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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESSIE D. RAMIREZ et al., Defendants and Appellants.	B231842 (Los Angeles County Super. Ct. No. VA107800)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Reversed in part and remanded for resentencing, otherwise affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant Jessie D. Ramirez.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant Lance Gonzalez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendants and appellants Jessie D. Ramirez and Lance Gonzalez guilty of three counts of attempted murder and found true gun and gang allegations.[1] On appeal, defendants contend they were prejudiced by the erroneous admission of Ramirez's statement that "Lance told me" to shoot. They also contend that there was insufficient evidence the tagging crew to which they belonged was a criminal street gang within the meaning of Penal Code section 186.22;[2] that the jury should have been instructed on voluntary intoxication and on voluntary manslaughter under a heat of passion theory; and that there was prejudicial prosecutorial and judicial misconduct. We agree that there was insufficient evidence to support the true findings on the gang allegations and reverse and remand for resentencing on that ground alone.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case: the shootings on October 5, 2008.*

On the evening of October 5, 2008, George Padilla hosted a party at his house on Cecilia Street in Bell Gardens. A band played and around 60 people were there, including Hector Corrales, Jimmy Maynard, Glicero Bravo, Daniel Perez, and Betty Lopez. Although Ramirez and Gonzales were not invited to the party, somebody let them in.

Corrales did not know Ramirez and Gonzalez, but he asked Gonzalez, who was smoking, to move, because the smoke was bothering a pregnant friend. Neither Gonzalez nor Ramirez responded, even when Corrales repeated his request a second and third time, although Ramirez tapped Gonzalez on the shoulder and they walked away.[3]

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[1] Gonzalez was also convicted of assault with a deadly weapon.

[2] All further undesignated statutory references are to the Penal Code.

[3] Corrales's brother, Jose Macias, saw Corrales talking to Gonzalez. Perez also saw Corrales arguing with Gonzalez.

The party broke up around midnight, although about 14 to 15 of Padilla's friends stayed. Ramirez and Gonzalez were still in the backyard, and Padilla testified that he thanked Gonzalez for coming but told him it was time to leave. Gonzalez asked if Padilla was kicking him out, but Ramirez said they should leave. Gonzalez asked Padilla where he was from, and Padilla said it was " 'nothing like that,' " the party was just over. Padilla's friend, Jeff, walked by and asked what was going on. Gonzalez shoved Jeff, who told Gonzalez to relax and that Corrales, who was still at the party, worked for the Sheriff's Department. Gonzalez said he didn't give a "fuck"—he would " 'shoot' " or " 'blast' " " 'that mother fucker, too.' "

Perez testified that someone told Gonzalez to go, but he said, " 'No, we are here to pick up on bitches.' " Aggressively, Gonzalez asked Perez if he was with a tag banging crew and where he was from. Gonzalez said he was from L.P.K. (Low Profile Kings or Letting Punks Know), and Perez said he knew some of the guys from there, although he used to belong to Killing City Streets (KCS), a tag banging crew. When Gonzalez bumped into Jeff, Gonzalez said, " '[H]e's from Nachos,' " a derogatory way of referring to NHC (Natural High Crews). Maynard overheard Gonzalez and Perez having a heated conversation about a tagging crew, but he did not see Perez do anything physically aggressive to Gonzalez. Bravo also overheard Gonzalez and Perez arguing about a rival crew. Gonzalez said, " 'Fuck NHC.' " Ramirez, however, said, " 'Fuck that, who cares? Let's just jam.' "

Bravo, who knew Ramirez and Gonzalez from high school, spoke to Gonzalez. Gonzalez told Bravo he wasn't there to disrespect the girl who had been bothered by the smoke. Gonzalez said he was "Kato" from L.P.K., and Ramirez told Bravo he was "Bills." Bravo told them he didn't gang bang anymore.

Gonzalez struck Perez in the face with a bottle. Gonzalez ran, but people pushed him toward Perez, who tried to fight him.[4] Gonzalez was pushed out of the party, and people were hitting and kicking him and throwing beer bottles. Gonzalez freed himself

[4] Macias testified that a crowd of 10 to 15 people converged on Gonzalez.

by wrestling out of his Dodgers jacket. According to Bravo, about five people, including Perez, punched and kicked Gonzalez and pushed him towards the driveway.

According to Padilla, people chased Ramirez, and a few people struggled with Gonzalez until Padilla and a friend separated them. "Tony" told Ramirez and Gonzalez to " 'just go,' " " 'forget [about] it,' " but Gonzalez, yelled back, " 'Fuck you.' " Padilla, Corrales, and Tony walked toward the street as Ramirez and Gonzalez walked backwards. Ramirez pointed a gun at the crowd, and while facing the crowd, he walked backwards out of the party with the gun pointed at them. Gonzalez yelled obscenities and told Ramirez a couple of times to " 'blast these mother fuckers.' " Corrales was in the front yard when he heard Gonzalez say from across the street, " 'Blast them. Shoot them.' " Maynard also heard Gonzalez tell Ramirez to "blast" them. Ramirez told Gonzalez, "No," they should leave, but then, while in the street, he fired several rounds into the air before pointing the gun in front of him and firing. Before Ramirez fired his gun the first time, Maynard did not see anybody run towards Ramirez or Gonzalez or physically threaten them.

When Ramirez waved the gun in Bravo's direction, Bravo turned, but he was shot on his right side. Bravo saw Betty Lopez fall in front of him. Corrales threw himself onto the grass as 10 to 15 rounds were fired. Seeing a woman on the ground, Corrales went to her. Ramirez said something to Corrales before shooting him, hitting Corrales's chest and, when Corrales turned to run, his back. Corrales fell, but Ramirez continued to shoot at him, wounding Corrales's thumb.

In addition to Corrales, Bravo and Lopez were shot. Corrales was paralyzed from the waist down as a result of his injuries.

When Officer Benson contacted Gonzalez on October 8, 2008, Gonzalez did not have any obvious injuries.

Three live nine-millimeter rounds were found on the driveway. Nine casings, all of which were fired from the same nine-millimeter gun, were also found at the scene.

B. *Prosecution's gang evidence.*

City of Bell Gardens Police Officer Brett Benson testified as the investigating officer and as a gang expert. In Gonzalez's bedroom, he found a notepad with graffiti, including "L.P.K." and "Kato." In a photograph, Gonzalez held his hands in an "L" position to indicate L.P.K.

L.P.K. had about 25 members. It started as a tagging crew but progressed into "tag bangers," carrying guns, committing "very violent assaults," and writing graffiti. In Officer Benson's opinion, L.P.K. was a criminal street gang having the primary activities of graffiti, assaults, and possession of firearms. They associate with the L.A. symbol, like the L.A. Dodgers, and they wear Dodgers' clothing. The area in which Padilla lived was in L.P.K. territory.

Based on speaking to other investigators, documentation in police reports, and Gonzalez's contact with another L.P.K. member, it was Officer Benson's opinion that Gonzalez was a member of L.P.K. It was also the officer's opinion that Ramirez was a member of L.P.K. Ramirez admitted his membership to the officer and identified himself as "Bills."

In gang culture, " 'Where [are] you from?' " means what gang or tagging crew are you from. It is generally an "aggressive type move," and the wrong answer can lead to a physical altercation, including getting shot and killed. From a hypothetical based on the facts of the case, Officer Benson said it was his opinion that the assault and the shooting were committed for the benefit of, at the direction of, or in association with a criminal street gang.

C. *Defense case.*

Ramirez testified that, on the evening of the shooting, from about 6:00 p.m. to 8:30 p.m., he and Gonzalez were at a bar, where he and four others shared five pitchers of beer. After leaving the bar but before going to Padilla's house, Ramirez and Gonzalez, around 9:00 p.m., went to another party where Ramirez had one beer. They didn't stay long before going to Padilla's house. At Padilla's house, Ramirez had four beers.

While at Padilla's house, somebody asked him not to smoke, so he moved. He was sitting and Gonzalez came over. Something happened, but Ramirez couldn't hear. About five people surrounded them, and Ramirez told Bravo he didn't want any problems.

Later, Ramirez was saying goodbye to "Quick" when a fight broke out. About 10 people were throwing bottles at Gonzalez and holding and punching him. Ramirez tried to help but he got hit. He pulled out his gun, and he and Gonzalez started to run down the driveway. To try and scare the people who were beating up Gonzalez and get them to stop, Ramirez, pointing the gun down, racked it three times while walking backwards and facing the partygoers. Bottles were hitting him as he backed out to the street. Six to nine people, including "Quick," "Clear," Maynard, Corrales, and "Miguel," were chasing them. Ramirez shot his gun into the air to scare them into moving back. Then he saw Miguel with a gun. Ramirez shot at a low angle towards the people chasing him, and he heard shots coming back. He didn't intend to kill anyone, but he needed to protect himself.

