Filed 9/12/17 P. v. Kellum CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LAMONT AARON KELLUM et al., Defendants and Appellants.	B268683 (Los Angeles County Super. Ct. No. TA135978)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed.

Law Office of Corey Evan Parker and Corey Evan Parker for Defendant and Appellant Kellum.

Law Office of Allen G. Weinberg and Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Stocker.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Lamont Kellum and Eric Stocker appeal from a judgment entered after they were convicted by a jury of first degree murder, two counts of attempted murder, possession of a firearm by a felon, and shooting at an inhabited dwelling. The jury found the firearm and gang enhancement allegations to be true. Appellants raise issues regarding insufficiency of the evidence, instructional error, and evidentiary error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At 12:20 a.m. on August 14, 2014, a shooting occurred outside the residence of Keiwan Williams at 824 West Maple Street in the City of Compton. Williams testified that shortly after midnight, he looked outside and saw his brother Sylvester Willis with Ronald Stoval and Reggie Heard in front of the house. At about 12:30 a.m., Williams heard a series of seven to ten gunshots. He called 911 and ran outside. Willis and Stoval ran past him and went inside the house. Heard, who had been shot, was crawling on the driveway. Heard died at the scene from a single gunshot wound.

Several hours later, paramedics removed defendants from a white vehicle that had crashed into a utility pole in the City of Lakewood. A paramedic alerted a sheriff's deputy that Kellum had a firearm in his pocket. A nine millimeter semiautomatic handgun was recovered from the pocket of Kellum's pants and a .357 revolver was recovered from inside the white vehicle. Ballistics tests showed that both firearms had been used in the Maple Street shooting.

Defendants were tried before a single jury on five counts: (1) first degree murder of Heard (Pen. Code, § 187, subd. (a);

count 1);[1] (2) attempted willful, deliberate, and premeditated murder of Willis (§§ 664, 187, subd. (a); count 2); (3) attempted willful, deliberate, and premeditated murder of Stoval (§§ 664, 187, subd. (a); count 3); (4) possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 4 as to Kellum and count 5 as to Stocker]);[2] and (5) shooting at an inhabited dwelling (the Williams residence at 824 West Maple Street) (§ 246, count 6).[3] Firearm[4] and gang[5] allegations were included in each count.

---

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

[2] Kellum and Stocker each stipulated to the prior felony conviction alleged in the unlawful possession charge.

[3] Count 7, shooting at an inhabited dwelling (at 824 W. Maple Street, adjacent to the Williams residence), was dismissed before trial.

[4] Counts 1, 2, and 3 contained allegations that each defendant personally discharged and used a firearm (§ 12022.53, subd. (b), (c), (d), and (e)(1)), and that a principal personally and intentionally discharged a firearm (*ibid.*).

[5] Counts 1 through 3 alleged that the offenses are punishable by imprisonment for life under section 186.22, subdivision (b)(5). It also was alleged that each of the offenses was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(A) & (C).)

The Prosecution's Evidence

The shooting occurred in the territory of the Cedar Block Pirus, a Blood gang which favors the color red. Heard, a college football player who worked at Target, was wearing his red employee shirt when he was shot. He was not a gang member. According to the medical examiner, the bullet had entered through Heard's back, perforated the carotid artery, and exited the left side of the neck.

The fatal .357 bullet that killed Heard (it was matched to him through DNA testing) was recovered on the driveway at 824 West Maple Street. Also at that address, fragments consistent with nine millimeter Luger type bullets were recovered from a tree, and bullet marks were found in a car parked in the driveway.

Two houses away from 824 West Maple Street, ten expended nine millimeter casings were found on the ground. Bullet marks were found on the exterior of 828 West Maple Street, and on a post between 828 and 830 West Maple Street. A bullet fragment consistent with a .38 or .357 revolver was found along a fence line between those properties.

Sergeant John O'Brien interviewed Williams, Willis, Stoval, and neighboring residents, but was not able to obtain the description of a possible suspect. Based on surveillance videos from nearby businesses, O'Brien thought that a white vehicle might have been involved in the shooting. Surveillance videos taken at 12:27 a.m., several minutes after the shooting, showed a white car speeding south on Wilmington Avenue with its headlights off. Two minutes later, a sheriff's radio car appeared on the videos, going north on Wilmington Avenue toward Maple Street.

Defendants' Car Accident

Several hours after the shooting, defendants were injured in a single vehicle accident. Kellum was driving a white Nissan Sentra when it crashed into a utility pole on Lakewood Boulevard and Ashworth Street in the City of Lakewood. The Sentra was registered to Kellum's girlfriend, Riki Davenport.

A reporter filmed a video of paramedics removing defendants from the vehicle, and posted the video on the Internet. The video, which was played at trial, showed a paramedic, Celina Serrano, removing Kellum from the vehicle. Serrano testified that she felt a gun in Kellum's pants pocket and alerted a deputy. Deputy Jody Napuunoa testified that he recovered a black nine millimeter Caltech semiautomatic handgun from the front right pocket of Kellum's red pants. Upon searching the Sentra, Napuunoa recovered a second firearm—a .357 chrome revolver with one live round and five empty casings—from the driver's side floorboard. In his report about the firearms, Napuunoa identified both defendants as members of the Park Village Crips.

Surveillance Video from New Wilmington Arms

On September 25, 2014, Sergeant O'Brien interviewed Semaj Newton, a confidential informant who was in custody on another matter. After the interview, O'Brien watched the Internet video of defendants' car accident and obtained a surveillance video from the New Wilmington Arms, a gated apartment complex on Laurel Street, south of the crime scene. The surveillance video showed a white car arriving outside the apartment complex on Laurel Street at 12:50 a.m. on the night of the shooting, and two men exiting the vehicle. At 1:13 a.m., the

video showed a large group of people emerging from the apartment complex, and two men reentering the white vehicle and driving away. O'Brien testified that he could not make out the faces of the two men in the white car or the license plate number.

Physical Evidence.

O'Brien obtained a warrant to search the white Nissan Sentra, which was at a tow yard. He recovered several black knit gloves and a bloodstained sweatshirt from the Sentra.

Gunshot residue was found on the sweatshirt and one of the gloves. The blood on the sweatshirt was matched to Stocker through DNA testing.

DNA from several sources was found on each of the guns recovered at the scene of the car accident—the .357 revolver found on the floorboard of the Sentra and the nine millimeter semiautomatic handgun found in Kellum's pocket. None of the DNA on the firearms was matched to either defendant.

