Filed 5/16/17 P. v. Valle 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. BRYAN VALLE, Defendant and Appellant.	B276970 (Los Angeles County Super. Ct. No. LA074974-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Affirmed.

Lynette Gladd Moore, 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, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Bryan Valle appeals his conviction of assault with a firearm, including a gang enhancement. He contends that a special instruction on assault given at the prosecutor's request was argumentative and lightened the prosecution's burden of proof. He further contends the prosecutor committed misconduct by arguing that the jurors could use evidence of the gang's predicate acts to establish the truth of the charges against him and his co-defendant, and that the trial court erred in refusing to admonish the jury after the argument was made. We conclude any error in giving the special instruction and in failing to admonish the jury was harmless. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellant Bryan Valle and his co-defendant, Roger Ruiz, were charged by information with assault with a firearm (Pen. Code, § 245, subd., (a)(2)), assaulting a peace officer with a firearm (§ 245, subd., (d)(1)), and conspiracy to commit murder (§ 182, subd., (a)(1).)[1] It was further alleged that appellant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members.[2] (§ 186.22, subd. (b)(1).)

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[1] Undesignated statutory references are to the Penal Code.

[2] The information also alleged that Ruiz personally used a firearm within the meaning of section 1203.06, subdivision (a)(1)
(Fn. continues on the next page.)

B. *Evidence at Trial*

1. *Prosecution Evidence*

a. *Percipient Witnesses*

The two primary percipient witnesses at trial were Pasadena Police Department Detective David Llanes and Deputy U.S. Marshal Kevin Clarke. Detective Llanes testified that on August 13, 2013, at approximately 4:00 p.m., he was assisting a team of U.S. Marshals in their attempt to arrest a sex offender. Detective Llanes was watching the building where the suspect was believed to be hiding. He was in an unmarked car, wearing casual clothing. The car had tinted windows. Detective Llanes noticed a group of four people -- appellant, Ruiz, a third man and a woman -- standing on a landing at a nearby apartment. At various times, the male members of the group came to take a closer look at the detective's car. First, Ruiz came down, and made what appeared to be gang signs. Next, the unidentified man came close to the vehicle and

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and 12022.5, subdivision (a) for purposes of count one; that Ruiz personally used a firearm within the meaning of section 12022.53, subdivision (b) for purposes of counts two and three; that appellant and Ruiz used a firearm within the meaning of sections 12022.53, subdivision (b) and 12022.5, subdivisions (a) through (d) for purposes of count two; and that a person used a firearm within the meaning of section 12022.53, subdivision (b) for purposes of counts two and three. As appellant points out, the information is not in the clerk's transcript. However, it was read into the record by the trial court, and the parties agree on its content. Ruiz is not a party to the instant appeal.

stared intently at the passenger window. Finally, appellant came down, cupped his hand over his eyes and peered into the window.[3] The detective rolled down his window, pointed his service revolver at appellant and yelled: "Police. Get the fuck away from my car." Appellant appeared startled and said: "Oh fuck, okay. Okay man. Okay."

Appellant returned to the landing where he engaged in a heated discussion with the others. Appellant, Ruiz and the third man came downstairs, walked past the detective's car, and turned into an apartment complex behind his vehicle. The detective told the other members of the team about the confrontation, put on a protective vest, and went to his trunk to get his shotgun. A few minutes later, another member of the team broadcast a warning that the three men were returning. Detective Llanes saw them walking side-by-side, approaching his vehicle from the rear. Slung over Ruiz's shoulder was a red nylon bag, the type used to hold a folding chair and long enough to hold a rifle or similar weapon. When the men got near the detective's car, they formed a single file line, with Ruiz in front and appellant directly behind him. Ruiz and appellant began walking in a crouch. Ruiz removed the bag from his shoulder and held it in a position Detective Llanes described as a "low ready" firing position, with one hand supporting the back and the other toward the front.

