Filed 4/14/17 P. v. Torres CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN TORRES et al., Defendants and Appellants.	B266849 (Los Angeles County Super. Ct. No. PA075068)

APPEALS from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan Torres.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Jimmy Diaz.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Jonathan Torres and Jimmy Diaz of attempted murder in connection with the a gang-related shooting. We affirm the convictions over contentions the trial court erred by refusing to allow read-back of testimony during deliberations, refusing to instruct the jury on self-defense, and admitting photographic lineup and in-court identifications by the victim. We also reject a challenge to the sentence the trial court imposed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Shots*

Oscar De La Cruz, Sr. (Oscar) and his daughter arrived home in his truck one evening at approximately 11:00 p.m. with a birthday cake for one of his adult sons, Christian. His other two sons, Oscar De La Cruz, Jr. (Oscar Jr.) and Ismael, and a family friend, Peter Romero, were inside the house for the birthday gathering. Oscar told his daughter to take the cake inside while he parked his truck.

As Oscar was standing in his driveway, he saw two Hispanic men wearing dark clothing walking toward him on the street. He "thought they were going to do something" because "they looked strange." He also saw them trying to hide when a police officer on a motorcycle passed by.

Oscar asked the two men what they wanted. They did not answer, but kept staring at him. One of them, whom Oscar

identified at trial (but not at the preliminary hearing) as Diaz,[1] took a gun from his waistband area and shot Oscar in the abdomen as Oscar tried to jump out of the way. Diaz "shot the whole gun," hitting Oscar six times. Then the second man, whom Oscar identified at trial (but again not at the preliminary hearing) as Torres, removed a gun from his waistband area and shot Oscar once in the upper left arm. Oscar fell to his knees, and the two men ran down the street. Oscar, who began to feel dizzy and was losing his hearing, saw Romero come out of the house, followed by Christian and Ismael, and chase the two men.

Oscar was taken to the hospital. While he was in the hospital, he met with Detective Craig Hewitt the day after the shooting and identified Diaz and Torres in six-pack photographic lineups. Detective Hewitt testified Oscar was "wide awake and had no problems communicating." Oscar also testified he was awake during the identification.

Oscar was in the hospital for a month. He had numerous bullet scars, which he showed to the jury.

B. *Pursuit*

Romero and Oscar Jr., who were inside the house during the attack, heard gunshots and ran outside. They saw Ismael and Christian, who were already outside, hiding behind a car in the driveway and screaming, "You shot my dad, you shot my dad." Oscar told Romero he was hurt and to call an ambulance.

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1 Oscar stated he did not want to testify at trial because he was afraid, and only came to court because he was ordered by the court to appear. Oscar said he did not identify Diaz and Torres at the preliminary hearing because he was afraid for his children and his family.

Romero saw two men, whom Romero identified at trial as Diaz and Torres, standing five feet from Oscar and hiding something in their pockets.[2] When the two men ran away, Romero, Christian, and Ismael chased them. Oscar Jr. stayed with his father, found a blanket, and covered him with it.[3]

As Romero, Christian, and Ismael pursued the two assailants, Torres fell, and Romero caught up with him. Torres still had the gun in his hand after he fell and was trying to put it away in his pocket. Then Torres pointed the gun at Romero, and Romero heard clicks. Ismael said, "Watch out for the gun." Romero, Ismael, and Christian then beat up Torres until he was unconscious and bleeding. The gun ended up on the ground. Ismael and Christian went back to check on Oscar, while Romero stayed with Torres until a police officer arrived. When the police arrived, Romero showed them the gun on the ground.

C. *Investigation*

Officer Michael Ornelas arrived at the scene and found two motor officers standing next to Torres, who was unconscious and bleeding from his head, and Romero, who was handcuffed.

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2 Romero admitted that at the preliminary hearing he testified he did not recall what had happened that night. He stated he understood the meaning of the phrases "snitches get stitches" and having "paperwork on you" (witnesses who testify get beat up, stabbed, or killed) but he was not afraid. Romero stated friends had discouraged him from testifying, but he explained, "You gotta either fear God or fear man." He said he took a walk and decided he "wasn't going to be scared of nobody."

3 Oscar Jr. testified he did not want to be at the trial, but appeared because he had been taken into custody the last time he had refused to come to court.

Officer Ornelas then went to the De La Cruz home and observed Fire Department paramedics treating Oscar. Officer Ornelas recovered .38 and .45 caliber casings and fragments and Torres's wallet on the ground in front of the house. Officers also recovered near Torres a .38 caliber gun with a broken handle and a bullet in the cylinder.

