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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JASON JENKINS, Defendant and Appellant.	B230113 (Los Angeles County Super. Ct. No. BA363320)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jason Jenkins of assault by means of force likely to produce great bodily injury, with a finding he committed the offense for the benefit of a criminal street gang. (Former Pen. Code, § 245, subd. (a)(1), Pen. Code, § 186.22, subd. (b).)[1] The trial court sentenced Jenkins to an aggregate term of six years, calculated as follows: a midterm of three years for the aggravated assault, plus three years for the gang enhancement. We affirm.

FACTS

Count 2 — The Aggravated Assault (Found Guilty)

During the morning hours of October 10, 2009, Brian P. drove his car to the area of Hillcrest Drive and 28th Street to visit his grandmother. Brian parked his car a few houses away and got out to walk to her door. When he got out his car, Brian saw Jenkins across the street. Jenkins stated, "What's up?" Brian replied, "What's up?" Jenkins then came back, "This is West [Boulevard] Crip." Brian recognized Jenkins's statement as the name of a local gang. As Brian walked to his grandmother's house, Jenkins approached to within two or three feet, and took a "swing" at Brian. Brian "swung back." A fistfight started. As Jenkins and Brian were fighting, two other men joined Jenkins. Someone hit Brian with an unknown object, possibly made of metal, opening a cut on his eyebrow that required five stitches to close. The incident ended in "four minutes at the most," when one of Jenkins's companions said, "Let's go," and Jenkins and his two companions ran down the street together, around a corner and out of sight.

Count 1 — The Attempted Murder (Found Not Guilty)

Brian P. continued to his grandmother's house. She suggested Brian move his car to a parking space across the street, closer to her house. He did so.

According to Brian P.'s trial testimony, when he got out of his car after moving it, he saw Jenkins again, now behind a tree on the same side of the street. Jenkins aimed a handgun at Brian, and Brian started running for his grandmother's house. As he ran,

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[1] All further undesignated section references are to the Penal Code unless otherwise noted.

Brian heard approximately five gunshots, and bullets "flying" and "whistling" by him and hitting a parked car. Brian reached his grandmother's house without being hit by any of the gunshots. Brian looked out a window and saw Jenkins and another male running from the scene.

Minutes later, Los Angeles Police Department (LAPD) Officer Manuel Mendieta and his partner, Officer Gregg Fischer, responded to a radio call of shots fired and spoke with Brian at his grandmother's house. Brian described his assailant as a slim African-American male, approximately six feet tall. He had been wearing a scarf and a multicolored T-shirt with gold or yellow and black or dark blue horizontal stripes. Brian also said that the male had Warner Bros. cartoon characters and a crown tattooed on his right arm.[2] Brian had previously seen tattoos of Warner Bros. cartoon characters on members of the West Boulevard Crips.

Officer Mendieta and other officers searched the area. The officers recovered a scarf found on the ground, and two spent .38-caliber rounds -- one from the backseat of Brian P.'s car, the other from a nearby apartment complex. Based on the description provided by Brian, Officer Fischer believed he may have encountered the assailant just the previous day at a nearby liquor store. Officers Mendieta and Fischer, with help from a Detective Henry, put together a six-pack photographic lineup (six-pack) that included Jenkins's photograph. On the same day of the shooting, at the police station, Officers Mendieta and Fischer, with Detective Henry, told Brian they had a possible suspect. They then read him a printed admonishment on the six-pack form, and then showed him the six-pack. Brian selected Jenkins's photograph. When Officer Mendieta asked, "Are you sure that's the person?" Brian answered, "Yes."

At 2:00 p.m., on the same day of the shooting, Officers Fischer and Mendieta found Jenkins at a liquor store at West Boulevard and Adams Boulevard, roughly two miles from the scene of the shooting. Jenkins was taken into custody.

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[2] At trial, photographs of Jenkins's right arm, with tattoos of Warner Bros. cartoon characters, were presented to the jury as trial evidence.

The Criminal Case

The People filed an information charging Jenkins with attempted murder (count 1; §§ 664, 187, subd. (a)) with the further allegations that Jenkins personally discharged a firearm, and personally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (d)), and that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)). Jenkins was also charged with assault by means of force likely to produce great bodily injury (count 2; former § 245, subd. (a)(1)) with the additional allegation that Jenkins committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)).[3]

The charges were tried to a jury, and the People presented evidence establishing the facts summarized above. In addition, a gang expert, LAPD Officer John Davis, testified about the West Boulevard Crips, and opined that the crimes were committed for the benefit of the gang. Jenkins testified in his own defense, denying any involvement. Jenkins also presented testimony from his mother and from character witnesses, denying that he was a member of a gang. Jenkins presented evidence from a psychologist specializing in problems and factors associated with eyewitness identifications.

