with his girlfriend when Marlon called him over because "there was a conflict" and defendant "decided to approach the fellas with him." Defendant listened to what the situation was for a couple minutes, walked away, and retrieved what he called a "mini Dodger bat" because he was "going to [use it] to intimidate the fellas . . . with Marlon . . . ." Defendant went back to the area of the Korean BBQ restaurant and was "swinging the bat" at one point. Defendant admitted he fought with one of the three men outside the restaurant but he denied "cracking him over the head with the baby bat." Defendant claimed he dropped the bat on the ground once the three men were no longer throwing bottles at him and Marlon.

C. Evidence Concerning the Injuries to Portillo and Oscar

As a result of the attack by defendant and his companions, Portillo suffered multiple fractures of his face, bleeding inside his brain, and bleeding in between his skull and his brain. The facial fractures caused enough swelling to be life-threatening. A breathing tube had to be placed inside his wind pipe to assist in maintaining his airway.

The injuries to Portillo kept him in the hospital for over two weeks. Though Portillo remembered being hit, he did not remember who hit him nor what he was hit with. He had difficulty remembering events before the attack and his injuries caused him to have trouble speaking. The hearing in his right ear was also affected.

Oscar suffered a left skull fracture, and blood collected between his skull and his brain. He also sustained a left eye socket fracture and a contusion to the right side of his brain. The swelling inside Oscar's brain was potentially life-threatening. Oscar remained in the hospital for three or four days. A laceration on his head required approximately sixty staples to close.

As a result of his injuries, Oscar became very nervous and "afraid of everything"; he would also sometimes forget things. Post-attack, it took about three weeks before Oscar stopped having trouble recognizing loved ones. It took about a month to a month and a half before he was able to walk again. Months after the attack, Oscar still was not able to remember much about what happened.

D. Gang Evidence

Mara Salvatrucha, or MS-13, is a criminal street gang. MS-13's primary activities include murders, attempted murders, robberies, vandalism, burglaries, possession of weapons, and narcotics sales. Defendant's attack on Oscar and Portillo occurred within the geographic boundaries of territory claimed by MS-13. Oscar remembered Marlon saying he was from MS-13 before he and defendant started to hit Oscar, and defendant admitted Marlon "claim[ed]" MS-13 during the incident with the three men.

Los Angeles Police Department Officer Gabriel Mejia testified as the prosecution's gang expert at trial. He opined Marlon was a member of MS-13 and testified defendant was an admitted member of the S.C.K. tagging crew. Officer Mejia explained a tagging crew normally consists of a group of individuals that get together to graffiti walls. He further testified the tagging crew S.C.K. was associated with MS-13, explaining S.C.K. was sometimes used as a "stepping stone" to get into MS-13 and noting several members of MS-13 were once members of the S.C.K. tagging crew. Officer Mejia further explained that if S.C.K. members want to represent their crew within MS-13 territory, they have to show they are willing to assist MS-13 members at any time. Members of S.C.K. are expected to physically step in if an incident involving an MS-13 member is happening.

The prosecution asked Officer Mejia to offer an opinion on a detailed hypothetical scenario designed to track the facts of the case against defendant. Officer Mejia opined the attack committed by the hypothetical assailants, including an MS-13 member and a member of S.C.K., was committed "to show the

amount of force the gang has" and "to show that this gang, that this particular area is run by them"—which is why they would yell out "Viva Salvatrucha" or "Mara Salvatrucha" during the hypothetical assault. According to Officer Mejia, the hypothetical S.C.K. member who used a baseball bat to strike two people during the attack might improve his or her standing with MS-13 by being involved in the altercation. The officer testified it would show "this individual is willing to commit a crime" and "put [in] work at a moment's notice," which is one of the main characteristics MS-13 looks for in recruiting members.

E. Verdict and Sentencing

The jury convicted defendant on all the charges against him: two counts of attempted premeditated murder, aggravated mayhem, and assault with a deadly weapon. The jury also found the criminal street gang and great bodily injury allegations true.