Meanwhile, Officer Allan Flores responded to an intersection near the De La Cruz home and observed Diaz sitting on a bus stop bench with another police officer. Diaz was grabbing his leg and appeared to be in pain. Officer Flores also saw and recovered a .45 caliber semiautomatic handgun with an empty magazine approximately 25 feet from Diaz. The slide was in the forward position, as though it were ready to fire. Criminologists with the Los Angeles Police Department determined all of the .38 caliber casings were discharged from the same firearm and all of the .45 caliber casings were discharged from the same firearm.

D. *Charges*

The People charged Torres and Diaz with attempted willful, deliberated, and premeditated murder (Pen. Code., §§ 187, subd. (a), 664)[4] and carrying a loaded firearm while an active participant in a criminal street gang (§ 25850, subds. (a), (c)(3)). The People also charged Torres with possession of a firearm by a felon (§ 29800, subd. (a)(1)) and possession of ammunition (§ 30305, subd. (a)(1)). The People alleged Torres and Diaz committed all of the crimes 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

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[4] Statutory references are to the Penal Code

by the gang, within the meaning of section 186.22, subdivisions (b)(1)(A) and (b)(1)(C). In connection with the attempted murder count, the People alleged Torres and Diaz personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury or death, within the meaning of section 12022.53, subdivisions (b), (c), and (d), and they were principals in an offense committed with the use or discharge of a firearm and violated section 186.22, within the meaning of section 12022.53, subdivision (e). Finally, the People alleged Torres served three prior prison terms for felonies within the meaning of section 667.5, subdivision (b). The People also alleged the attempted murder charge was punishable in state prison for life with a minimum parole of 15 calendar years, pursuant to section 186.22, subdivision (b)(5).

E. *Gang Evidence*

Torres and Diaz admitted to several police officers who testified at trial that they are members of a criminal street gang, Torres of the Pacoima Brownstone Locos with a moniker of Malo and Diaz of the Paxton Street Locos with a moniker of Cartoon. There was also evidence Oscar Jr. and Christian are members of the Clanton 14 criminal street gang.

Officer Ethan Livesey, who worked over 10 years in gang enforcement, testified for the People as an expert on criminal street gangs. He stated the Brownstone and Paxton Street Locos are affiliated gangs: "They are considered two separate gangs, but they are so closely tied together, they are sometimes almost referred to as the same gang." He explained a member of one of the two gangs will identify himself as a member of the other

gang, and members of the two gangs will commit crimes together. Livesey also stated Clanton 14 is a rival of the Brownstone and Paxton Street Locos, and the two sides were in a turf battle in Pacoima because Clanton 14 was starting to move into the territory of the Brownstone Locos.

In response to a hypothetical question mirroring the facts of this case, Officer Livesey opined that the two individuals committed the crime for the benefit of and in association with the Brownstone and Paxton Street Locos "because they are committing an act of violence against a rival gang. Basically, they are carrying out a mission to attack a rival gang member to . . . show that they still have power, that they are willing to commit acts of violence on behalf of their gang. And it's also committed in association because you have two members from the same gang who are working together in association to commit that crime." He also testified an attack by members of the Brownstone or Paxton Street Locos on a member of the Clanton 14 gang benefits the Brownstone and Paxton Street Locos because news of the attack will spread in the community and boost the status of attacking gangs.

F. *Conviction*

The jury convicted Torres and Diaz on all counts, found they committed the attempted murder willfully, with deliberation, and with premeditation, and found true the gang allegation under section 186.22, subdivision (b)(1)(C) as to the attempted murder counts, the gang allegation under section 186.22, subdivision (b)(1)(A) as to the remaining counts, and all of the firearm allegations. The trial court sentenced both defendants on count one to life imprisonment with the possibility

of parole, with a minimum parole eligibility term of 15 years, pursuant to section 186.22, subdivision (b)(5). In addition, the court imposed a sentence of 25 years to life for the firearm use enhancement under section 12022.53, subdivision (d). The court also imposed but stayed execution of sentences on the remaining counts and enhancements under section 654, and dismissed the prior prison term allegations as to Torres.