The recovered firearms were test fired by James Carroll, a prosecution firearms expert. By comparing the test fired cartridges and casings with the expended cartridges and casings recovered from the crime scene, Carroll linked both recovered firearms to the Maple Street shooting. He testified that the bullet that killed Heard had been fired by the .357 revolver recovered from the floorboard of the Sentra, and that the ten expended casings from the crime scene had been fired by the nine millimeter semiautomatic handgun recovered from Kellum's pocket.

Carroll concluded that the .357 revolver had misfired on the night of the shooting. He testified the revolver contained a

single live round. When he examined the round, he saw it had a firing pin impression, an indication the gun had misfired.

Kellum's Text Messages and Photographs

Several months after the shooting, Kellum was arrested for a parole violation. His parole officer took custody of his cell phone, and its contents were electronically downloaded and printed. Several of those downloaded text messages (Exhibits 83 and 84) and photographs (Exhibit 85) were presented at trial, but only against Kellum. (Other photographs that also depicted Stocker were admitted as to both defendants.)

Exhibit 83. On September 15, 2014, Kellum and a person named Kells (referred to as "Crip") exchanged text messages about a gun that had jammed:

Kells: "On god lol we got crackin last night fuck MexicanK."

Kellum: "That bunk ass strap smh."

(Detective Scott Lawler, the prosecution's expert witness on criminal street gangs, testified that "strap" means handgun, and "smh" means shaking my head.) "Bullshit jammed." (Lawler testified that this refers to a gun jamming.)

Kells: "On god that shit had me hot man."

Kellum: "That whole night had me hot cuh, nigga got get more organized on what they gone do."

Kells: "On my momma, bro. And we need to get a bigger gun."

Kellum: "Crip you know how I get down." "That shit was weak."

Exhibit 84. On September 4, 2014, Kellum and a person designated as "Bestfriend" exchanged text messages regarding Kellum's injuries and Baby Clues (Stocker):

Bestfriend: "you been feeling ok?"

Kellum: "Yeah. I'm recovering well . . . Still ah little sore but I'm good."

Bestfriend: "ok good be coo on baby clues"

Kellum: "Yeah im cool on that boy he did some gay shit too I called cuh and he won't answer and then I text cuh and he read it lol"

Cell Phone Tower Records.

FBI special agent Michael Easter provided expert testimony on the cell phone records for Kellum, Stocker, and Stocker's girlfriend, Tiffany Gilstrap,[6] on the night of the shooting. The cell phone towers used by Stocker's phone indicated he was in the vicinity of 824 West Maple Street from 12:02 a.m. to 12:27 a.m. At 12:29 a.m., Stocker's phone began moving west and then south of the crime scene area.

At 10 p.m., Kellum's phone was in the area south of Maple Street, and by 11:15 p.m. had moved east of 824 West Maple Street. Kellum's phone was turned off from 11:46 pm to 12:32 a.m., which meant it generated no cell phone tower activity during that period.

---

[6] Stocker had two Sprint cell phones, one with a number ending in 6435, and the other ending in 6530. Based on his analysis of the records for both phones, Easter concluded that on the night of the shooting, Gilstrap, who lives in the City of Perris, was using the 6530 Sprint phone (Gilstrap's phone), and Stocker was using the 6435 Sprint phone (Stocker's phone).

The next activity for Kellum's phone occurred after the shooting, at 12:32 a.m., when his phone received a call from Gilstrap's phone. At that time, Kellum's phone was slightly west of the crime scene.

At 12:32 a.m., Stocker's phone used the same cell tower that was being used by Kellum's phone. Easter testified that both defendants' phones were "at the exact same spot," which was "the northwest corner of Avalon Boulevard and Compton."

Several hours later, at about the time of the car accident, Kellum's phone was near the 91 and 710 freeways, in the vicinity of Lakewood Boulevard. After the accident, at 5:09 a.m., Stocker's phone was near Lakewood Boulevard and Alondra Boulevard when a call from Gilstrap's phone, which was in Perris, was routed to Stocker's voice mail. Gilstrap's phone made calls to both Stocker's and Kellum's phones, but no calls were made between Stocker's phone and Kellum's phone that night.

Gang Affiliation Evidence.

In 2011, Kellum was arrested by Deputy Orlando Saldana. Saldana testified that Kellum had admitted being a member of the Park Village Crips.

In 2012, Stocker was arrested by Deputy Javier Flores. Flores testified that Stocker, who had a tattoo on his right arm ("Only God can judge me"), admitted being a Park Village Crip.

Expert Gang Testimony.

Lawler testified that there are about 150 to 200 members of the Park Village Crips. The Park Village Crips claim an area to the south of the territory of a rival gang, the Cedar Block Pirus.

The area where the shooting occurred, Maple Street west of Wilmington Avenue, is in Cedar Block Piru territory.

There are three apartment complexes within the territory of the Park Village Crips: the Park Village Apartments (now called Jasmine Gardens), the New Wilmington Arms, and Sunny Cove.[7] The New Wilmington Arms and Park Village Apartments are on the same street.

The primary activities of the Park Village Crips are illegal possession of firearms, narcotics sales, vehicle thefts, shootings, murders, and assaults with deadly weapons. When committing crimes, gang members like to bring "true soldiers" who can handle the pressure and will not snitch. Associates hang out with a gang, but do not engage in its hard core activities.

Respect is essential in gang culture. To earn respect, a gang member will commit crimes, go to jail, and do the time. Gang members want to instill fear in others, particularly rival gangs. Fear is beneficial to a gang because it discourages witnesses from testifying in court.

Park Village Crips identify with the color blue. They favor blue hats (Chicago Cubs) and items with a "V" (Virginia Tech), "L" (St. Louis Cardinals), or "VL" (Louis Vuitton) which stands for Village Life. The gang also favors tattoos such as WACC (Wilmington Arms Compton Crip), Louis Vuitton (Village Life), Chanel (CC for Compton Crip), and street signs such as Wilmington or Laurel. To earn a tattoo, a gang member must put in work, such as committing a shooting. The ultimate crime for a gang member is murder.

---

[7] The Cedar Block Pirus gang claims an area to the north of the Park Village Apartments and south of Rosecrans Avenue.

In 2013, Lawler investigated Kellum's father, Lamont Kellum, Sr.[8] Lawler testified that Senior is an active member of the Park Village Crips.

Lawler has seen field identification cards which refer to Kellum as a member of the Park Village Crips. One of those cards was prepared by Lawler's partner. Lawler identified photographs that he had taken of Kellum's gang-related tattoos such as CC (Compton Crip) and VL (Village Life). Photographs of Kellum flashing gang symbols were admitted into evidence.