In argument to the jury, the prosecutor's theories were that the shooting was an attempted murder, and that the attempted murder was premeditated. The prosecutor argued the aggravated assault occurred during the fight in which Brian was hit across the head at the eyebrow.[4] As to count 1, the trial court instructed the jury on attempted

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[3] As originally filed, the information alleged as to count 1, the attempted murder, that Jenkins personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)); and as to count 2, the assault, that Jenkins personally inflicted great bodily injury (§ 12022.7, subd. (a)). Those allegations were not submitted to the jury as it was undisputed that Brian P. did not get hit by any gunshots during the shooting, and it was not clear who actually injured Brian during the three-on-one fight that preceded the shooting.

[4] In the prosecutor's words: "And it's just common sense. If you try to beat up a guy with your fist with two other guys, you know you are likely to produce great bodily injury."

murder, and instructed that, if the jurors found an attempted murder, they then had to determine whether it was premeditated. The record shows no instructions were given on lesser offenses as to count 1. As to count 2, the court instructed the jury on aggravated assault, and on the lesser offense of simple assault. During deliberations, the jury sent this note to the court: "Do you seperate [*sic*] count 1 from count 2 as one relating to the shooting and 2 relating to the fight?" The court responded: "Dear Jurors -- The answer is yes."

The jury returned verdicts finding Jenkins not guilty of the attempted murder as charged in count 1, and guilty of aggravated assault as charged in count 2, with a finding that Jenkins committed the offense to benefit a criminal street gang. In December 2010, the trial court sentenced Jenkins as noted at the outset of this opinion.

Jenkins filed a timely notice of appeal.

DISCUSSION

I. Ineffective Assistance of Counsel

Jenkins contends his assault conviction must be reversed because his trial counsel was ineffective. Specifically, Jenkins argues his trial counsel failed to challenge the admissibility of Brian P.'s pretrial and in-court identifications. We find Jenkins's claim meritless.

A. The Law Governing Admissibility of Eyewitness Identifications

A pretrial identification violates due process, and is not admissible, when (1) it is unduly suggestive and unnecessary; and (2) it is not otherwise reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of certainty demonstrated at the time of the identification, and the time between the crime and the identification. (*People v. Gordon* (1990) 50 Cal.3d 1233, 1242.) "If, and only if, the answer to the first question is yes and the answer to the second is no," is the pretrial identification deemed too unreliable to pass constitutional muster for admissibility. (*Ibid*.; see also *People v. Kennedy* (2005) 36 Cal.4th 595, 608; *Manson v. Brathwaite* (1976) 432 U.S. 98, 104-114.)

A witness's in-court identification is admissible unless the procedures used in obtaining a pretrial identification were "'so impermissibly suggestive as to give rise to a very substantive likelihood of irreparable misidentification.'" (*People v. Sanchez* (1982) 131 Cal.App.3d 718, 729-730, quoting *Simmons v. United States* (1968) 390 U.S. 377, 384.) In other words, an unduly suggestive pretrial identification will not necessarily preclude a subsequent in-court identification. The in-court identification is still admissible when it is shown to have a source of origin independent of a problematic pretrial identification.

In the context of a question about the admissibility of an in-court identification based on a claim that a pretrial identification procedure caused a substantive likelihood of *irreparable* misidentification, the defendant bears the initial burden of establishing that the pretrial identification was unduly suggestive. (*People v. Ingle* (1986) 178 Cal.App.3d 505, 512, fn. 4.) If a defendant establishes that a pretrial identification was unduly suggestive, the burden shifts to the People to prove that an in-court identification is independent of the pretrial identification. (*Ibid*.) In determining whether an in-court identification is independent of a suggestive pretrial identification, the trial court again applies a totality of the circumstances test. It must take into consideration such factors as the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, any prior description of the criminal, and the certainty of the identifications. (See, e.g., *People v. Nguyen* (1994) 23 Cal.App.4th 32, 37-38.)

