Filed 12/5/19 P. v. Harris CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SEMAJ RASHAAD HARRIS et al., Defendants and Appellants.	B288611 (Los Angeles County Super. Ct. No. NA103457)

APPEALS from judgments of the Superior Court of Los Angeles County. Richard R. Romero, Judge. Affirmed as modified and remanded with directions.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Semaj Rashaad Harris.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant Deante McNeese.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant Sohntee Laray Webb.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Susan Sullivan Pithey

and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Juries convicted defendants Semaj R. Harris, Deante McNeese, and Sohntee L. Webb of multiple gang-related murders, attempted murders, and firearm offenses committed over the course of several months in 2015. On appeal, the defendants raise numerous claims related to the sufficiency of the evidence, the admission of Webb's statements to police, testimony from a gang expert, the admission of evidence of uncharged crimes, the court's instructions on the firearm offenses, and the prosecutor's closing arguments. They also assert various claims related to their sentences.

We find no prejudicial error requiring reversal. We modify Harris's and McNeese's judgments to correct several sentencing errors and remand their cases for the limited purpose of conducting *Franklin* hearings. We also make corrections to all the defendants' abstracts of judgment. We affirm the judgments in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Charges

Harris, McNeese, and Webb were each charged by information with the following offenses: attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187, subd. (a))[1] of Antonio L. (Count 1), Gabriela C. (Count 2), Gilbert P. (Count 3), Robert H. (Count 5), Richard L. (Count 6), and Isaac M. (Count 7); first degree murder (§ 187, subd. (a)) of James R.

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

(Count 8) and Rodrigo P. (Count 9); shooting at an occupied building (§ 246; Count 4); and shooting at an occupied motor vehicle (§ 246; Count 10).[2] Various gang and firearm enhancements were also alleged. The cases were tried to separate juries for each defendant.

II. The People's Evidence

The People presented evidence at trial establishing the following.

A. Background

Webb and McNeese are members of the Rollin' 20's gang and go by the monikers "Baby Pittsburgh" and "D-Deuce," respectively. Harris is a member of the Linden Block clique and goes by the moniker "Scar Dog."

In July 2012, Harris and a few friends were walking to a liquor store when they were confronted by a group of Hispanic men. One of the men made a reference to a Hispanic gang, pulled out a gun, and fired multiple shots. Some of the bullets struck and killed Harris's friend, Ajay.

A few weeks later, Harris was shot in the groin. He told police he and a friend were approached by two men—one Mexican and one African-American—who "hit them up" and "banged on him."

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[2] The information erroneously referred to the crimes in Counts 4 and 10 as shooting at an inhabited dwelling and inhabited motor vehicle, respectively. The jury instructions and verdicts properly referred to the crimes as shooting at an occupied building and occupied motor vehicle.

B. Washington Place Shootings (Counts 1, 2, 3, 4, and 10)

About two years later, on July 28, 2015, Gabriela C., Antonio L., and Gilbert P. were in a parking lot in Long Beach fixing Antonio's Dodge Charger. Antonio and Gilbert are Hispanic.

Harris, McNeese, and a woman, Jasmine N.,[3] approached on foot. According to Jasmine, one of the people working on the Charger called them racial slurs and "crabs," which is a disrespectful term for members of Crips gangs. Harris asked, "Where are you from?" to which Antonio responded, "I'm not from nowhere, but I know where I'm at." Harris responded, "fuck Mexicans," "fuck Chongos," "fuck Bloods," and "Rollin' 20's Crips." "Chongos" is a disrespectful term for members of the Longo gang.

Harris, McNeese, and Jasmine walked across the street to a motel where McNeese was living. Harris returned, told Gabriela, Antonio, and Gilbert he had "something for you guys," and then disappeared from sight.

Fearing for their safety, Gabriela, Antonio, and Gilbert got in the Charger and drove towards Gilbert's house. McNeese and Jasmine watched them drive away, and McNeese made a comment about "Chongos." Webb drove up in a car, with Harris in the front passenger seat. McNeese got in the back seat, and they drove off in the direction of the Charger.

Gabriela arrived at Gilbert's house and parked the Charger on Washington Place. Gilbert got out of the car, and Gabriela heard a loud bang. Gilbert ducked and ran to a nearby alley.

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[3] Jasmine is the mother of Harris's child.

Gabriela looked behind her and saw Harris standing outside a car, holding a large gun. She heard two more shots and started driving. The car followed her, and the rear passenger yelled "fuck Chongos." Gabriela saw a man in the car pointing a gun at her. She turned down an alley and lost the car.

Gilbert's mother was outside the house collecting mail when the shootings occurred. She saw a man holding a long rifle-type gun exit a car parked behind the Charger. The man shot the gun twice in the direction of the Charger, using an "air-pump-type maneuver." While pumping the gun, the barrel was pointed forward, as opposed to up.

Maria H. worked in the National Guard Armory building close to Gilbert's house. She was inside the building at the time of the shootings and heard a loud noise that sounded like a crash. She went outside and noticed a hole in the building.

Police recovered from the scene two spent .308 Winchester bullet casings. They also recovered a bullet fragment in front of the Armory building. There was an impact mark on the wall of the building, consistent with having been struck by a bullet.

The People's firearm expert testified that a gun's recoil may cause a bullet to travel in an upward direction from where the gun was aimed. Rifles generally have greater recoil than handguns. The effect would be exacerbated if the barrel were shortened.

C. Murders of Andre Borero and Anthony Holston

About a month later, on August 23, 2015, Webb's and Harris's good friend, Andre Borero, was murdered outside a liquor store. Borero was a member of Linden Block. When police arrived at the scene, Webb was distraught and lying on top of Borero's body. Police had to restrain Webb because he continued

to return to the body, which was interfering with paramedics. Webb told police he heard "Longos" murdered Borero. Harris told someone he heard "Chongos" were responsible.

Around this time, a Rollin' 20s member, Anthony Holston, was murdered in a separate incident. Harris told someone Hispanic men were responsible for Holston's death.

D. Attempted Murders of Robert H. and Richard L. (Counts 5 and 6)

On August 24, 2015, the day after Borero's murder, Robert H. and his friend Richard L., who are both Hispanic, were sitting on the curb of a wide alley near 16th Street in Long Beach. Richard has a tattoo of "Wilmas," which is the name of a local street gang.

A black Jeep driven by McNeese's brother entered the alley. Harris and McNeese were passengers. Robert saw the Jeep moving fast in his direction. He tried to run, but the car struck him, knocked him to the ground, and then ran over him. Richard jumped out of the way, and the Jeep brushed his ankle. The Jeep drove to the end of the alley and turned around. It then started driving fast towards Robert. The Jeep's side mirror struck Robert before driving away.

Robert suffered a broken leg, fractured pelvis, injured foot, burns on his legs, scrapes, and bruises. He was hospitalized for two weeks.

E. Attempted Murder of Isaac M. (Count 7)

That same night, 17-year-old Isaac M. was riding his bicycle in Long Beach to meet up with his younger sister. Isaac came to a stop when a black Jeep—in which McNeese and Harris were passengers—pulled up and stopped a few feet from him. The Jeep's occupants began yelling at Isaac, asking "where are

you from?" They pointed three or four guns out the window and fired more than 14 shots in Isaac's direction. Isaac was struck by bullets in his legs, hip, liver, kidneys, lungs, back, arm, and neck. The SUV quickly drove away while its occupants cheered and laughed loudly. Isaac's sister rushed to his side and flagged a passing car, which drove them to the hospital. Isaac spent around two years in the hospital and underwent more than 19 surgeries in order to recover from his injuries.

Police recovered from the scene nine-millimeter luger cartridge cases, nine-millimeter bullets, .25-caliber automatic cartridge cases, .25-caliber bullets, and a .30-caliber bullet.

F. September 7, 2015 Murder of James R. (Count 8)

James R. and Candice T. dated in September 2015. James belonged to a Bloods gang. Before dating James, Candice dated Rollin' 20's member Jared Knight, who goes by the moniker "Lil' Pittsburg." After they broke up, Knight harassed Candice and got into arguments with James.

The evening of September 7, 2015, Webb drove Harris, McNeese, and two women to James's neighborhood and parked in a dark location. McNeese got out of the car.

At the time, James was in front of his apartment talking to his cousin, Anthony M. Anthony heard a gunshot and took cover. He saw James had been shot in the rear lower back, which was ultimately fatal.

After the shooting, McNeese returned to the car and one of its occupants asked, "Did you do it?" McNeese responded, "Yeah, yeah, man, I did it." Police recovered from the scene a .30-caliber bullet.

G. Murder of Rodrigo P. (Count 9)

Shortly after midnight on September 16, 2015, Rodrigo P. and his girlfriend Maria were standing outside an apartment building on Chestnut Street talking to a friend. Rodrigo belonged to the East Side Longo gang. A Jeep driven by McNeese's brother briefly stopped near where Rodrigo and Maria were standing. Harris, McNeese, and Webb were passengers. McNeese's brother then drove the Jeep to a nearby alley and shut off the headlights. A security video showed a man fire a gun near Rodrigo and then run to the area where the Jeep was parked. The Jeep then drove away.

Maria was hugging Rodrigo when she heard the first gunshot. Rodrigo shielded Maria's body, and Maria heard several more gunshots. Rodrigo died from a gunshot wound to the chest.

Police recovered from the scene a .308 Winchester cartridge case and two .30-caliber bullets. The People's firearm expert concluded the .308 cartridge case was fired from the same firearm as the cartridge cases found near Washington Place. The bullets were fired from the same firearm as the bullet found at the scene of James R.'s murder.

H. Recovery of the Rifle from Webb's Home

During a search of Webb's home in Rancho Palos Verdes, police found in the garage a rifle with a sawed-off barrel, loaded with a single .308-caliber cartridge. The People's firearm expert determined the .308-caliber cartridges and .30-caliber bullets located at the various crime scenes were fired by the rifle. Harris's DNA profile matched the DNA profile of the major contributor to a sample taken from the rifle grip.

I. Gang Evidence

During trial, McNeese was placed in a cell with a peanut butter and jelly sandwich for lunch. After McNeese was released, a deputy saw "20" and "20 Crip" written throughout the cell in peanut butter and jelly.