Oscar Ramirez, who was at the party that night, saw the fight break out in the backyard. Beer bottles were broken and a "scuffle" occurred. Someone was "escorted" out of the party. A large man stood in the middle of the street with a gun, and another man stood about four feet from him. After the first round was fired, the nonshooter said, " 'Let's go. [L]et's go. Fuck that.' "

II. Procedural background.

On October 8, 2010, a jury found Ramirez and Gonzalez guilty of counts 1, 2, and 3, the willful, deliberate, and premeditated attempted murders of Corrales, Lopez, and Bravo (§§ 187, subd. (a), 664). The jury also found Gonzalez guilty of count 4, assault with a deadly weapon on Perez (§ 245, subd. (a)(1)). As to Ramirez, the jury found true gun-use allegations under section 12022.53, subdivisions (b), (c), and (d), and gang allegations under section 186.22, subdivision (b)(1)(C), as to all three counts. As to Gonzalez and counts 1, 2, and 3, the jury found true gun-use allegations under section 12022.53, subdivisions (b), (c), and (e)(1)—a principal personally used a firearm—and

gang allegations under section 186.22, subdivision (b)(1)(C). As to count 4, the jury also found true a gang allegation under section 186.22, subdivision (b)(1)(B), and a great bodily injury allegation under section 12022.7, subdivision (a).

On March 8, 2011, the trial court sentenced Ramirez on counts 1, 2, and 3, to three consecutive life terms with the possibility of parole and imposed three 15-year minimum parole eligibility terms, plus three 25-years-to-life terms under section 12022.53, subdivision (d), for a total 120 years to life.

Also on March 8, 2011, the trial court sentenced Gonzalez on counts 1, 2, and 3 to three consecutive life terms with the possibility of parole and imposed three 7-year minimum parole eligibility terms, plus three 25-years-to-life terms under section 12022.53, subdivisions (b) through (e)(1), for a total 96 years to life. The court imposed a concurrent sentence on count 4 of 11 years.[5]

DISCUSSION[6]

III. Admissibility of Ramirez's statement about the shooting.

Over defense counsel's objections, the prosecutor was allowed to ask Ramirez if he told his girlfriend he shot "because Lance [Gonzalez] told me to." Ramirez and Gonzalez now contend that the prejudicial error in allowing this question to be asked requires a reversal of the judgment and a new trial. We disagree.

A. *Additional facts.*

After the People rested, Ramirez's counsel asked for a ruling whether the statement that his client's then girlfriend, Estela[7] Rosas, made to Officer Benson four days after the shooting was admissible. Counsel said: "And the last thing I want to state for the record is, if my client were to deny making that statement, I'd like to see if we

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[5] The record does not contain the reporter's transcript of Gonzalez's sentencing hearing.

[6] Defendants join in the other's argument.

[7] Her name is spelled both "Estela" and "Estella" in the record. We refer to her as "Estela" or Rosas.

have any good faith belief by the People whether they have Ms. Rosas on subpoena, whether she will be here tomorrow, because I don't want it to be a situation where the question is asked, my client denies, and then the People do not have the means of actually proving that this statement was made by Ms. Rosas. [¶] . . . . So, perhaps, if [the prosecutor] could make a record as to what efforts they have made or that they are going to make, in case there is a denial, how they can go about proving that evidence to the jury."

The prosecutor responded that Rosas was on probation and, that afternoon, Officer Benson confirmed her address with probation. The prosecutor added: "Rosas has known throughout this entire action that she could possibly be called as a witness, and it was made abundantly clear to her when I took the plea and when I also took a copy of the report and took a factual basis plea asking her to initial the bottom right-hand corner of each page of the report and certifying that the report and its contents were true. This was done in the presence of not only Detective Benson, but in the presence of her attorney, and she has known that when trial was coming that she was a potential witness. [¶] In addition to that, at the outset of this case in jury selection, Ms. Rosas was present in court and was actually in court during some of the selection process. [¶] So that's the representation that I have, and that is my understanding, and I am confident that, if and when Ms. Rosas is needed as a witness, she will respond to a subpoena served by Detective Benson."

The trial court said it was satisfied, based on the prosecutor's statements.

Gonzalez's trial counsel then raised a double hearsay problem with Rosas's statement, which was in a police report. According to the report, Rosas asked Ramirez why he shot the person, and he replied, " 'Because Lance told me to.' " The prosecutor argued that it was not hearsay but rather "simply an impeaching statement." Because the party-declarant was Ramirez, not Gonzalez, the court said that defense counsel's objection was well-taken. The prosecutor said: "I'm not asking to have this statement introduced unilaterally. It would only be introduced provided that the proper foundation is laid and depending on what Mr. Ramirez testifies to." The court reserved its ruling.

Later that day, Ramirez testified that he first fired the gun in the air to scare away the attackers, and he then fired the gun toward the gun in self-defense because "Miguel" pointed a gun at him. Gonzalez did not tell him to "blast them." The prosecutor, out of the jury's presence, asked to confront Ramirez with Rosas's statement. The trial court asked the prosecutor if he would "get somebody else to come in" if Ramirez denied making the statement, and the prosecutor said he would "endeavor to." The court said it was satisfied, and the court indicated that the statement was not double hearsay.

The prosecutor then asked Ramirez: "Did Estela ask you that morning why you had shot the person?

"A. No.

"Q. And did you tell Estela, 'Because Lance told me to'?

[Gonzalez's counsel]: Objection, Your Honor. It's hearsay. I want to put that on the record.

"The court: The objection is overruled.

"The witness: What was the question?

"Q. Did you tell Estela, when she asked you why you had shot the person, you said, 'Because Lance told me to'?

"A. No. [¶] . . . [¶]

"Q. And you're sure about that?

"A. Positive."

The prosecutor then asked whether a couple of days following the shooting Ramirez told Rosas that he shot at a party. Ramirez said he did. The prosecutor asked: "Now, isn't it true that when you told Estela that 'I shot someone, but I don't think it's serious,' and 'I shot because Lance told me to,' that you told her that because of the trouble you were in; that she needed to pack him a bag of personal items? Did you ever tell her that?" Ramirez answered: "No. I just told her to get some things ready for me. That's all I told her." Later, the trial court asked Ramirez: "At any time after that date [October 5, 2008], did you ever tell Estela that Lance told you to fire that gun? At any time after that date?" Ramirez answered, "Never."

Near the close of the defense case, Gonzalez's counsel asked: "[B]ecause a bell has been rung with regards to the statements by Jesse Ramirez of the prior inconsistent statements, is there any proffer that we actually have Estela Rosas going to be testifying this afternoon?"

The prosecutor answered: "I can make the representation to the court that Ms. Rosas is not in court today, and, depending on how the court is feeling, I am obviously going to endeavor to try to procure her presence in court, and if the court would allow me to get her into court tomorrow—at this point, I'm thinking it's unlikely that she's going to appear on her own based on conversations that I had with Officer Benson. And so, after my questioning of Officer Benson, I could rest my rebuttal. If the court is so inclined, or if the court wants me to or is going to allow me to give me more time to attempt to get her into court—you know, the People are sort of, I guess, asking for some direction from the court about how it's feeling." The court gave no direction, and the prosecutor did not call Rosas as a rebuttal witness. Officer Benson was the sole rebuttal witness, and no questions were asked of him relating to the statement.

Since Ramirez denied making the statement to Rosas, his counsel then asked for a special instruction that any question by counsel is not evidence, "because I don't want the jurors to assume that that statement is actually true even though my client denied it. I understand the People had a good faith basis to ask the question."

Gonzalez's counsel, however, argued that even though the question was not evidence, it was "still highly prejudicial," and therefore he asked for a mistrial because at no point was Rosas under subpoena. "In fact, there was a time when this witness was here in court. She was never even placed on the witness list. That question, I can't unring [the] bell with regards to anything I asked. That's going to be in the jurors' minds, and I understand the court is going to admonish them. I know that [the prosecutor] cannot argue that in his closing argument, but that bell has been rung, and I cannot unring that. I don't think there's anything, any prophylactic that can be set forth by this court that can protect Mr. Gonzalez in this matter, and for that, Your Honor, I am asking for a mistrial." Ramirez's counsel joined in the motion.

The prosecutor responded that the question was within the confines of appropriate cross-examination and that a special instruction was unnecessary. He had a good faith belief Ramirez made the statement, because it was memorialized in a police report that counsel had since the beginning of the case. The prosecutor represented that "we['d] made reasonable efforts to get Ms. Rosas to trial," but, according to Officer Benson, she evaded service. The prosecutor argued that it therefore was the People who suffered prejudice by the inability to call Rosas as a witness.

Gonzalez's counsel noted that the prosecutor had the ability to ask Rosas to be ordered back to court, because she was in the audience for at least two days, and "even though they may have had a good faith belief that the statement was made, they didn't have a good faith belief that they could produce and prove up the prior inconsistent statement or show it up," and therefore a mistrial was proper.

The trial court denied the mistrial motion. Based on that ruling, Ramirez's counsel made a tactical decision not to ask for a special instruction because "I don't want to draw more attention to that statement . . . ." The jury was therefore generally instructed: "Statements made by the attorneys during the trial are not evidence" and "not [to] assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer, and do not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the court. Treat it as though you had never heard it."