Prior to sentencing, only the prosecution submitted a written sentencing recommendation. At the outset of the sentencing hearing, defense counsel stated he would "prefer" a continuance because he was late arriving to the hearing and he did not want the court "to take any type of negative attitude toward the sentencing." The court reassured defense counsel it was not "taking any kind of negative attitude" because of defense counsel's tardiness and denied the request for a continuance.

The prosecution advocated for a total sentence of 38 years to life in prison, consisting of 15 years to life for each of the attempted premeditated murder charges (with the gang enhancement found true) and an additional eight years for the sentencing enhancements found true. Defendant addressed the

court personally and complained about the effectiveness of his lawyer and the jury's deliberation process.

The trial court then invited defense counsel to argue as to the appropriate sentence, and he made an oral motion for new trial contesting the sufficiency of the evidence, which the court denied. Defense also made motions to strike the jury's gang enhancement true finding and its finding of premeditation, also on evidence sufficiency grounds, and the trial court denied those motions too.

The court again invited defense counsel to be heard on the appropriate sentence, noting the only real issue was whether the prison terms imposed on the attempted murder counts would run concurrently or consecutively. Defense counsel asked the court to "strike the life" and sentence his client to "17 years concurrently," but the court explained the indeterminate term was mandatory based on the jury's findings (and warranted, in any event, in the court's view). The court again asked defense counsel for his position on what the sentence should be on the verdicts as rendered by the jury and defense counsel "ask[ed] the court to sentence him to the minimum which is 6 years concurrently . . . . [¶] [b]ased upon the . . . A.D.W. charges."

The trial court sentenced defendant to a total of thirty-eight years to life, as recommended by the prosecution, noting consecutive sentences for the attempted murder convictions were warranted based on the harm to two separate victims.[6] In imposing sentence, the court noted for the record it was familiar with both the facts of the case from presiding over the trial and

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[6] The sentences on defendant's remaining convictions were imposed and stayed pursuant to section 654.

defendant's background based upon the court's review of defendant's pre-plea report.[7]

In explaining its sentencing rationale, the trial court recognized defendant's young age was possibly a factor in mitigation, but the court reasoned defendant had "managed to accumulate a very significant criminal record" including sustained juvenile wardship petitions, which with his conduct in this case, meant "his age is not really to [the court's] mind a factor in mitigation that would outweigh any factors in aggravation." The court stated it did not take pleasure in sentencing "a man as young as [defendant]" to a substantial term in custody, but the court believed the sentence imposed was warranted by defendant's conduct—including the injuries inflicted on the victims that were "so severe, so obvious and so aggravated that to [the court's] mind, it goes beyond even what is required for aggravated mayhem, certainly what is required for assault with a deadly weapon in an attempted murder."

II. DISCUSSION

Defendant contends there is insufficient evidence to support the aggravated mayhem conviction and, as to the attempted murder convictions, insufficient evidence of an intent

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[7] At this point in the proceedings, defense counsel interjected his client would like a brief continuance. Defendant personally addressed the court and stated his attorney (who he retained) had not answered his calls or provided him with "any paperwork having to do with [his] trial." Defendant wanted more time "to go ahead and do [his] own part on the studies" and to give him some extra time to stay a little closer to his family before the court would "sentence [him] to whatever [it was] going to sentence [him] to." The trial court denied the request for a continuance.

to kill or of deliberation and premeditation. He further contends the prosecution prejudicially misstated the evidence in closing argument (by remarking "[I]f I didn't hear [defendant] correctly [when testifying], it is my understanding that he said [his confederates] were more important than family") and the matter should be remanded under *Franklin*, *supra*, 63 Cal.4th 261 to give defendant an opportunity to make a record of information relevant to an eventual youth offender parole hearing.