B. The Law Governing Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, a defendant must establish that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, and that the challenged actions or omissions of counsel resulted in prejudice. (*People v. Gamache* (2010) 48 Cal.4th 347, 391; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694.) Prejudice means a different result was reasonably probable in the absence of counsel's allegedly deficient performance. (*People v. Gamache, supra,* at p. 391; see also *Strickland v. Washington, supra,* at p. 694.)

C. Analysis

Even if we were to assume that Jenkins's trial counsel should have challenged the admissibility of Brian P.'s pretrial identification from the six-pack, and also his in-court identification, we reject Jenkins's ineffective assistance of counsel claim because we see no reasonable probability that the outcome of his trial would have been different had such challenges been pressed. A motion to suppress the admissibility of Brian's identifications undoubtedly would have been denied, and properly so. The identifications were sufficiently reliable so as to be admissible; the credibility of the identifications was an issue for the jury to decide. (*Manson v. Brathwaite, supra,* 432 U.S. at p. 116.)

Jenkins contends there were three problems with the pretrial identification: (1) the same officers who investigated the attack on Brian P. also conducted the six-pack lineup; (2) the six-pack procedure raised the likelihood that Brian would think his assailant was amongst them, and individual photos should have been used instead; and (3) the photograph of Jenkins was noticeably darker than the others in the six-pack lineup, causing him to stand out. Jenkins argues we should follow the lead of the New Jersey Supreme Court in *State v. Henderson* (N.J. 2011) 27 A.3d 872 (*Henderson*), and disallow the identification procedures employed as to him in the current case. Jenkins contends California should require "blind" or "double-blind" administrators during pretrial identification procedures to find a pretrial identification admissible. Apparently, Jenkins is arguing that his trial counsel should have moved to suppress the identifications under the authority or reasoning of *Henderson*.

In *Henderson*, the New Jersey Supreme Court presented an extensive survey of scientific studies of eyewitness identifications and memory, discussing different "system variables" (e.g., pre-identification instructions, lineup construction, avoiding feedback), and different "estimator variables" (that is, factors beyond the control of criminal justice authorities, e.g., the witness's stress at the time of the crime, the duration of the witness's observation, distance and lighting). The court further presented an extensive review of the then-existing tests for the admissibility of eyewitness identifications in New Jersey state criminal proceedings. It then determined, as a matter of New Jersey state

constitutional law governing due process (which recognizes greater individual rights than is provided under the federal Constitution), to establish a new "framework for evaluating eyewitness identification evidence [for admissibility]." (*Henderson, supra*, 27 A.3d at pp. 889-918, 919, fn. 10.)

Jenkins's ineffective assistance of counsel claim fails because he has not shown us that a successful motion to suppress Brian P.'s pretrial identification was reasonably probable under California law. First, the trial court was bound, as is this court, by our state Supreme Court's jurisprudence on eyewitness identifications. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) A suppression motion would not have been granted under the Supreme Court's rulings on the issue of the admissibility of eyewitness identifications. In short, *Henderson* is interesting reading, but it is of no usefulness here in establishing Jenkins's claim of ineffective assistance of counsel.

Under California law, as established by our state Supreme Court, on the admissibility of a pretrial identification, a pretrial identification, is admissible unless it was unduly suggestive and unnecessary. (*People v. Alexander* (2010) 49 Cal.4th 846, 901; *People v. Johnson* (2010) 183 Cal.App.4th 253, 271-272; see also *People v. Avila* (2009) 46 Cal.4th 680, 698.) A procedure is impermissibly suggestive when it gives rise to a very substantial likelihood of misidentification. (*People v. Johnson, supra*, at p. 272; see also *Simmons v. United States, supra,* 390 U.S. at p. 384.) This occurs when the identification procedure causes the defendant to stand out in a way that suggests the witness should select him. (*People v. Avila*, *supra*, at p. 698; *People v. Johnson*, *supra*, at p. 272.) A defendant has the burden of establishing as a demonstrable reality that the identification procedure was unduly suggestive. (*People v. Johnson, supra*, at pp. 271-272.)

If an unduly suggestive procedure has been shown, the trial court then assesses whether the identification was nonetheless reliable under the totality of the circumstances by taking into account factors such as the witness's opportunity to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the level of certainty at the time of the identification, and the amount of time between the offense

and the identification. (*People v. Alexander, supra,* 49 Cal.4th at pp. 901-902; *People v. Johnson, supra*, 183 Cal.App.4th at p. 271.)