Jerry Poole, who is an officer in the Gangs and Violent Crimes Unit of the Long Beach Police Department, testified as the People's gang expert. For the past five years, he exclusively investigated the Rollin' 20's gang in coordination with the FBI.

Based on their monikers, social media activity, tattoos, and interviews with detectives, Poole opined that Webb and McNeese were members of Rollin' 20's and Harris was a member of Linden Block. Poole explained that the Rollin' 20's is a primarily African-American Crip gang, with 400 to 600 documented members in Long Beach. Linden Block is a clique under the umbrella of the Rollin' 20's that Harris co-founded in the early 2000's. It has more than 10 members.

According to Poole, the Rollin 20's and Linden Block's primary activities include murders, robberies, burglaries, and pimping. Their rivals include the Longo, Barrio Pobre, and Wilmas gangs. They also have general racial animus towards Hispanics.

Poole testified that Andre Bisserup, who is a Rollin' 20's member, committed murder and attempted murder in January 2012. Marquis Demondre Wilson, who is also a Rollin' 20's member, committed murder in May 2013. They were both convicted and gang allegations were found true.

Poole explained he was aware of three Rollin' 20's members who use the moniker Pittsburg: Michael Riles, who goes by Big Pittsburgh, Jared Knight, who goes by Little Pittsburgh, and

Webb, who goes by Baby Pittsburgh. Rollin' 20's members use the monikers "big," "little," and "baby" to create a hierarchy: little is under big, and baby is under little. Those lower in the hierarchy must follow orders from those higher up, or there will be consequences.

Poole testified that he reviewed a music video tribute to Borero, in which the defendants appeared. Poole explained that gang members often sing about their crimes. In the video, the defendants rap about going into Longo territory with a loaded gun, ready to shoot. They also refer to a .30-caliber firearm, which Poole found remarkable because he has never seen such a weapon used in a crime.

The prosecutor presented Poole with several detailed hypotheticals mirroring the facts of the case. Poole opined the hypothetical crimes were committed for the benefit of, at the direction of, or in association with Rollin' 20's. He explained: "In the community it instills a sense of fear from Rollin' 20's gang members which allows them to do more criminal activity more freely without somebody calling the police and telling on them. So that benefits the gang. It benefits the gang from rival gangs realizing that these guys are serious, that you got to watch your back, that you could be the next one in line being shot." Poole further explained that a hypothetical crime mirroring the facts of the James R. murder would be committed for the benefit of the Rollin' 20's because "Baby Pittsburg had a person above him, Little Pittsburg, who had an altercation, and he's benefiting his big homey by carrying out this crime." Assuming the crime was directed by Little Pittsburg, there also would have been "consequences of not fulfilling what is being asked of the little homey."

Poole further explained that, in the hypothetical crimes, the other gang members who were present "were there to assist, watch their back if they need to if they encounter more than one enemy, and to give them reassurance to do what they are gonna do."

J. The Defendants' Statements to Police

1. Webb's Statements

The prosecutor played for Webb's jury an audio recording of his interrogation by detectives. With respect to the Washington Place shootings, Webb said he drove McNeese and Harris around in his car, looking for some Hispanic guys who shot at McNeese. Harris spotted them and jumped out of the moving car with a sawed-off hunting rifle. He ran down the street and fired the rifle once. After the shooting, Harris got back in the car and Webb drove him home. Webb denied knowing Harris had a gun when he got in the car. He also claimed he was high on crystal meth and was not thinking straight.

Webb told detectives he heard Hispanic men killed Borero. After Borero's death, Webb would ride around with McNeese and Harris getting "drunk and faded." When they would see a "Mexican," Harris and McNeese would jump out and shoot, while Webb stayed in the backseat. Webb said he knew Harris and McNeese had guns because they "always carry guns."

Regarding the Rodrigo P. murder, Webb said he, McNeese, and Harris were driving to a liquor store in a black Jeep. When they were near Chestnut and Anaheim, McNeese pointed to a man and said he might be Mexican. McNeese and Harris jumped out of the car and shot the man.

Webb said another time, he, McNeese, and Harris were driving to Long Beach from Los Angeles in the black Jeep. Harris announced he saw a Hispanic man and jumped out of the car with a rifle. Webb heard a gunshot.

2. Harris's Statements

The prosecutor played for Harris's jury an audio recording of his interrogation by detectives. As to the Washington Place shootings, Harris said he, McNeese, and Jasmine walked by some Hispanic guys who made racist and gang-related remarks. Harris thought they were Longo gang members. One of the men opened the trunk of his car, which made Harris think he had a gun.

Harris, McNeese, and Webb later drove around looking for the men. When they saw the Charger, Webb pulled up about a car's length behind it. Initially, Harris claimed McNeese and Webb were the shooters. Later, he admitted he was the shooter.

Harris said he heard some Hispanic guys from Wilmas murdered Borero, whom he considered to be his best friend. Sometime after Borero's murder, Harris was stabbed by a Hispanic man during a fight.

According to Harris, the night after Borero's murder, McNeese's brother was driving Harris, Webb, and McNeese around in a black Jeep. They spotted two men drinking beer in an alley, and Webb said, "there goes some . . . Mexicans right there." Harris said to leave them alone. Webb asked the men "where y'all from." McNeese's brother backed up the Jeep and hit one of the men with the vehicle.

Later that evening, Webb saw someone on a bike and said, "That's a Mexican." Webb shot at him with a nine-millimeter handgun and a rifle; McNeese shot at him with a .25-caliber gun.

Harris thought the victim was an Asian or Hispanic gang member.

Concerning the James R. murder, Harris said James "got into it" with Little Pittsburgh and Baby Pittsburg over a woman. One night, Webb drove Harris to an alley near James's house. Webb got out of the car and shot James with a large firearm. Harris said Little Pittsburg was the mastermind of the murder.

As to the Rodrigo P. murder, Harris said he was in a car with McNeese and his brother driving home from a concert. They picked up Webb, who said he needed to "go do something real quick." As they were driving, Harris and Webb saw a few people standing around who looked Hispanic. Harris wanted to go home. Webb got out of the car, and Harris heard a gunshot.

3. McNeese's Statements

The prosecutor played for McNeese's and Harris's juries an audio recording of McNeese's interrogation by detectives. Concerning the Washington Place shootings, McNeese said he, Harris, and Jasmine got into an argument with some Longos with a black Charger. One of the men went to the trunk and acted as if he had a gun. McNeese took Jasmine across the street to his motel. He went back outside and got in Webb's car. Webb was driving and Harris was in the front passenger seat. McNeese was looking for a fight. They soon came across the Charger and saw a passenger get out. Harris got out of the car and fired two shots, trying to scare them.

McNeese told detectives Borero's subsequent murder started a rash of shootings. McNeese believed Borero was murdered by members of the West Side Wilmas gang, although at first he thought it was Longos.

As to the attempted murders of Robert H. and Richard L., McNeese said his brother was driving him, Harris, and Webb in a black Jeep. They came across a couple Hispanic guys who looked like gangbangers, sitting and drinking in an alley. McNeese's brother drove the Jeep at the men and may have hit them with the bumper.

As to the Isaac M. shooting, McNeese said he, Harris, and Webb were in a Jeep being driven by McNeese's brother. Webb shot the .30-caliber rifle, McNeese shot a "deuce five" Hi-Point, and someone else shot a nine-millimeter handgun. McNeese claimed he was just trying to scare Isaac and "wanted everybody just to feel like it wasn't safe to be on the street." McNeese agreed they were fired up because Borero was killed by Hispanic men.

McNeese told detectives he is a distant cousin of James R., but did not know his name. A few days before the murder, James had an argument with Webb and Little Pittsburgh about Cynthia. The night of the murder, McNeese and Harris were in a car driven by Webb. Webb had the sawed-off rifle with him. They drove by a house and Webb said, "That's the motherfucker right there." Webb hopped out of the car, and McNeese heard a "boom." Webb returned to the car, giggled, and said, "I got him." The next day, Little Pittsburg called McNeese and told him James had been killed.

With regards to the Rodrigo P. murder, McNeese told detectives he was riding home from a concert in a Jeep with his brother and Harris when they picked up Webb. At some point, Webb told them to stop and jumped out of the car. McNeese heard gunshots, and Webb returned to the car with blood on his

shirt. Webb had a large hunting gun with a cut barrel, which was referred to as "the .30."

III. Harris's Defense

Harris called Glen M. to testify, who witnessed the Washington Place shootings. Glen saw Gilbert P. jump out of a car and start running. Someone reached out the window of another car and fired a gun high up in the air. It was obvious to Glen whoever shot the gun was not aiming at anyone and was just trying to scare people.

Harris also called T.C., who lives near the alley where Robert H. and Richard L. were struck by the Jeep. T.C. testified that lighting is limited in the alley and it was dark that night. T.C. heard Robert and Richard speaking Spanish and described them as Hispanic.

IV. Verdicts and Sentences

Harris's and McNeese's juries found them guilty on all counts. They found true armed principal allegations on Counts 1–3 and 7–9 (§ 12022.53, subds. (b), (c), (d), & (e)(1)). They also found true gang allegations on all counts (§ 186.22).

Webb's jury found him guilty on Counts 1–3 and 8–10, and found him not guilty on the remaining counts. It found true gang allegations on all counts. It found not true all the firearm allegations.

The court sentenced Harris to an aggregate term of 85 years plus 189 years to life, consisting of the following: three terms of 20 years plus 15 years to life on Counts 1, 2, and 3; 7 years to life on Count 4; two terms of 15 years to life on Counts 5 and 6; 25 years plus 7 years to life on Count 7; and two terms of 50 years to life on Counts 8 and 9. The court also imposed, but stayed pursuant to section 654, a 14-years-to-life term on

Count 10. The court further imposed various fines, fees, and assessments, and ordered Harris pay $19,681.70 in victim restitution.

The court sentenced McNeese to an aggregate term of 85 years plus 172 years to life, consisting of the following: three terms of 20 years plus 7 years to life on Counts 1, 2, and 3; 7 years to life on Count 4; two terms of 15 years to life on Counts 5 and 6; 25 years plus 15 years to life on Count 7; and two terms of 50 years to life on Counts 8 and 9. The court also imposed, but stayed pursuant to section 654, a 14-years-to-life term on Count 10. The court further imposed various fines, fees, and assessments, and ordered McNeese pay $19,681.70 in victim restitution.