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[3] Detective Llanes saw appellant reach toward his waistband, but did not see a weapon or any indication of one.

Fearing he was about to be attacked, Detective Llanes slipped out of the driver's side door and moved stealthily to the rear of the vehicle, continuing to watch the men through the vehicle's windows. He saw Ruiz, then standing between the vehicle's front mirror and the right front tire, point the red bag at the windshield. Detective Llanes sprang up behind the three men and yelled "Police -- hands up. Get on the ground" and "Drop the gun. Drop the gun." Ruiz dropped the bag and ran. Appellant and the third man also ran, in a different direction. The detective chased Ruiz, who was apprehended at the scene by another officer.[4]

Detective Llanes returned to where the red bag was lying and saw a pistol grip protruding from the top. The bag was booked and found to contain a shotgun with a pistol grip. The investigating officer who examined the shotgun after it was booked testified that it was loaded, with one round in the chamber and four additional rounds in the magazine, and that the safety was off. A weapon's expert test-fired the gun and found it operational.

Kevin Clarke, a deputy U.S. marshal, staking out the scene in a separate car parked one or two car lengths in front of Detective Llanes's vehicle, confirmed the detective's testimony in substantial part. Deputy Clarke saw the three young men, including appellant, approach the detective's vehicle and try to peer inside. He saw the men leave and

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[4] Appellant was spotted near the scene and arrested a few hours later.

return, and heard the broadcasted warning that they were carrying a bag.[5] The men were moving "pretty fast" and got into a single file position as they approached the vehicle. At that point, Deputy Clarke who had been holding his rifle ready to fire if need be, took it and got out of his car, briefly losing sight of the men. The next thing he saw was Ruiz holding the red bag in a position he called "cradling," palms up at chest level, his left hand in front of his right.[6] The front of the red bag was toward the driver's side of the windshield, but Deputy Clarke did not see the men crouching or Ruiz raise the bag like a rifle and get into a "low ready" position. He testified that if he had seen such a move, he would almost certainly have fired at Ruiz. By this time, Detective Llanes had moved around the far side of his car, gotten behind the three men, and begun yelling at them to drop the gun. Deputy Clarke simultaneously yelled at the men, telling them to get on the ground.

b. *Gang Evidence*

Detective Jeffrey Davis asked for and received permission to inspect Ruiz's cell phone. He retrieved some photographs from it. In addition, he observed that appellant

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[5] From his position, Deputy Clarke could not initially see the bag, but he saw its strap slung across Ruiz's chest.

[6] Confronted with the transcript of a statement he gave the day of the incident, Deputy Clarke acknowledged he had not mentioned observing Ruiz holding the red bag pointed at the windshield of Detective Llanes's vehicle.

had an "L" on one calf and an "H" on the other, and photographed those tattoos.

Los Angeles Police Department Officer James Jeppson was the prosecution gang expert. His primary focus as a gang expert was on the Logan Heights gang and their rivals. Logan Heights started in San Diego. At the time of trial, the San Diego area had hundreds of members. In the 1990's and 2000's, multiple cliques formed in Los Angeles County, including a clique in Van Nuys. At the time of trial, there were approximately 60 Logan Heights members in Los Angeles County. Los Angeles County Logan Heights cliques claim an area between Roscoe Boulevard, Vanowen Street, the 405 Freeway and Woodley Avenue. The gang uses a common hand sign, making an L and H with their fingers in various ways. Their primary activities are robbery, narcotics sales and assaults with firearms.

Officer Jeppson testified concerning two predicate acts committed by Logan Heights gang members: (1) in 2011, gang member Lara Yunan committed an assault with a firearm; and (2) in 2011, gang member Danny Lopez shot an LAPD helicopter out of the sky with an AK47.

Officer Jeppson expressed the opinion that appellant was a member of Logan Heights, nicknamed Baby D., based on his admission to other officers, his tattoos and a photograph of him throwing gang signs. The officer opined that Ruiz was also a Logan Heights gang member. He based this on having seen photographs of Ruiz with known gang members, throwing gang signs.