We hold there is substantial evidence of defendant's intent to kill the victims, or failing that, to maim them, based on testimony defendant repeatedly used a deadly weapon (the baseball bat) in a focused manner to target a vulnerable and vital part of their bodies (their heads), which left them with severe and life-threatening injuries. The jury's willful, deliberate, and premeditated finding is also supported by sufficient evidence of planning activity (leaving the scene to retrieve the bat), a gang motive, and a manner of attack suggestive of a preconceived design to kill. Defendant's prosecutorial misconduct claim is forfeited, and his fallback assertion of ineffective assistance of counsel fails because the prosecution's appropriately couched remark was not misconduct. And as to the *Franklin* claim, we conclude on the record presented that defendant was afforded a sufficient *opportunity* to make a record of facts relevant to his youth (the sentencing hearing took place months after *Franklin*).

A. There Is Substantial Evidence of Defendant's Intent to Kill Oscar and Portillo, or Failing That, to Maim Them

When confronted with a challenge to the sufficiency of the evidence, ""we review the entire record in the light most

favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 357 [same standard applies to convictions resting primarily on circumstantial evidence].) Substantial evidence supports the jury's finding that defendant had an intent to kill or maim his victims, Oscar and Portillo.

1. Intent to kill

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citation.] A defendant's intent is rarely susceptible of direct proof, and may be inferred from the facts and circumstances surrounding the offense. [Citation.]" (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1624 (*Felix*).)

Defendant asserts there is little beyond the severity of the injuries to show an intent to kill. While "the degree of the resulting injury is not *dispositive* of defendant's intent," the injuries inflicted are still probative of intent. (*People v. Avila* (2009) 46 Cal.4th 680, 702, italics added.) And here there was more.

The manner in which defendant attacked the victims provides additional evidence on which a jury could reasonably rely to find an intent to kill. There was evidence defendant hit Portillo with the bat at least once and hit Oscar in the head with the bat multiple times when he was lying largely defenseless on the ground. The jury could reasonably infer that blows to the head with a potentially lethal weapon like a baseball bat, inflicted with such force as to cause the injuries Oscar and Portillo suffered, are strongly suggestive of an intent to kill—especially for blows to the head delivered repeatedly on a person like Oscar who had little ability to defend himself. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [finding that shooting at a vital area of the body was indicative of a deliberate intent to kill]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 ["appellant's intent was established by the evidence of his unprovoked attack that rendered the unarmed victim prone and defenseless as appellant repeatedly stabbed him"].)

Indeed, in *People v. Lasko* (2000) 23 Cal.4th 101 (*Lasko*), our Supreme Court observed there was "strong[ ]" evidence of intent to kill where the defendant hit his victim in the head with a baseball bat using "extreme force" causing extensive and multiple fractures in the victim's skull. (*Id.* at p. 112.) The Supreme Court further observed the "defendant's actions *after* striking the fatal blow were not those of an unintentional killer" because the defendant did not call an ambulance and tried to "obscure evidence of the killing." (*Ibid.*)

There are strong parallels here to the facts in *Lasko*. Like the defendant in that case, defendant here used a baseball bat with extreme force and repeated strikes to inflict grave head injuries, including multiple face and skull fractures with brain

hemorrhaging.[8] Defendant's post-attack actions in no way undermine an inference of an intent to kill—as in *Lasko*, defendant certainly did not call an ambulance, and he ceased beating Oscar only when defendant believed the police would soon be on the way, at which point he fled.[9] Putting *Lasko* aside, defendant obviously had a motive to kill, namely, anger at perceived disrespect shown by the victims and a desire to use violence to ingratiate himself with MS-13 gang member Marlon and to benefit the gang, as is apparently common among members of defendant's S.C.K. tagging crew. All this is enough to support the jury's verdict.

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[8] The trial court commented at sentencing on the "long-lasting nature" of the victims' injuries. The court explained both of the victims, or "certainly . . . at least one of them" took "10 to 15 second pauses [during trial] between the question and their ability to answer. And it wasn't based upon the difficulty of the question. It was based upon the fact in my mind that their cognition and memory remains severely impaired from the extreme beating they received at the hands of . . . defendant." The trial judge further noted: "I don't think I've ever seen crime scene photos even in a murder that were as gruesome as the ones in this case."