DISCUSSION

A. *The Trial Court Did Not Violate Defendants' Rights by Prohibiting Read-back Because the Court Did Not Prohibit Any Read-back*

During deliberations the jury sent the court a note asking for a "transcript of the testimony of Peter Romero [and] Oscar De La Cruz, Sr." Pursuant to the parties' agreement, the court gave the following response:

"— A transcript is not possible

"— My court reporter informs that the full testimony of both witnesses will take two hours to prepare and then 3 1/2 hours to read back.

"— Is it possible to narrow your request to particular areas of their testimony?"

The jury never responded to the court's question before reaching and returning its verdicts.

Diaz argues the court violated his statutory rights under section 1138[5] and his constitutional rights to a unanimous jury, a

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[5] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the

fair trial, and due process "by prohibiting jurors from their requested readbacks." Diaz argues the court erred "by outright prohibiting" the read-back of testimony requested by the jury and refusing "to provide a readback."

The problem with Diaz's argument is that the jury did not request, and the trial court did not refuse to have the court reporter read back, any testimony. The jury asked for transcripts. They trial court denied the request for transcripts, and Diaz does not contend the trial court erred by denying that request. Although the jury did not ask for read-back of any testimony, the trial court raised that possibility for the jurors to consider. Indeed, rather than prohibiting read-back, the trial court, after denying the jury's request for transcripts, took the additional step of trying to assist the jurors by reminding them, as the court had previously instructed them, they could request read-back of testimony if they wanted it. They did not.

Diaz unfairly characterizes the court's agreed-upon answer to the jury's question as giving "the jury an all or nothing choice—narrow your request or get nothing." Diaz's reading of the court's answer is unreasonable. The court told the jury that, although transcripts were not possible, read-back was, and asked the jurors whether, if they wanted read-back, it was possible for them to narrow the read-back of testimony to what they wanted to hear. This kind of response to a request for read-back occurs

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testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

in criminal and civil courtrooms throughout the state, and the court's response was entirely proper.

The cases cited by Diaz are all distinguishable because, unlike this case, they involved refusals to allow court reporters to read back testimony to the jurors. For example, in *People v. Butler* (1975) 47 Cal.App.3d 273 the trial court refused the jury's request during deliberations for read-back of five witnesses who had testified at trial, commenting, "That's practically the whole trial" and "We'll be here forever." (*Id.* at pp. 276, 278, 279.) In holding the refusal to allow read-back was reversible error, the court in *Butler* faulted the trial court in that case for not doing what the trial court in this case properly did: "No attempt was made by the court to attempt a narrowing down to portions of the particular witnesses' testimony in order to satisfy the jury's request [citation] or to 'pinpoint' what the jurors wanted . . . ." (*Id.* at p. 281.) In *People v. Litteral* (1978) 79 Cal.App.3d 790 the trial court refused a request for read-back of testimony because the court reporter was ill, telling the jurors, "'There's just no way we can do it.'" (*Id.* at p. 793.) The court in *Litteral* emphasized that, as in *Butler*, the trial court "rejected the request without explaining possible alternatives." (*Id.* at p. 795.) And *People v. Henderson* (1935) 4 Cal.2d 188 involved a very different situation. In that case the Supreme Court reversed a conviction because the jury asked for read-back of the testimony of a witness regarding a specific subject matter, and the court reporter selected some but not all of the testimony "touching on" that subject matter. (*Id.* at pp. 193-194.)

People v. Anjell (1979) 100 Cal.App.3d 189, disapproved on another ground in *People v. Mason* (1991) 52 Cal.3d 909, 942-943, also cited by Torres, actually supports the People's position. The

court in *Anjell* held it was *not* error to "to inform the jurors of the time involved in rereading the requested testimony, so that they could make a knowledgeable decision as to whether they desired to hear it." (*Anjell*, at pp. 202-203; see *People v. Gurule* (2002) 28 Cal.4th 557, 649-650 [trial court did not abuse its discretion or coerce the jury by advising a juror the estimated time for reading back the requested testimony was three hours and by asking, "'Was there a particular part of any testimony that you were seeking be reread?'"]; *People v. Warren* (1900) 130 Cal. 678, 681-682 [trial court did not deny jury's right to read-back by informing the jury reading the 300 pages of testimony would take two hours, and the jury reached a verdict before the testimony could be read].)

