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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN KIRK LONG,

Defendant and Appellant.

B278411

(Los Angeles County
Super. Ct. No. BA431010)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Henry J. Hall, Judge. Affirmed as modified.

Emry J. Allen, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Senior Assistant
Attorney General, Paul M. Roadarmel, Jr., Stephanie A. Miyoshi,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Brian Kirk Long of one count of willful, deliberate and premeditated murder and five counts of assault with a firearm and found true specially alleged firearm and criminal street gang enhancements. On appeal Long contends the trial court erred by giving irrelevant and misleading jury instructions, permitting the prosecution to amend the information after the close of evidence to charge five counts of aggravated assault as lesser related offenses of attempted murder and preventing defense counsel from asking a proper hypothetical question during cross-examination of the prosecution's gang expert. He also contends his aggravated assault convictions were not supported by substantial evidence and his counsel was constitutionally ineffective. We modify the judgment to correct an unauthorized sentence and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Original Information

An information filed November 3, 2015 charged Long with the murder of Lavell Lee Smith (count 1) (Pen. Code, § 187, subd. (a))¹ and the attempted premeditated murder of Omari Johnson, Maurice Belisle, Elijah Mohammed, Clarence Morgan and Nicholas Krest (§§ 187, subd. (a), 664) (counts 2, 3, 4, 5 and 6). It was specially alleged as to all counts that Long had personally used and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subs. (b)-(d)) and Long had committed each of the charged offenses to benefit a criminal

¹ Statutory references are to this code unless otherwise indicated.

street gang (§ 186.22, subd. (b)(1)(C)).² Long pleaded not guilty to all counts and denied the special allegations.

2. *The Shooting*

In the early morning of June 28, 2014 Smith was socializing with friends at an after-hours club in Hollywood when Long approached him near the restrooms. Long, known by the moniker “Buckshot,” was a member of the Shotgun Crips gang. Smith, known by his moniker “No Good,” was associated with the Nine Block or Nutty Block gang, a rival of the Shotgun Crips. Smith threw a drink on Long. Long pulled out a handgun, pointed it at Smith and “cocked it back.” Smith responded by referring to Long as “snot gun,” a derogatory reference to the Shotgun Crips. Long fired his gun multiple times at point blank range, killing Smith. Belisle, Mohammad, Crest, Morgan and Johnson, club patrons who were near Smith at the time of the shooting, also suffered gunshot-related injuries. Long fled the scene. A witness identified Long as the shooter. The People also introduced video surveillance footage taken the morning of the shooting that purportedly depicted Long entering the club with a female companion, Kelly Robins, and running out of the club with a gun in his hand after the shooting.

Immediately after the shooting Long fled to Nevada, where he was later apprehended. During recorded telephone

² For simplicity, this opinion on occasion uses the shorthand phrase “to benefit a criminal street gang” to refer to crimes that, in the statutory language, are committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

conversations while Long was in custody, Long accused Robins of reporting him to police and demanded that she assure him she had “nothing to do with this.” Robins insisted she would never disclose incriminating information about Long and was not a “snitch.” Long blamed Robins for “start[ing] this shit” and told her to “stay away from the hood” for a while. In another recorded telephone conversation two days later, Long told a different caller that he had spoken to a woman and his “homies been looking for her in the hood.”

Three weeks prior to the shooting, Smith told his girlfriend he thought the Shutgun Crips were after him. Charlie Gix, a friend of Smith’s who was with him at the club, testified he did not see the shooter because his attention was focused on Smith. However, Smith’s girlfriend testified Gix had unequivocally identified Long as the shooter a few days after the shooting when she and Gix viewed Long’s photograph on Long’s social media page.

Gardena Police Detective Jason Hooker, a member of the South Bay Gang Task Force, testified as an expert on gangs and gang culture. According to Hooker, Long, using coded language during recorded custodial telephone calls, asked whether Robins had identified him as the shooter, directed her to hide evidence and warned her that anyone who cooperated with police would be killed.