[9] We reject, for this reason, defendant's suggestion that his decision to stop short of killing the victims is reason to conclude he had no intent to kill. Viewed in the light most favorable to the verdict, defendant stopped bashing Oscar's head with the baseball bat not out of mercy or some other non-lethal intent, but because the woman in the nearby apartment yelled she was going to call the police.

2. Intent to maim

A person commits aggravated mayhem if he or she, "under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his body." (§ 205.) An aggravated mayhem conviction "requires proof beyond a reasonable doubt 'that the defendant acted with the specific intent to cause a maiming injury.' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 86 (*Manibusan*).)

"A jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors. [Citation.]" (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 834 (*Ferrell*).) "'[E]vidence of a "controlled and directed" attack or an attack of "focused or limited scope" may provide substantial evidence of' a specific intent to maim. [Citation.]" (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831.) But "[e]vidence which shows no more than an 'indiscriminate attack' is insufficient to prove the specific intent to commit [aggravated] mayhem under section [205] . . . . [S]pecific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately. [Citation.]" (*Ferrell*, *supra*, at p. 835.)

Defendant argues the jury's finding of an intent to kill is inconsistent with a finding of an intent to maim. The finding of one, however, does not eliminate the possibility of finding the other. Rather, controlling precedent holds "'[a] defendant may intend both to kill his or her victim and to disable or disfigure

that individual if the attempt to kill is unsuccessful,' and evidence that is sufficient to establish a defendant's intent to kill the victim can also be 'sufficient to establish the intent to permanently disable or disfigure that victim.' [Citations.]" (*Manibusan*, *supra*, 58 Cal.4th at p. 89.) That is precisely the scenario here.

As already foreshadowed, courts have found sufficient evidence of an intent to maim where there is evidence the defendant targeted a vulnerable area of a victim's body in a focused manner. Indeed, that was our Supreme Court's holding in *Manibusan*. There, the Court found sufficient evidence to support a conviction for aggravated mayhem because the defendant did not immediately react with violence when he approached the victim, he attacked a specific, vulnerable part of the body (he shot the victim in the head), and there was a motivation for the attack that suggested it was not merely an indiscriminate action (the defendant did not want the victim identifying her assailants). (*Manibusan*, *supra*, 58 Cal.4th at pp. 88-89.) Similarly, in *People v. Park* (2003) 112 Cal.App.4th 61 (*Park*), the Court of Appeal held there was substantial evidence of intent to maim where the defendant used a steel knife sharpener in a "throwing motion" to strike "an extremely vulnerable portion of [the victim's] body: his head." (*Id.* at p. 69) The Court of Appeal reasoned there was substantial evidence of a specific intent to maim considering the defendant's decision to limit the scope of his attack to the victim's head, the defendant's decision to stop the attack once he maimed the victim's face, and the fact that the defendant "planned his attack on [the victim] following a demonstrated antagonism [i.e., a stare down and

verbal threats]" between a group of people the victim was with and defendant's group. (*Id.* at pp. 69-70.)

The parallels here to *Manibusan* and *Park* are obvious. In this case, both victims sustained severe, long-term injuries almost exclusively to their heads. Like the defendant in *Manibusan*, defendant did not attack immediately with the baseball bat. The gravity of the victims' injuries are suggestive, like the "throwing motion" in *Park*, of extreme force applied using the aluminum baseball bat. And like *Manibusan* and especially *Park*, the motivation for defendant's attack (revenge for prior antagonism among two groups) undercuts any suggestion of merely a sudden or indiscriminate attack. Substantial evidence accordingly supports the jury's finding of an intent to maim.