Applying these principles, Jenkins has not established that a suppression motion would have been successful in his case. Jenkins argues that his photograph had a darker tint than the other photographs in the lineup, but our Supreme Court has regularly rejected claims that differences in minor details necessarily render a lineup impermissibly suggestive. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1163 [size of the border and difference in glossiness of defendant's photograph were "trivial distinctions" that did not render the lineup unduly suggestive]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [differences in background color and size of images did not render lineup impermissibly suggestive]; *People v. Lawrence* (1971) 4 Cal.3d 273, 280 [fact that defendant was the only one wearing a gold shirt and gold sweater did not render lineup unduly suggestive].) We have examined the six-pack used by police to obtain Brian P.'s pretrial identification, and we do not observe that Jenkins's photograph stands out from the other photographs in the array.[5]

To the extent Jenkins argues a "six-pack" lineup is necessarily suggestive — his implied claim is that using such a procedure is necessarily suggestive as a matter of law. At least, Jenkins seems to argue it is enough to raise a presumption of suggestiveness sufficient to put the burden on the People to show reliability by consideration of other factors. We disagree. Jenkins cites no California case supporting the proposition that simultaneously showing photographs to a witness, instead of showing them to him sequentially, amounts to a procedure that is impermissibly suggestive. In contrast, the People have cited cases supporting the proposition that such lineups are an appropriate identification technique. (See, e.g., *People v. Avila, supra,* 46 Cal.4th at pp. 697-700; see also *People v. Boyer* (2006) 38 Cal.4th 412, 479 [noting that the defendant had cited

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[5] At trial, Jenkins's own expert on eyewitness identifications that he did not see "anything structurally suggestive" in the six-pack shown to Brian P., and that there was nothing that "would necessarily cause the witness to pick one photograph as opposed to another."

to "no case authority for the proposition that a group photo array is, per se, unduly suggestive"].) As one court has stated, "Group lineups have long been an accepted identification procedure, and nothing in this case indicates we should question that format." (*People v. Johnson, supra*, 183 Cal.App.4th at p. 272.)

In addition, Jenkins has not established that the involvement of Officers Fischer and Mendieta in the pretrial identification procedure with Brian P. necessarily rendered that procedure impermissibly suggestive. Neither officer gave Brian hints as to which photograph he should select, and there is nothing to suggest that Brian somehow selected Jenkins's photograph due to any clues consciously or unconsciously given to him by the officers. In sum, the trial court would not have ruled the pretrial identification inadmissible due to impermissible suggestiveness under California law.

Our analysis is much the same for Brian P.'s in-court identification. The record shows that even if the pretrial identification here was tainted by suggestiveness, Brian's identification was nonetheless reliable. Brian saw Jenkins on the street, and they exchanged greetings ("What's up?"). Jenkins then approached Brian, until they were about two to three feet apart. Brian looked at Jenkins's face and his forearms. Jenkins and two companions fought in direct contact with Brian for about four minutes. Brian saw Jenkins a second time during the shooting. Brian saw Jenkins a third time when Brian looked out the window of his grandmother's house and saw Jenkins fleeing. Brian's description of his assailant regarding unique tattoos matched Jenkins's tattoos. Police showed Brian the six-pack within a few hours of the shooting. Brian's pretrial identification of Jenkins was strong and certain. The totality of the circumstances undoubtedly established that Brian's ensuing in-court identification of Jenkins was sufficiently reliable to be admissible.

In summary, a motion to suppress Brian P.'s pretrial and in-court identifications of Jenkins would have been futile. For this reason, his trial counsel did not act below an objective standard of reasonableness in failing to make such a motion, nor was Jenkins prejudiced by the absence of such a motion. (See, e.g., *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1081-1082 [because pretrial lineups were not unduly suggestive,

defense counsel was not ineffective for failing to challenge those lineups or the in-court identification]; see generally *People v. Thompson* (2010) 49 Cal.4th 79, 122 [counsel is not ineffective for failing to make frivolous or futile motions]; see also *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 116 [unless a substantial likelihood of misidentification has been established, evidence regarding an identification is for the jury to weigh].)

Jenkins's trial counsel pursued a reasonable tactic in mounting a well-presented attack on the credibility of the identifications at trial. In opening statement, in cross-examination of the prosecution witnesses, in calling an expert on the problems with identifications, and in argument, defense counsel presented a vigorous defense attacking the credibility of Brian P.'s identifications. Without something more in the record to show this was an unreasonable tactic, there is no ineffective assistance of counsel.