Lawler has seen field identification cards for Stocker, known as Baby Clues, which identified Stocker and his companions, Lamar Chapman (Mighty Mouse or Chap) and Davell Reed (Veezy), as members of the Park Village Crips. Stocker has been called Baby Clues in recorded jailhouse phone calls. Lawler identified photographs he had taken of Stocker's gang tattoos—"VL" and "LV" for Village Life, "V" for Village, a dollar sign, and a clown with a gun. Based on Stocker's field identification cards, tattoos, criminal record, and known associates, Lawler testified that Stocker was a member of the Park Village Crips.

Lawler testified to the gang's predicate crimes: In 2012, Chapman was convicted of assault with force likely to cause great bodily injury. That same year, Anthony Merritt was convicted of illegal possession of a firearm.

Based on a hypothetical crime that tracked the prosecution's theory of this case,[9] Lawler testified that in his

---

[8] In order to differentiate between Kellum, Sr., and his son, we will refer to Kellum, Sr. as Senior.

opinion, the hypothetical gang members committed the crime for the benefit of a criminal street gang and in association with each other. As to the hypothetical victims' lack of gang affiliation, Lawler explained that when gang members are on a mission, it does not matter whether the victim is a gang member. The final body count is all that matters.

---

[9] The prosecutor posed the following hypothetical: "Assume that on August 14, 2014, a young man in Cedar Block Piru territory is standing outside of a house on Maple Street wearing a red shirt and brown khaki pants. He's standing with two other individuals neither of whom—all three of them are not gang members. [¶] And I'd like you to assume that two individuals open fire, one with a 9 millimeter Cal Tech, the other with a .357 Smith and Wesson. The Smith and Wesson revolver is the one that kills the individual wearing the red shirt and the khaki pants. [¶] The two individuals who open fire are later in a car accident a few hours later in a different neighborhood. When those individuals are identified to be Park Village Crip gang members, inside the vehicle that they are driving and that's involved in the accident is the 9 millimeter Cal Tech as well as the .357 revolver. Both of the Park Village gang members have numerous tattoos signifying their involvement in the gang. [¶] Do you have an opinion as to whether the murder of the young man wearing the red shirt in Cedar Block Piru territory as done at the benefit of, at the direction of, or in association with a criminal street gang?"

Detective Lawler responded yes, the hypothetical Park Village gang members committed the crime for the benefit of the gang as a whole and in association with each other.

Newton's Interview Statements

Newton was a reluctant prosecution witness. After Newton repeatedly testified that he did not provide O'Brien with information about the Maple Street shooting,[10] he was impeached with an audio recording and transcript of his interview, a summary of which follows.[11] Newton grew up with Baby Clues (referring to Stocker) in Park Village (an apartment complex within the territory of the Park Village Crips). Newton lives at 807 West Maple Street, the same block where the shooting occurred. Shortly before the shooting, Newton saw Stocker standing across the street from his house. As Newton watched from his window, Stocker loaded a chrome .357 revolver and placed it in his pocket. Stocker then loaded and cocked what appeared to be a black .40 or .45 semi-automatic handgun.

---

[10] At trial, Newton testified he was living at 807 Maple Street on the night of the shooting. He testified that he was a former affiliate of the Park Village Crips, but was not a member. He stated that he does not know anyone called Baby Clues (Stocker's gang moniker). He did not attend school with Stocker, nor did he identify Stocker as Baby Clues. He never told O'Brien that he saw Baby Clues loading a .357 revolver and a semi-automatic .40 or .45 handgun. He did not recall identifying Kellum as his cousin.

[11] The jury was instructed in relevant part: "You have heard evidence of [] statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways:

"1. To evaluate whether the witness's testimony in court is believable;

"AND

Newton called out to Stocker, "Yo, what's the deal?" Stocker replied, "Oh, oh, nothing, bro, nothing." Stocker began walking west on Maple Street toward Kemp Avenue. Fearing he might be shot, Newton closed his front door and window and went to his bedroom.

A few minutes later, Newton heard three shots from the .357 revolver, followed by ten rounds from the semi-automatic pistol. Newton was familiar with both weapons: the semi-automatic pistol belonged to Stocker, and the .357 revolver "came in through the hood" and had "been passed around."

Newton said that the occupants of the house where the shooting occurred are related to the mother of Newton's baby. They belong to several gangs—Village Town, Cedar, and Fruit Town. But Heard, the decedent, "wasn't from Compton. He works at Target. That's why he had a red shirt on. He's not a gangster at all." Heard was a "nice kid" and a "football player going to college." Newton believed that Stocker had fired at Heard because of the red shirt.

Newton identified a photograph of Kellum, known as AJ. Newton calls Kellum his cousin because his mother was married to Kellum's uncle. Newton was aware that Kellum had started hanging out with Stocker, but Kellum was not with Stocker that night. If Kellum had been there, Newton would have gone outside to find out what was happening.

Newton was surprised to see Stocker walking in Cedar Block Piru territory. When Newton saw Stocker that night, he thought to himself, "we Compton Crips, what the fuck is you doing walking down Cedar going that way anyways with two

---

"2. As evidence that the information in those earlier statements is true."

loaded pistols." Given the area, Stocker would not have come on foot. "No, realistically, y'all know damn well he didn't walk there." "I don't even walk to the store. So I know for a fact, hell no. Somebody—he had to either drop him off or something." "But wasn't nobody with him when he walking down that street though."

Newton said that Stocker recently had injured his face and ribs in a car accident. Stocker was riding in a white four-door midsize car at the time of the accident.

Defendants' Motions for Acquittal

After the People rested, defendants moved for acquittal under section 1118.1.[12] As to the attempted murder charges, defendants argued the evidence was insufficient to show that Willis and Stoval were the intended targets of the shooting. Unlike Heard, neither Willis nor Stoval was wearing red. In addition, the zone of fire was never defined—there was no evidence of the distance separating Willis and Stoval from Heard.

Defendants argued there was insufficient evidence to support the charge of shooting at an inhabited dwelling, 824 West Maple Street. At most, shots were fired at the ground and a tree,

---

[12] "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right." (§ 1118.1.)

but none at the dwelling itself. Strike marks on adjacent property at 828 West Maple Street, which was not occupied, and casings in front of 816 West Maple Street were not sufficient to prove that shots were fired at 824 West Maple Street.

As to the gang allegations, defendants relied on *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*). They argued that because Lawler had testified about the gang's three subsets,[13] the prosecution had to establish a connection between the defendants and the specific subset that committed the shooting, as well as a connection between the subset and the larger group.