B. Sufficient Evidence Supports the Jury's Premeditation and Deliberation Finding

Section 664, subdivision (a) enhances an attempted murderer's sentence where the "crime attempted is willful, deliberate, and premeditated." Premeditation and deliberation "'refers to careful weighing of considerations'" that is "'thought over in advance.'" (*People v. Cage* (2015) 62 Cal.4th 256, 276 (*Cage*).) A defendant's attempt must be the result of preexisting thought and reflection, as opposed to an unconsidered or rash impulse. (*People v. Burney* (2009) 47 Cal.4th 203, 235.) An extended period of time, however, is not required to show premeditation and deliberation. (*Cage*, 62 Cal.4th at p. 276.) "'"'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'"' [Citation.]" (*Ibid.*)

In determining whether an attempted murder was premeditated and deliberate, courts consider three factors first identified in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*): planning activity, motive, and the manner of killing. (*People v. Thomas* (1992) 2 Cal.4th 489, 517 ["The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations"]; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1125 ["The *Anderson* guidelines are descriptive, not normative"] (*Perez*).) Courts typically "require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) Considering the record here in light of the *Anderson* factors, there is sufficient evidence defendant acted with premeditation and deliberation.

1. Planning

"Planning activity" refers to "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing . . . ." (*Anderson*, *supra*, 70 Cal.2d at p. 26, italics omitted; see *Perez*, *supra*, 2 Cal.4th at pp. 1126, 1129 [the defendant obtaining a knife from the kitchen is indicative of planning activity]; *People v. Wharton* (1991) 53 Cal.3d 522, 547 [evidence of the defendant retrieving the hammer to kill the victim constitutes planning activity]; *Felix*, *supra*, 172 Cal.App.4th at p. 1627 [planning could be inferred from the defendant arming himself with a firearm and

driving to the victim's house].) There is strong evidence of planning on this record.

After initially confronting the victims with Marlon, defendant left the scene to obtain a potentially lethal weapon—an aluminum baseball bat—and then returned to attack. Further, while temporarily away from the restaurant, defendant also recruited others to participate in anticipated violence to respond to the victims' perceived disrespect. The video surveillance evidence shows that when defendant returned to the scene of the crime, he brandished the bat for a time before he moved in to commence beating the victims; even defendant conceded during his trial testimony that his considered purpose (or at least *a* considered purpose) was to use the bat to "intimidate the [victims]." This sequence—taking time to leave the scene of a confrontation, retrieve a potentially lethal weapon, recruit confederates, return to the scene, brandish the weapon in the victims' presence, and then use it to devastating effect—is quintessential planning activity suggestive of premeditation and deliberation. (See, e.g., *People v. Lee* (2011) 51 Cal.4th 620, 636 [the defendant brought a loaded handgun, indicating he considered the possibility of a violent encounter]; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [carrying a knife to the victim's home in his pocket makes it "'reasonable to infer that he considered the possibility of homicide from the outset'"]; see also *People v. Gonzalez* (2012) 54 Cal.4th 643, 665 [evidence of planning and deliberation strong where the defendant recruited her brother and boyfriend to ambush the victim].)

2. Motive

As we have already stated, defendant's gang connections and the perceived disrespect from the victims provide solid evidence of a motive to kill. Defendant was an S.C.K. member, a tagging crew with connections to MS-13, and he willingly accompanied an MS-13 member in committing the crime. As the gang expert at trial testified, MS-13 gang members expect S.C.K. crew members to back them up when involved in an altercation, and murders are among the gang's primary activities. The jury had ample basis to infer that defendant formed a preconceived plan to kill in order to ingratiate himself with MS-13 and benefit the gang—particularly when there was undisputed evidence defendant believed Oscar, Portillo, and Rodriguez had disrespected both him (defendant) and Marlon. (See *People v. Romero* (2008) 44 Cal.4th 386, 401 [gang expert testimony that a killing would elevate a person's status within the gang is evidence of motive]; *In re C.R.* (2008) 168 Cal.App.4th 1387, 1393 [killing committed for the benefit of the gang was evidence of motive].)

3. Manner

The manner in which defendant committed attempted murders also supports the jury's premeditation and deliberation finding. The evidence, viewed in the light most favorable to the verdicts, indicated defendant struck Portillo at least once with the baseball bat and bludgeoned Oscar several times in the head while he was already on the ground. As we have recounted, Portillo suffered multiple facial fractures, bleeding inside his brain, and bleeding in between his skull and his brain, while

Oscar suffered a left skull fracture, a left eye socket fracture, a contusion to the right side of his brain, and brain hemorrhaging.