The jury retired for deliberations on October 7, 2010, at 10:18 a.m. At 2:04 p.m., the jury submitted a request for read back of the prosecutor's "re-cross examination" of Ramirez "when he's talking about" Estela. The jury retired for the evening without receiving the read back, and the next morning, October 8, the trial court informed counsel that the jury had come back with a verdict on count 4, assault with a deadly weapon, as to Gonzalez. The jury had also reached a verdict on counts 1, 2, and 3 as to one of the defendants.

Ramirez's counsel again asked for a mistrial and argued that when the prosecutor asked the question of Ramirez, everyone was under the impression Rosas would be called as a witness. But she was not called. Counsel therefore asked the court to strike the portion of the transcript dealing with whether Ramirez told Rosas, " 'I shot because,' quote, 'Lance told me to.' " Counsel argued that because Ramirez denied making the statement it was irrelevant, but there was a danger the jury would treat it as evidence: "I think jurors will still nevertheless believe that statement was made by my client to Estella, and it's equivalent to a confession. That's how important that statement is. The question for the jurors is whether my client shot because of self-defense or because Lance told him to. And if that statement comes in, even though my client denied it, it's going to be I think the effect of that is not going to be overcome by anything."

The trial court responded that Ramirez's statement that he shot was "more devastating" and the reason why he shot was "really [an] aside." Ramirez's counsel pointed out that the statement went to self-defense, but the court found that there was a basis for the question and the prosecutor did not have to call Rosas. The court therefore refused to strike the question and the answer[8] and said it would allow the read back but would also refer the jury to the instruction that attorneys' questions are not evidence, the answers are. The jury, however, reached verdicts as to both defendants before receiving the read back.

Gonzalez made a motion for new trial on the ground that the statement was inadmissible hearsay. Ramirez made an oral motion for a new trial on the same ground. Both motions were denied.

B. *Any error in allowing Ramirez to be questioned about his statement to Rosas was harmless.*

Defendants make multiple arguments concerning the prosecutor's cross-examination of Ramirez. Ramirez contends that the prosecutor engaged in "bad faith

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[8] Gonzalez's counsel joined in the argument and motion.

presentation of information not admitted as evidence." Gonzalez contends that the statement, as to him, was inadmissible double hearsay; the trial court should have given a limiting instruction; his trial counsel provided ineffective assistance by failing to request such an instruction; and admission of the statement violated his constitutional right to confront witnesses under *Crawford v. Washington* (2004) 541 U.S. 36.

We begin with the multiple hearsay issue Gonzalez raises. These are the two statements: (1) Ramirez's statement to Rosas he "shot because Lance [Gonzalez] told me to"; and (2) Rosas's statement to the police officer (contained in a police report) that Ramirez told her he shot because Gonzalez told him to. To admit multiple levels of hearsay, an exception must apply to each level. (See, e.g., *People v. Zapien* (1993) 4 Cal.4th 929, 951-952; Evid. Code, § 1201.)

We need not decide whether and what exceptions apply, because hearsay is not the issue. Rosas's statement to Officer Benson about what Ramirez told her was not introduced at trial. The jury was never informed that Rosas made this statement to the police. Rather, the questions in dispute that the prosecutor asked Ramirez were:

"Did Estela ask you that morning why you had shot the person?" "And did you tell Estela, 'Because Lance told me to?' "

"Did you tell Estela, when she asked you why you had shot the person, you said, 'Because Lance told me to?' "

"Now, isn't it true that when you told Estela that 'I shot someone, but I don't think it's serious,' and 'I shot because Lance told me to,' that you told her that because of the trouble you were in; that she needed to pack him a bag of personal items? Did you ever tell her that?"[9]

[9] The trial court also asked Ramirez, "At any time after that date [October 5, 2008], did you ever tell Estela that Lance told you to fire that gun? At any time after that date?"

Ramirez was asked only whether *he* told Rosas that Gonzalez told him to shoot, which he denied. He was not asked about Rosas's statement to Officer Benson. Therefore, although the *source* of the prosecutor's question was potentially hearsay, the hearsay statement itself was not introduced at trial.

For the same reason, defendants' argument that their federal constitutional rights to confront and cross-examine witnesses were violated, either under *Crawford v. Washington*, *supra*, 541 U.S. 36 or otherwise, fails.[10] Ramirez was asked if he told Rosas he shot because Gonzalez told him to. In other words, he was asked about his statement. Aside from the fact that a question is not "evidence," there was no question asked indicating that Rosas made a statement to police incriminating Ramirez and Gonzalez. Ramirez was asked about his statement only, and he was subject to cross-examination. No confrontation violation occurred.

The problem therefore is not one of the admissibility of hearsay or of confrontation. The problem is the prosecutor based this line of questioning on an arguably hearsay source: a police report containing Rosas's statement about what Ramirez told her. This concerns the issue Ramirez raises, namely, whether the prosecutor had a good faith basis for asking the questions. It is improper to ask questions which clearly suggest the existence of facts harmful to the defendant, in the absence of the prosecutor's good faith belief that the questions will be answered in the affirmative, and "that the facts could be proved, and a purpose to prove them, if their existence should be denied." (*People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 388; see also *People v. Hughes* (2002) 27 Cal.4th 287, 386-389 (*Hughes*); *People v. Mickle* (1991) 54 Cal.3d 140, 191 & fn. 38; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1098 [prosecutor asked witness whether the defendant wrote to him about a rape and murder; witness denied receiving a letter and the prosecutor did not mention it again].) The issue turns on the prosecutor's good faith. (*Bittaker*, at p. 1098.)

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[10] Because defendants' trial counsel did not object on federal constitutional grounds, the Attorney General argues that the issue has been forfeited. We nonetheless address the issue.

In *Hughes*, for example, the defendant was on trial for murder, and there was evidence defendant was intoxicated before killing the female victim. Over defense counsel's objection and request for an offer of proof, the prosecutor repeatedly asked the defendant's girlfriend whether she told a police officer the defendant was " 'mean and nasty' " when drunk. (*Hughes, supra,* 27 Cal.4th at p. 386.) The prosecutor similarly asked a second defense witness whether the defendant was "mean and nasty" when he drank. Both witnesses denied making such statements. By the close of evidence, no evidence was introduced to support the prosecutor's insinuations. The trial court granted the defendant's motion to strike the questions and answers and admonished the jury with CALJIC No. 1.02.[11] (*Hughes,* at pp. 387-388.) The appellate court found no bad faith on the part of the prosecutor. (*Id*. at p. 388.) The "factual specificity" of the questions implied they were based on information available to the defense, and therefore they were not baseless or unfounded. (*Ibid*.) The record also showed that the prosecutor had a tactical reason not to pursue impeaching evidence, rather than a reason based in misconduct.

Here, the questions had a basis in fact. Rosas's statements were made to a police officer and were in a police report available to the defense. The prosecutor had Rosas review the report and initial each page to certify it was accurate. In fact, Ramirez's trial counsel conceded that the prosecutor had a good faith basis to ask the question, and the trial court found that the prosecutor had a good faith basis to ask the question.

But even if the prosecutor's questions had a basis in fact, the prosecutor still lacked a good faith belief he could prove them, Ramirez argues. When defense counsel asked for an offer of proof before Ramirez testified, the prosecutor represented that Rosas knew she was a potential witness, had been present in court for some of the proceedings, and he was "confident" she would respond to a subpoena. As defendants point out,

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[11] "Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it [enables] you to understand the answer, and do not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the court. Treat it as though you had never heard it."

however, Rosas was not on the prosecutor's witness list. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375 [the prosecutor's witness list must include rebuttal witnesses].) Rosas was also never placed under subpoena. Rather, the prosecutor indicated, after Ramirez testified and was cross-examined, that Rosas was evading Officer Benson's attempts to subpoena her.

The prosecutor's decision not to subpoena Rosas earlier may have been a tactical one, or he may have believed, as he said to the trial court, that it wouldn't be a problem to procure her attendance. In any event, the trial court credited the prosecutor's representations, and the record supports them. Given the record, we cannot find that the prosecutor acted in bad faith.[12]

Ramirez next contends that either the trial court should have given a limiting instruction (see, e.g., CALCRIM No. 319 or CALJIC No. 2.09)[13] or his counsel was ineffective for failing to request one. Similar to the supposed hearsay problem, the problem with these limiting instructions is no evidence of Rosas's statement was

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[12] As further evidence of the prosecutor's bad faith, Ramirez cites the prosecutor's decision not to question Officer Benson about Rosas's statement when he was called as a rebuttal witness. We do not agree it tends to show bad faith, because it is not clear that Officer Benson could give any admissible evidence on that issue, namely, that he could testify what Rosas said to him about Ramirez's statement to her.

Moreover, the prosecutor acknowledged he could not reference Ramirez's testimony in his closing argument, and he did not do so. Thus, this case is unlike cases Ramirez cites in which a prosecutor referenced during closing argument facts not in evidence. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 828; *People v. Zurinaga* (2007) 148 Cal.App.4th 1248, 1259; *People v. Woods* (2006) 146 Cal.App.4th 106, 115, 118-119; *People v. Hall* (2000) 82 Cal.App.4th 813, 817.)