II. Sufficiency of the Evidence of Assault

Jenkins contends his aggravated assault conviction must be reversed because the evidence does not support the jury's necessarily implicit finding that the force he used on Brian P. was of a nature "likely to produce great bodily injury." We disagree.

As a matter of due process under both federal and state constitutional precepts, a criminal conviction must be supported by sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-318; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578.) The test applied to determine a claim that the trial evidence is insufficient to support of a conviction is well-settled: we examine the evidence in the light most favorable to the jury's verdict, and presume in support of the jury's verdict the existence of every fact the jury could reasonably deduce from the evidence; we do not substitute our conclusions for those reached by the jury. (*People v. Holt* (1997) 15 Cal.4th 619, 667; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

Jenkins argues the Brian P.'s injuries were minimal and that such circumstances are insufficient to prove beyond a reasonable doubt that the force Jenkins used on Brian P. was "likely to produce great bodily injury" within the meaning of former section 245, subdivision (a)(1). We find Jenkins's argument unpersuasive because

whether a victim "in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) " 'The statute prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury.' [Citation.]" (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065.) A three-on-one fight in which one of the threesome strikes the one standing alone with an "object," "possibly metal," on the head, opening a wound that requires stitches, supports a common-sense conclusion that the force used amounted to force likely to produce great bodily injury. We may not and would not in any event second-guess the jury's finding that the force used was likely to produce great bodily injury in this case because it is based on a reasonable, common-sense assessment of the evidence.

III. Juror Misconduct

Jenkins contends his aggravated assault conviction must be reversed because the trial court did not adequately address what he contends were incidents of possible juror misconduct brought to the court's attention. We disagree.

A. The Trial Events

Before the start of the morning trial session on Monday, September 27, 2010, the prosecutor advised the trial court of two encounters he had with separate jurors outside the courtroom. One encounter occurred the previous Friday evening, September 24, 2010, at a bar in Culver City. While there, a person walked up to the prosecutor and pointed out the alternate juror across the room. The person was apparently in the company of the alternate juror. The prosecutor and the alternate juror did not speak to each other, but the prosecutor did overhear the alternate juror say, "Ah, come on. I am not supposed to talk to him." The prosecutor stated that the alternate juror seemed embarrassed, and the prosecutor felt the same way as well.

The second contact occurred after the last court session on September 24, 2010. The prosecutor said he had been walking down the hallway with Officer Mendieta, as everyone was leaving. "Officer Mendieta asked [the prosecutor] about sentencing," and the prosecutor "discussed sentencing with [Officer Mendieta]" and then saw Juror No. 25

coming down the hallway in their direction. The prosecutor suggested the court ask Juror No. 25 if she had overheard their discussion. The following exchange then ensued:

> "THE COURT: How far away would you say [Juror No. 25] was?
>
> "[THE PROSECUTOR]: Gosh, you know, oh, you know, from maybe from 29 and a half feet. However far it is from that witness box stand at the exit.
>
> "THE COURT: Okay.
>
> "[THE PROSECUTOR]: And then, you know, I don't think she heard me but because there weren't a lot of people in the hall, it may be that she did. And I just wouldn't rather take any chances on it.
>
> "THE COURT: Okay. Well, [w]hat we could do. I guess given that it's 11:15, I would propose to do it not right this second.
>
> "[THE PROSECUTOR]: That's fine."

The court then inquired of Jenkins's counsel whether he had "any issue" with the encounter with the alternate juror, and Jenkins's counsel answered: "Well, Your Honor, perhaps just out of an abundance of caution perhaps it would be appropriate to just get his statement of what took place." The court indicated that it "would hold that in abeyance." The court's minute order of the proceedings notes the prosecutor's disclosures, and then reads: "The court will take no action." If any further discussion of the reported juror encounters was made during the remainder of trial, there is no reference to it in the parties' briefs on appeal. To the best of our review of the record, it appears the issue was dropped without any further proceedings.