Officer Jeppson was given a hypothetical which mirrored the facts of the case and expressed the opinion that the crime was committed for the benefit of the Logan Heights gang. The crime took place inside the gang's claimed territory. It helped protect that territory from intrusion by rival gangs. In addition, it caused fear and intimidation within the community, particularly because it involved an attack on law enforcement. It also elevated the status and reputation of the individual gang members involved.

2. *Defense Evidence*

Appellant presented no evidence. Ruiz recalled Detective Davis, who testified that no prints were lifted off the shotgun or the shells, and that DNA testing did not result in a match to Ruiz. The detective found no gang tattoos on Ruiz. Ruiz did not live in Van Nuys.

C. *Pertinent Instructions*

The jurors were instructed in conformity with CALCRIM No. 860 that "[t]o prove a defendant is guilty of [the crime of assault with a firearm on a peace officer] the People must prove that, 1, the defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person; 2, the defendant did that act willfully; 3, when the defendant acted he was aware of the facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result

in the application of force to someone; 4, when the defendant acted he had the present ability to apply force with a firearm to a person; 5, when the defendant acted, the person assaulted was lawfully performing his duties as a peace officer; and 6, when the defendant acted, he knew or reasonably should have known that the person assaulted was a peace officer who was performing his duties."

The jurors were also instructed in conformity with CALCRIM No. 875 that to prove a defendant guilty of the crime of assault with a firearm "the People must prove that, 1, the defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person; 2, the defendant did the act willfully; 3, when the defendant acted he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and 4, when the defendant acted he had the present ability to apply force with a firearm to a person."

The jury was given the following special instruction on assault, based on one proposed by the prosecution: "Once a defendant has obtained the means and location to strike immediately he has the present ability to injure. The fact an intended victim takes effective steps to avoid injury does not negate this present ability. An intended victim's evasive maneuver, which permits him to approach a defendant from behind does not deprive a defendant of the present ability."

With respect to the gang evidence, the jury was informed in conformity with CALCRIM No. 1403: "You may

consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancements charged. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

D. *Pertinent Argument*

The prosecutor repeatedly argued that an assault with a firearm occurred when Ruiz "point[ed] the gun" at the windshield. Concerning present ability, he stated: "[O]nce you apply the facts as you've heard them, the evidence in this case to the law, it is clear that the defendants are guilty of assault with a firearm on Officer Llanes. They snuck up on the car and pointed the loaded shotgun towards the windshield, toward where they believed Officer Llanes was when they last saw him. They did it willfully. And they knew that they had the present ability to apply force. And you heard the evidence, it was loaded. Safety was off. They didn't have those little intermedian steps. The very next step would have been the pull of a trigger. The very next step would have been the application of force. They had the present ability to do it." He further stated: "You heard the judge instruct you. A victim's evasive maneuvers does not negate the present ability to injure. Doesn't negate the present ability to apply force. That means that [the defendants] committed an assault on Officer Llanes as soon

as they got up there with the shotgun and pointed it towards the windshield. The fact that Officer Llanes was smart enough, was well trained enough, was lucky enough to slip out of harm's way and sneak up behind them, they're still guilty of assault . . . even though Officer Llanes was not in that driver's seat."

Ruiz's counsel did not dispute the prosecutor's description of the legal requirements of assault. He argued that the entire case came down to "really one issue": "Whether Mr. Ruiz pointed that shotgun; whether he had the shotgun in the ready low position; and aimed it at that windshield. That's the issue." Counsel pointed out that Deputy Clarke had "an unobstructed view," and contended that if he had "seen . . . Mr. Ruiz going in the ready low . . . position or even raising his rifle and aiming it at the windshield," he would have reported it. In concluding, he argued: "[I]f there was no assault, which is the aiming of the shotgun at the front windshield, then there's no count 1 or 2."