[13] CALCRIM No. 319 informs the jury that evidence of a statement made by a person who did not testify may be considered only in a specified, limited way and not as proof that the information contained in the statement is true.

CALJIC No. 2.09 provides: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

admitted. The questions were not "evidence" and therefore could not be "limited" to a specific issue. Defense counsel therefore cannot be faulted for failing to request an irrelevant limiting instruction or the trial court for not giving one. Additionally, the court had no sua sponte duty to give the instructions. (CALJIC No. 2.09, Use Note.)

Moreover, Ramirez's counsel expressly stated he was not requesting a limiting instruction for the tactical reason he did not want to draw more attention to the statement. Gonzalez's counsel remained silent, but we can certainly attribute a similar tactical motive to his failure to ask for such an instruction. (See generally, *Strickland v. Washington* (1984) 466 U.S. 668; *People v. Hinton* (2006) 37 Cal.4th 839, 876 [reviewing courts defer to " ' "counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' " ' "]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [if the record on appeal 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].)

Although we conclude that the record does not support a finding of bad faith on the part of the prosecutor or a finding of error on the other grounds defendants raise, we acknowledge the troubling nature of what occurred. Once it became clear that the People would present no evidence to substantiate its questions to Ramirez, defense counsel, moved for a mistrial. Later, when the jury requested read back of the prosecutor's cross-examination of Ramirez, defense counsel asked that the questions and answers be stricken from the transcript to help dispel any insinuation arising from the mere question about what Ramirez told Rosas. Because there was no evidence to support the question, the motion to strike should have been granted.[14] (See *Hughes*, *supra*, 27 Cal.4th at

[14] The jury rendered its verdict before the transcript could be read back.

pp. 387-388 [trial court granted motion to strike prosecutor's unfounded questions after no evidence was introduced to substantiate them].)

Still, we cannot conclude Ramirez was prejudiced by the failure to strike the questions and answers. The jury was instructed that "[s]tatements made by the attorneys during the trial are not evidence," not to assume to be true any insinuation suggested by a question asked a witness, and that a question is not evidence. (CALJIC No. 1.02.) Therefore, the jury was told it could not consider the prosecutor's questions about what Ramirez said to Rosas as evidence. We assume the jury followed this instruction. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.)

Ramirez, however, makes much of the fact the jury was also instructed with CALJIC No. 2.13: "Evidence that at some other time a witness made a statement that is inconsistent or consistent with his or her testimony in this trial[,] may be considered by you not only for the purpose of testing the credibility of that witness, but also [a]s evidence of the truth of the facts as stated by the witness on that former occasion." CALJIC No. 2.13 requires that there be "evidence" of a prior inconsistent or consistent statement. Under CALJIC No. 1.02, there was no "evidence" Ramirez told Rosas that Gonzalez told him to shoot, there was only a question about it.

Defendants also argue that the jury's request for read back of the prosecutor's re-cross examination of Ramirez " 'when he is talking about' " Rosas demonstrates that the jury elevated the prosecutor's mere questions to evidence. The contested line of questioning, however, was made during the prosecutor's *cross*-examination of Ramirez, not re-cross examination. During re-cross examination of Ramirez, the only questions the prosecutor asked concerning Rosas were whether, when Ramirez fled to Mexico, he was there with Rosas. The trial court did ask, after the prosecutor finished his re-cross examination, whether Ramirez ever told Rosas that Gonzalez told him to fire the gun. It is therefore not clear that the jury was asking for read back on whether Ramirez fled to Mexico with Rosas or what Ramirez told Rosas about the shooting. But if the jury was interested in the statement about the shooting, then it seems to us that the jury would have asked for read back of the prosecutor's *cross*-examination, which more concerned that

contested line of questioning, rather than the re-cross examination. In any event, the jury never heard the read back, rendering its verdict before receiving it.

Nor do we agree that the questions were so devastating that they would have caused the jury to reject self-defense. The jury was instructed, for example, that it is lawful for a person being assaulted to defend himself from attack if he reasonably believes that bodily injury is about to be inflicted on him. (CALJIC No. 5.30.) The jury was also instructed on imperfect self-defense, which is a defendant's unreasonable but actual belief he is in imminent danger of being killed or of suffering great bodily injury. (CALJIC No. 5.17; CALCRIM No. 604.)[15] An imperfect self-defense reduces an attempted murder to attempted voluntary manslaughter. There was evidence that Gonzalez instigated the confrontation with Perez, and that Ramirez tried to get Gonzalez to leave. There was also evidence that members of the party threw bottles at Gonzalez and Ramirez and fought with them and chased them out of the backyard. Ramirez testified that he racked his gun[16] and fired it into the air to scare the crowd back. He also testified that "Miguel" fired at him. From this evidence, the jury could have found that defendants were guilty, at most, of attempted voluntary manslaughter.

We do not think, however, that the trial court's failure to strike the contested line of questions compelled the jury to reject that outcome. There was no dispute that Ramirez shot the victims. The dispute was why he did so. Ramirez's "statement" that he shot because Gonzalez told him to was ambiguous, in that it could support self-defense or undermine it.[17] It could have been interpreted to support self-defense because there was

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[15] The jury was also instructed that an assailed person need not retreat (CALJIC No. 5.50) and that actual danger is not necessary to justify self-defense, if a reasonable person has an actual belief and fear he is about to suffer bodily injury (CALJIC No. 5.51).

[16] Three unexpended nine-millimeter rounds were found on the driveway, potentially corroborating Ramirez's testimony.

[17] There was evidence that Gonzalez made such a statement and that he did not. Several witnesses (Corrales, Maynard, and Padilla) heard Gonzalez tell Ramirez to

evidence that party goers had attacked the defendants and were pursuing them; therefore, Gonzalez could have told Ramirez to "shoot them" because he believed they were in imminent danger of great bodily injury. Alternatively, the statement could undermine the defense because there was evidence that by the time Ramirez and Gonzalez were on the street, they were not being pursued or in imminent danger. The jury could have believed that Gonzalez told Ramirez to shoot even though they were not in imminent danger.

Given the conflicting testimony and the equivocal nature of the statement when placed in context, we cannot say that the failure to strike the questions and answers prejudiced defendants.

IV. Voluntary intoxication and voluntary manslaughter instructions.

Ramirez and Gonzalez make separate contentions regarding the jury instructions. Ramirez contends that his trial counsel provided ineffective assistance by failing to request a voluntary intoxication instruction. To the extent relevant, Gonzalez joins. Gonzalez separately contends that the trial court erred by not instructing, sua sponte, on voluntary manslaughter under a sudden quarrel/heat of passion theory, and Ramirez joins. We disagree with both contentions.

A. Ramirez's trial counsel did not provide ineffective assistance of counsel by failing to request a voluntary intoxication instruction.

"A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; and (2) . . . there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703, italics omitted; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) " 'If the record on appeal sheds no light on why counsel

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"blast" them. But Oscar Ramirez testified that Gonzalez did not say that, and instead told Ramirez they should go. Bravo testified that Ramirez was alone while he was shooting the gun.

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.]' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) The "review of counsel's performance is to be highly deferential." " 'Because of the difficulties inherent in making the evaluation [of counsel's tactical choices], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . .' [Citation.]" (*People v. Duncan* (1991) 53 Cal.3d 955, 966.) To show ineffective assistance of counsel, the appellant must show that he or she " 'suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]' " (*People v. Gray* (2005) 37 Cal.4th 168, 207; see also *People v. Bolin* (1998) 18 Cal.4th 297, 333.)

A trial court must instruct the jury, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) A trial court is not obligated, however, to instruct sua sponte on voluntary intoxication. Voluntary "[i]ntoxication is now relevant [after diminished capacity was abolished as a defense] only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state. Thus it is now more like the 'pinpoint' instructions . . . to which a defendant is entitled upon request. Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case . . . . They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; see also *Hughes, supra,* 27 Cal.4th at p. 342; CALCRIM No. 625;

§ 22.) A defendant is entitled to a voluntary intoxication instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected his actual formation of specific intent. (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

Here, defense counsel had at least one tactical reason for not requesting a voluntary intoxication instruction: there was insufficient evidence to support such a request. Ramirez testified that on the evening of the shooting, from about 6:00 p.m. to 8:30 p.m., he and Gonzalez were at a bar, where he and four others shared five pitchers of beer. After leaving the bar but before going to Padilla's house, Ramirez and Gonzalez went to another party around 9:00 p.m., where Ramirez had one beer. At Padilla's house, Ramirez had four beers.