Section 1089 vests the trial court with discretion to discharge a juror at any time, whether before or after submission of the case to the jury, when good cause is shown to the court that the juror is "unable to perform his or her duty." And, once the trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty to make whatever inquiry is reasonably necessary to determine whether the juror should be discharged. (*People v. Cowan* (2010) 50 Cal.4th 401, 505-506 (*Cowan*).) But not every incident involving a juror's conduct requires a further investigation. (*Id.* at p. 506.) Whether and to what extent to investigate a juror's conduct, and the decision to retain or

discharge a juror, rests within the discretion of the trial court. (*Ibid*.) A hearing is required only when the trial court receives information, which if proved true, would be sufficient to show good cause to remove a juror, i.e., to create a doubt about the juror's ability to perform his or her duties. (*Ibid*.) The corollary is that a hearing is not required when information received by the trial court does not amount to good cause.

A helpful application of these principles is set forth in *People v. DeSantis* (1992) 2 Cal.4th 1198. In *DeSantis*, a defense investigator told the trial court that a witness had been talking loudly in the hallway and that jurors may have overheard the witness. The court admonished the parties to keep their witnesses at a safe distance during trial recesses, but did not conduct any inquiry into whether any jurors overheard the witness's remarks. (*Id*. at p. 1234.) The Supreme Court ruled that the trial court had committed no error in failing to conduct a hearing. The court found no error was shown because there was nothing in the record to suggest that any material matter was actually overheard. There, defense counsel "did not regard the matter as serious enough to request a hearing or even to engage in a colloquy with the court regarding the matter," and the defense investigator had "merely mentioned the item as an afterthought." (*Id.* at p. 1235.)

Cowan, supra, 50 Cal.4th 401 is similar. In *Cowan*, the Supreme Court again ruled that the trial court did not err in failing to conduct a more detailed inquiry into possible juror misconduct. In *Cowan*, a juror told the court and the parties that another juror had been sitting next to two of the defendant's relatives and that the relatives had been talking. The juror was not sure whether the other juror had engaged in conversation with the relatives, who had also been witnesses. (*Id.* at pp. 504, 507.) Shortly thereafter, the juror in question asked to speak to the court. The juror said she heard that the court had been informed she had been seen talking to the defendant's relatives. The court said that it had been informed the juror had been seen sitting next to the defendant's family members, but no one had said that she had been seen talking to the relatives. (*Id.* at pp. 504-505.) The court told the juror that it had not planned on taking any further action because there was nothing indicating the juror had acted improperly. (*Id*. at p. 505.) The Supreme Court found the trial court had acted within its discretion when it decided not to

inquire further into the juror's alleged contact because, "[a]t best, the trial court possessed ambiguous information" suggesting the juror may or may not talked to the defendant's relatives. (*Id.* at p. 507.) The Supreme Court noted that, although the juror probably should not have been sitting near defendant's relatives, the trial court reasonably could have concluded there were no grounds for believing the juror had actually been engaged in a conversation with the relatives. (*Id.* at pp. 507-508.) Apart from speculation, there was nothing in the record suggesting that the juror had heard anything to do with the trial. (*Ibid*.)

In this case, there was no need for further inquiry into either event. The information received by the trial court was that the prosecutor saw an alternate juror across a public room, and that a companion of the juror walked over to tell the prosecutor that the alternate juror was present. There is absolutely nothing in this scenario to suggest a need for a hearing to determine whether the alternate juror could still perform his or her duties.

Further, the event that occurred in the courtroom hallway did not require further inquiry. The information received by the trial court was that the prosecutor saw a juror walking toward the prosecutor in the courthouse hallway, while the prosecutor was engaged in a discussion with one of the investigating officers about "sentencing." The record shows that the prosecutor and the juror were separated by some distance and there is no evidence the juror even heard the conversation. Even though inquiry of Juror No. 25 might have been advisable, it was not required by law.

Jenkins's reliance on *Remmer v. United States* (1954) 347 U.S. 227 (*Remmer*) for a different result is not persuasive, as is his reliance on two Ninth Circuit decisions, *U.S. v. Angulo* (9th Cir. 1993) 4 F.3d 843 and *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608. None of the cases upon which Jenkins relies supports the proposition that a hearing is required any and every time a trial court hears of juror conduct that might conceivably, upon further investigation, justify discharging the juror. In *Remmer*, the court was informed that an unnamed person had contacted a juror and told the juror that "he could profit by bringing in a verdict favorable" to the defendant. (*Remmer, supra*, at p. 228.)