Counsel for appellant similarly argued that Deputy Clarke's testimony established that no assault occurred: "Nowhere in [Deputy Clarke's] statement does he say he observed Mr. Ruiz crouched down next to Llanes's car; that he observed Mr. Ruiz take the bag get it in the low ready position. Nowhere in that statement . . . does he say that he observed Mr. Ruiz turn around, face the windshield, raise the bag, and had it in a position like he was prepared to shoot. [¶] . . . . Didn't you think that if he actually saw that

he would have reported it to someone? And not only that, what did he say? If he'd actually seen Ruiz raise that weapon he would have shot him. No doubt in his mind. He would have shot him. That's what he's tried to do. Ruiz never lifted the gun. Never pointed it at anybody." Counsel further stated: "I thank [the prosecutor] for framing the issue here. The issue is whether or not [the prosecutor] has proven beyond a reasonable doubt that Mr. Ruiz had the present ability to injure. If he didn't have the bag in his hand. If he didn't raise it there's no ability to injure. [¶] . . . There's no pointing of the weapon, no raising of the weapon. Regardless of whether [Detective] Llanes is still in the vehicle or not. . . . [I]f Mr. Ruiz did not raise the weapon there is no present ability to injure anybody whether they're there or not. If they haven't met that element you must find [appellant] not guilty."

In rebuttal, the prosecutor focused on the evidence that Ruiz had pointed the gun at the vehicle's windshield: "You heard Officer Llanes tell you about what he saw: Ruiz coming up with the gun in the low ready position, gets up to the front of the windshield, turns towards the windshield, raises the gun. [¶] . . . [Deputy Clarke] got out of the car. And when he got out of the car he lost sight of defendant Ruiz for a second or [two] . . . . Probably that same second or [two] that Ruiz had the gun in the low ready position and turned towards the windshield. . . [¶] . . . And you heard me talk to Deputy . . . Clarke about that. Did you say it was low ready position? Did you see him take the bag off his

shoulder? No. [Deputy Clarke] was getting out of the car when that happened. But by the time he got out of the car and ordered Ruiz to drop it, the kid dropped the bag from his hands. It wasn't still over his shoulder. When Clarke last saw Ruiz the bag was over the shoulder. He had to get out of the car to back up his fellow officer. [¶] In that time Ruiz put it into the low ready position, took the few more steps to the windshield and turned." A few moments later, the prosecutor reiterated the point: "The fact that Clarke didn't see that part of it because he was busy getting out of his car to protect his coworker doesn't mean Llanes didn't see it."

E. *Verdict and Sentencing*

The jury found appellant guilty of assault with a firearm (count one). It found the gang allegation true. It was unable to reach a verdict on the charge of assault on a peace officer (count two). The jury also found appellant guilty of conspiracy to commit murder (count three), but the court subsequently overturned that conviction and dismissed the charge. The jury found the allegations that appellant knew the victim was a peace officer and that he conspired to murder a peace officer not to be true. The court declared a mistrial as to count two.

The court sentenced appellant to nine years in state prison, and imposed various fines. Appellant noticed an appeal.

DISCUSSION

A. *Special Instruction on Assault*

Appellant contends the trial court erred in giving the special instruction on assault, as it was argumentative and lessened the prosecution's burden of proof.