It is true, as Diaz points out, the trial court in *Anjell* made additional statements indicating the jurors were entitled to read-back of testimony if they wanted it: "'So you can see that if you add up those three you have got an awful lot of hours of testimony. Now that is not to say that you can't have that if that's what you need in your deliberations. . . . And what I am going to ask you to do is retire to the jury room and have a discussion as to what you need and then you write me another note and let me know and *whatever it is that the jury decides they need, that's what you're entitled to have if you need it*.'" (*Anjell*, *supra*, 100 Cal.App.3d at p. 202, fn. 4.) The trial court here instructed the jury before deliberations that the court reporter was making a record of the trial proceedings, and the jury had the ability to ask the court reporter to read the record if the jurors decided it was necessary. Perhaps the trial court could have included a reinforcement of its prior instruction and reminded the jurors in its response to their question they could

have read-back of any testimony they wanted. But the trial court did not abuse its discretion in failing to instruct the jury on this point again, particularly when, as noted, the jurors' question did not even ask for read-back. (See *People v. Williams* (2015) 61 Cal.4th 1244, 1267 [where, as here, """"the original instructions are themselves full and complete, the court has discretion under . . . section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information""""]; *People v. Hodges* (2013) 213 Cal.App.4th 531, 539 ["'[w]e review for an abuse of discretion any error under section 1138"'].)

B. *The Court Did Not Err in Refusing To Give an Instruction on Self-defense Because There Was No Substantial Evidence To Support the Defense*

At trial, Diaz and Torres asked the court to give jury instructions on self-defense, suggesting they were defending themselves from an attack by the De La Cruz brothers, who were members of a rival gang. Counsel argued there was sufficient evidence to give such instructions because a percipient witness, Sergio Cabrera, testified he saw one of the two individuals who were chasing another individual with "what appeared to be a gun in a shooting manner." Counsel also argued the court should instruct on self-defense because the gang expert testified "gang members would potentially arm themselves up," and Oscar admitted he had lied about what happened. The trial court apologized to counsel and stated, "It's really not even close. There is no substantial evidence of self-defense, so I am not going to give self-defense instructions." At a subsequent discussion about the jury instructions, counsel for Diaz and Torres renewed their requests for self-defense instructions, including attempted

voluntary manslaughter based on imperfect self-defense. The trial court again denied the requests, stating, "I just don't think there is sufficient evidence of self-defense, imperfect or otherwise, heat of passion, any kind of basis for attempted voluntary manslaughter."

Torres argues the trial court violated his constitutional rights by refusing to instruct the jury on perfect and imperfect self-defense. Torres argues Cabrera's testimony, the number of bullet casings at the scene, the lack of Torres's fingerprints on the .38 caliber revolver, and the fact the De La Cruz brothers were affiliated with a rival gang, "suggested that some kind of a gang confrontation occurred between the De La Cruz family and [Diaz and Torres] and therefore [Torres] could have been acting in self-defense."

"'The doctrine of self-defense embraces two types: perfect and imperfect.'" (*People v. Iraheta* (2014) 227 Cal.App.4th 611, 620.) "Perfect self-defense requires that a defendant have an honest and reasonable belief in the need to defend himself or herself." (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168; accord, *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1227.) Perfect self-defense exonerates the defendant completely. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744.)

"Imperfect self-defense, which reduces murder to voluntary manslaughter, arises when a defendant acts in the actual but unreasonable belief that he is in imminent danger of death or great bodily injury." (*People v. Duff* (2014) 58 Cal.4th 527, 561-562; accord, *Iraheta*, *supra*, 227 Cal.App.4th at p. 620; see *People v. Simon* (2016) 1 Cal.5th 98, 132 ["[i]mperfect self-defense differs from complete self-defense, which requires not only an honest but

also a reasonable belief of the need to defend oneself"].) "Unreasonable self-defense is 'not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter.'" (*People v. Elmore* (2014) 59 Cal.4th 121, 134.) Neither perfect nor imperfect self-defense may "'"be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified."'" (*People v. Enraca* (2012) 53 Cal.4th 735, 761; see *People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

The trial court need only instruct on self-defense if there is substantial evidence to support the defense. (See *Simon*, *supra*, 1 Cal.5th at p. 132; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1048; *People v. Stitely* (2005) 35 Cal.4th 514, 551.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8; see *People v. Wilson* (2005) 36 Cal.4th 309, 331 ["'[s]ubstantial evidence is "evidence sufficient 'to deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak"'"].)

