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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JULIUS DARNELL HARRIS et al., Defendants and Appellants.	B266099 (Los Angeles County Super. Ct. No. TA133670)

APPEALS from judgments of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as to defendant and appellant Julius Darnell Harris. Affirmed in part and reversed in part with directions as to defendant and appellant Michael Dunn.

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant Julius Darnell Harris.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant Michael Dunn.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Julius Darnell Harris appeals his conviction for first degree murder and true findings regarding firearm and gang allegations; defendant Michael Dunn appeals his conviction for second degree murder and true findings regarding firearm and gang allegations.

Harris contends the trial court prejudicially erred by failing to instruct the jury on the lesser-included offense of voluntary manslaughter based on imperfect self-defense and heat-of-passion. Harris also contends his lawyer was ineffective by failing to request that the jury be instructed on provocation to reduce the degree of murder.

Dunn contends the trial court improperly imposed two prison priors based on the same conviction, and he is entitled to an additional day of credit. He also contends the trial court prejudicially erred by instructing the jury on the right of a home occupant to use deadly force, and there was insufficient evidence to support the gang enhancement. Harris joins in Dunn's arguments.

We reverse on the imposition of multiple prison priors and find that Dunn is entitled to an additional day of credit; otherwise we hold that reversible error did not occur and affirm both judgments.

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural Background

Dunn and Harris were charged by information with murder (Pen. Code, § 187, subd. (a);[1] count 1),[2] with allegations that the crime was for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that each personally used, and personally and intentionally discharged a firearm, causing great bodily injury and death (§ 12022.53, subds. (b), (c) & (d)). It was further alleged that Dunn suffered one prior serious or violent felony conviction (§ 667, subd. (a)), three prior convictions for which a prison term was served (§ 667.5, subd. (b)), and a prior strike (§§ 667, subd. (d) & 1170.12, subd. (b)).

After jury trial, Dunn was convicted of second degree murder. The jury found true the gang allegation and that he both personally used a firearm, and personally and intentionally discharged a firearm, but found not true that he personally and intentionally discharged a firearm causing great bodily injury. Dunn admitted his prior conviction allegations. The court denied probation and sentenced Dunn to 58 years to life in prison. He received 391 days of presentence custody credit and was ordered to pay a $10,000 restitution fine (§ 1202.4, subd. (b)), a $10,000 parole revocation fine (§ 1202.45) which was stayed, a $40 court security fee (§ 1465.8), a $30 criminal conviction assessment

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

[2] The information also charged codefendant Maliek Dwayne Grissett with two counts of attempted murder (§§ 664 & 187, subd. (a); counts 2, 3). Grissett pleaded no contest to one count of assault by means likely to produce great bodily injury. (§ 245, subd. (a)(1).) Grissett is not a party to this appeal.

(Gov. Code, § 70373), and $7,837.10 plus 10 percent interest in restitution.

Harris was convicted of first degree murder. The jury found true the gang allegation and that he both personally used a firearm, and personally and intentionally discharged a firearm, but found not true that he personally and intentionally discharged a firearm causing great bodily injury and death. The court denied probation and sentenced Harris to 45 years to life in prison. He received 374 days of presentence custody credit and was ordered to pay a $10,000 restitution fine (§ 1202.4, subd. (b)), a $10,000 parole revocation fine (§ 1202.45) which was stayed, a $40 court security fee (§ 1465.8), a $30 criminal conviction assessment (Gov. Code, § 70373), and $7,837.10 plus 10 percent interest in restitution.

II. Facts

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

A. Background

Isaac "Ike" Gaston, Champagne Gaston, Izell Gaston, Frank Gaston and Keon Easley[3] were all siblings who lived together in an apartment in Compton, California, apartment G. The apartment was a two-story unit with a fenced and gated patio. Directly inside the front door was a living room area. An internal staircase to the second floor was on the far wall across from the front door. A small bathroom was located in the far

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[3] To avoid confusion, the siblings will be referred to by their first names.

corner, near the staircase. The apartment complex was in the territory of the Nutty Blocc Crip gang. Ike was a member of the gang. Izell, Champagne, Frank and Keon were all affiliated with the gang.

Harris, Dunn and Grissett were all members of the Nutty Blocc gang. Champagne had known Harris and Grissett since childhood. Harris's moniker was Ju-Ju; Grissett's moniker was Chop-Chop.[4] Champagne was also close with Jazzmine Harris, a blood relative of Harris.[5] Izell had also known Dunn for about 10 years; Dunn's moniker was "Mike Dog."

B. The Shooting

On March 9, 2014, Champagne threw a party with Harris at the Gaston family apartment to celebrate the birthday of a friend of Harris, pay off bills, and raise money for the Gaston family to move. Over 100 people attended the party, including members of the Nutty Blocc and Santana Blocc gangs. Many of the Gaston siblings were present, including Ike, Izell, Frank and Keon. Many of Harris's relatives and friends attended, including his brothers Darryl, Derrell, Darnell, sisters Darnesha and Samiaa, a cousin, and friends Rita Richardson and Jazmin Lopez.