1. *Background*

The Penal Code defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) In *People v. Chance* (2008) 44 Cal.4th 1164 (*Chance*), the Supreme Court resolved whether an assailant maintains the "present ability" to commit a violent injury where the victim has, unbeknownst to the assailant, moved to a protected position. In *Chance*, the victim law enforcement officer had surprised the defendant, who had been concealed behind a trailer with a gun pointed toward the front, by stealthily approaching the defendant from the back. (*Id.* at p. 1168.) Found guilty of assault, the defendant claimed on appeal he lacked the present ability to inflict injury because he had been aiming in the opposite direction from the victim. (*Id.* at p. 1173.) The court held that the defendant's "mistake as to the officer's location was immaterial," and that the officer's "evasive maneuver, which permitted him to approach defendant from behind, did not deprive defendant of the 'present ability' required by section 240." (*Id.* at p. 1176.) In so concluding, the court quoted with approval *People v. Valdez* (1985) 175 Cal.App.3d 103, 113 (*Valdez*), in which the

court had said: "'Once a defendant has attained the means and location to strike immediately he has the "present ability to injure." The fact an intended victim takes effective steps to avoid injury has never been held to negate this "present ability."'"

Here, the prosecutor requested a special instruction based on the above-quoted language in *Chance* and *Valdez*.[7] Appellant's counsel objected, contending that the proposed instruction was "too specific" to the facts of the case, and that the jury might be persuaded by the language of the proposed instruction that an assault occurred whenever an assailant walks down the street holding a weapon. Counsel for Ruiz agreed, and argued that the CALCRIM instructions on assault covered the issue. The court overruled the objections, agreeing with the prosecutor that "the jury

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[7] The prosecutor requested the following instruction: "Once a defendant has attained the means and location to strike immediately he has the present ability to apply force. The fact an intended victim takes effective steps to avoid injury does not negate this present ability. An intended victim's evasive maneuver, which permitted him to approach a defendant from behind does not deprive a defendant of the present ability." The instruction given was substantially similar. The court changed "apply force" to "injure" in the first sentence to align more closely to the language of *Chance*, and the verb tense in the final sentence -- "permitted" to "permits" -- to make the instruction less specific to the facts of the case.

[might] be confused and believe that because the victim had exited the car that you could no longer have an assault."

2. *The special instruction did not prejudice appellant*

Appellant contends the court erred in giving the instruction. While under the facts of this case, a special instruction may have been appropriate to clarify the meaning of "present ability" to injure, the reference to the evidence of the case in the instruction given by the court could be seen as argumentative. Any error, however, was harmless.

"The court has a duty to see to it that the members of the jury are 'adequately informed on the law governing all elements of the case submitted to them to [the] extent necessary to enable them to perform their function in conformity with the applicable law.'" (5 Witkin & Epstein, Criminal Law (4th ed. 2012) Criminal Trial, § 690, p. 1062.) "Instructions on every aspect of the case must be given, and should be clear, concise and simple in order to avoid misleading the jury or in any way overemphasizing either party's theory." (*People v. Rice* (1976) 59 Cal.App.3d 998, 1004.) When a party presents a proposed instruction, the court should give it if it is "correct and pertinent." (§ 1127.)

"'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.'" (5 Witkin & Epstein, *supra*, § 699, p. 1072.) "An instruction is

improper if it recites facts drawn from the evidence in such a manner as to constitute an argument to the jury in the guise of a statement of the law." (*Ibid.*) "[A]rgumentative instruction[s]" -- "instruction[s] 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence'" -- must be refused. (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) An argumentative instruction "violates the accused's right to a jury trial" when it "lighten[s] the prosecution's burden of proof" (*People v. Hunter* (2011) 202 Cal.App.4th 261, 276 (*Hunter*), such as when the instruction directs the jurors to find an element of the charge true from specific facts. (*People v. Reyes Martinez* (1993) 14 Cal.App.4th 1412, 1417 [jurors told that movement of 500 feet or more was sufficiently substantial to sustain kidnapping conviction]; but see *People v. Battle* (2011) 198 Cal.App.4th 50, 80, italics added [instruction informing jury that "'a substantial period of time [for purposes of establishing lying in wait] *could occur* within 90 seconds.' [¶] . . . did not direct the jury to find that a period of time more than 90 seconds is substantial" (italics added)].)