The court sentenced Webb to an aggregate term of 95 years to life, consisting of three 15-years-to-life terms on Counts 1, 2 and 3, and two 25-years-to-life terms on Counts 8 and 9. It also imposed, but stayed pursuant to section 654, a 15-years-to-life term on Count 10. The court further imposed various fines, fees, and assessments, and ordered Webb pay $17,008.70 in victim restitution.

Harris, McNeese, and Webb timely appealed.

DISCUSSION

I. Webb's Statements to Police Were Admissible

Webb contends the trial court erred in denying his motion to suppress statements he made to detectives during his interrogation. We disagree.

A. Background

1. The Interrogation

At the start of the interrogation, Webb was very forthcoming about the Washington Place shootings. He became

significantly less forthcoming when the questioning turned to the murders. One of the detectives tried to convince Webb to talk by telling him it would "greatly help the situation." When Webb continued to deny knowledge of the murders, the detectives told him they found his DNA on the rifle, but assured him they were not calling him the shooter.

Webb eventually told the detectives he heard rumors about the murders, but it would be pointless for him to talk about them because it would be inadmissible hearsay. One of the detectives replied: "[R]ight now is the best time [to tell us what you know], because we have to march into the district attorney's office and say what happened. Okay, I know about [Webb's] business. What do you guys think? Was he honest to me? Did you catch him in little lies? I want to know this so I know what to, what to file on him and what to do. [¶] And we don't want to go back to well, he was a decent dude, he was respectful and all that, but we did catch him in three or four different, little small lies."

The detective went on to explain that, after spending some time in jail, defendants are often more willing to talk to police: "That's when you start calling whoever and say get a hold of those detectives, and get a hold of that district attorney, because I need to start talking. I need to worry about me. But the people who are prideful, and they sit here, and they deny, and they deny, and they deny, those are the people that rot, okay. They get the LWOPs. Okay, they never see the [light of day]."

Webb responded that he had nothing to lose because he was already facing a long prison sentence. He then provided vague information about Harris and the rifle. The detectives pressed him to provide more details, which they suggested "can greatly help you." Webb continued to give vague responses.

At some point, one of the detectives told Webb, "you can either help yourself, or you can bury yourself [¶] . . . . We know you're lying. . . . [¶] . . . Don't bury yourself. Don't get caught in lies." Webb replied, "I just don't see how I'm facing attempted murder [for the Washington Place shootings], by me being a driver. So attempted murder holds what, 25 to life?" The detective responded, "It could be. [¶] . . . [I]t depends on a lot of factors." The other detective told Webb "there's nothing that my partner and I could do to promise you anything. We can't promise you anything okay. [¶] But the more cooperative you are, the better it looks for you in the future . . . ."

Webb responded that even if he were honest, "I'm still going to get 25 to [life]." He continued, "so those years are still going to add up to 45, 50 years." The detective replied, "You're burying yourself is what you're doing. You're already, you're already saying you're done. You can be used later on down the line as a witness. Right now is the time when okay, maybe he is more of a witness. Maybe he's not an active participant, okay. . . . If you're the shooter, man you probably should zip it, okay. If you're not the shooter, you need to say hey dude, listen, I was there, but man, I didn't know he was going to do this, I didn't know he was going to do that."

At that point, Webb asked the detectives to tell him the addresses of the murders. The detectives refused, explaining, "[We] don't want to coerce you to do anything. You're going to do things, because you know what it is, man? At some point in your life, it's the right thing to do." Webb then began to provide more details about the murders.

During a pause in the interrogation, Webb expressed doubt that his cooperation would actually benefit him. One of the detectives responded to Webb's concerns by telling him, "I believe it's going to help you in the long run, and this could, this could make you more, more of a witness, where you'll get a little time, instead of an acting participant . . . ." The other detective quickly reminded Webb, "we cannot promise you anything." Webb responded, "Yeah, I know."

Webb then expressed frustration that the detectives said they could help him, yet they refused to make any promises. One of the detectives responded that their next step would be to talk to the district attorney, who would ask them whether Webb was the sort of person he could make a deal with to testify. The detectives would tell the district attorney whether Webb was sincere and whether they caught him in any lies.

Webb responded that he had been completely honest with the detectives in his other case, but he felt "played" by them. He then remarked, "I'm not going to sit here and act like that's why I came and told what I told." At that point, the detectives switched tactics and began discussing how not coming clean would eat away at Webb's conscious. Webb eventually provided more information about the murders.

Near the end of the interrogation, Webb again expressed doubts about whether he would see any benefit from talking to the detectives: "I feel like sometimes you guys, like how I felt, the same way with my other case, I felt like they come in here and [say] . . . it'll work out better for you to do this and do that. But it don't; because at the end of the day, you still face that time, the same amount of time you could probably face without saying nothing." One of the detectives responded, "All we can do

is convey to the district attorney that you're extremely cooperative. That's all we can do is convey that, okay."

2. Webb's Motion to Suppress

During trial, Webb moved to suppress evidence of his statements to the detectives as involuntary. The court ruled the statements were admissible, noting that, although the detectives convinced Webb to be more forthcoming, their conduct was not coercive and did not overbear his will. The court further noted that offering to bring a defendant's cooperation to the attention of the prosecution does not, by itself, render a resulting statement involuntary.

B. Relevant Law

"The use in a criminal prosecution of involuntary confessions constitutes a denial of due process of law under both the federal and state Constitutions." (*People v. Haydel* (1974) 12 Cal.3d 190, 197.) Accordingly, a defendant's confession or admission may be introduced into evidence only if the People can prove it was voluntary, that is, it was the product of ' "a rational intellect and a free will." ' (*Mincey v. Arizona* (1978) 437 U.S. 385, 398; *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)

The test to determine whether a statement was voluntary is whether the defendant's will was overcome at the time he made it. (*People v. Duff* (2014) 58 Cal.4th 527, 555.) To make that determination, courts examine " 'all the surrounding circumstances—both the *characteristics of the accused* and the *details of the interrogation.*' " (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208.) This includes consideration of the defendant's "age, sophistication, prior experience with the criminal justice system and emotional state," as well as whether officers made promises of leniency, employed psychological

manipulation, or threatened to take official action against the witness. (*Id.* at p. 209; *People v. Lee* (2002) 95 Cal.App.4th 772, 782; *Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) " '[M]ere questions, or exhortations to tell the truth or clear [one's] conscience or help [one]self by revealing facts as to the dominant part of [a codefendant] or some other person in the criminal enterprise' " are insufficient: " '[I]ntellectual persuasion is not the equivalent of coercion.' [Citation.]" (*People v. Hill* (1967) 66 Cal.2d 536, 548–549.)

The court must also consider whether the officers deceived the defendant during the interrogation. (*People v. Hogan* (1982) 31 Cal.3d 815, 840–841 disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836; *People v. Engert* (1987) 193 Cal.App.3d 1518, 1524.) However, "California courts have long recognized it is sometimes necessary to use deception to get at the truth. Thus, the courts have held, a 'deception which produces a confession does not preclude admissibility of the confession *unless the deception is of such a nature to produce an untrue statement.*' It is also well established exhortations directed to the suspect or witness to 'tell the truth' are not objectionable." (*People v. Lee, supra,* 95 Cal.App.4th at p. 785, fns. omitted.)

As the facts regarding the interrogation are not in dispute, we independently review the entire record to determine whether the defendant's statements were coerced, so as to render his trial unfair. (*People v. Lee, supra,* 95 Cal.App.4th at p. 781; *People v. Badgett* (1995) 10 Cal.4th 330, 350–351.)

C. Analysis

The totality of the surrounding circumstances indicates Webb's statements during the interrogation were voluntary.

Webb was 24 years old at the time of interrogation; while still young, he was unquestionably an adult. He also displayed a relatively high level of sophistication and familiarity with the criminal justice system. On multiple occasions, Webb expressed a belief that talking to the detectives would not actually benefit him. At one point, he astutely remarked, "I could be honest, and I'm still going to get 25 to [life]." Webb also noted how detectives in another case had counseled him that telling the truth would be helpful, yet he ultimately faced the same prison time. It is clear from these statements that Webb understood his candor was unlikely to help his case, no matter what the detectives said. In fact, at one point, he was explicit that potential leniency was not a motivating factor in his decision to discuss the crimes with the detectives.

Contrary to Webb's contentions, the detectives made no improper promises of leniency. Although the detectives frequently remarked that Webb could help himself and the situation by being truthful, they were explicit that they could not make him any concrete promises. Instead, they could only pass along their impressions of Webb's truthfulness and cooperation to the district attorney, who would then decide what charges to bring and whether to offer a deal. Courts have consistently held such statements do not constitute the sort of improper promises of leniency that risk resulting in an involuntary admission. (See *People v. Carrington* (2009) 47 Cal.4th 145, 174 [detective's "statement that he would inform the district attorney that defendant fully cooperated with the police investigation did not constitute a promise of leniency"]; *People v. Jones* (1998) 17 Cal.4th 279, 298 ["detective's offers of intercession with the district attorney amounted to truthful implications that [the

defendant's] cooperation might be useful in later plea bargain negotiations"]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203.)

There is also no merit to Webb's assertion that the detectives threatened to charge him as a shooter if he did not cooperate. According to Webb, the threat was implicit in the detectives' remarks that they were not calling him the shooter, coupled with their fabrication about his DNA being found on the rifle. Viewed in context, it is clear the detectives were not threatening Webb. Rather, they were simply trying to persuade him to be more forthcoming by expressing an open mind about his involvement in the crimes. Moreover, the detectives' deception regarding Webb's DNA was not of the sort likely to produce a false confession. (See *People v. Farnam* (2002) 28 Cal.4th 107, 182 [false statement that defendant's fingerprints were found on a piece of evidence was unlikely to produce a false confession].)

We further reject Webb's contention that the detectives improperly threatened him with life without the possibility of parole (LWOP). The reference to LWOP was made in passing, and the detectives never expressed that Webb would actually face such a charge if he declined to cooperate. They also made clear that the district attorney, not the detectives, was solely responsible for deciding what charges to bring.