There was no evidence Torres or Diaz had an honest and reasonable belief he needed to defend himself or acted in an actual or unreasonable belief he was in imminent danger of death or great bodily injury. There was no substantial evidence any of the De La Cruz brothers were present when Torres and Diaz shot Oscar, let alone were present with guns and shot at Torres and Diaz. Cabrera, on whose testimony Torres and Diaz rely, stated only that *after* he heard shots fired, he saw two individuals running down the street chasing another individual, and one of

the individuals in pursuit was "making a shooting motion" "as if he [was] shooting." Cabrera testified, however, he could not see whether either of the two people running had a gun in his hand. Moreover, although Torres's fingerprints may not have been on the gun the police found near him, there was no evidence of anyone else's fingerprints on the gun. And the fact that some of the De La Cruz brothers may have been gang members, or that "nearly everyone involved in this shooting was connected to one or more gangs," is not substantial evidence that anyone actually attacked Torres and Diaz and caused them to fear, reasonably or unreasonably, they were in danger. (See *People v. Young* (2005) 34 Cal.4th 1149, 1200 ["[t]he trial court need not give instructions based solely on conjecture and speculation"]; *People v. Waidla* (2000) 22 Cal.4th 690, 735 ["'speculation is not evidence, less still substantial evidence'"].) The trial court properly denied the requests for jury instructions on self-defense.

C. *The Trial Court Did Not Err in Admitting Oscar's Six-Pack Photographic Lineup Identification Because It Was Not Suggestive, Let Alone Unduly Suggestive*

Torres argues the trial court violated his federal and state constitutional rights by admitting Oscar's "hospital bed six-pack identification." Torres contends the "hospital identification . . . was not reliable and was subject to a strong possibility of mistaken identification" because of Oscar's condition when Detective Hewitt showed him the six-pack photographic lineups. According to Torres, at the time of the identification Oscar was in the intensive care unit and "could barely move, was heavily medicated, and had trouble seeing," and the police should have waited until Oscar "was far more stable

and able to clearly make an analysis of the six-pack without feeling pressure to make a selection while in a compromised state."

"In determining whether a defendant's right to due process is violated by the admission of identification evidence, we consider '(1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances.'" (*People v. Clark* (2016) 63 Cal.4th 522, 556; see *People v. Avila* (2009) 46 Cal.4th 680, 698 ["'[d]ue process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable'"].) "'If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Where the identification procedures are not unduly suggestive, the court need not address the issue whether the identification is reliable. (*People v. Cook* (2007) 40 Cal.4th 1334, 1355; see *People v. Alexander* (2010) 49 Cal.4th 846, 902 ["'[o]nly if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification'"]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1224, fn. 8 ["[o]ur holding that the lineups were not suggestive makes it unnecessary to decide whether the in-court identification was reliable despite the suggestiveness"].) As Torres acknowledges, "'what triggers due process concerns is police use of an unnecessarily suggestive identification procedure.'"

Torres contends Oscar's identification was unreliable but he does not argue it was suggestive, unduly or otherwise. Torres

does not argue there was anything about the photographs Detective Hewitt showed Oscar in the hospital that caused either defendant "'to "stand out" from the others in a way that would suggest the witness should select him.'" (*Avila*, *supra*, 46 Cal.4th at p. 698; see, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1162 [defendant claimed photographic lineup was unduly suggestive because "he was the only person whose photograph depicted an individual wearing an orange shirt that resembled a 'jail jumpsuit'"]; *People v. Carlos* (2006) 138 Cal.App.4th 907, 912 [six-pack photographic lineup was unduly suggestive because the defendant's name and identification number appeared directly below his photograph]; *People v. West* (1984) 154 Cal.App.3d 100, 105 [defendant claimed his face in the photograph "was turned a different direction than the others" and had "a 'yellow cast'"].) Nor does Torres argue Detective Hewitt made any statements or movements suggesting which photograph Oscar should select. (See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 124 [photographic lineup was not unduly suggestive where the police detective "never suggested or intimated by word or gesture that [the witness] should pick a particular photograph"]; *People v. Pijal* (1973) 33 Cal.App.3d 682, 689 [suggestive comments by the police to the witness is an indication the identification was unduly suggestive].) To the contrary, Torres concedes "the six-pack was not unduly suggestive" and "this case does not involve a suggestive six-pack composition." Torres's failure to argue and prove the photographic identification was unduly suggestive dooms his constitutional challenge to its admissibility. (See *Ochoa*, *supra*, 19 Cal.4th at p. 413 ["for a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e.,

it must, wittingly or unwittingly, initiate an unduly suggestive procedure"].)[6]