Several people who were present at the club, including those injured in the shooting, told police they did not see, and could not identify, the shooter. Detective Hooker testified it was common for witnesses to refuse to identify the perpetrator or to cooperate with police for fear of retaliation by gang members. Given a hypothetical set of facts based on the evidence in the

case, Detective Hooker opined the shooting was committed to benefit a criminal street gang.

Long did not testify or call any witnesses. His theory at trial was misidentification: Although he was at the club when the shooting occurred, he was not the shooter.

3. *The Amended Information at the Close of Evidence*

At the close of evidence the People asked the court to instruct the jury on assault with a deadly weapon with respect to the five injured individuals identified in the attempted murder counts. Long objected on the ground those crimes had not been charged in the information. The court refused to give the instruction, explaining an instruction on an uncharged lesser related offense could not be given absent Long's consent.

The next day, after further discussion of the jury instructions, the People moved to amend the information according to proof to add five counts of assault with a deadly weapon (§ 245, subd. (a)) on Johnson, Belisle, Mohammed, Morgan and Krest and to include special allegations of personal use of a firearm (§ 12022.5, subd. (a)). The court granted the request over Long's objection, stating, "If the defense [were] an intent defense I think it would be arguable the defendant is prejudiced by allowing the amendment to conform to proof. The fact that the defendant was presenting an identity defense I think obviates that prejudice. And over the defendant's objection I will allow the People to amend" to allow five counts of assault with a firearm (§ 245, subd. (a)(2)) and a personal use of a firearm enhancement (§ 12022.5, subd. (a)).³

³ Although the People did not formally move to add the gang enhancement to those new counts, the jury was nonetheless

4. *Closing Argument*

The People's theory of the case was that Long had committed the premeditated murder of a rival gang member to benefit his gang; and, by shooting 12 times inside a crowded club, Long intended to kill "anyone and everyone" who impeded that effort and was thus guilty of attempted murder. At the very least, the prosecutor argued, Long had committed assault with a firearm on the five individuals injured in the shooting.

5. *Jury Instructions, Verdict and Sentence*

The jury was instructed, among other things, on the elements of murder (first and second degree), voluntary manslaughter, attempted murder and assault with a firearm. The jury found Long guilty of the willful, deliberate and premeditated murder of Smith and found true the firearm-use and criminal street gang enhancements specially alleged in connection with that offense (count 1). The jury found Long not guilty on all attempted murder charges (counts 2 through 6) and guilty of five counts of assault with a firearm (counts 7 through 11) with a true finding on the firearm-use enhancement as to those counts. The jury found the special allegations that the aggravated assaults were committed to benefit a criminal street gang not true.

Long was sentenced to an aggregate state prison term of 81 years four months to life.⁴

asked to determine whether the aggravated assault counts were committed to benefit a criminal street gang. The jury found those special allegations not true.

⁴ Long's sentence was calculated as 50 years to life for premeditated murder (25 years to life for first degree murder, plus 25 years to life for the firearm enhancement resulting in

DISCUSSION

1. *The Jury Instructions on Consciousness of Guilt and Adoptive Admissions Were Proper; Any Error Was Harmless*

“The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty “to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.” [Citation.] “It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.”” (*People v. Alexander* (2010) 49 Cal.4th 846, 920; accord, *People v. Clark* (2016) 63 Cal.4th 522, 605.)

death), plus a full determinative term of 14 years for count 7 (the upper term of four years for aggravated assault plus 10 years for the firearm-use enhancement (12022.5, subd. (a)) and consecutive determinate terms of four years, four months (one-third the middle term for the aggravated assaults plus one-third the upper term for the firearm enhancements) alleged in counts 8 through 11. The court concluded the 15-year minimum parole eligibility date required by section 186.22, subdivision (b)(5), for the murder count because the crime had been committed for the benefit of a criminal street gang was “largely . . . a nullity” because it was subsumed within the 50-year-to-life sentence imposed on that count. Finally, the other firearm enhancements found true for the murder count under section 12022.53, subdivisions (b) and (c), were stayed (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1123).

Long contends the trial court erred in instructing the jury with CALCRIM Nos. 362 on consciousness of guilt and 357 on adoptive admissions.⁵ Although he did not object to those instructions at trial, he now contends there was no evidence to support either of them. His argument lacks merit.