The evidence on intoxication thus amounted to how much Ramirez, and to some extent, Gonzalez, drank over the course of about six hours. Absent was evidence of the effect of alcohol consumption on Ramirez's state of mind and ability to form the requisite intent. (See, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 848 [evidence that defendant had an unspecified number of drinks over a period of hours and seemed "dazed" did not support the conclusion he was unable to premeditate or to form an intent to kill].) The evidence did not show that Ramirez was, for example, incoherent, slurring his speech, or otherwise not in control of himself. To the contrary, Ramirez gave a detailed account of the evening's events. (See *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [suggesting that the defendant's ability to give a detailed account of all of the events of the night in question indicated that his alcohol consumption had no effect on his memory and conduct]; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1662 [where defendant gave "detailed testimony" about the relevant events, the evidence was insufficient to show that his drug use affected his mental state].)

In fact, Ramirez's account of the events showed that he was mentally coherent. According to him, after Gonzalez hit Perez, Ramirez tried to leave the party without further incident. Ramirez first racked the gun and, when that didn't stop his attackers, he

fired it into the air to scare them, a fact supported by other witnesses. Only when he saw Miguel with a gun did he fire his gun in self-defense.

Moreover, Ramirez's trial counsel could have believed that an intoxication defense was incompatible with self-defense. (See *People v. Jones* (1991) 53 Cal.3d 1115, 1138-1139 [noting in the context of conflict of interest between a client and his counsel that the "presentation of conflicting defenses is often tactically unwise because it tends to weaken counsel's credibility with the jury"].) To a certain extent, the self-defense argument depended on Ramirez's ability to respond rationally and coherently to the alleged attack. Adding an argument that Ramirez was so intoxicated he could not have formed any intent might have undercut the argument based on self-defense.

We therefore conclude that Ramirez's counsel was not ineffective for failing to request a voluntary intoxication instruction.[18]

B. *The trial court did not err by failing to instruct on voluntary manslaughter under a heat of passion theory.*

The trial court instructed the jury on attempted voluntary manslaughter under an imperfect self-defense theory. The trial court did not give, and Gonzalez's counsel did not request, instruction on voluntary manslaughter under a sudden quarrel/heat of passion theory. Defendants now contend that the trial court should have, sua sponte, instructed the jury on that theory.

As we said, a trial court must instruct the jury, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye, supra,* 47 Cal.4th at p. 548; *People v. Abilez, supra,* 41 Cal.4th at p. 517; *People v. Breverman, supra,* 19 Cal.4th at p. 154.) Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense,

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[18] This conclusion appears to be equally applicable to Gonzalez's trial counsel. The People's point, however, that Gonzalez's and Ramirez's situations are very different is well-taken. Although Gonzalez joins in the issue to the extent applicable, we cannot address this issue as to him because of his failure to brief it and address any evidence unique to him.

but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Cook* (2006) 39 Cal.4th 566, 596.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*Manriquez*, at p. 584.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the trier of fact. (*Id.* at p. 585.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*Id*. at p. 587; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *People v. Manriquez, supra*, 37 Cal.4th at p. 583.) Voluntary manslaughter is the intentional but nonmalicious killing of a human being. (*People v. Moye, supra*, 47 Cal.4th at p. 549; § 192, subd. (a).) Voluntary manslaughter is a lesser included offense of murder. (*People v. Lee* (1999) 20 Cal.4th 47, 59; *Manriquez*, at p. 583.) A killing may thus be reduced from murder to voluntary manslaughter if there is evidence negating malice, for example, where the defendant kills upon a sudden quarrel or in the heat of passion on sufficient provocation. (*Manriquez*, at p. 583.)

"Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The provocation that incites the defendant to homicidal conduct must be caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim. (*People v. Manriquez, supra*, 37 Cal.4th at p. 583.) It may be physical or verbal, but it must be sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Ibid.*; *People v. Lee, supra*, 20 Cal.4th at p. 59.) Thus, the heat of passion requirement has both an objective and a subjective component: " 'The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.' " (*Manriquez*, at p. 584.) A defendant may not set up his own standard of conduct and

justify or excuse himself because in fact his passions were aroused, unless the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable person. (*Ibid.*) " ' "[S]udden quarrel or heat of passion" ' " as mitigation negating malice aforethought requires that the perpetrator's reason was actually obscured as the result of a strong passion aroused by a provocation sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than judgment. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) No specific type of provocation is required, and the passion aroused need not be anger or rage, but can be any violent, intense, high-wrought or enthusiastic emotion other than revenge. (*Ibid.*)

Here, defendants argue that the "provocation" was the partygoers' assault on them, and they liken the case to *People v. Breverman, supra,* 19 Cal.4th 142. In *Breverman,* two young men were walking past the defendant's house, where their exchange of words with a group of men escalated into a fight. (*Id.* at p. 150.) Defendant was present but stayed in the backyard. The next night, the two young men returned with friends, armed with weapons, to defendant's house, with the aim to have an "even fight." The group slashed the tire of a car in the defendant's driveway and beat the car with their weapons and called to defendant that they wanted an even fight. Defendant fired shots from the house, killing one victim. Defendant told police it looked to him like the group was coming at him and rushing the door, and he was afraid they would kill him. (*Id.* at p. 151.) *Breverman* held that this evidence supported instructing the jury on a heat of passion theory of voluntary manslaughter. (*Id.* at pp. 163-164.)

Defendants argue that this case is similar to *Breverman* because people at the party hit and threw bottles at them. But this ignores what happened *before* the partygoers allegedly converged on Ramirez and Gonzalez. There was evidence that Gonzalez asked Perez and Padilla where they were from or whether they belonged to a tagging crew. Gonzalez said, "Fuck" NHC or Nachos. The argument between Gonzalez and Perez and/or Padilla, however, was insufficient to provoke Gonzalez or Ramirez. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 706 ["[r]easonable people do not become homicidally enraged when hearing" a fleeting gang reference or challenge].) In fact, the

evidence showed that Ramirez was not provoked by the exchange between his friend and Perez, because he repeatedly told Gonzalez they should leave. Moreover, after exchanging words with Perez, Gonzalez hit him with a bottle. A person who instigates a fight cannot then assert he was provoked when the challenge is accepted. (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1313.)

There was also no evidence that Ramirez acted in a heat of passion, rashly or without due deliberation and reflection. (*People v. Manriquez, supra*, 37 Cal.4th at p. 583.) Rather, he tried to get Gonzalez to leave. When Gonzalez instigated the attack on himself and Ramirez by hitting Perez, Ramirez, according to his own testimony, racked the gun several times in an attempt to scare the partygoers. When that didn't work, Ramirez, according to himself and other witnesses, fired warning shots into the air.

But even if the jury should have been instructed on voluntary manslaughter under a heat of passion theory, defendants were not prejudiced by the error. If the factual question posed by the omitted instruction was necessarily resolved against the defendant under other, properly given instructions, then the failure to instruct on a lesser included offense is harmless. (See *People v. Wharton* (1991) 53 Cal.3d 522, 572 ["By finding defendant was guilty of first degree murder, the jury necessarily found defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion"].)

Here, the jury was instructed: "Now, it is also alleged in counts 1 through 3 that the crime of attempted murder was willful, deliberate and premeditated. If you should find the defendant guilty of attempted murder, you must determine whether this allegation is true or not. That is, whether or not it was willful, deliberate and premeditated. [¶] 'Willful' means intentionally. [¶] 'Deliberate' relates to how a person thinks, and means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. That's deliberate. [¶] 'Premeditated' relates to when a person thinks and considers beforehand. [¶] A person premeditates by deliberating before taking action. [¶] If you find that the

attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding . . . the idea of deliberation, it is attempt to commit willful, deliberate, and premeditated murder." (CALJIC No. 8.67.)

The jury found true the allegations that the attempted murders were willful, premeditated and deliberate. It is therefore not reasonably probable that defendants would have obtained a more favorable outcome had the heat of passion instruction been given. (See *People v. Breverman, supra*, 19 Cal.4th at p. 149 [a failure to instruct on a lesser included offense is reviewed under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836, namely, whether, upon an examination of the entire record, it appears reasonably probable the defendant would have obtained a more favorable result had the error not occurred].)

V. Sufficiency of the evidence to support the true finding on the gang allegation.

The jury found true gang-enhancement allegations as to all counts against both defendants, who now contend there was insufficient evidence to show either that L.P.K. was a criminal street gang or that Gonzalez was a member of the "gang." We agree there was insufficient evidence that L.P.K. was a criminal street gang.

A " 'criminal street gang' " is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f); see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320, 323.) These acts include, murder, attempted murder, and felony vandalism. A " 'pattern of criminal gang activity' " means "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of" statutorily enumerated offenses. (§ 186.22, subd. (e).)

To establish the group's primary activities, the trier of fact may consider the present, charged offenses, as well as past offenses. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 323.) But those offenses must be one of the group's "chief" or "principal" occupations, which necessarily excludes the occasional commission of crimes by the group's members. (*Ibid.*) 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.) The testimony of a gang expert may also provide sufficient evidence of a gang's primary activities. (*Ibid.*; *People v. Gardeley* (1996) 14 Cal.4th 605; see also *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611 [isolated criminal conduct is not enough]; *People v. Perez* (2004) 118 Cal.App.4th 151, 160 [evidence of retaliatory shootings of a few individuals over a period of less than a week plus a beating six years earlier was insufficient to establish the defendant's gang consistently and repeatedly committed criminal activity as listed in the gang statute].)