The party was disrupted when Grissett started scaring people by stating he was going to shoot up the party. Champagne told him to stop. Later, Grissett began disparaging other gangs saying "f[uck] different gangs," "f[uck] Fronthood" and Santana

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[4] A moniker is a gang nickname used by gang members to avoid detection by law enforcement.

[5] Also, Harris's siblings and relatives will be referred to by their first names.

gangs.[6] At this point, Champagne told Grissett she was cancelling the party and she began yelling "the party's over," "everybody . . . go home." She told Harris she was shutting down the party. Harris told Champagne they were "going to shut down nothing," and told Ike "you better tell [Champagne] she ain't shutting down nothing."

The verbal dispute escalated into a series of physical altercations, culminating in a gun battle. The first physical confrontation occurred at the apartment's gated patio. When Harris blocked Champagne's entry through the patio gate, she pushed him to enter. Then, as Champagne went into the apartment, Harris and Ike began fighting on the patio. Harris threw the first punch at Ike and missed; Ike then punched Harris, knocking Harris to the ground. The fight turned into a melee, with five to six Nutty Blocc affiliates, including Grissett, joining the attack on Ike. Grissett escalated the fight by swinging a knife, stabbing Ike. Frank attempted to defend his brother Ike by pushing the attackers away. After the fight on the outside patio, Ike was woozy, stumbling and bleeding heavily from his head. His brothers and cousins carried him into the apartment.

The second physical confrontation ensued inside the apartment. Harris challenged Ike to fight again by stating "you got to catch my fade again." Harris accused Ike of stabbing him, and lifted his arm to show a bleeding cut. For the first time in the incident, a gun appeared. In his hand, Ike held a gun

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[6] The People's gang expert testified that the Fronthood and Santana gangs were not Nutty Blocc's enemies.

pointing up, and he began waving it in a circular motion.[7] Keon tried, without success, to take the gun away from Ike; Champagne ran up the stairs and called the police. After the verbal challenge, another physical fight broke out in the living room involving Harris, his brothers and Grissett, battling Ike's brothers Izell and Keon. Grissett again swung a knife, cutting Izell above his right elbow. Izell and Frank were able to push Ike halfway up the internal staircase, away from the fight. Ike was bleeding profusely and semi-conscious. Frank forced some of the partygoers out of the apartment, including Harris and Grissett, and locked the door.

The quarrel did not end. Dunn, another Nutty Blocc gang member, joined the conflict for the first time. When Dunn yelled from outside the apartment, "Jazzmine, open the door, [bitch]," Jazzmine [Harris's relative] opened the door. Dunn and then Harris entered and each fired multiple shots, Dunn shooting first, towards the staircase bearing Ike and his siblings Izell, Champagne, Keon and Frank. None of the siblings shot back. Ike was shot in the chest and front shoulder; the chest shot was fatal.

C. The Investigation

The night of the shooting, witnesses and bystanders were uncooperative with law enforcement. Ike's family members did not immediately tell law enforcement what they knew about the shooting because they did not want to be snitches or were scared for their lives. Indeed, Keon talked to the police at the hospital

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[7] Keon recalled seeing Ike holding a .44-caliber revolver before Ike was carried to the stairs and before Harris and Grissett came inside. Keon later testified that he only noticed the gun in Ike's hand when Ike was on the stairs.

after the shooting but lied about his name and birthday because he was nervous and scared. That same night, Izell went with the police to the station but did not cooperate or identify the shooters because the shooters were active gang members and he thought he and his family could get hurt.

Forensic evidence suggested a "gun battle."[8] The ballistic evidence was consistent with two people standing at or near the front door of apartment G, shooting *into* the apartment, one shooting a nine-millimeter handgun, the other a .32-caliber handgun.[9] Additional spent casing, bullet and bullet fragments found on the patio outside the fence suggested that someone shot a nine-millimeter handgun from the walkway *towards* apartment G.[10] The evidence was also consistent with another

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[8] Blood was found on the patio, inside the apartment near the front door, on the landing area, on the stair railing, on the wall coming down the stairs, the upstairs hallway, and in the living room; the highest concentration of blood was on the stairs.

[9] Ballistic evidence was found around and inside the apartment. One .32-caliber shell casing stamped C.B.C. was located in front of the front door across from apartment G, two more .32-caliber C.B.C. shell casings were just inside the front door, and two 9-millimeter R.P. shell casings were in the apartment, one under the front door.

[10] Ballistic evidence was found outside apartment G. A spent nine-millimeter R.P. casing was located on the sidewalk in front of a nearby apartment; impact marks suggested that the shooter had been standing near the casing, and was firing towards apartment G. Another spent projectile that had struck the sidewalk suggested an additional bullet travelling towards apartment G. A bullet lodged in a fence surrounding the patio, suggested another bullet travelling towards apartment G. Three

shooter firing a revolver from *inside* the apartment from an area near the front bathroom, using a cabinet as cover and firing *towards* the front door.[11] Finally, a bag of .44-caliber Smith & Wesson Special live rounds, and a single live round were found at the bottom of the stairs, and a holster for a large frame revolver was found in the upstairs bedroom.