In a recorded telephone conversation Long told Robins to “park my car” because police were looking for his “whip.” Detective Hooker testified that “whip” meant “car” in gang

⁵ The jury was instructed in accordance with CALCRIM No. 362, “If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.”

The jury was also instructed in accordance with CALCRIM No. 357, “If you conclude that someone made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true. [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The defendant heard and understood the statement; [¶] The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant’s response for any purpose.”

culture and Long was deliberately using coded statements to direct Robins to “get rid of” the car they had used the night of the shooting, knowing his statements were being monitored by law enforcement. There was thus substantial evidence from which a jury could infer the statement was designed to mislead law enforcement and reflected Long’s consciousness of his own culpability. (See *People v. Arias* (1996) 13 Cal.4th 92, 141 [consciousness-of-guilt instruction proper when jury could reasonably infer defendant’s statement to his mother that stabbing was accident was a deliberate fabrication in light of eyewitness testimony that stabbing was deliberate].)

Similarly, substantial evidence supported an adoptive admissions instruction in CALCRIM No. 357. During the same recorded telephone conversation, Robins accused Long of taking her cell phone following the shooting so she could not use it to call police and report him for the shooting. In response, Long did not deny that was the reason he had taken her cell phone or deny his participation in the shooting. In addition, when Robins told Long the police were looking for the car they drove that night, Long did not protest the car had no evidentiary value because he was not involved in the crime.

Finally, both CALCRIM Nos. 362 and 357 were permissive, not mandatory. (See CALCRIM Nos. 362 [jury instructed to determine the weight, if any, to give to the evidence; the statements could not alone be used to convict the defendant; and the jury should disregard the permissive inference if it did not make the allowable findings]; 357 “[i]f you decide that any of these requirements has not been met, you must not consider either the statement or the defendant’s response for any purpose”].) Both instructions applied only if the jury concluded

that Long’s statements were deliberately misleading (CALCRIM No. 362) and Long had failed to deny an accusation of criminal misconduct made directly to him or in his presence (CALCRIM No. 357). The jury was also told in accordance with CALCRIM No. 220 to disregard any instruction it found inapplicable to the facts. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 905 [jurors presumed intelligent and capable of understanding and applying court’s instructions].) Considering the record and the instructions as a whole, any error in giving either or both instructions was harmless. (See *People v. Henriquez* (2017) 4 Cal.5th 1, 34 [consciousness of guilt instruction in CALJIC No. 2.02 was permissive, not mandatory; even if error because not supported by evidence, no prejudice occurred]; *People v. Chism* (2014) 58 Cal.4th 1266, 1299 [adoptive admission instruction that had no application to facts was harmless under standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 because jurors were told to disregard instruction if not applicable]; *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1250 [in light of permissive nature of consciousness-of-guilt instruction, any error in giving instruction harmless]; *People v. Rankin* (1992) 9 Cal.App.4th 430, 436 [same].)

2. *Long Has Forfeited His Contention the Gang Expert Provided Improper Testimony on Long’s State of Mind; Long Has Not Demonstrated His Counsel Was Constitutionally Ineffective in Failing To Object*

During trial the prosecutor asked Detective Hooker, the People’s gang expert, whether he had found “anything significant” in his review of the transcript of Long’s recorded jailhouse phone calls. Long’s counsel objected, insisting the question called for speculation. The court overruled the objection,

explaining Detective Hooker could provide expert opinion testimony. Detective Hooker then described, without additional objections, language used during Long's telephone calls that he explained was jargon or code commonly understood in gang culture. For example, Detective Hooker testified the term "paperwork" in the context of the sentence, "show me some goddamn paperwork," referred to police reports identifying the person who reported Long. Similarly, Robins's statement, "motherfuckers want to take a chance without having no paperwork," referred to individuals intent on assaulting Robins for being a snitch without documentation—proof—that she had incriminated Long. Detective Hooker explained, "[f]ucking with . . . Nutties and all that shit," meant that Robins had been hanging out with Smith's gang, a rival gang, and "park my car" was a coded instruction to get rid of the car used the night of the shooting. In addition, Detective Hooker opined Robins's statement, "My name is golden in the fucking hood," meant Robins was known not to be a snitch and would not snitch on Long. Asked why that was important, Detective Hooker replied, "if it was found out . . . that she was the one who had told the police that it was Mr. Long, it could mean her life." Long's warning to Robins to "stay away from the hood," according to Detective Hooker, suggested the possibility that an order had been placed for gang members to assault her for being a snitch, an opinion he said was reinforced by another recorded telephone call with someone else, during which Long stated, "She better convince me[;] [if] not, I ain't calling nothing off." Detective Hooker also explained Long's use of the term "guns up" if anyone should collect reward money meant anyone who reported Long to obtain the reward would be shot.