In *Hunter*, the primary factual issue at trial was whether the defendant used a real or facsimile gun in committing a bank robbery. (*Hunter, supra,* 202 Cal.App.4th at pp. 265-266.) The jury was instructed: "'When a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a

firearm. The victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt as a matter of law that the gun was a firearm.'" (*Id*. at p. 267.) Quoting the first sentence of the instruction, the Court of Appeal characterized it as "unduly argumentative" because "the jury could just as accurately have been told the opposite, that when a defendant displays an object that looks like a gun, the object's appearance and the defendant's conduct may constitute sufficient circumstantial evidence to support a finding *that it was not a firearm*." (*Id*. at p. 275-276.) The court further found that the instruction lightened the prosecution's burden of proof by highlighting one aspect of the evidence "as not necessarily creating a reasonable doubt, thereby permitting the jurors to interpret the instruction as a caution against finding a reasonable doubt on this basis. This impermissibly alleviated the district attorney's need to persuade the trier of fact that the gun used in the robbery was a real one, the most important fact at issue in the case." (*Id*. at p. 276.)

Relying on *Hunter*, appellant contends the instruction at issue here was argumentative and "lighten[ed] the burden of the prosecution to prove each element of the offense beyond a reasonable doubt" by "suggest[ing] to the jury that they could find Ruiz guilty of assaulting Llanes without resolving the conflict in the evidence between Llanes['s] testimony that he pointed the bag at the windshield, and Clarke's testimony in his report that he did not see Ruiz with the bag in his hands." We disagree. The special

instruction correctly advised the jury of the principle that steps undertaken by a victim to avoid an assault do not negate present ability to injure. The final sentence may have been overly specific in referencing the evidence presented and inviting the jurors to conclude that Detective Llanes's "evasive maneuver," permitting him to "approach a defendants from behind," did not "deprive [the defendants] of the present ability." The instruction did not, however, direct the jury to find the existence of present ability to injure from that fact. More important, it did not suggest how the jury should resolve the central issue in the case, viz., whether Ruiz raised the shotgun and pointed it at the car's windshield. That, the parties agreed, was the key issue to be resolved by the jury. That Detective Llanes had left the vehicle at the time of the alleged assault was not disputed. Thus, regardless of whether the final sentence in the instruction was argumentative, it gave no direction to the jurors on "the most important fact at issue in the case."[8] (*Hunter*, *supra*, 202 Cal.App.4th at p. 276.)

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[8] Appellant further contends that the instruction suggested to the jury that "if they found that Ruiz had a weapon and was near enough to Llanes to shoot him, they should find that he assaulted him." This is not true. The special instruction stated that "[o]nce a defendant has obtained the means and location to strike immediately he has the present ability to apply force." But the CALCRIM jury instructions on assault and assault on a peace officer made clear that the "present ability to injure" was only one of the elements of the crime of assault that must be proven by the prosecution. The jury was also instructed the prosecution must

(Fn. continues on the next page.)

Assuming the instruction was argumentative, instructional error that favors the prosecution is generally resolved under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836: whether there is a "reasonable probability that the outcome of the defendant's trial would have been different had the trial court properly instructed the jury . . . ." (*People v. Flood* (1998) 18 Cal.4th 470, 490.)[9] In determining prejudice, courts may consider other jury instructions given and the argument of counsel. (*People v.*

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prove that "the defendant *did an act* with a firearm that by its nature would directly and probably result in the application of force to a person" and that "when the defendant *acted* he had the present ability to apply force with a firearm to a person." Thus, the instructions as a whole made clear that the jury was to focus on the defendants' actions in determining guilt.

[9] In *Flood*, the court also found that "an instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element," relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense, requires review under the standard established in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Flood*, *supra*, 18 Cal.4th at pp. 494, 502-503.) Under *Chapman*, a reviewing court must determine whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Flood*, *supra*, at p. 503.) We do not find that the instruction improperly described or removed an element of the offense from the jury. In any event, we would find no prejudice even under the *Chapman* analysis.