Kellum raised an additional ground: lack of evidence that he was present during the shooting. Newton stated that Kellum was not with Stocker, and according to O'Brien, the identities of the men in the white vehicle could not be determined from any of the surveillance videos. Because Kellum's cell phone had been

---

[13] During cross-examination, Lawler was asked about territories and subsets:

"Q. Referring to Park Village, I think you said they have three territories, right? What used to be the Park Village Garden?

"A. Well, it was Park Village. Now it's – has been since renamed the Jasmine Garden.

"Q. The New Wilmington Arms?

"A. The New Wilmington Arms. Yes, Sir.

"Q. You know of Sunny Cove?

"A. Yes. Housing complex.

"Q. *Those three territories does that constitute three subsets of Park Village*?

"A. *Yeah. You have the Sunny Side. That's going to be Sunny Cove. You have the WACC Side, Wilmington Arms. WACC, Wilmington Arms Compton Crip. And the Park Side located now in the Jasmine Gardens*." (Italics added.)

turned off, there was no cell phone activity for his phone when the shooting occurred. Kellum and Stocker were together several hours later, but that is irrelevant given the lack of evidence that Kellum was an aider and abettor or the getaway driver.

The prosecutor argued the evidence supported a reasonable inference that all three victims were the intended targets of a gang shooting. From the number of shots fired, it was reasonable to infer that after Heard had been shot and was on the ground, shots continued to be fired at Willis and Stoval. They managed to escape unharmed as bullets hit the surrounding area—the ground, a tree, a car, and the house next door.

The prosecution sought to distinguish *Prunty*, which involved the Norteno and Sureno In this case, subsets are not at issue. Defendants belong to the same gang, the Park Village Crips, and have the same tattoos regarding Village Life.

The trial court denied the motion, finding the evidence was sufficient to support the substantive charges and gang allegations. The court distinguished *Prunty* because, in this case, there was substantial evidence to show that the primary and predicate offenses were committed by members of the Park Village Crips regardless of any subsets.

Kellum's Defense

Kellum presented defense witnesses, but Stocker did not.

Janae Council. Kellum's cousin, Janae Council, testified that she knows both defendants. When Council visited Stocker in the hospital after the car accident, Stocker said he had one gun in his lap and the other gun in his pocket. Council stated that neither Kellum nor his father belonged to a gang.

Chastity Wright. Kellum's mother, Chastity Wright, testified that after the car accident, she went to the wrecking yard with Davenport and removed Kellum's red sweat pants from the Sentra. Wright brought the sweat pants with her to court.

Senior. Senior testified that he was a former member of the Park Village Crips and a former longtime resident of the Wilmington Arms. On the night of the shooting, Senior was gambling at the Wilmington Arms with Deandre Davis (also known as Uncle Rudy) and others. Because he had been drinking, Senior called Kellum to ask for a ride home. About 15 minutes later, Kellum arrived at the Wilmington Arms and waited for Senior to finish gambling. Eventually Senior left in a white car with Kellum, Davis, and Stocker. Senior drove the white car even though he had been drinking. They drove on Wilmington Avenue to the 91 Freeway and exited on Downey Avenue. Stocker was unable to enter his grandmother's house, so they all drove to the apartment building where Senior and Davis reside. After Senior and Davis got out of the vehicle, Kellum and Stocker drove off. Senior did not see any guns in the car. Later, Senior got a call saying there had been an accident.

Senior testified that Kellum does not belong to the Park Village Crips and does not have a Village Life tattoo. Senior stated he did not know whether Kellum has a Wilmington Arms tattoo, or whether the Park Village Crips hang out at the Wilmington Arms.

Kellum. Testifying in his own defense, Kellum stated that he is known as AJ, which stands for Aaron Junior, and his father is known as Senior. Kellum admitted he had a prior felony conviction.

Kellum is a former long-time resident of the New Wilmington Arms. On the night of shooting, Kellum was staying with his aunt on Wilmington Avenue and 103rd Street. Shortly after 11 p.m., Senior called to ask for a ride home. Kellum drove alone in the white Nissan Sentra to the New Wilmington Arms. Because non-residents may not drive into New Wilmington Arms after 10 p.m., Kellum parked on the street outside the front gate. He went inside to meet his father and uncle who were shooting dice in the visitors' parking lot. While Kellum was waiting for his father, Stocker came over and asked for a ride. Kellum agreed. Kellum had been to Stocker's house before.

Senior drove the Sentra while Stocker and Kellum rode in the back seat. They took Wilmington Avenue to the 91 Freeway and exited at Downey Avenue. They stopped to let Stocker out, but Stocker could not get into his house and returned to the car. Senior and Davis were dropped off at their apartment building. The accident occurred while Kellum and Stocker were driving back to Stocker's house.

Kellum was unconscious when he was placed in the ambulance. He was wearing the red Hollister sweat pants that his girlfriend had cut into shorts. He did not recall any gloves or guns in the car. Kellum claimed it was impossible to fit a handgun inside his pants pocket, which contained his cell phone. Kellum regained consciousness eight days later, after being on life support for four and a half days. His arm was in a cast.

On cross-examination, Kellum claimed to have quit the Park Village Crips upon learning of his girlfriend's pregnancy in March 2014. He confirmed that Newton was his cousin by marriage. Kellum stated that he used to hang out with Stocker at the Wilmington Arms, but did not know him by his nickname.

After playing the audio recording of Kellum's police interview, the prosecutor asked Kellum to explain some of his statements. Kellum testified that when he told O'Brien he could not remember anything about the accident, his memory was still impaired from the accident. When he said that he did not know Stocker, he was being sarcastic because they had just been in an accident together.

Kellum testified that he did not know there were guns in the car. He admitted having two prior felony convictions, one in 2011 for carrying a firearm in a public place, and another in 2012 for assault with a firearm.

On redirect, Kellum explained that his tattoos have different meanings. The one that says "Lord I knows I try" has wings and a serenity prayer. The tombstone tattoo is for his deceased grandparents. The tattoos on his back memorialize his late friend and cousin. He also has tattoos of Jesus' hands, the Hollywood sign, and the Compton courthouse.

Prosecution's Closing Argument

The prosecutor, Jennifer Turk, argued that Kellum and Stocker belong to the Park Village Crips, and they ventured into Cedar Block Piru territory to commit a shooting. They drove around until they spotted Heard—who was wearing a red shirt—and his companions on West Maple Street. Defendants fired 15 rounds, intending to kill all three men. The scattered casings, strike marks, and bullet fragments supported a reasonable inference that all three victims were being targeted while they

were running toward the front door of 824 West Maple Street.[14] Turk stated that "the casings tell us the story. The fact that Mr. Williams said that they came running to the house told us a story. The fact that there were at least 14 fragments and casings that were found tells us the story that they weren't just aiming for Mr. Heard because Mr. Heard was only hit once." "[T]hankfully these two are bad shots and the other two were able to get away."