The criminalist that examined the ballistic evidence from the crime scene and the bullet recovered from Ike's body opined that all three 9-millimeter casings marked R.P., were Remington Peters brand, and had been fired from the same firearm; all three .32-caliber cartridge cases stamped C.B.C., were Magtech brand, and had been fired from a second gun; the bullet fragments recovered from the exterior crime scene were all nine-millimeter luger caliber, and had been fired from the same gun (although he could not determine whether that was the same gun that had fired the nine-millimeter bullets or the gun that had fired the .32-caliber bullets). The bullet extracted from Ike's body was a .32-caliber bullet.

Harris was arrested on March 31, 2014 at an apartment in Compton, and Grissett was later arrested on June 5, 2014 at same location. On June 5, the police recovered a box of ammunition stamped "R.P." and Grissett's identification at that apartment. When Dunn was arrested on June 5, police seized gang-related items, namely, a hat, jacket and shirt bearing the Yankees insignia, and a phone book with gang monikers.

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additional bullet strikes and three holes in the fence suggested at least three more bullets fired towards apartment G.

[11] No casings were recovered, suggesting a revolver. The ballistic evidence of strikes to the curio cabinet and a bullet hole in the television suggested at least two shots.

D. Gang Evidence

Los Angeles County Sheriff's Detective Scott Lawler testified as a gang expert, and described the Nutty Blocc Crips as a gang with 230-240 members, engaged in gun possession, shootings, narcotics sales, and witness intimidation. Their common color is blue and they identify themselves with New York Yankees merchandise, and the letters "NY." There is a hierarchy of gang members. Dunn is a high-ranking Nutty Blocc member; Harris and Grissett are members.[12]

Fear and respect are important concepts in gang culture. Gangs must be feared by rival gang members and instill fear in the community to operate as a gang. If a gang member is disrespected, this would be seen as weakness, thus a disrespected gang member would be expected to retaliate in a more aggressive manner: if "he was slapped, he'd have to punch; if he was punched, he'd have to stab; if he was stabbed, he'd have to shoot." Shooting and killing someone who disrespected a gang member would be considered "putting in work for the gang" and would earn respect among fellow gang members. A shooting of a fellow gang member who had acted disrespectfully would benefit the individual shooter by raising his status within the gang by creating fear and respect, and would benefit the gang by instilling fear and respect by enemy gangs, recruiting youths to the gang, and facilitating the expansion of the gang's territory.

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[12] Harris also admitted to another deputy on April 13, 2013 that he was a member of the Nutty Blocc gang with a moniker of Ju-Ju.

E. Harris's Evidence

1. Forensic evidence

Criminalist Marc Scott Taylor, an expert on gunshot residue (GSR), examined GSR collected from Izell the night of the shooting, and found GSR on both hands, indicating that Izell either fired a weapon, was in the vicinity of a fired weapon, or came in contact with another source of GSR. Taylor also reviewed the coroner's findings regarding Ike and concluded the particles recovered from Ike's hands very likely came from a gunshot.

Taylor explained the production of GSR. When a gun is fired, the chemicals in the primer explode in a puff of smoke, dispersing tiny particles, which are deposited on the hands of the shooter and nearby objects and people. It can also be transferred to a person touching the gun fired or touching the gunshot wound, or touching a wall with a bullet strike. GSR dissipates over time, normally lasting no more than five to seven hours.

GSR is more likely to get on another person in a confined place. If multiple guns are being fired in a room, GSR may be deposited on a person standing within five feet of a shooter. The presence of GSR does not indicate who fired first.

2. Ballistic evidence

Bullet strikes were found on a building across the courtyard from the Gaston residence. Theoretically, if someone was shooting from inside the Gaston residence, they could have fired those shots, "shooting high and wild."

3. Harris's testimony

Harris testified. He grew up in the Nutty Blocc area, and associated with the Nutty Bloccs since high school. He was not a member of the gang and his tattoos were not gang-related. He had known Dunn since he was 10 years old and Grissett his whole life. He knew "Mike Dog" Dunn and "Chop-Chop" Grissett as associates of Nutty Blocc. Harris had known Champagne and Izell since high school; both were members of Nutty Blocc. He had previously met Ike at a party.

Champagne offered to host a party for Harris's friend. Harris arrived at the party after 10:00 p.m. with his brothers Derrell and Darnell and a cousin. A third brother Darryl arrived separately. Soon after Harris arrived, he spoke to Ike who appeared "probably buzzed" and was not acting normally. The partygoers were a mixture of gang and non-gang members.