Also lacking in merit is Webb's passing suggestion the detectives should have informed him he faced liability as an aider and abettor. It is clear that Webb already understood this. At one point during the interrogation, he expressed his frustration that he was merely the driver during one of the shootings, yet still faced a sentence of 25 years to life.

People v. Johnson (1969) 70 Cal.2d 469 (*Johnson*), *People v. McClary* (1977) 20 Cal.3d 218 (*McClary*), and *People v. Cahill* (1994) 22 Cal.App.4th 296 (*Cahill*), upon which Webb relies, are distinguishable. In those cases, the police misrepresented the law (*Johnson*, at p. 479; *McClary*, at p. 223; *Cahill*, at p. 315), directly threatened to charge a 16-year-old defendant with a capital offense (*McClary*, at p. 229), and strongly implied a defendant could only avoid a charge of first-degree murder if he confessed (*Cahill*, at p. 314). Nothing of the sort occurred here. The trial court did not err in finding Webb's statements voluntary and admissible.

II. Sufficient Evidence Supports Webb's Convictions

A. Sufficient Evidence Shows the Defendants Intended to Kill the Victims of the Washington Place Attempted Murders (Counts 1, 2, and 3)

Webb contends there is insufficient evidence to support his convictions for the attempted murders of Antonio L., Gabriela C., and Gilbert P. Specifically, he asserts the evidence does not demonstrate he or Harris harbored the specific intent to kill the victims, rather than merely scare them. We disagree.

1. Relevant Law

" 'To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 617.) " ' "On appeal, we . . . must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must

ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.)

This standard of review applies to claims involving both direct and circumstantial evidence. " 'We "must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" [Citation.] "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

2. Analysis

There is substantial evidence that Harris intended to kill the victims. Jasmine testified that, prior to the shootings, the victims disrespected Harris and McNeese by calling them racial slurs and "crabs," which is a derogatory gang-related term. Harris and McNeese, in turn, referred to the victims as "Chongos," which is a derogatory term for members of one of their

rival gangs. As Webb concedes, a desire to retaliate against perceived members of a rival gang provided sufficient motive for the attempted murders.

The circumstances of the shootings also suggest an intent to kill. Gilbert's mother reported seeing the shooter pointing the gun forward in the direction of the victims, rather than up in the air. Gabriela similarly testified that she saw the gun pointed at her and heard three gunshots, which would be consistent with a desire to kill the victims rather than simply scare them. The fact that Harris missed his targets, despite firing from close range, could be explained by the firearm expert's testimony that rifles with sawed-off barrels will have a pronounced recoil, causing the bullets to travel above where the shooter was aiming.

There is also substantial evidence that Webb shared Harris's intent to kill the victims. Webb admitted to police that when he picked up Harris in his car, he was under the impression the victims had fired a gun at McNeese, his fellow gang member. The jury also could have reasonably inferred that Harris and McNeese conveyed to Webb their belief that the victims belonged to a rival gang, which would have provided further motive to kill them.

Moreover, given the size of the rifle, the jury could have reasonably inferred Webb was aware Harris was armed prior to the shootings. Webb also told detectives he knew Harris always carried a gun. Despite such knowledge, the evidence shows Webb drove Harris around looking for the victims, eventually stopped the car close to the Charger, and allowed Harris to exit the vehicle with a large rifle. Considered as a whole, this is sufficient evidence from which the jury could reasonably infer Webb assisted Harris with the intention that he kill the victims.

People v. Ratliff (1986) 41 Cal.3d 675, upon which Webb relies, is inapposite. In that case, the California Supreme Court held the fact that the defendant shot the victim at close range was not conclusive evidence he harbored an intent to kill. (*Id.* at p. 698.) Here, our review is substantial evidence. Accordingly, the evidence supporting the conviction need not be conclusive.

Webb's reliance on Justice Werderger's dissent in *People v. Smith* (2005) 37 Cal.4th 733, also misses the mark. In that case, the California Supreme Court upheld the defendant's two convictions for attempting to murder a woman and her baby. (*Id.* at p. 737.) Justice Werderger dissented, noting the lack of evidence showing a motive to kill the baby and the fact that the defendant fired a single shot. (*Id.* at p. 752, Werderger dissenting opn.) She then suggested the majority had improperly conflated intent to kill with a conscious disregard for life. (*Id.* at p. 753.) Even if Justice Werderger's dissent were binding, which it is not, it does not help Webb. Here, unlike in *People v. Smith*, there is evidence the defendants fired three shots and had a motive to kill each victim.

Finally, we reject Webb's speculation that the jurors simply did not consider whether he had the intent to kill. The trial court instructed the jurors that, to convict Webb, they had to find he harbored the specific intent to kill the victims. We presume the jurors followed the court's instruction. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

B. Sufficient Evidence Shows the Washington Place Attempted Murders (Counts 1, 2, and 3), James R. Murder (Count 8), and Rodrigo P. Murder (Count 9) Were Premeditated and Deliberate

Webb contends the evidence is insufficient to show the attempted murders on Washington Place (Counts 1, 2, and 3) and the James R. and Rodrigo P. murders (Counts 8 and 9) were committed with deliberation and premeditation. He additionally asserts the jury erroneously equated intent to kill with premeditation and deliberation. We disagree.

Deliberation " 'refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.' " (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) Premeditation and deliberation do not require any specific length of time. " 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.' [Citations.]" (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, overruled on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610; see *People v. Solomon, supra*, 49 Cal.4th at p. 812.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the California Supreme Court identified three types of evidence commonly shown in cases of premeditated and deliberate murder: (1) planning activity; (2) motive; and (3) manner of killing. (*Id.* at pp. 26–27.) The *Anderson* factors are "not prerequisites for proving premeditation and deliberation, nor must the factors

‘ “be present in some special combination or . . . be accorded a particular weight.” ’ [Citations.]” (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 10, fn. 16.)

Here, the *Anderson* factors support a finding that the attempted murders on Washington Place were premeditated and deliberate. As Webb acknowledges, there is evidence showing a motive for the crimes: retaliation for an earlier gang-related altercation with the victims. Evidence of planning activity and the manner of the shootings also support a finding of premeditation and deliberation. Webb told police that, after he learned of the altercation, he picked up Harris and McNeese and drove them around looking for the victims. Given the size of the rifle used in the shootings and Webb's acknowledgement that Harris always carries a gun, the jury could have reasonably inferred Webb was aware Harris was armed. When they spotted the victims, Webb parked the car; Harris exited and started shooting. From this, the jury could reasonably infer both Webb and the shooter decided well in advance to murder the victims and made a deliberate choice to do so.

The same is true of the James R. murder. There is evidence showing a motive for the murder: the defendants' fellow gang member, Little Pittsburg, had an ongoing conflict with the victim. There is also evidence of planning activity. The night of the murder, Webb drove McNeese and Harris, at least one of whom was armed, to James's neighborhood and parked in a dark location. McNeese exited the car and shot the victim. When he returned, someone in the car asked if he "did it," suggesting the occupants knew ahead of time what McNeese intended to do. From this, the jury could reasonably infer Webb and McNeese acted with premeditation and deliberation.

Finally, there is substantial evidence showing the Rodrigo P. murder was premeditated and deliberate. Once again, there was evidence of motive. Webb told police that, after his friend and fellow gang member Borero was murdered, he would drive around with Harris and McNeese while they looked for people to shoot in retaliation. The evidence showed Rodrigo P. belonged to a rival gang, whose members Webb thought were responsible for Borero's murder.

The manner of the killing also suggests premeditation and deliberation. Before the shooting, defendants' vehicle stopped close to the victims and then parked in a nearby alley. Shortly thereafter, the victim was shot and killed. From this, the jury could reasonably infer Webb and the other defendants acted with premeditation and deliberation.

We reject Webb's suggestion that the prosecutor improperly relied on the gang expert's testimony regarding generalizations about gang culture in order to prove Webb's intent. As the Supreme Court has observed, "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Accordingly, trial courts have discretion to admit expert testimony regarding gang culture, habits, and psychology. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 945 [courts have discretion to admit expert testimony regarding gang culture and psychology]; *People v. Vang* (2011) 52 Cal.4th 1038, 1044 (*Vang*)

[expert may testify to the culture and habits of criminal street gangs].) Webb fails to meaningfully explain how Poole's testimony fell outside these bounds.

Moreover, as Webb acknowledges but then quickly discounts, the gang expert's testimony was not the sole, or even primary, evidence showing his intent. As we recounted above, testimony from percipient witnesses and Webb's own statements provided abundant circumstantial evidence of his intent. The gang expert's testimony simply provided a context through which the jury could view Webb's behavior, which might otherwise seem perplexing to someone not familiar with Rollin' 20's culture.

III. The Prosecutor Did Not Misstate the Law During Closing Argument

Webb contends the prosecutor engaged in misconduct by misstating the law during her closing argument. Specifically, he takes issue with the prosecutor analogizing the decision of whether to stop at a yellow light to the sort of premeditation and deliberation required for first degree murder. The prosecutor remarked:

> "You all probably premeditated and deliberated today when you came to court. You're on your way down Ocean Boulevard. The light in front of you turns yellow. 'I got to be there at ten o'clock. With my luck, today is the day we are actually going to start at ten o'clock and I'm going to be the late guy.' You hit that yellow light, and you're, like 'Do I go? Do I stop?' And you think about it for moments. 'Is the guy in front of me going to keep going?' 'Is there a red light camera in the vicinity?' 'Is there a cop in the intersection?' Is the guy in front of me going to stop,

> or is he gonna go?' You ultimately, 'got to go,' boom, you hit the gas and go through the yellow light. It doesn't take long at all. It's a matter []of seconds, but it is premeditation and deliberation."

Webb insists these remarks erroneously conveyed to the jury that premeditation and deliberation mean "an instantaneous, commonplace decision." We disagree.

Initially, Webb forfeited this argument by failing to make a timely objection and request an admonition from the trial court. (See *People v. Tully* (2012) 54 Cal.4th 952, 1037–1038 ["Ordinarily, the failure to object specifically on grounds of misconduct and to seek an admonition forfeits the claim unless an admonition would not have cured the harm."].) Nonetheless, we will address the merits of his argument in order to forestall his derivative ineffective assistance of counsel claim.