In re Alexander L., supra, 149 Cal.App.4th 605, found that the gang expert's testimony was insufficient to establish the primary activities element of the gang enhancement. This was the entirety of the expert's testimony as to the primary activities element: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id.* at p. 611.) This evidence was insufficient to support the gang enhancement: "No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities. Indeed, on cross-examination, [he] testified that the vast majority of cases . . . he had run across were graffiti related." (*Id.* at pp. 611-612, fn. omitted.)

The expert's testimony in *Alexander L.* is similar to the expert's testimony here. Officer Benson was assigned to Bell Gardens's gang unit, meaning he was responsible for investigating gang-related crimes in the city. A gang investigator since 2007, Officer

Benson was involved in search warrants related to gangs; he collected evidence and apprehended suspects; and he spoke to hundreds of gang members and members of the public over the past nine years. He described L.P.K. as a tagging crew that progressed into "tag bangers, where they are carrying guns" and committing "very violent assaults," and constantly writing graffiti. He vaguely said L.P.K. was well known in Bell Gardens for "just creating[,] you know, general . . . disruptions, and, again, with these violent crimes, more than just disruptions." He added that L.P.K.'s primary activities are "[c]ertainly, graffiti," assaults, and "numerous arrests for possession of firearms." In Officer Benson's opinion, L.P.K. was a criminal street gang because "they commit violent acts, . . . numerous members have been arrested for weapons charges, meaning guns, and they have been involved in acts of violence for the reasons we're here today."

Despite the vague nature of Officer Benson's testimony and ambiguous references to "general disruptions," the main problem, as in *Alexander L.*, is we cannot ascertain whether the officer's claimed knowledge of the gang's activities was based on highly reliable sources, such as court records of convictions, or on entirely unreliable hearsay. (*In re Alexander L.*, *supra*, 149 Cal.App.4th at p. 612.) In *People v. Gardeley*, *supra*,14 Cal.4th at page 612, for example, the gang expert testified that the defendant's gang primarily sold narcotics and intimidated witnesses, and he based his opinion on personal investigations into hundreds of gang-related offenses, conversations with the defendant and other gang members, and information from fellow officers and law enforcement agencies. (*Ibid.*; see also *In re Alexander L.*, at p. 613.)

Although Officer Benson here was a gang investigator who had spoken to gang members over the years, he did not connect any of his knowledge specifically to L.P.K. Rather, his testimony was conclusory and vague. (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003 ["vague, secondhand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred"].) He referred to one L.P.K. member, Joseph Alfonso Mesa, who pled guilty, in 2007, to possession of a firearm by a felon and was sentenced to 16 months in prison. The officer also referred to a Jesus Gutierrez who was involved in a shooting-related crime, but he offered no other

details. It was also not clear to what extent and how the officer was familiar with either Mesa or Gutierrez. The gang expert did not testify, for example, that he personally investigated any L.P.K.-related crimes, other than the ones involving Ramirez and Gonzalez, or otherwise establish a basis for his conclusion that L.P.K. commits "violent crimes," "consistently and repeatedly." (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324, italics omitted; see also *People v. Perez, supra,* 118 Cal.App.4th at p. 160.) Rather, Meza's 2007 conviction and Ramirez's and Gonzalez's charged crimes showed only that L.P.K. engaged in the "occasional" commission of crime.

We therefore must conclude that there is insufficient evidence to support the true findings on the gang-enhancement allegations. (*In re Alexander L., supra,* 149 Cal.App.4th at p. 614 ["Substantial evidence does not mean any evidence, or a mere scintilla of evidence. It 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. [Citations.]' [Citation]"].) Those findings are therefore reversed as to both defendants and all counts.[19]

VI. Prosecutorial misconduct.

Defendants raise numerous alleged incidents of prosecutorial misconduct committed during cross-examination of Ramirez and closing argument. We conclude that any misconduct was not prejudicial.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct

[19] Because reach this conclusion, we need not address whether there was sufficient evidence Gonzalez was an LPK member.

unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.) At the same time, that prosecutors "have wide latitude to discuss and draw inferences from the evidence at trial," and whether "the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

"To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and, unless an admonition would not have cured the harm, ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct." (*People v. Martinez* (2010) 47 Cal.4th 911, 955-956.)

Defendants contend that the prosecutor committed misconduct by (a) asking argumentative questions and misstating facts while cross-examining Ramirez; (b) misstating facts and arguing facts not in evidence during closing argument; (c) commenting on Gonzalez's failure to testify; and (d) disparaging defense counsel.

A. *Argumentative questions and misstatement of facts during cross-examination of Ramirez.*

Defendants first contend that the prosecutor repeatedly misstated the evidence and asked argumentative questions while cross-examining Ramirez.

A prosecutor commits misconduct where he or she misstates or mischaracterizes the evidence or asserts facts not in evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550; *People v. Hill* (1998) 17 Cal.4th 800, 827-828 [vigorous presentation of facts does not excuse deliberate or mistaken misstatements of fact].) The line between permissible and impermissible argument is, however, not always clear. (*Hill*, at p. 823.)

"An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable." (*People v. Chatman* (2006) 38 Cal.4th 344, 384 [question whether the "safe" was lying was argumentative].) Although questions such as " 'were they lying' " should not be allowed when argumentative or designed to elicit irrelevant or speculative testimony, "a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Ibid.*)

1. Whether bottles were thrown.

Bravo testified that bottles were thrown in the direction of the fight, but he did not see a bottle hit Gonzalez. The prosecutor later appeared to misstate this testimony when he asked Ramirez, "Mr. Bravo testified, and he never said anything about seeing bottles being thrown in your direction; right?" Ramirez's counsel objected that the question misstated the testimony, and the court answered, "I'm not sure. He can answer the question." When the prosecutor asserted that no one testified seeing bottles thrown at him, defense counsel objected again, but Ramirez answered that witnesses testified bottles were thrown, although not exactly at him. The prosecutor asked, "But that's different than what you're saying today; right?" The trial court sustained defense counsel's argumentative objection.

It is not clear that the prosecutor misstated the evidence. Certainly, there was evidence that bottles were thrown and that Ramirez was in or near the area at which the bottles were being directed. But Bravo did not testify he saw bottles hitting Gonzalez or Ramirez; therefore, the prosecutor's intimation that Bravo didn't say a bottle was thrown *at Ramirez* was accurate. We therefore cannot conclude that this line of questioning constituted misconduct. In any event, the objection was sustained, and we assume that any possible prejudice was abated. (*People v. Dykes* (2009) 46 Cal.4th 731, 764.)

2. Racking the gun.

The prosecutor cross-examined Ramirez about racking the gun several times to scare the crowd. Although Ramirez testified that a cartridge came out while he was racking the gun near a white pole, the prosecutor referred to the criminalist's testimony that he didn't find any rounds by the white pole. Defendants argue that the question was argumentative because it implied Ramirez was lying about when he first racked the gun.

Of course that was the implication. The prosecutor was within the "wide latitude" afforded him by testing Ramirez's credibility about racking the gun. If Ramirez testified he racked the gun near the white pole but the criminalist found no cartridge near the pole, that could tend to show Ramirez was mistaken or lying. Defendants' assertion that any discharged cartridge could have been moved by people in the backyard was something the defense could argue, but it was not a "fact" that the prosecutor somehow misstated by pursuing this line of questioning.

3. A gun in a partygoer's hand.

The prosecutor asked Ramirez: "So you're telling me that you see a gun while you're running out of the driveway; is that correct?" Ramirez answered, "Yes," and the prosecutor then asked, "Now, would you agree with me, Sir, that was a little bit different than what [defense counsel] had asked you about yesterday?" Ramirez's counsel's argumentative objection was sustained. In fact, defense counsel had asked, "At that point when the group is following you, did you see a gun in any of those people's hands that were following you?" The prosecutor continued to ask questions about when Ramirez saw the gun, while in the driveway or on the street.

It is not clear to us that these questions rose to the level of misconduct. Ramirez may have testified he saw the gun while being followed by the crowd, but the prosecutor was trying to uncover even the smallest of discrepancies in Ramirez's story by focusing on at what point defendant saw someone in the crowd with a gun, namely, while on the driveway or on the street. This is a proper cross-examination relevant to Ramirez's credibility. (See generally, *People v. Chatman, supra,* 38 Cal.4th at p. 384.)

4. Miguel.

Ramirez testified on direct examination that "Miguel" had a gun. While cross-examining Ramirez about Miguel, the prosecutor asked, "And it's your testimony he's leading seven other people with a gun, trying to get you out of a party that they already want you out of; is that correct?" Ramirez's counsel's argumentative objection was sustained, and the trial court told the prosecutor to reframe the question, which he did: "So you're telling us that Miguel has got a gun, someone you didn't have any problems with at the party, and he's leading the charge of the seven other people outside. That's your testimony?"