Harris went outside to help Champagne with Grissett who had been walking around "banging on people." Champagne was yelling that she wanted to shut down the party. Ike came outside and argued with Champagne about shutting the party down before he had made money back for the drinks and food purchased for the party. A fight began on the patio: Ike shoved Harris twice; Harris said "if you push me again, we gonna fight." Ike hit Harris in the back of the head; Harris turned around and shoved Ike against the wall. Ike bit Harris on his right shoulder. When Harris tried to yank away, he fell on his back and Ike, swinging, landed on top of Harris. He did not see Grissett with a knife, did not know whether Grissett joined the fight and could not tell if Ike was bleeding. Ike was pulled off Harris and Ike said that he was going to get his gun. Harris got up and told his cousin and some other women to leave because Ike was getting a gun.

Harris left, but returned to the party to look for his brothers. He walked into the dimly-lit apartment through an open door, and saw Ike, in the middle of the stairway with one of his brothers, and a group of people at the bottom of the stairs. When Ike began waving a long revolver, Harris ran toward the dining area. Gunshots went off from the living room area, by the stairs. Harris could not tell if Ike was firing his gun, whether anyone in the bathroom area at the base of the stairs was firing a gun, or the path of the bullets. Also, Harris did not see Dunn that night. Harris denied that there was a second fight inside the living room and ever telling Ike " 'I want to catch your fade.' " Harris also denied possessing, pointing or firing a handgun at the party.

After the gunshots stopped, Harris waited a few seconds, ran towards the gate, and saw his brother Darryl, with a gunshot wound to his right shoulder, in the bushes next to the patio.

4. Partygoer's evidence

Rita Richardson went to the party with Harris's sister Darnesha, arriving at about 8:00 p.m. At some point, there was a commotion, she and others ran inside the apartment, and the door was closed. As Rita was kneeling in the corner near the bottom of the stairs, the door opened, some people ran out, and the door was closed again. She then was pushed into a corner near a bathroom, the front door opened again, and a man, who she later identified as Ike, came in waving a big gun, struggling to hold on to it. Another man was trying to get the gun away. Ike fell onto her legs, the gun fell, and the man who had been trying to take the gun picked it up. Harris was not in the residence at this time. Rita ran out of the house, and saw Harris standing outside, shirtless. She heard a gunshot as she stood in front of another apartment, ran to the parking area, heard

another gunshot, jumped the complex fence, and then ran out of the complex to the street. Harris and his brother, who was bleeding, were outside on the street.

Darryl Slaughter, Harris's brother, arrived at the party about 10:00 p.m. While inside the apartment, he heard a commotion from the patio area, went outside, heard yelling and then heard 12 to 15 gunshots. Panicking, he ran away from the party and was shot in the upper back. Darryl fell into a bush and then Harris picked him up and carried him to the street. That evening, Darryl never saw Harris with a gun or shooting, nor did he see Dunn at the party or with a gun.

Harris's friend, Jazmin Lopez, arrived at the party about 9:30 p.m. At some point when she was on the patio, she noticed a woman yelling about a situation that had happened. No more than 15 minutes later, a man pushed Harris, the two began a fistfight, and more than 10 people began fighting. She then left and sat in her parked car, and within 10 minutes Harris walked out onto the street with his brother who had been shot.

Darnesha, Harris's older sister, arrived at about 9:00 or 9:30 p.m. Inside, she saw Izell dancing, armed with a gun in his waistband. She heard a commotion outside, went outside where she saw Ike and Harris. She went back in, the front door closed, and then reopened, there was another commotion, someone said "go" and she left. Once outside, around the corner from the unit, she heard shots coming from an unknown direction and ran away. Harris was not with her at the time of the shooting. She did not see Dunn at the party.

Samiia Farris, Harris's stepsister, arrived at about 10:00 p.m. About an hour later, she saw a group of people fighting on the patio. She did not see Harris involved in the fight. As she ran out to the complex entrance, she heard

gunshots. Harris and Darryl were running a few feet behind. She did not see Dunn at the party.

F. *Dunn's evidence*

Dunn called witnesses who impeached prosecution witnesses with prior statements or challenged the adequacy of the police investigation.

1. *Gunshot residue evidence*

Debra Kowal, a criminalist with the Los Angeles County Coroner's Office, analyzed the GSR kit collected from Ike. She explained that when a gun is discharged, particles are produced either made up of lead, barium and antimony ("three-component particles"), lead and barium or lead and antimony ("two-component particles"), or just lead (a "single-component particle"). She found several consistent particles[13] of GSR recovered from Ike's right hand and "many" recovered from his left hand; accordingly Ike may have discharged a firearm, or had his hands in the vicinity of a firearm that had been discharged or received the particles from an environmental source. She would expect to find GSR around the wound of a person shot by someone standing 20 feet away. In a 15.5-foot by 19-foot room where multiple guns had been fired, she would expect to see GSR possibly "on everyone in a room that size." Hypothetically, if Ike had fired a .44-caliber handgun, she would expect to see combinations of all three components, two of the three components, or a single component. Also, bagging hands is an appropriate way to preserve evidence. She also examined Izell's

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[13] A "consistent" particle of GSR would be one of the two-component particles, or a single-component particle, such as lead.

GSR kit and found particles characteristic of GSR. The positive GSR tests for Ike and Izell do not necessarily mean that Ike or Izell had fired a weapon.