Long concedes Detective Hooker's opinion testimony on the meaning of specific language used by gang members and their associates was proper. (See *People v. Champion* (1995) 9 Cal.4th 879, 924-925 [expert testimony to assist jury in understanding meaning of words used by gang members was proper]; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193-1194 [same]; see generally Evid. Code, § 801 [expert may provide opinion testimony on matters related to a subject that is sufficiently beyond common knowledge and experience].) However, citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, 647 for the broad proposition that expert testimony on the defendant's state of mind is improper, Long contends Detective Hooker purported to opine on Long's state of mind and intent and not just explain coded language used in gang culture. That is, by phrasing his opinion at times as, "He wants to know if he can trust her," or "the way I interpret[] [his language] is that he possibly has some Crips on standby, and, if he does find out that she is a snitch, that he would have her assaulted or possibly even killed," Detective Hooker exceeded the scope of expert testimony and invaded the province of the jury, which was as capable as Hooker in discerning Long's intent. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1048 ["to the extent that *Killebrew* . . . was correct in prohibiting expert testimony regarding whether the *specific* defendants acted for a gang reason, the reason for this rule is *not* that such testimony might embrace the ultimate issue in the case," an opinion expressly permitted under Evidence Code section 805, but because such opinions are of "no assistance" to the triers of fact, who are "as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt"].)

We need not determine whether Detective Hooker’s testimony exceeded the scope of permissible expert opinion because Long did not object to any portion of the testimony on those grounds (*People v. Clark, supra*, 63 Cal.4th at p. 603 [failure to make timely and specific objection forfeits claim of evidentiary error on appeal]; Evid. Code, § 353 [same]), and there is no indication an objection to testimony that exceeded the scope of proper expert opinion on the meaning of common gang terms would have been futile. (See *People v. Delgado* (2017) 2 Cal.5th 544, 582 [forfeiture doctrine properly applied when record does not suggest a proper objection would have been futile].)⁶ In fact, the record indicates the court may well have been receptive to an objection had one been made. On at least on one occasion during Detective Hooker’s direct testimony, the court sua sponte interjected to admonish the prosecutor to confine her questions to appropriate topics for expert testimony and not inquire specifically about Long. We have no difficulty applying the forfeiture doctrine in these circumstances.

Long’s related claim his counsel was ineffective for failing to object to testimony he now claims was improper also fails. “To establish ineffective assistance of counsel, a defendant must show

⁶ Although Long’s counsel objected to a general query whether Detective Hooker had noticed “anything significant” in the recorded conversation as calling for speculation, he did not object that portions of Detective Hooker’s subsequent testimony exceeded the proper scope of an expert opinion because they related to the speakers’ respective states of mind. (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1160 “[t]he overruling of an objection to one item of evidence does not necessarily mean an objection to different evidence would have been futile”].)

that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.” (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980; accord, *In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) ““In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.”” (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

There may well have been a reasonable, tactical basis for defense counsel's decision to forgo objections and more fully challenge those aspects of Detective Hooker's testimony on cross-examination. (See *People v. Majors, supra*, 18 Cal.4th at p. 403 [““whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence””]; see also *People v. Johnson, supra*, 60 Cal.4th at p. 980 [there is a presumption that challenged action or inaction is sound trial strategy; in reviewing a claim for ineffective assistance of counsel “we give great deference to counsel's tactical decisions”]; *People v. Gamache* (2010) 48 Cal.4th 347, 391 [same].) Indeed, on cross-examination defense counsel painstakingly questioned Detective Hooker on each aspect of his testimony concerning the recorded conversations. In overruling the prosecutor's objections to defense counsel's cross-examination, the court observed the prosecutor had “spent a long time on direct interpreting the

words” and defense counsel should have equal opportunity to challenge that interpretation. Detective Hooker conceded on cross-examination he had no specific information that Long had ordered a “hit” on any witness; he did not hear Long actually threaten Robins; it was possible Long was warning Robins to stay away from the neighborhood because he feared for her safety and was upset for having been arrested for a crime he did not commit.