Merritt (2017) 2 Cal.5th 819, 831; *People v. Jennings* (2010) 50 Cal.4th 616, 676.)

Here, the jury was properly instructed as to the definition of assault under both CALCRIM No. 860 and CALCRIM No. 875. More significantly, the jurors were repeatedly informed by counsel for both sides that the key to the defendants' guilt or innocence was whether Ruiz raised the shotgun concealed in the bag, and pointed it in the direction of the car's windshield; if he did not, there was no assault. Even when discussing the special instruction and the principle that a victim's evasive maneuvers do not negate the present ability to injure, the prosecutor stated the assault happened when Ruiz "got up there with the shotgun and pointed it towards the windshield." Ruiz's counsel described the case as "really one issue": "[w]hether Mr. Ruiz pointed that shotgun; whether he had the shotgun in the ready low position, and aimed it at that windshield." Appellant's counsel "thank[ed]" the prosecutor for "framing the issue," and agreed that "if Mr. Ruiz did not raise the weapon there is no present ability to injure anybody . . . [¶] . . . [and] you must find [appellant] not guilty." In short, the jurors were directed to the instructions that resolved the key issue in the case and repeatedly informed how to apply them. In view of this and our conclusion that the special instruction, at most, invited the jurors to find a fact that was not in dispute, we find that any error did not contribute to the verdict.

B. *Prosecutorial Misconduct*

Appellant contends the prosecutor committed prejudicial misconduct in closing argument.

1. *Background*

Near the end of his closing argument, the prosecutor made the following comments with respect to the allegation that the defendants had knowingly assaulted a peace officer: "[Y]ou may be sitting there thinking, why would these men do this? Why would you think to bring a loaded shotgun back out onto the street and point it at a cop? The answer to that question is answered by the gang allegation. Right? Because what's it about? This guy on their turf. They didn't know him. They didn't want him. And as you heard[,] Logan Heights, they've shot at cops before. This wasn't the first time." He went on to remind the jurors of Officer Jepson's testimony that the Logan Heights gang had committed an "assault with a firearm on [a] police helicopter back in 2011."

Appellant's counsel did not immediately object when the prosecutor urged the jurors to consider one of predicate acts to support that the defendants had knowingly assaulted a peace officer. Counsel waited until the prosecutor had concluded his argument, and then stated at a sidebar that the prosecutor had improperly used one of the predicate acts to suggest the defendants had a propensity to commit the charged assault. Counsel asked the court to admonish the jurors not to take the predicate act into consideration in

determining the defendants' guilt. The court declined to admonish the jury. The court stated that the prosecutor's argument was "fair" because the "evidence they have taken shots at police officers before" supported that "[t]his is something that [the] gang does." Because "most people" and "most jurors" would "find it hard to believe someone would take a shot at air police officers," evidence that "[t]his is a gang that's done it before" and "it's something that they do" was, in the court's view, relevant.

2. *The prosecutor's misuse of a predicate act and the trial court's refusal to admonish did not prejudice appellant*

The parties agree that the evidence of the predicate acts were relevant for the purpose of establishing that Logan Heights was a criminal street gang. Respondent contends appellant forfeited any objection to the prosecutor's argument by failing to object on the specific ground that the evidence had been admitted for a limited purpose. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168 ["CALCRIM No. 1403 . . . states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the credibility of witnesses"].) Counsel's objection that the prosecutor was arguing the evidence to establish something other than the purpose for which it had been admitted was

sufficient to preserve the issue. Moreover, we agree that the argument was improper. The prosecutor invited the jury to put aside any doubts that gang members would deliberately target a law enforcement official by considering that in the past, another Logan Heights gang member had done just that. However, there was no prejudice. The jurors did not convict on the charge of assault on a peace officer (count two) and found not true the allegation that the defendants knowingly targeted a peace officer. Accordingly, there is no basis for reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.