Stocker was identified by Newton, who saw Stocker loading the .357 revolver. Newton said that the revolver had been passed around the neighborhood, and this was corroborated by the presence of DNA from multiple sources.

Newton heard two guns being fired at the same time. This suggested there were two shooters. Stocker was implicated in the shooting by the presence of his blood and gunshot residue on the sweatshirt recovered from the Sentra. Because the blood was on the front left shoulder of the sweatshirt, it is unlikely that Kellum was wearing the sweatshirt. Had Kellum been wearing the sweatshirt, because he was in the driver's seat the force of the

---

[14] "They're being followed everywhere. This is 828 Maple Street, and we know that there were some strikes on that house as well even though no one lived there. Just consistent with people continuing to fire. And then we know this is 828 and 830. There was this fragment that actually came from the Smith and Wesson th[at] is consistent with a revolver. We have nine millimeters that start on the corner of the property and we have the .357 that kills Mr. Heard, and we continue to have .357 even further west of the property and it ends up over by 830. But again everyone is moving towards 824 Maple to get to safety except for Mr. Heard who was unfortunately struck."

collision might have transferred Stocker's blood to Kellum's right shoulder, but not to the left.

Kellum's testimony that he drove alone from his aunt's house to the New Wilmington Arms in order to give his father a ride home was rebutted by cell phone tower records which showed that Kellum was "actually driving around. All of these phone calls where he's hitting off of all of these towers, he's driving around, looking, hunting. It's twelve o'clock at night. There are not a lot of people out when this happens. So you got to kind of look for your victim here. And that's what happened."

Kellum was implicated in the shooting by the presence of defendants' cell phones at the same location shortly after the shooting. The cell phone tower records showed the direction of travel of defendants' cell phones, which coincided with the direction of travel of the white car in the surveillance videos. Other evidence of Kellum's involvement included the surveillance videos showing two men arriving at the New Wilmington Arms in a white car, their subsequent departure, and, several hours later, the accident in which both defendants were found inside a white Sentra with the firearms used in the Maple Street shooting.

In addition, incriminating text messages on Kellum's cell phone supported a reasonable inference that he was a participant in the shooting. Although Kellum told O'Brien that he did not know Stocker, and testified that he did not know Stocker by his nickname Baby Clues, the text messages by Kellum referred to Baby Clues and a gun that had jammed.[15] Turk argued: "You

---

[15] Unless Kellum was "talking about some other strap that jammed, the logical and reasonable inference is that he's talking about this gun. And keep in mind that text message was just sent a few weeks after. It was about a month after the murder

heard that audio for yourself. You saw his demeanor on the stand and his sarcastic tone of voice in here. There wasn't a trace of sarcasm when Detective O'Brien slid that photo across the table, and you heard him say with all sincerity. No. I don't know who that person is." In addition, Kellum's text message—"Crip, you know how I get down"—contradicted his testimony that he had quit the Park Village Crips upon learning of his girlfriend's pregnancy in April 2014.

All of these facts viewed together supported a reasonable inference that the white car in the surveillance videos was the same white Nissan Sentra that was crashed by Kellum several hours later. Because it is unlikely Stocker would commit a shooting in rival gang territory without a getaway car, it is reasonable to infer that Kellum was the getaway driver.[16]

---

when [Kellum] had been in the hospital for a while for his injuries. I'm not going to deny that he had serious injuries. I don't know if he was actually on life support. I know that he was really, really injured. And we know he had that big cast on his arm. So either he went out did another shooting with a gun that jammed which seems unlikely or this is what he's talking about. And again [Stocker and Kellum] were together based on the direction of travel, the cars, the cell phones, and the location where defendant Kellum was at the time that Stocker's phone pinged around that one [tower] near Rancho Dominguez."

[16] "If defendant Kellum wasn't there, how did Eric Stocker get anywhere? Wandering around? Because, I mean, according to . . . defendant's Kellum's testimony and his father's testimony, Mr. Stocker just shows up and needs a ride. So he's running around shooting people with two weapons and then walking around Compton? I don't think so. That doesn't make any sense."

Turning to count 1, first degree murder, Turk argued that defendants intended to kill Heard, and that the shooting was willful, deliberate, and premeditated.[17] Regardless of which defendant fired which gun, both would be guilty of first degree murder as perpetrators. Alternatively, even if the jury concluded that Kellum was sitting in the car while Stocker was firing both guns, Kellum would be equally responsible for the murder under a theory of aiding and abetting.[18]

As to counts 2 and 3, the attempted murders of Willis and Stoval, defendants are guilty because they were targeting all three men who were standing outside the house, even though they succeeded only as to one. Alternatively, defendants are guilty because the evidence showed that they intended to kill "everyone in a particular zone, the harm or kill zone." [19]

---

[17] The jury was instructed with CALCRIM Nos. 500 (Homicide: General Principles), 520 (First or Second Degree Murder with Malice Aforethought), and 521 (A) (First Degree Murder: Deliberation and Premeditation).

[18] The jury was instructed with CALCRIM Nos. 400 (Aiding and Abetting: General Principles), and 401 (Aiding and Abetting: Intended Crimes).

[19] The jury was instructed with CALCRIM No. 600 (Attempted Murder):

"The defendants are charged in Counts 2 and 3 with attempted murder.

"To prove that the defendant is guilty of attempted murder, the People must prove that:

"1. The defendant took at least one direct but ineffective step toward killing another person;

Counts 4 (Kellum) and 5 (Stocker), unlawful possession of a firearm by a felon, were supported by the recovery of the .357 revolver from the Sentra's floorboard, an area accessible to either defendant. In addition, Stocker was in possession of both weapons when he was loading them before the shooting, and Kellum was in possession of the 9-millimeter semiautomatic when it was recovered from his pocket.

Count 6, shooting at an inhabited dwelling, was established by the shots fired toward 824 West Maple Street. There were bullet fragments and strike marks on a car, a tree, and the pavement in front of that house.

Jury Verdict and Sentence

The jury convicted Kellum and Stocker on all charges. The gang and gun enhancement allegations were found true as to all

---

"AND

"2. The defendant intended to kill that person.

"A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

". . . . . .

"A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' . . ."

counts. (§§ 12022.53, subds. (b), (c), (d), (e), 186.22, subd. (b)(1)(A).)