Moreover, as discussed, much of Detective Hooker’s explanation of the meaning of terms used in gang culture was admissible, including the order to “park my car,” the significance of “snitching” and the meaning of “guns up” in response to those who “snitched” on Long to collect a reward. On this record, is not reasonably probable an objection to limited aspects of Detective Hooker’s testimony challenged on appeal would have resulted in a more favorable verdict.

3. Detective Hooker Did Not Testify to Hearsay

During direct examination the prosecutor asked Detective Hooker, “Now, by looking at all the tattoos that [Long] has and the field interview cards and the information you received from senior detectives did you form an opinion whether or not, first, [Long] claims or belongs to any particular criminal street gang in Los Angeles?” Detective Hooker replied, “yes,” and stated, “my opinion is that he is from the Shotgun Crip gang.” The prosecutor also asked whether Detective Hooker had any opinion as to whether Long remained active in the gang. Detective Hooker said he believed he was active. During cross-examination defense counsel asked Detective Hooker, “[Y]our only knowledge that Mr. Long was active in your opinion was based on talking to other gang investigators?” Detective Hooker responded, “Yes, and documentation that I reviewed.”

Long did not object to this testimony at trial. He now contends Detective Hooker’s opinion that Long remained active in the gang was based on hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665, 684 (*Sanchez*), decided after Long’s trial but before he was sentenced.⁷ In *Sanchez* the Supreme Court held a gang expert may not “relate as true case-specific facts asserted as hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.” (*Id.* at p. 686; see *ibid.* [“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

⁷ Apparently concerned about the legal effect of his counsel’s failure to object at trial, Long presented this argument as part of his claim of ineffective assistance of counsel. However, because *Sanchez* altered the rules governing the admissibility of expert-basis evidence established in pre-*Sanchez* decisions in effect at the time of Long’s trial (see *Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13 [disapproving *People v. Gardeley* (1996) 14 Cal.4th 605 “to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules”]), application of the forfeiture doctrine would be improper in these circumstances. (See *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [no forfeiture “where an objection would have been futile or wholly unsupported by substantive law then in existence”]; but see *People v. Perez* (2018) 22 Cal.App.5th 201 [defense counsel’s failure to object to expert’s testimony on case-specific hearsay in pre-*Sanchez* trial resulted in forfeiture of hearsay objection on appeal because previously decided cases should have alerted counsel to issue].) Accordingly, we consider the question of the admissibility of the evidence under *Sanchez*.

be maintained that the statements are not being admitted for their truth.”].)

Contrary to Long’s contention, Detective Hooker did not relate any hearsay statement in his testimony. He identified generally the sources he consulted and opined Long was an active member of the Shotgun Crips. This was permissible expert opinion testimony under *Sanchez*. (See *Sanchez, supra*, 63 Cal.4th at pp. 685-686 [“Any expert may still *rely* on hearsay in forming an opinion and may tell the jury *in general terms* that he did so. . . . 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”].)⁸

Long also contends, generally and without additional argument, that Detective Hooker’s testimony violated the federal confrontation clause as articulated in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. However, as discussed, Long fails to identify any particular hearsay statement Detective Hooker related to the jury, much less any testimonial hearsay that would constitute a confrontation clause violation. (See *Sanchez, supra*, 63 Cal.4th at p. 685

⁸ The *Sanchez* Court observed that the jury may repose greater confidence in an expert who describes in detail the bases for his or her opinion, rather than simply describing his or her sources in general. (See *Sanchez, supra*, 63 Cal.4th at p. 686.) Long’s counsel understood this principle, emphasizing in closing argument that Detective Hooker’s opinion that Long remained active in his gang was suspect because it was not based on first-hand knowledge but simply on information he had obtained from other officers.