Contrary to Webb's contentions, the prosecutor's analogy did not convey that premeditation and deliberation are "an instantaneous, commonplace decision." Rather, her remarks properly illustrated that premeditation and deliberation can occur rapidly, which is consistent with the law. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 [" 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' "].) The California Supreme Court, in fact, has rejected a challenge to a prosecutor's use of a remarkably similar analogy to the one at issue here. (See *People v. Avila* (2009) 46 Cal.4th 680, 715.)

Because the prosecutor's remarks did not misstate the law, we reject Webb's argument that his counsel was ineffective for failing to object to them on that basis. (See *People v. Anderson*

(2001) 25 Cal.4th 543, 587 ["[c]ounsel is not required to proffer futile objections"]; *People v. Price* (1991) 1 Cal.4th 324, 387 ["[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"].)

IV. The Admission of Evidence of Uncharged Crimes Does Not Warrant Reversal

Webb and McNeese contend the trial court committed prejudicial error in allowing the prosecutor to introduce evidence of several uncharged crimes. We find no merit to their arguments.

A. Relevant Law

"Evidence of crimes committed by a defendant other than those charged is inadmissible to prove criminal disposition or a poor character." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123; see Evid. Code, § 1101, subd. (a).) Nonetheless, the trial court has discretion to admit evidence of uncharged crimes if relevant to prove, " 'among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes.' [Citations.]" (*People v. Lenart, supra*, 32 Cal.4th at p. 1123; see *People v. Lewis* (2001) 25 Cal.4th 610, 636–637; *People v. Kelly* (2007) 42 Cal.4th 763, 783.) When used to show intent, the uncharged crimes must be sufficiently similar to the charged offense to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Lewis, supra*, 25 Cal.4th at pp. 636–637.) We review the admission of such evidence for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

B. Analysis

1. October 5 Shooting

Webb contends the trial court erred in admitting evidence showing he was involved in an uncharged shooting on October 5, 2015. According to Webb, the incident was not sufficiently similar to the charged crimes. We disagree.

Over Webb's objection, the prosecutor presented evidence that on October 5, 2015, a Hispanic man was shot in West Side Longo territory. When asked about the incident, Webb told detectives the day of the shooting he drove some friends to the house of a drug dealer who had ripped off those friends in a narcotics transaction. When they could not find the drug dealer, they decided to drive around looking for "Mexicans" to shoot in retaliation for Borero's murder.

The court acted well within its discretion in allowing this evidence. The prosecutor's theory of several of the charged crimes—the murder of Rodrigo P. and attempted murders of Robert H., Richard L., and Isaac M.—was that the defendants were indiscriminately targeting Hispanic men in retaliation for Borero's murder. Webb admitted to police that on October 5, he and some friends attacked a Hispanic man with whom they had no apparent connection, in retaliation for Borero's murder. The similarities with the charged crimes are immediately apparent and more than sufficient to lead to an inference that Webb harbored the same intent in each instance. The court did not abuse its discretion in admitting evidence of the October 5 shooting.

2. July 1 Shooting

McNeese, joined by Webb, contends the court erred in admitting evidence that McNeese fired a shotgun at a car during

an uncharged incident on July 1, 2015. We find the issue forfeited.

a. Background

While examining Jasmin N., the prosecutor asked whether, on July 1, 2015, she was in a car with McNeese, Harris, and a Rollin' 20's gang member named Treavon Miller. After Jasmine responded in the affirmative, Webb's counsel asked the court for an instruction limiting the testimony to McNeese and Harris, which the court provided.

The prosecutor then asked Jasmine whether the "guys [got] into an altercation with anyone," to which Harris's and McNeese's counsel objected on relevance grounds. The court overruled the objection. Jasmine proceeded to explain that they stopped at a gas station and got into a verbal argument with people in another car who accused Miller of cutting them off. Harris's and Webb's counsel objected to the testimony on relevance grounds and "352, prejudicial as to time." The court overruled the objections and the prosecutor continued her examination, asking Jasmine if "something happen[ed] beyond just the verbal argument." Defense counsel did not object. Jasmine responded that, when they got back in the car, Miller said "blow him." McNeese grabbed a shotgun and fired once at the other car. He then threw the shotgun out the window.

Later in trial, the prosecutor played for McNeese's jury a recording of his interview with detectives. During that interview, McNeese volunteered, without prompting, that he fired the gun at the other vehicle on July 1. He explained there was an argument and he wanted to fight, but he did not intend to kill anyone. Later in the interview, McNeese again brought up the incident without prompting. He said, "I told my boy, 'Pass me the

thing.' Not meaning to shoot him or anything, but just to warn him to get away from us and stop bothering us." Counsel did not object to this evidence.

b. Analysis

The Attorney General contends the defendants forfeited their claims related to evidence of the July 1 shooting. We agree.

McNeese's and Webb's counsel asserted several objections to Jasmine's testimony, but none were directed specifically at the testimony about the shooting, which they now challenge. McNeese's counsel also failed to object when the prosecutor subsequently played for the jury a recording of McNeese admitting he was responsible for the July 1 shooting. The defendants' failure to raise timely and specific objections has forfeited the issue on appeal.[4] (*People v. Dykes* (2009) 46 Cal.4th 731, 756 ["trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal"].)

For the first time in his reply brief, McNeese contends his counsel provided ineffective assistance in failing to raise a proper objection to the testimony. Because McNeese did not raise this argument in his opening brief, it is untimely and we need not

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[4] In his reply brief, McNeese acknowledges he did not raise a sufficient objection. He suggests, however, the insufficiency stems only from his counsel's failure to assert the proper basis for the objection. The record does not support this. Counsel objected to Jasmine's testimony regarding a verbal altercation, but he did not object when the prosecutor then asked if anything occurred beyond a verbal altercation. Counsel also did not object to Jasmine's actual testimony regarding the shooting. As we discuss below, there may have been a strategic reason for counsel not to do so.

consider it. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26 [points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before].)

In any event, he has not shown he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel a defendant must establish two elements: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors or omissions, a determination more favorable to the defendant would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; see *People v. Holt* (1997) 15 Cal.4th 619, 703.) "Whether to object to arguably inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference, failure to object seldom establishes counsel's incompetence." (*People v. Maury* (2003) 30 Cal.4th 342, 415–416.) If the record fails to disclose why trial counsel acted or failed to act in the manner challenged, the ineffective assistance of counsel claim must be rejected unless counsel was asked for, and failed to provide, an explanation or there could be no plausible explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

Here, we can conceive of a plausible explanation for counsel's failure to object to evidence of the July 1 shooting. There was overwhelming evidence that McNeese was an active participant in the majority of the charged crimes. As to those offenses, the primary issue for the jury to decide was whether he harbored the requisite intent. On that issue, McNeese's counsel

may have reasonably determined evidence of the July 1 shooting was helpful to his client. The jury heard McNeese's statement to police that he intended only to scare the occupants of the other vehicle. Consistent with this assertion, there was no evidence a bullet actually struck the other vehicle, despite being fired at close range. The similarities to the Washington Place and Isaac M. shootings are readily apparent and support McNeese's claim that he also did not intend to kill those victims. Because we can conceive a plausible explanation for counsel's failure to object to evidence of the July 1 shooting, we reject McNeese's claim that he received ineffective assistance of counsel.

3. Weapons and Marijuana Found in McNeese's Room

McNeese, joined by Webb, contends the trial court erred in admitting evidence that police recovered from McNeese's motel room two firearms and marijuana. We find any error harmless.

a. Background

During trial, McNeese objected to the prosecutor's anticipated introduction of evidence showing police recovered from his motel room a handgun, a shotgun, and marijuana. McNeese argued such evidence was irrelevant and prejudicial given it was undisputed the firearms were not connected to the charged crimes. Webb also objected, asserting any evidence regarding guns was highly prejudicial and violated his due process rights. The prosecutor responded that the evidence contradicted McNeese's statements to police and corroborated testimony that he fired a shotgun at another vehicle on July 1.

The court overruled the objections, noting the presence of the guns corroborated other incidents involving uncharged crimes. The court further explained that, given the "intense

testimony involving other egregious acts of somebody in killing other individuals in a very inflammatory way, the rather sterile evidence of a shotgun and handgun is not inflammatory or prejudicial."

During direct examination, Detective Theodore Covey testified that, while searching McNeese's motel room, he discovered a loaded pistol, loaded shotgun, a marijuana prescription bearing McNeese's name, and two jars of marijuana. McNeese's jury subsequently heard a recording of him telling police he had a shotgun and a .380-caliber gun at his motel room.

b. Analysis

Assuming for the sake of argument the evidence was inadmissible, reversal is not required because the error was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) McNeese generally posits the evidence was prejudicial because jurors likely used it as propensity evidence, may have used it as justification for a guilty verdict irrespective of the present charges, and may have been so put off that they did not give his evidence fair consideration. Webb separately contends the evidence "reflect[s] badly on [him] by his 'association' with and his decision, on subsequent occasions, to drive in a car with a person who keeps loaded firearms in his home with infants."

Contrary to the defendants' contentions, the prejudicial effect of the evidence, if any, was minimal. Initially, there was no suggestion that McNeese's possession of the firearms or marijuana was illegal. In fact, the jury heard evidence that the police found in McNeese's room a prescription for the marijuana.

In any event, given the nature of the charged crimes and evidence presented against the defendants, we can confidently say the jurors were not swayed by knowledge that McNeese possessed marijuana and firearms, legally or illegally. The jury heard overwhelming evidence that McNeese and Webb were involved in numerous murders and attempted murders in connection with their membership in an incredibly violent street gang. Much of that evidence came from the defendants' own mouths. Among other things, McNeese's jury heard him admit to personally firing a gun at Isaac M., a teenager who had no apparent gang connections and who spent two years in the hospital recovering from his injuries. Webb's jury heard him admit to driving around with Harris and McNeese, whom he knew to possess guns, while they looked for people to shoot. In light of such evidence, we are certain the fact that police recovered marijuana and firearms from McNeese's room did not factor into the jurors' decisions to convict. Any error in admitting the evidence was harmless beyond a reasonable doubt.