D. *The Trial Court Did Not Err in Sentencing Torres and Diaz under Section 186.22, Subdivision (b)(5)*

"[S]ection 186.22, subdivision (b)(5) . . . provides that a defendant who commits 'a felony punishable by imprisonment in the state prison for life' for the benefit of a criminal street gang 'shall not be paroled until a minimum of 15 calendar years have been served.'" (*People v. Montes* (2003) 31 Cal.4th 350, 352; see *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [where a defendant is convicted of a violent felony punishable by life imprisonment, "section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole"]; *People v. Williams* (2014) 227 Cal.App.4th 733, 736 ["[s]ection 186.22, subdivision (b)(5) provides that the 15-year minimum parole eligibility requirement should be imposed instead of the [criminal street gang] sentence enhancement . . . if the defendant is convicted 'of a felony punishable by imprisonment in the state prison for life'"].) Attempted willful, deliberate, and premeditated murder is punishable by life imprisonment. (See § 664, subd. (a) ["if the crime attempted is willful, deliberate, and premeditated murder . . . the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of

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[6] Torres also argues the trial court should not have allowed Oscar to identify Torres and Diaz in court because the prior six-pack photographic lineup identification tainted the in-court identification. Because the former was not unduly suggestive, however, there was no error in admitting the latter. (See *Yeoman*, *supra*, 31 Cal.4th at pp. 123-124.)

parole"]; *People v. Gonzalez* (2012) 54 Cal.4th 643, 654 ["if either the defendant or an accomplice formed the intent to kill with premeditation and deliberation, punishment for the attempted murder is increased to life imprisonment with possibility of parole"].)

As noted, the jury found true the gang allegation under section 186.22, subdivision (b)(1)(C), as to the attempted murder count. The trial court did not impose the 10-year enhancement under that provision, but instead imposed the alternative sentence under section 186.22, subdivision (b)(5), of life imprisonment with a minimum parole period of 15 years.

Torres argues that, because the jury returned true findings on the gang enhancement under section 186.22, subdivision (b)(1)(C), and not under section 186.22, subdivision (b)(5), the court should have imposed the 10-year enhancement under the former provision and not sentenced Torres under the latter provision. Torres argues the People must plead and prove all enhancements, and, "while both specific gang enhancements were pled, only one was 'found true' by the trier of fact": the 10-year enhancement under 186.22, subdivision (b)(1)(C). Torres asks for a "reduction" in his sentence enhancement from 15 years to 10 years.

It is true, as Torres argues, that under section 1170.1, subdivision (e), "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Section 186.22, subdivision (b)(5), however, is not an enhancement. It is an "*alternate* penalty for the underlying felony itself." (*People v. Jefferson* (1999) 21 Cal.4th 86, 101; see *People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7 ["[s]ection 186.22, subdivision (b)(5) is

an alternate penalty provision that applies to any gang-related underlying felony 'punishable by imprisonment in the state prison for life'"]; *People v. Campos* (2011) 196 Cal.App.4th 438, 451 ["section 186.22, subdivision (b)(5) does not prescribe an additional term of years to be added to a base term and is therefore not an enhancement"], disapproved on another ground in *People v. Fuentes* (2016) 1 Cal.5 218, 281, fn. 8.)[7] Indeed, as the People point out, because section 186.22, subdivision (b)(5) applies, the trial court would have committed error by imposing the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). (See *Lopez*, *supra*, 34 Cal.4th at p. 1004 ["[s]ection 186.22(b)(1)(C) does not apply . . . where the violent felony is 'punishable by imprisonment in the state prison for life,'" and "[i]nstead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole"]; *People v. Fiu* (2008) 165 Cal.App.4th 360, 390 ["[i]f the parole limitation of subdivision (b)(5) is applicable, the 10-year enhancement is not"].

E. *There Was No Cumulative Error*

Torres argues the cumulative effect of the trial court's errors compels reversal. Because the trial court did not err, however, there is no cumulative error. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 910 ["[b]ecause defendant has failed to demonstrate any error, there is no prejudicial cumulative effect"]; *People v. McWhorter* (2009) 47 Cal.4th 318,

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[7] An enhancement is "an *additional term* of imprisonment added to the base term," while an "alternate penalty" provision specifies a different, increased sentence for the underlying offense. (*Jefferson*, *supra*, 21 Cal.4th at p. 101.)

377 [no cumulative error where no error]; *People v. Ramirez* (2006) 39 Cal.4th 398, 465 ["we discern no error when defendant's contentions are considered individually, and therefore find no cumulative error"].)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

SMALL, J.*

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