[confrontation clause implicated when expert testifies to case-specific testimonial hearsay on which his or her opinion is based].) He has not shown error.

4. *The Court's Evidentiary Ruling Limiting Defense Counsel's Question, If Error at All, Was Harmless*

During cross-examination Long's counsel asked Detective Hooker, "[I]f a gang member would go to an event [attended by rival gang members,] would they protect themselves in some way based on your training and experience?" Detective Hooker responded, "Usually, yes." In response to the prosecutor's objection that the hypothetical was vague and improper as phrased, the court stated, "Actually, I don't think it is a hypothetical" and overruled the objection. Long's counsel reiterated, "If you know there are going to be rival gangs there are you going to protect yourself?" Detective Hooker responded, "Absolutely." When Long's counsel then asked how gang members would protect themselves, the prosecutor objected the question was vague and irrelevant. During the sidebar conference that followed, the court stated, "As I see where this is going, there are two lines that can come from it. Either the victim, Mr. Smith, was there and had people with him . . . to protect him or the inference that Mr. Smith was somehow armed. Is that where you're going with this?" When Long's counsel suggested he was, the court stated, "there is zero evidence that Mr. Smith was armed." Long's counsel stated, "I'm pointing out it was preposterous there was one gun in the club. I'm not suggesting anybody specifically had the gun." The court sustained the prosecutor's objection, ruling, "there is no evidence of that." After the sidebar Long's counsel asked Detective Hooker, "So typically when multiple gangs come to parties, some

people are armed, correct?” Detective Hooker replied, without objection, “Yes.” When defense counsel continued, “They don’t necessarily use those guns, but they have guns on them?” the court sustained the prosecutor’s objection on relevance grounds.

Long contends the court erroneously prohibited him from asking a proper hypothetical question that would have resulted in expert testimony confirming the likelihood there was more than one firearm on the premises. We need not determine whether the court abused its discretion in sustaining the prosecutor’s objection to the question posed. Detective Hooker specifically testified that, in his training and experience, gang members would routinely come armed to social gatherings attended by rival gang members, the very testimony sought by Long and argued by his counsel in closing argument. The court’s limited evidentiary ruling precluding further inquiry confirming whether “armed” meant in possession of “guns,” if error at all, was harmless. (See *People v. Brooks* (2017) 3 Cal.5th 1, 47-48 [exclusion of evidence harmless when, “even if the evidence in question should have been allowed,” there is no reasonable probability defendant would have obtained a more favorable result if it had been admitted]; *People v. Masters* (2016) 62 Cal.4th 1019, 1062 [same].)

5. *The Trial Court Did Not Abuse Its Discretion in Permitting the People To Amend the Information To Add the Aggravated Assault Charges*

An information may be amended at any stage of the proceedings provided the amendment is supported by evidence at the preliminary hearing and does not prejudice the defendant’s substantial rights. (§ 1009; *People v. Goolsby* (2015) 62 Cal.4th 360, 367; *People v. Birks* (1998) 19 Cal.4th 108, 129; accord,

People v. Hamernik (2016) 1 Cal.App.5th 412, 424.) The trial court’s decision to permit an amendment is reviewed for abuse of discretion. (*Hamernik*, at p. 424 [court’s ruling granting or denying amendment “will not be disturbed on appeal absent a clear abuse of discretion”]; *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1580-1581 [same].)

Long does not contend the aggravated assault charges, lesser related offenses to the attempted murder charges, were not supported by evidence presented at the preliminary hearing. Rather, he argues the belated amendment, made at the close of evidence, was prejudicial because he had no opportunity to consider and present evidence to rebut the new charges. Had the aggravated assault charges been timely filed, Long argues, he could have emphasized evidence at trial that the individual victims had retreated from the area where the shooting occurred, casting doubt on whether any of the victims was at imminent risk of a battery. (See § 240 [assault is unlawful attempt, coupled with a present ability to commit violent injury on person of another]; *People v. Williams* (2001) 26 Cal.4th 779, 786 [“[a]n assault is an incipient or inchoate battery”].)