On count 1, the jury found defendants guilty of the willful, deliberate and premeditated murder of Heard. Each defendant was found to have personally and intentionally discharged a firearm which caused great bodily injury and death to Heard. The jury found that each defendant personally used a firearm, and that a principal personally and intentionally discharged a firearm.

On counts 2 and 3, the jury found defendants guilty of the willful, deliberate and premeditated attempted murders of Willis and Heard. The jury found that each defendant personally and intentionally discharged a firearm, and that a principal personally and intentionally discharged a firearm.

After denying the defense motions for new trial, the trial court imposed identical sentences of 80 years to life as to count 1, and concurrent sentences as to the remaining counts. The sentence on count 1 consisted of a base term of 25 years to life, doubled to 50 years to life under section 667, subdivision (e)(1), with an additional 25 years to life under section 12022.53, subdivision (d), plus an additional 5 years under section 667, subdivision (a).

DISCUSSION

I

Kellum contends the gang enhancement findings must be reversed. We do not agree.

In *Prunty*, *supra*, 62 Cal.4th 59, the Supreme Court discussed the meaning of the phrase "criminal street gang" as used in the Street Terrorism Enforcement and Prevention Act

(the STEP Act or Act): "The Act imposes various punishments on individuals who commit gang-related crimes—including a sentencing enhancement on those who commit felonies 'for the benefit of, at the direction of, or in association with *any criminal street gang*.' (. . . § 186.22, subd. (b) (section 186.22(b)), italics added.) A criminal street gang, in turn, is defined by the Act as any 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses. (§ 186.22, subd. (f) (section 186.22(f)).) To prove that a criminal street gang exists in accordance with these statutory provisions, the prosecution must demonstrate that the gang satisfies the separate elements of the STEP Act's definition and that the defendant sought to benefit that particular gang when committing the underlying felony." (*Prunty*, at p. 67.)

The issue in *Prunty* was what "type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets. In this case, the prosecution's theory was that defendant Zackery Prunty committed an assault to benefit the Sacramento-area Norteño street gang. The evidence showed that Prunty identified as a Norteño; that he claimed membership in a particular Norteño subset, the Detroit Boulevard Norteños; and that Prunty uttered gang slurs and invoked 'Norte' when shooting a perceived rival gang member at a Sacramento shopping center. To show that Prunty's crime qualified for a sentence enhancement under the STEP Act, the prosecution's gang expert testified about the Sacramento-area Norteño gang's general existence and origins,

its use of shared signs, symbols, colors, and names, its primary activities, and the predicate activities of two local neighborhood subsets. The expert did not, however, offer any specific testimony contending that these subsets' activities connected them to one another or to the Sacramento Norteño gang in general." (*Prunty*, *supra*, 62 Cal.4th at p. 67.)

Prunty held that if the prosecution elects to rely on crimes committed by members of a subset as predicate offenses to prove a gang enhancement, the prosecution must establish a connection between the gang and the subset. The Supreme Court stated: "We conclude that the STEP Act requires the prosecution to introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang. The prosecution has significant discretion in how it proves this associational or organizational connection to exist; we offer some illustrative examples below of strategies prosecutors may pursue. Yet when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets. In this case, the prosecution did not introduce sufficient evidence showing a connection among the subsets it alleged comprised a criminal street gang, so Prunty was not eligible for a sentence enhancement under the STEP Act." (*Prunty*, *supra*, 62 Cal.4th at pp. 67–68.)

Kellum argues the prosecution did not satisfy *Prunty's* requirements because it failed to prove "that any of the subsets share an associational or organizational connection with the larger group, as required by *Prunty*." But, unlike *Prunty*, in this

case the predicate crimes were committed by members of the Park Village Crips, and the prosecution did not rely on predicate crimes committed by members of a subset. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458 [charged offense may be used as predicate offense].)

The issue of subsets arose, if at all, during cross-examination of Lawler. The initial question—"Referring to Park Village, I think you said they have three territories, right?"—referred to territories and not subsets. After Lawler listed the three apartment buildings (Park Village, Sunny Cove, and New Wilmington Arms), all within the gang's territory, he was asked whether "[t]hose three territories . . . constitute three subsets of Park Village?" Lawler answered yes, but went on to describe three geographical areas or sides: "You have the Sunny Side. That's going to be Sunny Cove. You have the WACC Side, Wilmington Arms. WACC, Wilmington Arms Compton Crip. And the Park Side located now in the Jasmine Gardens." Lawler did not use the word "subset" in his testimony.

We see no indication that the prosecution was relying on a crime committed by a member of a subset to establish one or more predicate offenses under the STEP Act. Accordingly, *Prunty* is inapplicable to this case.

II

Defendants challenge the gang enhancement findings based on evidentiary error under *People v. Sanchez* (2016) 63 Cal.4th 665, 699–700 (*Sanchez*), which was decided after the trial in this case. Defendants contend that Lawler relied on inadmissible hearsay when he testified that defendants were active members of the Park Village Crips based on police reports

prepared by other officers and statements of other officers in field identification cards, and that this resulted in a violation of their right to confrontation. (*Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).)[20] We find no error.

A. The Sanchez Decision

In *Sanchez*, the court rejected the practice of admitting hearsay statements related by experts as the basis of their opinion, with a caution to the jury that the statements should only be considered as the basis of the expert's opinion and should not be considered for their truth. (*Sanchez*, *supra*, 63 Cal.4th at p. 680–681.) The flaw in this method, *Sanchez* explained, is that "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth. In such a case, 'the validity of [the expert's] opinion ultimately turn[s] on the truth' [citation] of the hearsay statement. If the hearsay that the expert relies on and treats as true is *not* true, an important basis for the opinion is lacking." (*Id.* at pp. 682–683.)

---

[20] Respondent argues the hearsay and Confrontation Clause claims were forfeited by the failure to object below. We do not agree that the claims were forfeited. The hearsay objection is based on *Sanchez*, *supra*, 63 Cal.4th 665, which was decided after the trial in this case. Accordingly, "[a]ny objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause. [Citation.]" (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7, review granted on March 22, 2017, No. S239442 [opinion remains precedential under Cal. Rules of Court, rule 8.1115(e)(3)].)

Sanchez held that "[w]hen an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true." (*Sanchez*, *supra*, 63 Cal.4th at p. 683.)

However, *Sanchez* reaffirmed "the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

The court explained its holding: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. A jury may repose greater confidence in an expert who relies upon well-established scientific principles. It may accord less weight to the views of an expert who relies on a single article from an obscure journal or on a lone experiment whose results cannot be replicated. There is a distinction to be

made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception.