V. Gang Expert Testimony

A. The Gang Expert Testimony Was Not Unreliable and Did Not Render the Trial Fundamentally Unfair

Webb posits various, often perfunctory, claims related to the gang expert testimony. As we discuss below, the arguments lack merit.

First, Webb contends the gang evidence rendered his trial fundamentally unfair and violated his right to due process. In support, he generally asserts the volume of testimony, which spans 105 pages of the reporter's transcript, was excessive and created a danger the jury would infer he is a danger to society and must be punished. We disagree.

The gang evidence was not excessive under the circumstances. The prosecutor had to prove that each of the three defendants committed seven attempted murders and two murders—which took place over the course of several months during multiple incidents—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. This is no small task. On top of that, she relied in part on the defendants' gang affiliations to show their motives and prove they acted with the requisite intents for the charged crimes. A little over one hundred pages of testimony under such circumstances is not unusual or excessive. The evidence did not "approach[] being classified as overkill," with such little relevance and with such extraordinary prejudice, that it raised the distinct potential to sway the jury to convict regardless of Webb's actual guilt. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 228.)

Next, Webb insists that, because Poole is both law enforcement and an expert, his testimony carried an improper aura of special reliability and trustworthiness. Relatedly, he claims Poole was impermissibly biased against the defendants given his position in law enforcement. Webb fails, however, to provide any relevant authority even suggesting Poole's occupation in law enforcement rendered his testimony inadmissible. Law enforcement officers routinely testify as gang experts in criminal cases. (See, e.g., *People v. Sanchez* (2016) 63 Cal.4th 665, 671; *People v. Sandoval* (2015) 62 Cal.4th 394, 414.) We are aware of no cases holding such a practice impermissible.

Finally, Webb asserts Poole's conclusions were speculative and unreliable because they were based on unreliable and unverifiable sources. Not so. A gang expert's opinions may be

premised "on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies . . . ." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.) Here, Poole testified at length to his extensive personal experience working with gangs over the course of his 15 years as a detective with the Long Beach Police Department's Gang and Violent Crimes Unit, five of which were spent exclusively investigating the Rollin' 20's gang. During that time, he spoke to hundreds of Rollin' 20's members and investigated numerous crimes involving Rollin' 20's members. He also attended various seminars, conferences, and trainings related to gangs. This provided a sufficient foundation for Poole's expert opinions.

B. The Court Did Not Err in Permitting the Gang Expert to Provide Opinions Related to Hypothetical Scenarios

McNeese, joined by Webb, contends the court erred in permitting the prosecutor to elicit from the gang expert opinions related to detailed hypothetical scenarios mirroring the evidence. We disagree.

1. Background

The prosecutor asked Poole to consider a series of hypothetical scenarios closely tracking the evidence presented at trial and her theory of the case.[5] After each hypothetical, she

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[5] While the prosecutor was reciting the first hypothetical, the defendants objected that it was unfair for her to argue her entire case in the form of a hypothetical. They also argued it was improper to ask the expert to give an opinion on the defendants' intent. The court overruled their objections.

asked Poole for an opinion as to whether the hypothetical crimes were committed for the benefit of, at the direction of, or in association with the Rollin' 20's criminal street gang. On each occasion, Poole responded in the affirmative and provided a detailed explanation of the basis for his opinion. At one point, while discussing a hypothetical involving "Baby Pittsburg," Poole referred to "Mr. Webb." The prosecutor interrupted and admonished Poole to "assume it is just an individual by the name of Baby Pittsburgh."

At the close of evidence, the court instructed the jurors as follows: "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. . . . [¶] . . . An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

2. Analysis

An expert may offer opinion testimony based upon facts given in a hypothetical question asking the expert to assume their truth. (*Vang*, *supra*, 52 Cal.4th at p. 1045.) Such a hypothetical question must be rooted in the evidence presented in the case being tried. (*Id.* at p. 1046.) Gang experts are allowed to opine whether a crime involving a hypothetical set of given facts would have been committed for the benefit of a criminal street gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618–620,

disapproved of on other grounds by *People v. Sanchez, supra,* 63 Cal.4th 665; see *Vang, supra*, 52 Cal.4th at p. 1052 [it is "settled" that an expert may express "an opinion regarding whether a crime was gang related"].)

Here, the prosecutor properly asked Poole to assume hypothetical scenarios tracking the facts of the case and provide opinions as to whether the crimes in those scenarios were committed for the benefit of a gang. The prosecutor did not ask Poole his opinion on whether the defendants actually committed the crimes with a specific intent; nor did Poole offer such opinions. In fact, when Poole referred to one of the defendants by name, the prosecutor quickly corrected him and admonished him to consider only a hypothetical person. This, along with the court's instructions, properly conveyed to the jurors the limited scope of Poole's testimony. The court did not err in permitting this testimony.

McNeese insists it is "sheer sophistry" to say Poole was responding to hypothetical questions given how closely the facts tracked the evidence presented at trial. We disagree. Poole gave no indication that he had personal knowledge of the facts recited by the prosecutor; he was instructed to simply assume their truth. This is the very definition of a hypothetical question. Moreover, contrary to McNeese's suggestions, the fact that the hypotheticals closely tracked the evidence did not render them improper. (See *Vang, supra*, 52 Cal.4th at p. 1051 ["Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence."].)

We may swiftly reject McNeese's remaining arguments as to why it was improper for Poole to opine that the hypothetical criminal conduct benefited a gang. The Supreme Court has stated it is "settled" that such testimony is admissible. (*Vang, supra*, 52 Cal.4th at p. 1052.) We are bound by this precedent, and McNeese offers no compelling reason for us to depart from it.

For these same reasons, we reject McNeese's claim that the admission of Poole's testimony violated his constitutional rights to due process and trial by jury. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 809 abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192 ["The routine and proper application of state evidentiary law does not impinge on a defendant's due process rights."].)

VI. There is No Merit to the Defendants' Various Arguments Regarding the Firearm Offenses

A. Sufficient Evidence Supports the Convictions for Shooting at an Occupied Building (Count 4)

McNeese argues insufficient evidence supports his conviction for shooting at an occupied building in violation of section 246 (Count 4). We disagree.

Section 246 provides that any person who "maliciously and willfully discharge[s] a firearm at an . . . occupied building [or] occupied motor vehicle" is guilty of a felony. Consistent with this language, the Supreme Court has stated there are two elements of a violation of section 246: "(1) acting willfully and maliciously, and (2) shooting at [an occupied building or motor vehicle]." (*People v. Ramirez* (2009) 45 Cal.4th 980, 985 (*Ramirez*).)

A violation of section 246 is a general intent crime, meaning it requires only " 'an intent to do the act that causes the harm.' " (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1357

(*Overman*); see *Ramirez, supra,* at p. 985, fn. 6.) Because only general intent is required, courts have consistently held a defendant need not intend to strike the target to violate this section; it is sufficient that the defendant "shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it." (*Overman*, at p. 1356, fn. omitted; see *People v. Cruz* (1995) 38 Cal.App.4th 427, 432–433 (*Cruz*); *People v. Chavira* (1970) 3 Cal.App.3d 988, 993 (*Chavira*); see also *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1500–1501.)

McNeese does not dispute there is substantial evidence showing one of the bullets fired during the Washington Place shootings struck the Armory building, which was occupied. Nor does he dispute that the jury could have reasonably inferred the defendants intended to shoot "in such close proximity to [the Armory building] that [they] show[ed] a conscious indifference to the probable consequence that one or more bullets [would] strike [the Armory building] or persons in or around it." (*Overman, supra*, 126 Cal.App.4th at p. 1356, fn. omitted.)

Nonetheless, McNeese insists his conviction must be reversed because there is no evidence showing the defendants specifically intended to strike the Armory building. In so arguing, he maintains that a violation of section 246 is a specific intent crime requiring proof the defendant intended to strike the target. As explained above, courts have consistently rejected such contentions. (See *Ramirez, supra*, 45 Cal.4th at p. 985, fn. 6; *Overman*, *supra*, 126 Cal.App.4th at p. 1356; *Cruz, supra*, 38 Cal.App.4th at pp. 432–433; *Chavira, supra*, 3 Cal.App.3d at p. 993.) McNeese acknowledges that fact but posits the cases

were wrongly decided. He fails, however, to offer any meaningful critique of their reasoning.[6] We agree with the conclusion reached by seemingly every court to have considered the issue: a violation of section 246 is a general intent crime that does not require the defendant specifically intend to strike the target. Accordingly, the evidence recounted above is sufficient to support McNeese's conviction for shooting at an occupied building in violation of section 246.

B. There Was No Instructional Error Related to the Charges Under Section 246

On the charges for shooting at an occupied building (Count 4) and occupied motor vehicle (Count 10), the court instructed the jurors as follows: "To prove the defendant is guilty of [violating section 246], the People must prove that: [¶] 1. The defendant willfully and maliciously shot a firearm; [¶] 2. The defendant shot the firearm at an occupied building[/vehicle]." McNeese posits various reasons why these instructions were erroneous or insufficient. We are not persuaded by any of them.

McNeese first argues the court was required to additionally instruct the jurors they must find the defendants specifically intended to strike the Armory building and victims' vehicle. This is simply a rehash of his substantial evidence argument, and we reject it for the same reasons already discussed.

Next, McNeese contends the court was required to instruct the jurors that gross negligence is an element of section 246. He reasons as follows: In *Ramirez*, the Supreme Court held all the elements of a grossly negligent shooting under section 246.3 are necessarily included in the more stringent requirements of

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[6] In his reply brief, McNeese concedes he is simply preserving the issue for purposes of subsequent review.

section 246. (*Ramirez, supra*, 45 Cal.4th at p. 990.) One of the elements of section 246.3 is the defendant shot a firearm in a "grossly negligent manner." (*Ramirez,* at p. 986.) Therefore, "gross negligence" is also an element of section 246, and the trial court was required to instruct the jury accordingly.