The court informed the prosecutors, and the incident was investigated by the FBI. Based on the FBI report, the court and prosecution, without notifying the defense, concluded that the statement to the juror had been made in jest. Defense counsel first learned of the matter in the newspaper. (*Ibid*.) The Supreme Court held that under such circumstances, "[t]he trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the consequences, the impact thereof, upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." (*Id.* at pp. 229-230.) The Supreme Court did not hold that a hearing was required every time there was any indication of conduct involving a juror.

The Ninth Circuit has more than once stated that *Remmer* does "not stand for the proposition that *any time* evidence of juror bias comes to light, due process requires the trial court to question the jurors alleged to have bias." (*Tracey v. Palmateer* (9th Cir. 2003) 341 F.3d 1037, 1044; see also *Sims v. Rowland* (9th Cir. 2005) 414 F.3d 1148, 1154 ["*Remmer* provides little prospective guidance as to when a hearing is required or even appropriate"].) Instead, the Ninth Circuit has interpreted *Remmer* as "providing a flexible rule." (*Tracey v. Palmateer, supra*, at p. 1044.) The federal authorities do not support Jenkins's position. Here, there was simply no good reason for a hearing on the state of the information given to the trial court during Jenkins's trial.

B. Ineffective Assistance of Counsel

Taking a different path to reach the same end, Jenkins argues his conviction must be reversed due to ineffective assistance of his trial counsel in failing to request a broader inquiry into the jurors' conduct. We disagree.

As to the alternate juror, he or she was never called on to be part of deliberations. There is no possibility that the outcome of Jenkins's trial would have been any different had his counsel pressed for a further inquiry into the alternate juror's ability to be an unbiased juror.

As to Juror No. 25, there is nothing in the record on appeal to support a conclusion that the trial court would have uncovered evidence of jury bias had a further hearing been held. (*People v. Prieto* (2003) 30 Cal.4th 226, 275.) Jenkins's claim that evidence justifying discharging Juror No. 25 might have been learned is "wholly speculative." (*Ibid*.) Jenkins has not demonstrated how the juror's possible fleeting exposure to a passing-by discussion about sentencing, where there is no evidence that the juror even heard the discussion, caused the juror to be unable to evaluate the evidence of Jenkins's guilt.

IV. Sufficiency of the Evidence of the Gang Enhancement

Jenkins next contends the jury's gang benefit finding attached to his aggravated assault conviction must be reversed because the evidence does not support that one of the gang's "primary activities" was the commission of crimes listed in section 186.22, subdivision (e). We disagree.

As noted above, the test applied to determine a claim the evidence is insufficient to support of a conviction is well-settled: we examine the evidence in the light most favorable to the jury's verdict, and presume in support of the jury's verdict the existence of every fact the jury could reasonably deduce from the evidence; we do not substitute our conclusions for those reached by the jury. (*People v. Holt*, *supra*, 15 Cal.4th at p. 667; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1208.)

Here, the gang expert, Officer Davis, testified that criminal activities are one of the primary activities of the West Boulevard Crips gang, and that the types of criminal activities in which the gang engaged are "[s]ales of narcotics, criminal threats, witness intimidation, shootings, murders, burglaries of residential properties, [and] burglaries of commercial properties . . . ."

Jenkins contends Officer Davis's testimony was "conclusory," and that it did not satisfy the requirements of the gang enhancement statute as articulated by the Supreme Court in *People v. Sengpadychith* (2001) 26 Cal.4th 316. We do not agree. In *Sengpadychith*, the Supreme Court explained that the definition of "primary activities" would "necessarily exclude the occasional commission of . . . crimes by the group's

members." (*Sengpadychith, supra*, at p. 323.) In other words, the evidence supporting a finding under the gang enhancement statute is not sufficient when the evidence shows no more than that gang members happen to commit crimes. Instead, the evidence must show that one of the gang's primary activities is the commission of listed crimes in the gang statute. "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 the gang statute." (*Id*. at p. 324.) These principles, when coupled with the applicable standard of review on appeal described above, require us to affirm the gang finding in Jenkins's current case if there is any substantial evidence in the record to support the conclusion that one of the West Boulevard Crips gang "primary activities" or nonoccasional, consistent and repeated activities is the commission of crimes listed in the gang statute. This evidence may consist of a gang expert's testimony. (*Id.* at p. 323.) We have reviewed the entirety of Officer Davis's testimony, and we are satisfied that it supplies evidence supporting the conclusion that one of the West Boulevard Crips gang primary activities is the commission of crimes enumerated in the gang statute. We would agree that Officer Davis's testimony regarding the primary activities of the West Boulevard Crips gang was short and direct, but we do not agree with Jenkins that it was conclusory. Officer Davis provided an extensive background on gang culture, and, in that context, explained — with sufficient information to support the jury's finding — that one of the primary activities of the gang was the commission of the crimes listed in the gang statute. Officer Davis did not merely testify that West Boulevard Crips gang members commit crimes.