"What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception. It may be true that merely telling the jury the expert relied on additional kinds of information that the expert only generally describes may do less to bolster the weight of the opinion. The answer to this reality is twofold. First, the argument confirms that the proffered case-specific hearsay assertions *are* being offered for their truth. The expert is essentially telling the jury: 'You should accept my opinion because it is reliable in light of these *facts* on which I rely.' Second, in a criminal prosecution, while *Crawford* and its progeny may complicate some heretofore accepted evidentiary rules, they do so under the compulsion of a constitutional mandate as established by binding Supreme Court precedent.

"In sum, we adopt the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685–686, fn. omitted.)

B. Analysis

Respondent contends that when Lawler referred to field identification cards and police reports, he did so only in general terms to explain that he relied on these materials in forming his own opinion, which was not improper. (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) In addition, respondent argues that because there was independent evidence to establish that defendants are members of the Park Village Crips, the expert testimony did not violate the hearsay rule. (*Ibid.*) We conclude respondent is correct.

Lawler's testimony that he personally photographed each defendant's gang-related tattoos did not violate the hearsay rule. Information regarding a case-specific fact may properly be established "by a witness who saw the tattoo, or by an authenticated photograph." (*Sanchez*, *supra*, 63 Cal.4th at p. 677.) "That [a particular tattoo] is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a [particular] tattoo shows the person belongs to the gang." (*Ibid.*)

Kellum's former gang membership was established through his own testimony. Whether he was telling the truth when he testified that he had quit the gang upon learning of his girlfriend's pregnancy was for the jury to decide. Based on Kellum's text message—"Crip, you know how I get down."—a jury could reasonably conclude Kellum had lied about quitting the gang. We find no violation of the hearsay rule. (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

III

Kellum argues the evidence was insufficient to support his conviction of first degree murder. He focuses on the lack of evidence of planning, motive, and participation in the shooting. Kellum also argues the gunshot residue on the sweatshirt recovered from the Sentra does not implicate him as the shooter. He contends the sweatshirt was worn by Stocker, whose blood was found on the front left shoulder of the garment.

The jury found that each defendant personally and intentionally discharged a firearm which caused great bodily injury and death to Heard, and that a principal personally and intentionally discharged a firearm which caused great bodily injury to Heard. (§ 12022.53, subd. (d).) These findings show that each defendant was found to be a perpetrator in the shooting, and that each was found to have proximately caused great bodily injury and death to Heard.

The findings under section 12022.53, subdivision (d) were proper as to both defendants. The fact that Heard was struck only once by a single bullet from the .357 revolver does not contradict the jury's findings that both defendants proximately caused his death. "Proximately causing and personally inflicting harm are two different things." (*People v. Bland* (2002) 28 Cal.4th 313, 336 (*Bland*).)[21]

---

[21] The jury was correctly instructed on the meaning of proximate cause: "There may be more than one cause of death. An act causes death only if it is a substantial factor in causing death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death."

Kellum argues that there was no evidence he personally engaged in any planning activity prior to the shooting. He relies on *People v. Casares* (2016) 62 Cal.4th 808, which is distinguishable because it did not involve a violation of the STEP Act.

Significantly, the jury found that the crime alleged in each count was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. By these STEP Act findings, the jury found that Kellum and Stocker had engaged in a joint criminal enterprise to commit a shooting in rival gang territory for the benefit of a gang. Viewed in light of the STEP Act findings, the contention that the evidence was insufficient to show Kellum had engaged in planning activity is not persuasive.

The record contained substantial evidence of planning activity by Kellum. In addition to the cell phone activity earlier that evening which indicated he was driving around the area where the shooting occurred, Kellum and Stocker were found together several hours after the shooting in a white vehicle with the murder weapon on the floorboard. The other firearm used in the shooting was recovered from Kellum's pocket, and during Kellum's testimony he provided no explanation as to how the guns had come to be in his possession. Taken together, the circumstantial evidence supported a reasonable finding that Kellum was the getaway driver in a gang related shooting in enemy territory. Under these circumstances, a jury could reasonably infer that while Stocker was loading the firearms, Kellum was parking the vehicle. The fact that only Stocker was

seen loading both weapons does not render the evidence insufficient to support Kellum's conviction on count 1.

Nor does the fact that only Stocker's blood was found on the sweatshirt compel a different result. Regardless which weapon was used by which defendant, the jury found that both defendants committed the shooting for the benefit of a gang within the meaning of the STEP Act. In light of the STEP Act findings, defendants are equally culpable for the results of their joint criminal enterprise regardless of which one actually fired the fatal shot that killed Heard. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1176 [STEP Act allows accomplice liability].)

IV

In a related contention, Kellum argues the evidence was insufficient to support his conviction on count 6, shooting at an inhabited dwelling. We do not agree.

Section 246 provides that "[a]ny person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house . . . is guilty of a felony . . . ." As with "'all general intent crimes, the question is whether the defendant intended to do the proscribed act.' [Citation.] 'In other words, it is sufficient for a conviction if the defendant intentionally did that which the law declares to be a crime.' [Citation.]" (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356.) A violation of the statute occurs where the evidence shows that the defendants were firing at persons standing close to an inhabited dwelling, and were consciously indifferent to the risk of that some of the shots would hit the building. (*Ibid.*)

It was reasonable to conclude that before the shooting, Kellum was driving around in rival gang territory while looking

for potential victims. Because the area where the shooting occurred was residential, it was reasonable to infer that Kellum was consciously indifferent to the risk that an inhabited dwelling would be struck by bullets fired at those standing in front of the building.

Kellum argues that he did not violate section 246 because the evidence failed to show that he committed the shooting or knew of Stocker's criminal purpose. He contends that because the only evidence linking him to the shooting was discovered several hours later, at the scene of the car accident, his conviction on count 6 must be reversed.

As previously discussed, the evidence was sufficient to support the conviction of Kellum either as a perpetrator of the shooting or as an aider and abettor. In *People v. White* (2014) 230 Cal.App.4th 305, which involved a gang-related shooting by defendant White, we held that defendant Gales, the aider and abettor, "need not know of, or share, the perpetrator's specific intent to shoot at an inhabited dwelling, even when the perpetrator has such an intent." (*Id.* at p. 309.) We stated that "[a]lthough White may have had the specific intent to fire the gun at the building, that particular intent was not, in fact, required for White's commission of the crime: as explained above, White's state of mind was sufficient for the crime, provided that he intentionally fired the gun 'in such close proximity to the target that he show[ed] a conscious indifference to the probable consequence that one or more bullets w[ould] strike the target.' (*Overman*, *supra*, 126 Cal.App.4th at p. 1356.) For that reason, Gales's status as an aider and abettor was not dependent on whether he knew of, or shared, White's particular intent to shoot at the building. Rather, under the circumstances presented here,

to establish Gales's status as an aider and abettor, it was sufficient to demonstrate that Gales knowingly and intentionally encouraged White to shoot the gun under circumstances showing that Gales—like White—was consciously indifferent to the probable consequence that the bullets would strike the building." (*White*, at pp. 318–319.)