A close reading of *Ramirez* reveals the flaw in McNeese's argument. In *Ramirez*, the high court stated a violation of section 246 has two elements: "(1) acting willfully and maliciously, and (2) shooting at [an occupied building or occupied vehicle]." (*Ramirez, supra*, 45 Cal.4th at p. 985.) In holding a violation of section 246 "cannot be committed without also committing a grossly negligent shooting," the court necessarily determined these elements encompass gross negligence. (*Id*. at p. 985.) Here, the trial court instructed the jurors on the elements of section 246 as explicated in *Ramirez*. It would have been redundant, therefore, to also instruct them that a violation of section 246 requires gross negligence. The court did not err in this regard.

McNeese additionally insists the court erred in failing to instruct the jurors they must find the defendants knew the Armory building and victims' vehicle were occupied at the time of the shootings. As noted above, however, the Supreme Court has stated there are only two elements of a violation of section 246; knowledge that the target is occupied is not one of them. (See *Ramirez, supra*, 45 Cal.4th at p. 985.) The court, therefore, did not err in this regard.

Finally, McNeese contends the trial court should have instructed the jurors "the requirement that the shot be fired 'at' the building is satisfied by firing the gun with 'reckless disregard of its probable consequences.' " McNeese forfeited this claim.

"A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) Here, the trial court's instructions were accurate statements of the law, and none of the defendants requested it give additional clarifying instructions. Accordingly, the claim is forfeited.

C. The Court's Failure to Instruct on Grossly Negligent Discharge of a Firearm is Not Reversible Error

McNeese, joined by Harris and Webb, contends the trial court erred in not sua sponte instructing the juries on grossly negligent discharge of a firearm in violation of section 246.3, which is a lesser included offense of shooting at an occupied building and occupied vehicle in violation of section 246. (*Ramirez, supra*, 45 Cal.4th at p. 990; *Overman, supra*, 126 Cal.App.4th at pp. 1359–1360.) His argument is primarily based on his view that section 246 requires the defendant specifically intend to strike the target, which is incorrect as we have explained. Under the correct understanding of the relevant offenses, no evidence supported instructing on section 246.3 as a lesser offense of shooting at an occupied building (Count 4). Moreover, although the court should have instructed on section 246.3 as a lesser offense of shooting at an occupied vehicle (Count 10), the error was harmless.

"A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ' "that is, evidence that a reasonable jury could find persuasive" ' [citation], which, if accepted, ' "would absolve [the] defendant from guilt of

the greater offense" [citation] but not the lesser.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1218, italics omitted.) We review de novo the trial court's failure to sua sponte instruct on a lesser offense. (*Ibid*.)

As discussed above, the Supreme Court has stated the elements of shooting at an occupied building/vehicle in violation of section 246 are (1) the defendant acted willfully and maliciously, and (2) the defendant shot at an occupied building/vehicle. (*Ramirez, supra*, 45 Cal.4th at p. 985.) The elements of grossly negligent discharge of a firearm in violation of section 246.3 are (1) the defendant unlawfully discharged a firearm, (2) the defendant did so intentionally, and (3) the defendant did so in a grossly negligent manner that could result in injury or death of a person. (*Ramirez,* at p. 986.)

The *Ramirez* court explained the difference between the two offenses: "Both offenses require that the defendant willfully fire a gun. Although the mens rea requirements are somewhat differently described, both are general intent crimes. The high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 246.3(a), which requires that injury or death 'could result.' The only other difference between the two, and the basis for the more serious treatment of a section 246 offense, is that the greater offense requires that an inhabited dwelling or other specified object be within the defendant's firing range. All the elements of section 246.3(a) are necessarily included in the more stringent requirements of section 246." (*Ramirez, supra*, 45 Cal.4th at p. 990; see *Overman, supra*, 126 Cal.App.4th at p. 1362 ["The only difference between sections 246 and 246.3 is that

section 246 requires that a specific target . . . be in the defendant's firing range"].)

Here, the trial court had no obligation to instruct on section 246.3 as a lesser included offense of shooting at an occupied building. It is beyond dispute that the Armory building, which was occupied, was within the shooter's firing range. Indeed, the People presented undisputed evidence that one of the bullets actually struck the building while someone was inside. On this record, there was no substantial evidence from which the jury could conclude the defendants committed grossly negligent discharge of a firearm, but not shooting at an occupied building.

We agree with the defendants, however, that the court should have instructed on section 246.3 as a lesser included offense of shooting at an occupied vehicle. Unlike the Armory building, there is no evidence that a bullet struck the vehicle. In addition, multiple witnesses testified the shooter was firing the gun high in the air and not at anyone in particular. From this evidence, the jurors could have reasonably concluded the shots were fired in a grossly negligent manner that could result in injury or death of a person, but the vehicle was not within the shooter's firing range. (See *Overman, supra*, 126 Cal.App.4th at pp. 1362–1363 [evidence supported section 246.3 instruction as lesser offense because no witness saw where defendant aimed rifle when he fired, no points of impact were found on building, and defendant was excellent marksman].)

Nonetheless, reversal is not required because there is no reasonable probability the error affected the outcome of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 165 [failure to instruct on lesser offense subject to *Watson* harmless error standard].) In convicting the defendants of the attempted

murders of Antonio L. and Gabriela C., the jurors necessarily concluded the shots were fired with the intent to kill the victims, who were inside the vehicle. It is not reasonably probable the jurors would reach this conclusion without also concluding the shots were fired at the vehicle for purposes of section 246. Accordingly, the instructional error was harmless and reversal is not required.

D. The Court's CALCRIM No. 250 Instruction Was Harmless Error

McNeese contends the court erred in instructing his jury with CALCRIM No. 250. We agree but conclude the error was harmless.

The court instructed the jurors that shooting at an occupied building and shooting at an occupied motor vehicle require general criminal intent. It then instructed the jurors with CALCRIM No. 250, which concerns the union of act and intent for general intent crimes: "For you to find a person guilty of this or these crimes . . . that person must not only commit the prohibited act but must do so with wrongful intent. A person acts with wrongful intent when he intentionally does a prohibited act. However, it is not required that he intend to break the law. The act required is explained in the instruction for that crime . . . ."

McNeese contends these instructions created a risk the jurors would erroneously think the intent required for a violation of section 246 was satisfied if they found the defendants intentionally fired the shots. We agree. The Supreme Court explained the problem in *People v. Hill* (1967) 67 Cal.2d 105: "The general intent instruction here told the jury that 'the intent to do the forbidden thing constitutes the criminal intent.' When the jury then heard the specific intent instruction they might well

have believed that they should automatically infer specific intent from the voluntary doing of the act." (*Id.* at pp. 117–118.) For this reason, the bench notes to CALCRIM No. 250 warn that "[t]he instruction must not be used if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense." Here, a violation of section 246, although classified as a general intent offense, requires the defendant act "maliciously." The court, therefore, should not have given CALCRIM No. 250. (See *People v. Jo* (2017) 15 Cal.App.5th 1128, 1160 [error to give CALCRIM No. 250 where offense required the defendant act maliciously].)

Nonetheless, the error is harmless under any standard. (*Chapman, supra*, 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836.) The attempted murders in Counts 1, 2, and 3, and the violations of section 246 in Counts 4 and 10, were premised on the same acts: firing the rifle on Washington Place. In convicting the defendants of the attempted murders, the jurors necessarily found the shots were fired with the intent to kill. Under these circumstances, there is no doubt the jurors also would have found the rifle was shot maliciously, as required for a violation of section 246. (See § 7, subd. (4) ["The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act."]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1030 ["in finding [the defendant] guilty of attempted voluntary manslaughter, the jury necessarily found he fired at the car with a 'malicious' intent"].) The error, therefore, was harmless.

E. Harris's and McNeese's Cases Must Be Remanded For the Limited Purpose of Conducting *Franklin*[7] Hearings

Harris and McNeese request we remand their cases to allow them to present evidence for use at future youth offender parole hearings. They acknowledge they did not present such evidence below, but contend their counsel was ineffective in failing to do so. We agree.

A few months before Harris and McNeese were sentenced, the Legislature amended section 3051 to raise the age of those eligible for youth offender parole hearings from those who were under 23 years old to those who were 25 years of age or younger when they committed their controlling crimes. (Stats. 2017, ch. 675, § 1.) The law provides certain dates by which a youth offender must be considered for release at a youth offender parole hearing. (See § 3051, subd. (b)(1)–(4).) At the hearing, the Board of Parole Hearings must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

In *Franklin, supra,* 63 Cal.4th 261, the California Supreme Court, in evaluating former section 3051 as it applied to juvenile offenders under the age of 23, held that juvenile offenders must be given the opportunity to compile information regarding their characteristics and circumstances at the time of the offense to be considered at future youth offender parole hearings, including statements by family members, friends, school personnel, faith leaders, and representatives from the community. (*Id.* at p. 283.)

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[7] *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

Noting that such statements are more easily compiled at or near the time of the juvenile's offense rather than decades later when memories have faded or records have been lost, the high court remanded the matter to allow the defendant "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.) Given its origin, this type of hearing is often referred to as a *Franklin* hearing.

The Attorney General concedes that the defendants, who were between the ages of 23 and 25 when they committed the offenses, were entitled to present evidence in the trial court for use in their future youth offender parole hearings. He posits, however, their trial counsel chose not to do so because there was no relevant evidence to present. We find such a prospect highly unlikely. Harris and McNeese were relatively young men when they committed the crimes, and it is inconceivable they could not produce any evidence showing they displayed some of the hallmark features of youth. (§ 4801, subd. (c).) We can conceive of no plausible explanation for their counsel's failure to present such evidence.

The Attorney General further insists that remand is unnecessary because the defendants may take advantage of a procedure, recently set forth by the Supreme Court, allowing eligible defendants with final judgments to obtain a *Franklin* hearing. (See *In re Cook* (2019) 7 Cal.5th 439, 453.) Such an additional procedural step is unnecessary under these circumstances and may result in the consumption of additional judicial resources. The more prudent course is to remand the cases for the limited purpose of conducting *Franklin* hearings.

F. Harris's and McNeese's Sentences are Unauthorized

Harris and McNeese contend, and the Attorney General concedes, the trial court improperly imposed both gang enhancements and gang-related firearm enhancements on several of their convictions. We agree.

On Counts 1, 2, and 3, Harris's jury convicted him of willful, deliberate, and premeditated attempted murder. On Count 7, McNeese's jury convicted him of willful, deliberate, and premeditated attempted murder. The sentence for such offenses is life with the possibility of parole after seven years. (§§ 664, subd. (a), 3046, subd. (a)(1).)