Contrary to Long’s contention, the amendment did not alter his substantial rights to present a defense. The same incentive to proceed on the theory that the injured victims were not in danger of an imminent battery was available to Long in defending against the more serious attempted murder charges—that the victims were outside the “kill zone.”⁹ Yet he elected not to

⁹ “[A] shooter may be convicted of multiple counts of attempted murder on a “kill zone” theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim

present that theory, relying instead on an identity defense. Long's assertion that, had he been on notice of the aggravated assault charges earlier in the trial, he could have emphasized his singular focus was on Smith, not any of the individuals near Smith, also misses the mark. "[A] specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent." (*People v. Williams, supra*, 26 Cal.4th at p. 786.)

In sum, the aggravated assault charges, indisputably supported by evidence taken at the preliminary hearing, did not prejudice Long's defense. Although Long may have preferred the case to go to the jury on the more serious attempted murder charges alone, which were more difficult to prove and required a specific intent not at issue in the aggravated assault offenses, the addition of the aggravated assault charges to conform to proof did not deprive Long of notice or prejudice his substantial rights to defend himself at trial. The trial court did not abuse its discretion in permitting the amendment.

6. *Substantial Evidence Supported Long's Aggravated Assault Convictions*

Long's alternate argument that his convictions for assault with a firearm are not supported by substantial evidence also fails.¹⁰ Emphasizing testimony by one of the investigating

(i.e., the "kill zone") as the means of accomplishing the killing of that victim." (*People v. Perez* (2010) 50 Cal.4th 222, 232; accord, *People v. Smith* (2005) 37 Cal.4th 733, 745-746.)

¹⁰ In considering a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.

officers that some bullets were found lodged in the rug on the floor suggesting the shooter fired in a downward direction, Long argues it was impossible for the jury to find he shot his firearm in a manner that created a “direct and probable” risk of a battery to Mohammad, Krest, Belisle, Morgan and Johnson. However, Long disregards other evidence, most particularly that all five victims were struck by bullets (including evidence that Belisle was shot in the buttocks and Mohammad in the arm) that indicated not all the shots were fired toward the floor, substantial evidence that supported the jury’s aggravated assault findings. (See *People v. White* (2015) 241 Cal.App.4th 881, 884 [that appellant “had poor aim” is not a defense to assault].)

[Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. . . . A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Zaragoza* (2016) 1 Cal.5th 21, 44; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) “Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal.” (*People v. Clark* (2016) 63 Cal.4th 522, 626.)

7. *Long's Sentence Must Be Modified*

In imposing Long's sentence the trial court stated the 15-year minimum parole eligibility term required under section 186.22, subdivision (b)(5), for any felony punishable by a life sentence that was committed for the benefit of a criminal street gang "largely becomes a nullity" because it was subsumed within Long's 50-year-to-life sentence for murder. Beyond that observation, the court's oral pronouncement of sentence did not refer to that provision. However, the minute order from the sentencing hearing indicates the court imposed and stayed an additional 15 years in state prison pursuant to section 186.22, subdivision (b)(5), and the abstract of judgment reflects a stay of the gang enhancement on the murder count.

As the Supreme Court explained in *People v. Lopez* (2005) 34 Cal.4th 1002, 1009, although it may appear that section 186.22, subdivision (b)(5)'s 15-year minimum parole eligibility term has no practical effect for first degree murderers, who have a minimum parole eligibility term of at least 25 years, "[t]he true finding under section 186.22(b)(5), which provides for a lower minimum term, 'is a factor that may be considered by the Board of Prison Terms when determining a defendant's release date, even if it does not extend the minimum parole date per se.'" Accordingly, it was error for the court not to impose the subdivision (b)(5) term, as indicated at the hearing, or to impose and stay the term, as reported in the minute order and abstract of judgment. We therefore modify the judgment to properly reflect the alternate 15-year minimum parole eligibility term specified in section 186.22, subdivision (b)(5).

DISPOSITION

The judgment is modified to accurately reflect the 15-year minimum parole eligibility alternate penalty in section 186.22, subdivision (b)(5). The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.*

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