There was no objection, but defendants contend that the second question was equally argumentative, in light of evidence defendants were forcibly pushed out of the party. An argumentative question talks past the witness and makes an argument to the jury. (*People v. Chatman, supra,* 38 Cal.4th at p. 384.) Such a question is "improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*Ibid.*) Although the question was certainly framed in an argumentative way, it did seek to elicit relevant testimony about Miguel's role in following or chasing defendants out of the party. We therefore do not agree that the question constituted misconduct.

Later, Ramirez testified that he shot at Miguel, who continued to run towards him. The prosecutor asked, "Okay. But you can understand, Sir, that when you've just shot at someone three times, the idea that someone is still coming after you is kind of odd." Defense counsel's objections were sustained. The question was argumentative, but because the objection was sustained, we assume that any possible prejudice was abated. (*People v. Dykes, supra,* 46 Cal.4th at p. 764.)

5. Gonzalez.

Ramirez testified that when he shot the gun, Gonzalez was not standing next to him. The prosecutor asked, "You heard the testimony of the witnesses in this case; right?" Ramirez answered, "Yes," and the prosecutor asked, "And, for the most part, all of them testified. Mr. Corrales; right? Mr. Padilla? They all testified about seeing someone standing next to you; right?" Gonzalez's attorney objected, "Padilla did not

state that." The court told Ramirez: "All right. The witness can—listen to me carefully, Mr. Ramirez. The question is do you remember that type of testimony. If you do, say, 'Yes, I do remember that.' If you don't recall, then just say, 'I don't recall.' I don't want you to guess as to what you think the correct answer should be." Ramirez said he understood.

The prosecutor continued:

"Q. Now, Mr. Padilla, he saw you out there with a gun and he saw Mr. Gonzalez, didn't he?

"The court: In other words, is that the testimony?

"Q. That was his testimony; correct?

"The court: Do you recall that testimony?

"The witness: No."

Defendants contend that the original question misstated facts, because not all witnesses testified that they saw someone standing next to Ramirez while he was shooting. Perez and Bravo testified that nobody stood next to Ramirez. The question does not necessarily misstate the facts. Although somewhat vague, the question could be interpreted to ask whether Padilla and Corrales said someone stood next to Ramirez during the shooting. Corrales did testify he heard Gonzalez tell Ramirez to "blast them," which would imply Gonzalez was standing near Ramirez.

Defendants also imply that the trial court was "complicit" in the alleged misconduct, because it improperly reframed the prosecutor's question and allowed Ramirez to be asked about other witnesses' testimony. The court, however, reasonably interpreted the question to ask whether Ramirez recalled the specific testimony. As to defendants' contention that the questions were argumentative, such questions may be allowed where, as here, the witness had personal knowledge that allows him to provide competent testimony that may assist the trier of fact in resolving credibility questions. (*People v. Chatman, supra,* 38 Cal.4th at p. 384.)

B. *Misstating and arguing facts not in evidence during closing argument.*

Defendants next contend that the prosecutor misstated the evidence and gave his unsworn testimony during his closing arguments. (See generally, *People v. Valdez* (2004) 32 Cal.4th 73, 133.) We again disagree that prejudicial prosecutorial misconduct occurred.

Defendants first focus on statements the prosecutor made while arguing, in essence, that there was no evidence they were attacked and that is why Ramirez shot his gun. The prosecutor argued, for example, that there was "absolutely no evidence" defendants felt like they were "in peril" and needed to use deadly force; no witness saw Gonzalez "actually being kicked"; there was no evidence defendants were "chased" out of the party; and there was no evidence that defendants were chased out of the party or that anyone touched or grabbed them or pursued them with a weapon.[20] The prosecutor also argued that there was no evidence to support Ramirez's testimony about where he was when he racked the gun[21] and that no witness testified Miguel was outside the party.[22]

As we have said, prosecutors have wide latitude to discuss and draw inferences from the evidence, and it is for the jury to decide whether the prosecutor's inferences are reasonable. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522.) A prosecutor may therefore argue points and draw evidentiary inferences at odds with defendants' view of the evidence. (*Ibid.*) Here, there was evidence Gonzalez was punched or kicked and that

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[20] After the prosecutor said there was no evidence someone came after defendants with a weapon, Ramirez's counsel did object that he'd misstated the testimony. The court told the jury, "You decide. This is how we interpret it, but you're the final deciders of what the evidence is."

[21] Ramirez's counsel objected that the prosecutor misstated the testimony. The trial court said: "Okay. When an objection is made of misstating the testimony, maybe you all heard it differently. The bottom line is, once again, you people determine what you heard."

[22] Corrales testified that Miguel, along with others, was outside the party when Ramirez and Gonzalez were leaving.

defendants were pushed or chased out of the party. But there was also evidence to support the prosecutor's version of events. Oscar Ramirez, for example, testified that defendants were merely "escorted" out of the party. Maynard testified that when defendants were on the street, nobody came after or threatened them. In any event, to the extent the prosecutor misstated the evidence, it was not prejudicial, as we discuss below.

Next, the prosecutor argued that when Ramirez fired his gun, defendants were across the street from the party and therefore in no danger. Defendants contend that this contradicts physical evidence showing that Ramirez was in the middle of the street when he fired the gun, and therefore the argument that Ramirez was not in danger when he fired the gun misstated the facts. It did not. This was a proper inference from the evidence. (See *People v. Dennis, supra,* 17 Cal.4th at p. 522.)

C. Griffin *error*.

Gonzalez contends that the prosecutor inappropriately commented on his right to remain silent, so-called *Griffin* error. (*Griffin v. California* (1965) 380 U.S. 609.) We disagree.

Griffin holds that it is error for a prosecutor to comment, directly or indirectly, on the failure of the defendant to testify. (*Hughes, supra,* 27 Cal.4th at pp. 371-372.) A prosecutor therefore may not "refer to the absence of evidence that only the defendant's testimony could provide." (*Id.* at p. 372.) This does not preclude a prosecutor from, however, commenting " 'on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.' " (*People v. Hovey* (1988) 44 Cal.3d 543, 572.) To determine whether *Griffin* error occurred, we ask whether there is a reasonable likelihood that jurors could have understood the prosecutor's comments to refer to defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) Still, " 'brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.' " (*People v. Turner* (2004) 34 Cal.4th 406, 419-420.)

Here, the prosecutor said, in the context of arguing that there was no evidence of imminent bodily injury to Gonzalez: "No evidence even of people chasing them out of this driveway. Please tell me there was one person sprinting after them. Please tell me that there was someone with a weapon coming after them, *and there's been absolutely no testimony. No evidence of that* . . . ." (Italics added.) When Ramirez's counsel objected on the ground the prosecutor misstated the testimony, the trial court told the jurors they were the final arbiters of the evidence. The prosecutor continued to argue that there was no evidence Gonzalez had been beaten up: "The physical evidence shows that this man, while he might have been grabbed and maybe physically pushed in the direction of the driveway, there's no evidence that he was pummeled or beat up, and that phrase, 'beat up,' 'attacked,' was used over and over again by counsel and Mr. Ramirez, but there's no physical evidence of that. *Please tell me that we heard someone testify to that, and all we're looking at is an empty witness chair.* There's no evidence . . . ." (Italics added.)

These comments were not inappropriate comments on Gonzalez's failure to testify. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 527-528 [no *Griffin* error where the prosecutor commented in closing argument that the defense offered " 'no explanation' " for " 'certain damning aspects' " of the case]; *People v. Medina* (1995) 11 Cal.4th 694, 755-756 [prosecutor's argument that defense counsel offered no " 'rational explanation' " for evidence defendant had a gun and that " 'none of this evidence was explained. . . . [T]he defense attorney did not explain this evidence and how it pointed to some other rational conclusion, because it doesn't, and he can't' " was not *Griffin* error because the comments "were directed to the general failure of the defense to provide an innocent explanation as to why defendant was armed . . . at the time of the robberies"].)

Similarly, the prosecutor here was commenting on the absence of evidence that Gonzalez was being chased out of the party or was injured. These remarks contained no references, express or implied, to Gonzalez's silence, and therefore were unobjectionable. (*People v. Medina*, *supra*, 11 Cal.4th at p. 756.) In addition, neither Gonzalez nor Ramirez were the only witnesses with knowledge of the night's events. *Griffin* error

occurs when a prosecutor argues that certain evidence was uncontradicted, if such contradiction or denial could be provided *only* by the defendant. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) Where, as here, witnesses other than the defendant could have taken the stand to provide contrary evidence, there is no *Griffin* error.[23] (*Ibid.*)

D. *Disparaging counsel.*

Gonzalez also contends that the prosecutor disparaged defense counsel. We disagree.

A prosecutor may not attack defense counsel's integrity or cast aspersions on defense counsel. (*People v. Hill, supra,* 17 Cal.4th at p. 832.) But " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets . . . ." ' " [Citation.]' [Citation.]" (*Id.* at p. 819.) Thus, a prosecutor may give his or her opinion on the state of the evidence, vigorously attack the defense case, and focus on the deficiencies in defense counsel's tactics and factual account. (*People v. Redd* (2010) 48 Cal.4th 691, 735; see also *People v. Wharton, supra*, 53 Cal.3d at p. 567.)