V. The Claim of Instructional Error

Jenkins contends the jury's gang benefit finding attached to his aggravated assault conviction must be reversed because the trial court's instructions to the jury had the effect of removing from the jury's consideration the element that Jenkins had to harbor a mental state, i.e., the intent, to benefit his gang when he committed the assault on the victim. His contention lacks merit.

Jenkins argues there is a conflict between CALCRIM No. 370, read here in the connection with the substantive crimes charged against Jenkins (attempted murder and aggravated assault), and CALCRIM No. 1401, read here in connection with the gang benefit allegation attached to the substantive crimes. The former instruction told the jury that the People were not required to prove motive, while the latter instruction told the jury that Jenkins had to have "intended to assist, further, or promote criminal conduct by gang members."

When a defendant claims that instructions were ambiguous or otherwise may have misdirected the jury, the test for a reviewing court is to determine whether it is reasonably likely the jury would have construed the instructions in a manner that violated the rights of the defendant. (*People v. Rogers* (2006) 39 Cal.4th 826, 873.) Here, Jenkins claims his rights were violated by instructions that effectively allowed the jury to find the gang benefit allegation true without finding that Jenkins had the requisite intent to benefit his gang.

Under the test noted above, the trial court's instructions here did not create error. Motive and intent "'are separate and disparate mental states.'" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504; see also *People v. Wilson* (2008) 43 Cal.4th 1, 22.) Motive is the reason a person chooses to commit a crime; it is quite different from a required mental state for the crime. (*Hillhouse, supra*, at p. 504; see also *Wilson, supra*, at p. 22.) CALCRIM Nos. 370 and 1401 "did not use the terms 'motive' and 'intent' interchangeably, and therefore there is no reasonable likelihood the jury understood those terms to be synonymous." (*People v. Cash* (2002) 28 Cal.4th 703, 739.) More directly, CALCRIM No. 370 by its terms applied to "the crimes charged." It did not apply to the gang enhancement allegation. (See *People v. Snow* (2003) 30 Cal.4th 43, 98 [instruction on motive did not conflict with instruction on special circumstance allegation]; *People v. Noguera* (1992) 4 Cal.4th 599, 637; *People v. Heishman* (1988) 45 Cal.3d 147, 178.) We must presume the jurors were intelligent and capable enough to understand instructions and apply them correctly. (*People v. Carey* (2007) 41 Cal.4th 109, 130.) In the absence

of something in the record showing the jurors mixed distinctly applicable instructions, we reject Jenkins's claim of instructional error.

VI. The Request for Appellate Review of *Pitchess* Discovery

Prior to trial, Jenkins sought discovery of the personnel records of LAPD Officers Mendieta and Fischer regarding complaints about fabrication of evidence and probable cause, perjury, dishonesty, and a variety of other categories. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); see also Pen. Code, § 832.5 et seq.; Evid. Code, § 1043 et seq.) Jenkins indicates the discovery of such prior complaints would have been relevant to witness credibility. The trial court ordered the custodian of records of the LAPD to produce the personnel files, and conducted an in camera review to determine whether relevant, discoverable material existed. The court ordered discovery of a citizen's complaint of false testimony against Officer Fischer. It found all remaining complaints, if any, against Officers Fischer and Mendieta to be irrelevant and not discoverable.

Jenkins has requested our court to conduct an independent determination of whether the trial court conducted a proper hearing and made a proper ruling after the in camera review. (See *People v. Mooc* (2001) 26 Cal.4th 1216.) We have reviewed the transcript of the in camera hearing and conclude the trial court conducted the hearing properly, describing the nature of all complaints, if any, against the officers. Further, we find the court did not abuse its discretion in ordering the custodian of records to disclose discovery of the one complaint noted above.

VII. The Claim of Cumulative Error

Because we have found no errors, or, if error, have found no prejudice, we reject Jenkins's claim that his conviction must be reversed for the effects of cumulative errors.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.