DISCUSSION

I. Instructions

A. Proceedings Below and Arguments on Appeal

The trial court instructed the jury on first degree murder, under the theories of premeditation and felony murder, and second degree murder. As to defendant Dunn only, the jury was instructed on self-defense and voluntary manslaughter based upon imperfect self-defense. Counsel for Harris requested self-defense, and voluntary manslaughter instructions based on imperfect self-defense and heat of passion. The trial court ruled that because Harris had testified at trial that he was not a shooter, neither self-defense nor imperfect self-defense applied to him. Harris contends the failure to instruct on the lesser included offense of voluntary manslaughter based upon imperfect self-defense was prejudicial error.[14] Also, Harris asserts that his

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[14] The court also ruled that it was not going to give the voluntary manslaughter heat of passion instruction (CALCRIM No. 570) as there was no evidence of a "sudden heat or passion" as to either defendant. Harris asserts that this too was prejudicial error. Harris's bare assertion that the trial court erred in refusing his request for instruction on manslaughter based on heat of passion is deemed waived. Briefs must provide argument and legal authority for the positions asserted; lacking such support, improperly raised issues are deemed waived. (*Pringle v. La Chappelle* (1999) 73 Cal.App.4th 1000, 1003, fn. 2; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283 [argument of counsel is insufficient; briefs must contain factual underpinning, record references, argument and authority].)

trial counsel failed to request that the jury be instructed on provocation to reduce the murder from first degree to second degree (CALCRIM No. 522), constituting ineffective assistance of counsel.

Finally, the jury received modified instructions related to self-defense including the right to eject a trespasser from real property (CALCRIM No. 3475) and the right to defend real or personal property (CALCRIM No. 3476). Counsel for Dunn objected to the instructions; counsel for Harris neither explicitly objected to the instructions nor joined in Dunn's objection.[15] Counsel for Dunn argued that the instructions were not warranted because Ike and his siblings were not "in a position to ask anybody to leave" "you have a party that people have been invited to. You can['t] call the people who c[o]me in trespassers." The court pointed to evidence in the record, indicating that Champagne revoked any consent when the "[f]amily went in, shut the door, locked it, and pushed people out." The trial court ultimately gave the instructions, deleting two repetitive paragraphs and adding a concluding sentence based upon case law. Harris and Dunn both assert this was prejudicial error.

B. Discussion

1. Applicable legal principles

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v.*

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[15] Harris's counsel's failure to object could be explained by the fact that the court had ruled that it was not going to instruct the jury as to self-defense regarding Harris.

Millbrook (2014) 222 Cal.App.4th 1122, 1137.) Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the greater. (*People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Manriquez* (2005) 37 Cal.4th 547, 584.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) The existence of any evidence, no matter how weak, will not justify instruction on a lesser included offense. (*People v. Whalen* (2013) 56 Cal.4th 1, 68, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17; *People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In deciding whether substantial evidence exists, we do not evaluate the credibility of the witnesses, a task for the jury. (*Wyatt*, at p. 698; *Manriquez*, at p. 585.) Substantial evidence to support an instruction may exist even in the face of inconsistencies presented by the defense itself. (*Millbrook*, at p. 1137.) The duty to instruct on lesser included offenses is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61.)

We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113; *People v. Booker* (2011) 51 Cal.4th 141, 181.) Doubts about the sufficiency of the evidence to warrant an instruction should be resolved in the defendant's favor. (*People v. Moye*, *supra*, 47 Cal.4th at p. 562; *People v. Tufunga* (1999) 21 Cal.4th 935, 944.) When considering whether lesser included instructions should have been given, we view the evidence in the light most favorable to the defendant. (*People v. Millbrook*, *supra*, 222 Cal.App.4th at p. 1137; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5.)

2. Imperfect self-defense

Harris contends that the trial court's failure to instruct the jury on the lesser included offense of voluntary manslaughter based upon imperfect self-defense was prejudicial error. Voluntary manslaughter is the intentional but nonmalicious killing of a human being, and is a lesser offense of murder. (§ 192, subd. (a); *People v. Moye*, *supra*, 47 Cal.4th at p. 549; *People v. Benavides*, *supra*, 35 Cal.4th at p. 102; *People v. Lee*, *supra*, 20 Cal.4th at p. 59.) A killing may be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation, or if the defendant kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. (*People v. Beltran* (2013) 56 Cal.4th 935, 942, 951; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 583.) Imperfect self-defense requires that the defendant be in actual fear of imminent danger to life or great bodily injury at the time of the homicide. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Sinclair* (1988) 64 Cal.App.4th 1012, 1016 (*Sinclair*).)