The challenged comments the prosecutor made here were a vigorous attack on the defense case within the wide latitude afforded prosecutors. During rebuttal closing argument, the prosecutor responded to the defense counsel's argument that L.P.K. was not a criminal street gang. The prosecutor said: "L.P.K. is only a tagging crew. It's not a real gang. It doesn't have a pedigree of King Cobras or the Playboys or B.G. Locos. It's only a tagging crew, and I think that maybe was Mr. Perez or Mr. Bravo that testified that, 'Yeah, I know L.P.K. is a tagging crew.' And what have both counsel done? They have taken that one snippet of testimony and said, 'You know what, L.P.K. is not a gang. Everyone says it is a tagging crew.' [¶] What are they asking you to do? They are

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[23] Because we conclude that no *Griffin* error occurred, Gonzalez's ineffective assistance of counsel claim, based on a failure to object, fails.

asking you to ignore the legal definition of a gang. They hear tagging crew, that's the only thing they want you to hear, and they say it's not a gang. *I mean it is such an elementary argument. I mean it is an argument you would hear on the playground, it's just a tagging crew. They're asking you to ignore the legal definition of a gang.*" (Italics added.)

The prosecutor then addressed self-defense: "And after listening to both counsel[] for over an hour about how reasonable Mr. Ramirez was acting, about how reasonable Mr. Gonzalez was acting, I think Mr. Aval said if there was a handbook, if there was a playbook of reasonableness, Mr. Ramirez followed it step by step. I think he gave 13 reasons about how and why Mr. Ramirez is being reasonable. But what does he do at the end of his argument? He goes from was it reasonable, was Mr. Ramirez reasonably believing that he was in imminent danger and needed to use force or—this is what he did at the end—was it that he unreasonably believed that he was in imminent danger and needed to use force? At the very end of his argument, he says, okay, well, maybe he wasn't acting reasonably. Maybe he was acting unreasonably. So if you don't acquit, if you don't acquit the defendant, find he acted unreasonably and convict him of attempted voluntary manslaughter.

"*Does this make sense to you? This is untenable. This is absolutely untenable.* You've heard testimony and you've heard argument about how reasonable and about how in fear for his life he was that he acted reasonably. You listened to an hour of that, . . . You listened to arguments of [defense counsel], and, at the very end, it's like, okay, maybe they're acting unreasonably.

"*This is why people don't like attorneys. I mean this is absolutely an untenable position. It was either self-defense or it wasn't.* It's not in between, and, if you consider all of the evidence in this case, ladies and gentlemen, if you look at all of the witness testimony and not hand-select witnesses that you like or don't like, by considering all of the evidence, not disregarding pieces of testimony or highlighting, you know, pieces of evidence in the street, when you consider everything, ladies and gentlemen, you can only

come to one conclusion, that these defendants are guilty. They're guilty of attempted murder, plain and simple.

"*This is untenable. You cannot go from saying that Mr. Ramirez acted reasonably to then saying, all right, well, let's assume he acted unreasonably, find him guilty of attempted voluntary manslaughter. It simply does not make sense, and you are not given a reasonable explanation for Mr. Ramirez'[s] actions on this side of the table.*" (Italics added.)

These comments amounted to nothing more than a colorful way in which to criticize defense counsel's tactical approach rather than a personal attack on defense counsel or their integrity. The prosecutor, for example, said it was inconsistent for defendants to argue both that they acted reasonably in self-defense *and* that they had an unreasonable but actual belief they needed to defend themselves. Referring to these defenses as "untenable" was a fair comment on the defense strategy. Similarly, referring to the defense argument about tagging crews as "elementary" and "something you would hear on the playground" was also a fair, albeit colorful, attack on the defense argument. (See, e.g., *People v. Zambrano* (2007) 41 Cal.4th 1082, 1154-1155 [prosecutor calling defense counsel's argument a " 'lawyer's game' " was not misconduct], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Stitely* (2005) 35 Cal.4th 514, 559 [telling jurors to "avoid 'fall[ing]' for [defense] counsel's argument" and to view it as a " 'ridiculous' attempt to allow defendant to 'walk' free," and as a " 'legal smoke screen' " did not disparage defense counsel]; *People v. Young* (2005) 34 Cal.4th 1149, 1193 [characterizing defense counsel's argument as " 'idiocy' " was fair comment on counsel's argument]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215-1216 [saying that defense counsel was "arguing out of both sides of his mouth" was an example of " 'great lawyering' " which " 'doesn't change the facts, it just makes them sound good' " was not misconduct].)

E. *Prejudice and cumulative error*.

To the extent there were a few instances of misconduct, no prejudice resulted, even considering their cumulative effect. We have reviewed the prosecutor's cross-examination of Ramirez and his closing arguments, and we are satisfied that the prosecutor did not engage in misconduct that violated defendant's right to a fair trial either under federal or state law. The prosecutor's cross-examination was detailed, vigorous, intense, and argumentative at times. His closing statement was similarly vigorous, containing occasional misstatements about what the state of the evidence was.

We cannot, however, rely on words, phrases or even sentences to establish misconduct. Rather, we must view the challenged statements in the context of the argument as a whole. (*People v. Dennis, supra,* 17 Cal.4th at p. 522.) When we do so, we conclude that neither the questions individually or in combination nor any misstatements in the closing argument rose to the level of conduct that was egregious, deceptive or reprehensible such that the trial was infected with such unfairness as to make the convictions a denial or due process or render it fundamentally unfair. (Cf. *People v. Hill, supra,* 17 Cal.4th 819-839, 845 [prosecutor's wide-ranging and "pervasive campaign to mislead the jury on key legal points," combined with other errors, required reversal of the conviction.)

The trial court also told the jury that they were the final arbiters of fact and instructed that statements by attorneys are not evidence. Moreover, the trial court did sustain some of the objections, and we therefore assume that any prejudice was abated.[24] (*People v. Dykes* (2009) 46 Cal.4th 731, 764; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1329.)

[24] The trial court also instructed the jury, "If an objection was sustained to a question, do not guess what the answer might have been, and do not speculate as to the reason for an objection."

F. *Ineffective assistance of counsel.*

Because we have concluded prejudice did not result from any prosecutorial misconduct, defendants' ineffective assistance of counsel claim similarly fails.

To this we add that a trial attorney's decision whether to object or seek a jury admonition is a strategic one, and the failure to do either seldom establishes constitutionally ineffective assistance of counsel. (See, e.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335; *People v. Collins* (2010) 49 Cal.4th 175, 233.) The "decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one," and we should be reluctant to second-guess defense counsel. (*People v. Padilla* (1995) 11 Cal.4th 891, 942, overruled on other grounds by *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.) "Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' " (*People v. Huggins* (2006) 38 Cal.4th 175, 206.)

Defense counsel here could have concluded that additional objections would have drawn closer attention to any misstatements, causing more harm. (See *People v. Castaneda*, *supra*, 51 Cal.4th at p. 1335; *People v. Collins*, *supra*, 49 Cal.4th at p. 233.) Counsel also might have concluded that the trial court's instruction that the jurors were the final deciders of fact was a sufficient admonition. Thus, because there are possible reasonable explanations for counsel not taking additional steps to address any factual misstatement, "[w]e cannot find on this record that counsel's performance was deficient." (*People v. Huggins*, *supra*, 38 Cal.4th at p. 206.)

VII. Judicial misconduct.

Gonzalez contends that the trial court committed misconduct, first, by aligning itself with the prosecution; and, second, by failing to control the prosecutor's pervasive misconduct. No judicial misconduct occurred.

A trial court may not persistently make discourteous and disparaging remarks that discredit the defense or create the impression the court is aligning itself with the prosecution. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.) No such remarks were made here. Rather, when Ramirez's defense counsel objected that the prosecutor's argument there was no evidence people chased defendants out of the party with weapons misstated the evidence, the trial court said, "You decide. This is how we interpret it, but you're the final deciders of what the evidence is."[25] By using the plural pronoun "we" the trial court was not allying itself with the prosecutor. The court was simply saying that this was the prosecution's interpretation of the evidence, and the court reminded the jurors that they were the "final deciders of what the evidence is."

Next, Gonzalez argues that the trial court failed to control the allegedly pervasive prosecutorial misconduct. As we have explained above, there was no such pervasive prosecutor misconduct. The trial court did sustain many defense objections, there was no *Griffin* error, and the prosecutor did not disparage defense counsel. Moreover, the trial court did not have "an independent duty to remedy unobjected-to prosecutorial misconduct in order to control the proceedings[.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298; see also *People v. Ervine* (2009) 47 Cal.4th 745, 806-807.)

[25] Defendants did not object. "As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial." (*People v. Sturm, supra,* 37 Cal.4th at p. 1237.)

DISPOSITION

The true findings on the gang-enhancement allegations as to all counts and as to both defendants are reversed. The matter is remanded for resentencing only. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.