The injuries were focused on the victims' heads and are indicative of the use of extreme force. And the manner of defendant's attack on Oscar in particular (which was essentially contemporaneous with the attack on Portillo—and therefore probative of intent as to Portillo as well) is suggestive of a premeditated intent to kill because Oscar was largely incapacitated and defendant nevertheless struck him with the bat in the head repeatedly. The jury had ample basis to conclude the manner of defendant's attack demonstrated a "'preconceived design' to take his victim[s'] life in a particular way" (*Anderson*, *supra*, 70 Cal.2d at p. 27), which was thwarted only by his belief that someone was calling the police.

C. Defendant's Prosecutorial Misconduct Claim Is Forfeited and Meritless in Any Event

During closing argument, "'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].' [Citation.] Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] To establish misconduct, defendant need not show that the prosecutor acted in bad faith. [Citation.] However, she does need

to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."]' [Citation.] If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) Defendant contends the prosecutor committed misconduct by misstating or mischaracterizing his trial testimony during closing argument.[10] The contention is forfeited, and regardless, there was no misconduct.

1. Additional background

During defendant's testimony, the prosecutor questioned defendant about his loyalty to Marlon and MS-13:

"[Prosecutor]: So you guys are just part of this group, S.C.K., and the words Mara Salvatrucha all this stuff that you guys are part of, it is like you don't even need to tell them much, you say, hey I need backup and, boom, they are on it with you; right?

"[Defendant]: Correct.

"[Prosecutor]: That is the culture you guys are a part of?

"[Defendant]: That is how anybody is. Any family members do the same.

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[10] Initially, defendant also contended the prosecutor misstated the law by stating he did not have to prove defendant intended to assist, further, or promote criminal conduct by a gang member. Defendant withdrew the contention after a corrected reporter's transcript revealed there was no such misstatement.

"[Prosecutor]: So that's how close you guys are, you guys are like family?

"[Defendant]: I seen them grow up. They are not like family, but I seen them grow up. They are all friends of mine.

Later during closing argument, the prosecutor revisited this exchange to argue there was strong evidence of a gang motive for the attack because defendant abandoned his girlfriend (who was with him at the time) to back up Marlon in a fight. The prosecutor argued: "You heard testimony from Officer Mejia and also from the defendant, Mr. Magana, about gang culture, about the fact that these ties that bind gangs [*sic*] members together are strong. He compared, Mr. Magana did, to ties of a family. *And if I didn't hear him correctly, it is my understanding that he said they were more important than family*." (Emphasis ours.)

2. Forfeiture

To preserve a claim of prosecutorial misconduct, the defendant must object at the time the misconduct occurs and request a curative jury admonition. (*People v. Winbush* (2017) 2 Cal.5th 402, 482; *People v. Williams* (2013) 56 Cal.4th 630, 671.) Trial counsel for defendant did neither here. Defendant points to nothing in the record to indicate an objection would have been futile or a request for admonition would have been ineffective. The misconduct claim is forfeited.

3. Ineffective assistance of counsel

Defendant argues trial counsel's decision not to object to the challenged statement by the prosecutor constitutes ineffective assistance of counsel. "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's

representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [(*Strickland*)]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217[ ].)" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) We presume "'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.'" (*Ibid.*) If the appellate record "'sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]'" (*Ibid.*)

Defendant's ineffective assistance of counsel claim fails on (at least) the first prong of *Strickland* analysis. Defendant's testimony was arguably amenable to the prosecutor's articulated understanding of it. When the prosecutor asked defendant about the culture of S.C.K. and MS-13, it was defendant who volunteered, "Any family members do the same." Defendant also conceded he left his girlfriend behind (who just recently told him she was pregnant) to go get in a fight with Marlon and the others. Articulated with an appropriate qualification ("And if I didn't hear him correctly, it is my understanding . . . ."), the prosecutor's statement during summation falls within the bounds of permissible argument. (*Berger v. United States* (1935) 295 U.S. 78, 88 [a prosecutor "may strike hard blows . . . [but] is not at

liberty to strike foul ones"]; *People v. Hamilton* (2009) 45 Cal.4th 863, 928 ["A prosecutor engages in misconduct by misstating facts, but enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom"].) Defense counsel was not constitutionally ineffective for not objecting; indeed, defense counsel appeared to understand his client's testimony in much the same way and would have reasonably thought no objection was warranted.[11] (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90 ["Failure to raise a meritless objection is not ineffective assistance of counsel"]; see also *People v. Weaver* (2001) 26 Cal.4th 876, 926 ["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"].)