Sinclair noted that in *People v. Barton* (1995) 12 Cal.4th 186, cited by Harris, which set out the "intellectual and jurispruden[t]ial underpinnings" of a trial court's duty to instruct on inconsistent lesser included offenses, the defendant admitted shooting the victim. (*Sinclair*, *supra*, 64 Cal.App.4th at pp. 1020, 1022; see *Barton*, at pp. 192-193.) In *Barton*, the defendant testified that he shot the victim by accident while screaming at the victim to drop his knife. (*Barton*, at pp. 192-193.) *Sinclair* explained that *Barton* was entirely consistent with other Supreme Court decisions allowing voluntary manslaughter instructions to be read on request when the defendant admits shooting the victim but denies any intent to kill. (*Sinclair*, at

p. 1021.) *Sinclair* noted, however, that "no Supreme Court decision has held that when the defendant completely denies shooting the victim . . . voluntary manslaughter instructions are in order." (*Ibid.*)

Harris asserts that since the trial court instructed the jury on imperfect self-defense as to Dunn, the court should have also instructed on that lesser included offense as to him as the evidence was the same as to both. We disagree. Here there were crucial differences between the evidence against Harris and Dunn. Critically, Harris testified that he did not have a weapon and did not fire any shots. Harris's claim of substantial evidence to support the instruction rests on the fact that Champagne testified "that a gun was shown," Harris testified that Ike "was waving the gun around," and ballistic evidence of a gun battle. However, there was no evidence from any witness of Harris's actual belief in the need to defend himself against imminent peril. Rather, all witnesses testified that Dunn fired first, followed by Harris. As Harris's own testimony was a complete denial, there was no evidence of the required state of mind to support imperfect or perfect self-defense.

Moreover, even if the court improperly failed to instruct, reversal for failure to instruct on a necessarily lesser included offense is not warranted unless "an examination of 'the entire cause, including the evidence,' discloses that the error produced a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) This test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 149, 178.) If the instruction should have been given since Dunn and Harris were similarly situated, Dunn's result establishes that it is not

"reasonably probable" that Harris would have achieved a more favorable result. The jury clearly did not believe that malice was obviated. As to both Harris and Dunn, the jury was instructed on two theories of first degree murder: malice aforethought and felony murder. Since Dunn was found guilty of second degree murder, the jury obviously rejected the People's alternative theory of felony murder. Stated in other words, to convict Dunn of second degree murder, the jury must have found malice, a finding incompatible with self-defense or imperfect self-defense. Moreover, the jury found true, as to both defendants, the allegations that the murder was committed for the benefit of a criminal street gang with the specific intent to promote, further or assist in the gang members' criminal conduct. Such a finding is at odds with the idea that Harris shot Ike to avoid imminent danger to his life or great bodily injury. The existence of any evidence, no matter how weak, will not justify instruction on a lesser included offense. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 68; *People v. Wyatt*, *supra*, 55 Cal.4th at p. 698.)

3. Right to use force to expel a trespasser and defend property

Dunn contends that the trial court erred because there were no facts to support CALCRIM Nos. 3475 and 3476 and these instructions deprived him of his self-defense defense.[16] The

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[16] Harris joined in this argument in his Reply Brief. Putting aside the issue of forfeiture, the self-defense instructions were limited to Dunn. Also, the jury was instructed that some "of these instructions may not apply, depending on your findings about the facts of the case. Do not assume [that] just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

modified version of CALCRIM No. 3475 the trial court gave the jury was phrased as follows: "The lawful occupant of a home may request that a trespasser leave the home. If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to the home or the occupants, the lawful occupant may use reasonable force to make the trespasser leave. [¶] Reasonable force means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. [¶] If the trespasser resists, the lawful occupant may increase the amount of force he uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property. [¶] When deciding whether the lawful occupant used reasonable force, consider . . . what a reasonable person in a similar situation with similar knowledge would have believed. If the lawful occupant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The right of a lawful occupant to defend himself and his property is a relevant consideration in determining whether a defendant may prevail when he seeks to negate malice aforethought by asserting the affirmative defense of imperfect self-defense. *If the [] lawful occupant has a right to use force to defend himself in his home, then defendant Dunn has no right of self-defense, imperfect or otherwise.*" (Italics added.)[17]

(CALCRIM No. 200.) Given these circumstances, there is no reasonable likelihood that the jury would have applied these instructions to Harris.

[17] The court referenced *People v. Watie* (2002) 100 Cal.App.4th 866, 878 (cited in the use notes to CALCRIM No. 3475), to support the proposition that the right to defend one's home may negate a defendant's claim of imperfect self-defense. Specifically, the trial court quoted "the right of a victim

The trial court further instructed with CALCRIM No. 3476: "The possessor of real property may use reasonable force to protect that property from imminent harm. A person may also use reasonable force to protect the property of a family member or guest from immediate harm. [¶] Reasonable force means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm. [¶] When deciding whether the possessor of real property used reasonable force, consider all the circumstances as they were known to and appeared to him and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the possessor of real property's beliefs were reasonable, the danger does not need to have actually existed."