As in *White*, the evidence in this case was sufficient to demonstrate that Kellum, either as a perpetrator of the shooting or as an aider and abettor, knowingly and intentionally fired at an inhabited dwelling or encouraged his codefendant to do so.

V

Defendants contend the evidence was insufficient to support their convictions on counts 2 and 3 for attempted murder. They challenge the sufficiency of the evidence to support the jury's finding that they intended to kill Willis and Stoval, who ran into the house unharmed. "In reviewing the sufficiency of evidence to support a conviction, we review the entire record to determine whether there is reasonable and credible evidence such that a reasonable trier of fact could find defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Ramos* (2011) 193 Cal.App.4th 43, 47 (*Ramos*).)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.]" (*Ramos*, *supra*, 193 Cal.App.4th at p. 47.) "Unlike the crime of murder, the crime of attempted murder requires the specific intent to kill" each attempted murder victim. (*Ibid.*) "Evidence of intent to kill is usually inferred from defendant's acts and the circumstances of the crime. [Citation.] Firing a gun toward a victim at a close

range in a manner that could have inflicted a mortal wound had the bullet been on target supports an inference of intent to kill. [Citation.]" (*Ramos*, at p. 48.)

Williams testified that before the shooting, he heard his brother outside, looked out the window, and saw his brother in front of the house with Heard and Stoval. The next time Williams saw the three men was after he made a 911 call. When Williams went outside, Heard was crawling on the driveway and Willis and Stoval ran past Williams toward the front door.

Defendants contend that because neither Willis nor Stoval testified at trial, and there was no evidence as to where Willis and Stoval were standing in relation to Heard when the shooting began, it is not reasonable to infer that Willis and Stoval were intended targets, or that they were inside the zone of fire in relation to Heard. They contend that at most, the testimony by Williams supports an inference that Willis and Stoval were coming from the general vicinity of the gunshots, but not that they were the intended targets of the shooting.

The prosecutor addressed this issue in her argument to the jury. She argued that the evidence supported a reasonable inference that after Heard was shot, defendants continued firing at Willis and Stoval as they ran to the house.

The evidence supported a reasonable inference that defendants were targeting all three men who were standing in front of the residence. The evidence supporting this inference included Newton's statement that the shots were fired in rapid succession, which suggests the crime occurred quickly, and Williams' testimony that when he went outside after calling 911, Heard was crawling on the driveway and Willis and Stoval were running toward the front door. In light of the quick succession of

events, the fact that Willis and Stoval had not yet reached the front door supports a reasonable inference that they had been closer to Heard when he was shot and fell on the driveway. The jury had photographs of the crime scene to assist in evaluating the testimony and physical evidence. Under the circumstances, a jury could reasonably infer that all three men were standing in close proximity to one another when Heard was shot, and that defendants intended to shoot Willis and Stoval as they ran to safety.

The fact that only Heard was dressed in red is not conclusive evidence that Willis and Stoval were not being targeted. Lawler's testimony that murder is the ultimate crime for gang members, who do not care whether the victim is a member of a rival gang or not, supports a reasonable inference that Willis and Stoval also were targeted during the shooting.

VI

Defendants contend the trial court prejudicially erred in instructing the jury on the kill zone theory because the evidence did not provide substantial support for the application of that theory. (CALCRIM No. 600.) Respondent argues the issue was forfeited by the failure to raise it below. We agree. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Because the instruction was supported by substantial evidence, the contention also fails on the merits.

The attempted murder instruction (CALCRIM No. 600) correctly stated that in order to convict defendants of the attempted murder of Willis and Stovall, the jury must find defendants intended to kill each victim. The instruction permitted this finding to be made based upon proof beyond a

reasonable doubt that defendants intended to kill Willis and Stoval, or, alternatively, that defendants intended to kill a specific person, Heard, "and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.'"

As we have previously discussed, the evidence supported a reasonable inference that defendants are gang members who committed a shooting in rival territory, and that they targeted Heard because he was wearing a red shirt, the color of the rival gang, as well as his companions, Willis and Stoval, in order to enhance the reputation of their gang and instill fear in the community at large. The evidence was therefore sufficient to support a finding that notwithstanding the intent to kill Heard because he was wearing a red shirt, defendants intended to kill his companions as well.

In *People v. Smith* (2005) 37 Cal.4th 733, the Supreme Court explained that the kill zone theory is a theory of concurrent intent. The theory allows a shooter to be "convicted of multiple counts of attempted murder . . . where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. (*Bland, supra,* 28 Cal.4th at pp. 329–330.) As [the court] explained in *Bland*, 'This concurrent intent [i.e., "kill zone"] theory is not a legal doctrine requiring special jury instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific

target does not rule out a concurrent intent to kill others.' (*Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.)" (*Smith*, at p. 746.)

We conclude the instruction was properly given in this case. Defendants' reliance on *People v. Pham* (2011) 192 Cal.App.4th 552 is misplaced. Because the defendant in that case was not charged with a violation of the STEP Act, there was no evidence that he belonged to a gang or that he committed the crime for the benefit of a gang. The court's determination in *Pham*—that firing a gun repeatedly at several persons will not necessarily support a finding of attempted murder of every person in the group—is not applicable where, as here, the expert gang testimony supported a reasonable inference that defendants had fired their weapons in rival gang territory with the intention of killing all three victims.

The remaining authority, *People v. McCloud* (2016) 211 Cal.App.4th 788, is distinguishable. Defendants McCloud and Stringer fired 10 shots from a semiautomatic handgun into a crowd, killing two persons and injuring one. In addition to two counts of murder, Stringer was convicted on 46 counts of attempted murder, and McCloud on 46 counts of assault with a deadly weapon. Only the murder convictions were affirmed on appeal. The remaining convictions were reversed since the number of alleged victims (46) far exceeded the number of shots fired (10). *McCloud* is not helpful to defendants because in this case, the number of shots fired (15) exceeded the number of victims (3), and the convictions are supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.