D. No Franklin *Remand Is Required*

Pursuant to section 3051, subdivision (b)(3), a person 25 years old or younger who is convicted of an offense and sentenced to 25 years to life in prison is entitled to a youth offender parole hearing during his or her twenty-fifth year of incarceration. (*Franklin*, *supra*, 63 Cal.4th at pp. 276-277.) At such a hearing,

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[11] During defendant's testimony on re-direct examination, defense counsel asked, "When you said that you were like family, when you were asked by the district attorney about the Mara Salvatrucha or individuals that grew up in the area being like family, you were saying it not in a way to say that you were from the gang; correct?" The trial court sustained an objection to this question as leading, but the question itself reveals how defendant's answer to the prosecutor's question was reasonably understood.

the Board of Parole Hearings (the Board) must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).) Additionally, persons "with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the [B]oard." (§ 3051, subd. (f)(2).)

In *Franklin*, our Supreme Court recognized that assembling information about a youth offender's characteristics "is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.) Additionally, the Court recognized "[c]onsideration of 'subsequent growth and increased maturity,'" which is required at a youth offender parole hearing, "implies the availability of information about the offender when he was a juvenile." (*Id.* at p. 284.) Because it was unclear whether the defendant in *Franklin* had sufficient opportunity to make an accurate record of his characteristics and circumstances at the time of the offense that would enable the Board, years later, to discharge its obligations, our Supreme Court remanded the case to the trial court "for the limited purpose of determining whether Franklin was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations . . . ." (*Id.* at pp. 284, 286-287.)

Defendant argues a limited *Franklin* remand is warranted here, relying heavily on the fact that the defense presented no

mitigating evidence at the sentencing hearing and did not file a written sentencing memorandum.[12] He argues this means he was not given a sufficient opportunity to put mitigation information on record relevant to sections 3051 and 4801. In our judgment on the record before us, defendant had the opportunity that *Franklin* requires—and *Franklin* requires no more than that, an opportunity. (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

Franklin was decided nearly eight months before defendant's sentencing hearing and we must presume defense counsel and the court were then aware of applicable law, which would include the *Franklin* decision. (*People v. Barrett* (2012) 54 Cal.4th 1081, 1105 ["Counsel is presumed competent and informed as to applicable constitutional and statutory law"]; *People v. Thomas* (2011) 52 Cal.4th 336, 361 ["In the absence of evidence to the contrary, we presume that the court 'knows and applies the correct statutory and case law'"].) During the sentencing hearing, the trial court noted it was familiar with defendant's background from reading his pre-plea report and commented on defendant's relatively young age at least three times. The trial court also extended multiple invitations to defense counsel to present whatever argument the defense wished to present, and defense counsel made various arguments on his client's behalf. Although defense counsel did not seek to introduce evidence related to defendant's age and maturity, it is

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[12] Defendant also calls attention to defense counsel's unprofessional behavior in other instances during these proceedings. None of these incidents, however, is material to whether defendant had a sufficient opportunity at sentencing to make a record of factors relating to youth—factors of which the trial court seemed well aware.

possible defense counsel determined there was no such evidence that would be helpful to present (beyond the evidence already before the court). Under these circumstances, no limited remand is necessary. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089 [no *Franklin* remand necessary where sentencing took place after enactment of the youth offender parole hearing statutes, the trial court repeatedly asked defense counsel whether he wanted to add anything to the probation report, and defense counsel noted the probation report identified the mitigating factors he would bring up].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J. SEIGLE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.