The trial court did not deprive Dunn of his self-defense defense by giving the modified versions of CALCRIM Nos. 3475 and 3476. The instructions do not misstate the law. (See *People v. Watie*, *supra*, 100 Cal.App.4th at p. 878 ["If [victim] had a right to use force to defend himself in his home, then defendant had no right of self-defense, imperfect or otherwise."].) Nor did the instruction compel the jury to find that Dunn was a trespasser. Rather, the instructions merely summarized the legal principles that the jury should apply *if* it believed Dunn was a trespasser

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to defend himself and his property is a relevant consideration in determining whether a defendant may prevail when he seeks to negate malice afore thought [*sic*] by asserting the affirmative defense of imperfect [self-]defense. [¶] *If [the victim] had a right to use force to defend himself in his home, then defendant has* [*sic*] *no right of self-defense, imperfect or otherwise.* So that's the language I'm intending to put in based on the case[.]" (Italics added.) This language remains a correct statement of the law.

when he entered the house on the night he killed Ike. In a separate instruction, the trial court told the jury that "[s]ome of [the] instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." Thus, if the jury found that Dunn was not a trespasser, the jury would have understood that the modified CALCRIM Nos. 3475 and 3476 instructions did not apply.

Nor did the instructions lower the prosecution's burden of proof. Neither CALCRIM No. 3475 nor CALCRIM No. 3476 specifically address or allocate the burden of proof. The trial court instructed the jury in CALCRIM Nos. 103 and 220: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." The court reminded the jury of the People's burden of proof in the instructions on self-defense,[18] first degree murder,[19]

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[18] The trial court instructed the jury in CALCRIM No. 505 (Justifiable Homicide: Self-Defense): "Defendant Dunn is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. . . . [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find defendant Dunn not guilty of murder or manslaughter."

[19] The trial court instructed the jury in CALCRIM No. 521 (First Degree Murder [Pen. Code, § 189]): "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People

and voluntary manslaughter.[20] Finally, the prosecutor explicitly acknowledged that she had to prove that Dunn was not acting in self-defense.

Even though the instructions did not direct the jury to find that he was a trespasser, Dunn argues CALCRIM Nos. 3475 and 3476 undermined his defense because they *permitted* the jury to find he was a trespasser; in defendant's view, there was no substantial evidence on which the jury could so find. After reviewing the record, we do not share defendant's view. There was evidence, that although Harris had been invited to the party, the invitation was revoked when Champagne yelled "the party's over" and told everyone to go home. Defendants' permission to stay was certainly revoked when Frank forced some of the partygoers, including Harris and Grissett, out of the apartment and locked the door. Dunn and Harris were only able to obtain re-entry when Dunn screamed for Harris's cousin to "open the door, bitch." This evidence was sufficient to deserve consideration by the jury as to whether Dunn was in fact a trespasser. (See *People v. Williams* (2015) 61 Cal.4th 1244, 1263

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have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

[20] The trial court instructed the jury in CALCRIM No. 571 (Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another–Lesser Included Offense [Pen. Code, § 192]): "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant [Dunn] not guilty of murder."

[" '[s]ubstantial evidence' " that warrants jury instruction is " 'evidence sufficient to "deserve consideration by the jury" ' "].)[21]

4. Failure to instruct on provocation

Harris contends that his attorney provided ineffective assistance of counsel by failing to request CALCRIM No. 522 on provocation.[22] Harris recognizes that CALCRIM No. 522 is a pinpoint instruction and need not be given sua sponte. (*People v. Rogers* (2006) 39 Cal.4th 826, 880 [addressing equivalent instruction, CALJIC No. 8.73]; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333 [CALCRIM No. 522].) Accordingly, he contends that his attorney's failure to request the instruction

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[21] Insofar as Dunn argues that there was insufficient evidence to support CALCRIM No. 3476 regarding the right to defend property, any error is harmless as the instruction was repetitive of CALCRIM No. 3475. Moreover, as noted, the jury was instructed that some of the instructions might not apply, and directed to follow the instructions that apply to the facts found. (See CALCRIM No. 200, cited in footnote 15, *ante*.) On this record, reversal is not required because it was not reasonably probable that without CALCRIM No. 3476 the result would have been more favorable to Dunn.

[22] CALCRIM No. 522 (Provocation: Effect on Degree of Murder) provides: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]"

constituted ineffective assistance of counsel. In order to prevail on such a claim, Harris would have to establish not only that trial counsel's performance in this regard "fell below an objective standard of reasonableness" "under prevailing professional norms," but also that he was prejudiced thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) He fails to make either showing. Defense counsel had a legitimate tactical reason for failing to request an instruction on provocation that would focus the jury's attention on Harris's mental state when he fired the gun: such attention might undermine the defense that Harris was not the shooter. Indeed, Harris testified he never fired a shot, and his counsel argued that Izell shot his brother by accident. An attorney does not provide ineffective assistance by failing to request a pinpoint instruction that is inconsistent with his theory of the defense. (*People v. Wader* (1993) 5 Cal.4th 610, 643.)