As to each of these counts, the juries also found true gang enhancements, which change the minimum eligibility for parole to 15 years for a willful, deliberate, and premeditated attempted murder. (§ 186.22, subdivision (b)(5).)

As to Counts 1, 2, and 3, Harris's jury additionally found true allegations that a principal discharged a firearm. On Count 7, McNeese's jury found true an allegation that a principal discharged a firearm, which caused great bodily injury.

Typically, a finding that a principal discharged a firearm would not result in a sentencing enhancement. However, if the offense was gang-related, such a finding results in a 20-year enhancement. (§ 12022.53, subds. (c), (e)(1).) If the principal's discharge of the firearm resulted in great bodily injury, the enhancement is a consecutive term of 25 years to life. (§ 12022.53, subds. (d), (e)(1).)

The imposition of both a gang enhancement and a gang-related firearm enhancement is permissible only if the defendant personally used or discharged the firearm. (§ 12022.53, subd.

(e)(2).) In all other situations, the court must impose the enhancement that provides for the greatest penalty or longest term of imprisonment. (§ 12022.53, subd. (j).)

On Counts 1, 2, and 3, the trial court imposed on Harris sentences of life with the possibility of parole at 15 years, pursuant to the gang enhancements. It also imposed an additional 20-year term on each count for the gang-related firearm enhancements.

On Count 7, the court imposed on McNeese a sentence of life with the possibility of parole at 15 years, pursuant to the gang enhancement. It also imposed a consecutive term of 25 years to life for the gang-related firearm enhancement.

The parties agree, as do we, that these sentences were unauthorized. Because the juries did not find true that Harris or McNeese personally used or discharged a firearm in the commission of the offenses, section 12022.53, subdivision (e)(2), precluded the court from imposing both the gang enhancements and gang-related firearm enhancements on the same counts. (See *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1427.)

As to McNeese, we agree with the parties that the gang enhancement should be stricken and the firearm enhancement imposed. This results in a sentence on Count 7 of life with the possibility of parole at seven years plus a consecutive term of 25 years to life for the firearm enhancement.

As to Harris, the parties agree that a sentence of life with the possibility of parole at seven years plus 20 years for the firearm enhancement will result in a greater punishment than a 15-years-to-life term for the gang enhancement. Accordingly, on Counts 1, 2, and 3, the gang enhancements should be stricken and the firearm enhancements imposed.

Harris argues that, although the firearm enhancement should be imposed on Count 1, the gang enhancements should instead be imposed on Counts 2 and 3.[8] He reasons that the gang enactments would result in greater punishment on the latter counts because the determinate firearm enhancements would need to be reduced by two-thirds pursuant to section 1170.1. Not so. "[S]ection 1170.1's one-third limit for consecutive subordinate terms and enhancements does not apply" to a " 'gun-use enhancement attached to an offense which carries an indeterminate term of imprisonment.' " (*People v. Felix* (2000) 22 Cal.4th 651, 656; see *People v. Leon* (2016) 243 Cal.App.4th 1003, 1025 ["*if* a trial court elects to impose consecutive sentences for two or more offenses that require indeterminate life terms, any enhancements attached thereto must be imposed for the full term of the enhancement"]; *In re Maes* (2010) 185 Cal.App.4th 1094, 1099 ["The determinate term enhancement attached to an indeterminate term is not subject to the determinate sentencing law."].) Here, Counts 2 and 3 carry indeterminate life terms, even without the enhancements. Accordingly, any enhancements attached to those counts—determinate or indeterminate—must be served in full.

Finally, the Attorney General asserts, and Harris concedes, that his sentence on Count 4, for violation of section 246, is unauthorized. We agree. The trial court sentenced Harris to a term of seven years to life on Count 4. However, because the jury found true the gang allegation on that count, section 186.22, subdivision (b)(4)(B), mandates the sentence be life with a minimum term of imprisonment of 15 years.

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[8] The Attorney General concurs with Harris but does not explain his reasoning.

We modify the judgments accordingly. (See *People v. Crooks* (1997) 55 Cal.App.4th 797, 811 [reviewing courts may modify unauthorized sentences].)

G. McNeese Forfeited His Arguments Regarding the Fines, Fees, and Assessments

At McNeese's sentencing, the court imposed $400 in court operations fees (§ 1465.8), $300 in criminal conviction assessments (Gov. Code, § 70373), a restitution fine of $390 (§ 1202.4), and a stayed parole revocation fine of $390 (§ 1202.45). McNeese did not object to any of these fines, fees, or assessments.

On appeal, McNeese challenges the imposition of these fines, fees, and assessments on due process and equal protection grounds. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), he requests we vacate or stay them until the People prove he has the present ability to pay them.[9] McNeese, however, concedes he did not raise this issue in the trial court. For the reasons set out in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*), we find the issue forfeited. (See also *People v. Gutierrez* (2019) 35 Cal.App.5th

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[9] In *Dueñas*, the court held that "due process of law requires the trial court to conduct an inability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Duenas, supra*, 30 Cal.App.5th at p. 1164.) It also held that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

1027, 1033 [finding forfeiture where defendant failed to object to fines and fees under sections 1202.4, 1465.8, and 290.3, and Government Code sections 70373 and 29550.1, based on inability to pay]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [citing *Frandsen* to find *Dueñas* issue forfeited for failure to object in trial court]; *People v. Avila, supra,* 46 Cal.4th at p. 729 [finding forfeiture where the defendant failed to object to imposition of a restitution fine under former section 1202.4 based on inability to pay].)

McNeese suggests his claim is not forfeited because the court's imposition of the fines, fees, and assessments without an ability-to-pay determination resulted in the imposition of an unauthorized sentence, which is not subject to the regular forfeiture rules. "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) It applies only where the sentence could not be lawfully imposed under any circumstances in a particular case. (*Ibid.*) Here, McNeese implicitly concedes the court could have imposed each of the fines, fees, and assessments, if only it had made certain factual findings after conducting an inability-to-pay hearing. In other words, there are certain circumstances in which the sentence would have been proper. As such, the "unauthorized sentence" exception to the general forfeiture rules does not apply.

We are also not persuaded by McNeese's insistence that his failure to object is excused because, at the time of his sentencing hearing, the law was against him and any objection would have been futile. Even before *Dueñas* was decided, section 1202.4

expressly contemplated an objection based on inability to pay. It provides that, although a "defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine," it may be considered "in increasing the amount of the restitution fine in excess of the minimum fine . . . ." (§ 1202.4, subd. (c).) Here, the trial court imposed a $390 restitution fine, which is above the minimum fine of $300 (§ 1202.4, subd. (b)(1)). It was therefore incumbent on McNeese to exercise his statutory right to object to the fine on the basis that he did not have the ability to pay it. This is true regardless of who had the burden of proof. McNeese's failure to object forfeited the issue.

The same is true of the fees and assessments imposed under section 1465.8 and Government Code section 70373. Although the statutory provisions for these fees and assessments suggest they are mandatory, nothing in the record of the sentencing hearing indicates McNeese was foreclosed from making the same request the defendant in *Dueñas* made in the face of similar mandatory assessments. *Dueñas* was decided based on longstanding constitutional principles and represents a clarification of existing law rather than new law. We therefore stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they desire appellate review of that issue.

H. The Defendants' Abstracts of Judgment Must be Amended to Reflect the Victim Restitution Ordered is Joint and Several

Webb, Harris, and McNeese claim, and the Attorney General concedes, their abstracts of judgment must be amended to reflect that their liability for direct victim restitution is joint and several. We agree.

Section 1202.4, subdivision (f), provides in part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims . . . ." Here, the parties agree the trial court imposed on each defendant direct victim restitution for the same economic losses to their victims. This includes $17,008.70 in restitution related to Counts 1 through 3 and 9 through 10, imposed on all three defendants. It also includes $2,673 in restitution related to Counts 4 through 7, imposed on Harris and McNeese. Although the trial court did not expressly state the restitution obligations were joint and several, it is clear from the record and circumstances that is what it intended. (See *People v. Fortune* (2005) 129 Cal.App.4th 790, 795 [restitution ordered is intended to make the victim whole, not to give a windfall]; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.) An appropriate remedy in this situation is to modify the abstracts of judgment so as to provide expressly that the victim restitution ordered is joint and several. (*People v. Blackburn*, at p. 1535.)

I. A Typographical Error in Harris's Abstract of Judgment Must be Corrected

Harris contends, and the Attorney General concedes, his abstract of judgment erroneously identifies his conviction for

shooting at an occupied vehicle as "Count 01" rather than "Count 10." We agree and order the abstract of judgment corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 187 [Courts of Appeal should correct clerical errors in abstracts of judgment].)

DISPOSITION

As to Harris, his sentence on Count 4 is life with a minimum term of imprisonment of 15 years, and his abstract of judgment shall be modified accordingly. On Counts 1, 2, and 3, the 15-year minimum parole eligibility periods under section 186.22, subdivision (b)(5), are stricken. His abstract of judgment shall be modified to reflect his sentence on each of those counts is life with the possibility of parole at seven years plus 20 years. The abstract of judgment shall also be modified to reflect the victim restitution ordered is joint and several, and his conviction for shooting at an occupied vehicle is "Count 10." Harris's case is remanded for the limited purpose of conducting a *Franklin* hearing. His judgment is affirmed in all other respects.

As to McNeese, the 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5), imposed on Count 7 is stricken. His abstract of judgment shall be modified to reflect his sentence on Count 7 is life with the possibility of parole at seven years plus a consecutive term of 25 years to life. The abstract of judgment shall also be modified to reflect the victim restitution ordered is joint and several. McNeese's case is remanded for the limited purpose of conducting a *Franklin* hearing. His judgment is affirmed in all other respects.

As to Webb, his abstract of judgment shall be modified to reflect the victim restitution ordered is joint and several. His judgment is affirmed in all other respects.

For each defendant, the trial court shall issue amended abstracts of judgment consistent with this opinion and forward them to the Department of Corrections and Rehabilitation.

BIGELOW, P. J.

We Concur:

GRIMES, J.

WILEY, J.