II. There Was Sufficient Evidence to Support the Gang Allegations

Dunn and Harris contend there was insufficient evidence that the killing was committed " 'with [the] specific intent to promote, further, or assist' " the Nutty Blocc gang. In evaluating a claim of insufficient evidence as to an enhancement, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances

might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

To establish a gang allegation, the prosecution must prove that the crime was "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)(1).) " 'Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.' " (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412.) "[A] trier of fact may rely on expert testimony [on] gang culture and habits to reach a finding on a gang allegation." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617 disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665.) An expert's opinion can be sufficient to support a section 186.22, subdivision (b)(1) gang allegation. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

Substantial evidence supports a reasonable inference that Dunn and Harris had the specific intent to promote, further or assist the Nutty Blocc gang based on their gang membership, the circumstances surrounding the crime, and the expert's opinion. Harris, Dunn and Grissett were all self-admitted Nutty Blocc members who bore gang tattoos. Notwithstanding that the Gaston family was also heavily associated with the Nutty Blocc gang, they took steps to ensure that gang violence would not occur at the party. Everyone coming into the party was searched; some were "gang checked" for weapons. The incident commenced on the patio when Grissett–a Nutty Blocc member–threatened to

shoot up the party and disparaged two other gangs which "[got] along" with Nutty Blocc. When Champagne then threatened to shut down the party, Harris began arguing with Ike, threw a punch at Ike, who in turn punched Harris, knocking him to the ground. This knock to the ground appeared to be the act of disrespect which precipitated the further actions. Six other Nutty Blocc members, including Grissett, joined the brawl. Later, the conflict continued inside the apartment after Harris challenged Ike to fight again and a fight ensued involving Harris, his brothers and Grissett battling Ike's brothers, Izell and Keon. Frank pushed Harris and Grissett out of the apartment, and locked the door. Harris returned with yet another fellow Nutty Blocc gang member, Dunn, who had not been involved in the earlier incidents, and shot at Ike and his siblings, killing Ike.

The gang expert, Detective Lawler, explained how shooting a fellow gang member who disrespected the gang would be considered putting in work for the gang and would earn respect. Fear and respect are paramount for gang culture to operate in a community. When a Nutty Blocc member responds with violence towards a fellow gang-member that has disrespected him, that instills fear within the people who are present, and the community as a whole. Lawler opined that shooting a fellow gang member who had acted disrespectfully, in circumstances similar to the instant case, would benefit the individual shooter by raising his status in the gang. It would also benefit the gang by instilling respect and fear in enemy gangs, recruiting youths to the gang, and facilitating expansion of the gang's territory. Thus, notwithstanding that Ike was a member of the defendants' gang, based on this testimony, the jury could reasonably infer, even if there was a personal motive for the shooting, that Harris and Dunn killed Ike with the specific intent to promote, further or assist the Nutty Blocc gang. (See *People v. Vazquez* (2009) 178

Cal.App.4th 347, 353 [jury could find defendant committed murder with intent to achieve the gang expert's "predicted effect of intimidating rival gang members and neighborhood residents, thus facilitating future crimes committed by himself and his fellow gang members"]; *People v. Albillar*, *supra*, 51 Cal.4th at p. 62 [jury presented with two competing inferences was "entitled to credit the evidence that the attack on [Ike] was gang related, not [personal]."])[23]

III. Prior Prison Term Enhancement and Presentence Custody Credit

Dunn contends, and the People agree, that the trial court erred in imposing consecutive enhancements for the same prior felony conviction. The People alleged, and Dunn admitted, that he had suffered a conviction in case No. TA092555, and that this constituted a prison prior under section 667.5, subdivision (b) and a serious felony prior under section 667, subdivision (a). At sentencing, the court added one year for the prison prior and five years for the serious felony conviction. The parties concur that

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[23] This case is therefore not like *People v. Ramon* (2009) 175 Cal.App.4th 843 and *People v. Ochoa* (2009) 179 Cal.App.4th 650, cases involving stolen vehicles which could be used in other gang-related crimes, where the courts found the evidence insufficient to support the gang allegations. In *Ramon*, the only evidence supporting the enhancement was the gang expert's testimony that the defendant and his codefendant were members of the same gang and they were stopped driving a stolen vehicle (a crime commonly committed by their gang) in territory their gang claimed. (*Ramon*, at p. 849.) In *Ochoa*, the defendant, while stealing a car, made no gang signs or signals or otherwise engaged in gang behavior during the commission of the crime. (*Ochoa*, at p. 662.)

the one-year enhancement should be stayed. (*See People v. Walker* (2006) 139 Cal.App.4th 782, 794, fn 9.)

Dunn also contends, and the People agree, that Dunn was entitled to 392 days of custody credit rather than the 391 days awarded by the trial court upon counsel's representation. Dunn was arrested on June 5, 2014 and sentenced on July 1, 2015. Thus he is entitled to 392 days of actual presentence custody credits.

DISPOSITION

The judgment as to Dunn is affirmed in part and reversed in part. On remand, the trial court shall impose and stay the section 667.5, subdivision (b) enhancement as to case No. TA092555, correct his presentence custody credits to reflect 392 days of actual custody credits, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. Accordingly, the judgment as to Dunn is affirmed in all other respects. The judgment as to Harris is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORT

BACHNER, J.*

We concur:

EDMON, P.J. LAVIN, J.

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