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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARIEL PANIAGUA, Defendant and Appellant.	B289253 (Los Angeles County Super. Ct. No. LA081995)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas S. Rubinson, Judge. Affirmed in part, reversed in part, and remanded with directions.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General and Allison H. Chung, Deputy Attorney General for Plaintiff and Respondent.

INTRODUCTION

Ariel Paniagua appeals from the judgment entered after a jury convicted him of murder, attempted murder, shooting at an occupied motor vehicle, and possession of a firearm by a felon, for which the trial court sentenced him to an aggregate prison term of 268 years four months to life. Paniagua contends (1) the trial court violated his constitutional rights by revoking his in propria persona privileges in jail without cause, (2) the trial court erred in instructing on attempted murder, (3) the trial court erred in failing to give a unanimity instruction on the charge of possession of a firearm by a felon, (4) the jury's verdict on his murder conviction was unintelligible, (5) the trial court's minute order and the sentence imposed for his conviction of shooting at an occupied motor vehicle erroneously reflected a true finding on the related gang allegation, and (6) we should remand to allow the trial court to exercise its discretion whether to strike a prior serious felony conviction for which the court imposed sentence enhancements.

Regarding (3), we conclude that the trial court erred in not giving the unanimity instruction and that, although the error was harmless regarding the conviction for the substantive offense of possession of a firearm by a felon, it was not harmless with regard to the true finding on the gang allegation for that offense. We therefore reverse that true finding. We also agree with (5) and therefore remand for the trial court to correct its minute order and the unauthorized sentence imposed for the conviction on the offense of shooting at an occupied motor vehicle. And because we also agree with (6), we remand for the trial court to exercise its discretion whether to strike the serious felony prior

conviction for the purpose of sentence enhancement. Otherwise, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *The October 6, 2015 Shooting*

On October 6, 2015 Paniagua and Hubaldo Martinez, members of the Bryant Street criminal street gang, were riding in Martinez's car in an area of Canoga Park controlled by a rival gang, the Canoga Park gang. Another, unidentified man and Joseline Cuellar, Paniagua's former girlfriend, were also in the car. Martinez eventually stopped the car alongside Victor Castillo, who was walking to a friend's house. Paniagua got out of the car and asked Castillo if he was associated with the Canoga Park gang. As Paniagua asked, he lifted his shirt to show a handgun in his waistband and a "Bryant Street" tattoo across his chest. He was also wearing a hat with a "B" on it, for Bryant Street. He said, "I'm from Bryant Street. I got a gun. Fuck Canoga." Castillo said that he did not "gangbang" and that he was a "normal person." Castillo walked away, and Paniagua got back into the car.

Martinez drove the group in his car to a nearby marijuana dispensary. Outside the dispensary he pulled behind a white car occupied by three men: Israel Ponce, Eduardo Renderos, and Jovani Pantoja. According to Cuellar, Paniagua thought he saw one of the men wore a hat with a "C" on it, for Canoga Park (none did). Paniagua got out of Martinez's car, said, "Fuck Canoga," and started shooting at the white car. Two bullets hit the trunk of the car, one of them entering the backseat, where it struck Pantoja in the shoulder. Another bullet hit a car parked farther

down the street, killing its occupant, Eduardo Rebolledo. The white car drove away, as did Martinez. Police detectives recovered seven .40-caliber casings from the scene.

B. *The October 13, 2015 Shooting*

On October 13, 2015 Lisette Ruedas was driving with her friend Natalie Garcia. About one block from the house where Cuellar lived, they saw a man later identified as Paniagua pull a "shiny silver" gun from his shorts and fire two or three shots at a car parked across the street from him. That car then sped off, and Paniagua ran up the street in the opposite direction. Ruedas and Garcia called 911 and drove around the block, catching sight of Paniagua again on an adjacent street, where he was "just walking casually, as if nothing had ever happened."

Shortly after, police officer Jennifer Poepke found Paniagua crouched against a nearby retaining wall and arrested him. About two feet away Officer Peopke found a chrome, semiautomatic, nine-millimeter handgun with one round in the chamber and three more in its 12-round magazine. A police detective who responded to the scene swabbed Paniagua's hands for gunshot residue, and the results were positive. Another responding detective had Ruedas and Garcia view Paniagua in a field show-up, and Ruedas and Garcia identified Paniagua as the shooter. At the scene of the shooting, detectives recovered three nine-millimeter shell casings that tests showed were fired from the gun recovered near Paniagua.

C. *The Trial*

The People charged Paniagua with murder (Pen. Code, § 187, subd. (a);[1] count one), three counts of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a); counts two through four), two counts of shooting at an occupied motor vehicle (§ 246; counts five and seven), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count nine). Counts seven and nine related to the shooting on October 13, 2015, the remaining counts to the shooting on October 6. The People alleged that Paniagua committed all the offenses for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1); that in committing the offenses charged in counts one through five he personally and intentionally discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivision (d); and that in committing the offense charged in count seven he personally used a firearm within the meaning of section 12022.5, subdivision (a). The People also alleged Paniagua had a prior conviction for a felony that was a serious felony within the meaning of section 667, subdivision (a)(1), and a prior serious or violent felony within the meaning of the three strikes law (§§ 667, subd. (b), 1170.12), and had served a prison term within the meaning of section 667.5, subdivision (b).

Paniagua initially represented himself in the proceedings, but after revocation of his in propria persona (pro per) privileges in jail, he accepted representation by court-appointed counsel. The case went to trial before a jury in September 2017. Paniagua

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[1] Statutory references are to the Penal Code.

testified in his defense, denying he was involved in the shootings in question or committed any of the charged offenses.

The jury found Paniagua guilty on all counts, the firearm allegations true for all counts, and the gang allegations true for all counts except count seven. Paniagua admitted the prior felony conviction allegations and the prior prison term allegation. The trial court sentenced him to an aggregate prison term of 268 years four months to life, not including various terms the court imposed and stayed. Paniagua timely appealed.

DISCUSSION

A. *The Trial Court Did Not Err in Revoking Paniagua's Pro Per Privileges*

1. *Paniagua's Behavior Creates Safety and Security Risks, and the Trial Court Revokes his Pro Per Privileges*

In April 2016 Paniagua waived his right to court-appointed counsel and began representing himself. When he did so, he acknowledged The Superior Court of Los Angeles County, Local Rules, rule 8.42 (Rule 8.42) sets forth "rules that defendants who act as their own attorney at the Los Angeles County jail must follow." That rule delineates an inmate's pro per privileges, such as use of the law library and its telephone, the right to have someone act as a legal messenger, and the right to accumulate legal materials, including court documents and legal correspondence. The rule states that "[a]n inmate exercising *pro per* privileges has an affirmative duty to exercise the privileges in such a manner as not to infringe upon the exercise of *pro per*

privileges by other inmates," and in several places it cautions that repeated violations of the rules or threats to the safety of inmates or staff may result in loss of pro per privileges. (Rule 8.42(d)(1).) The rule further provides that "[t]he Sheriff may apply for an order modifying or revoking some or all of an inmate's *pro per* privileges or status for cause," then sets forth the procedure for doing so. (Rule 8.42(g).)

As an inmate with pro per privileges, Paniagua was housed in a "pro per module" of the jail, "module 2500," which permitted inmates a daily "law library schedule." While housed in module 2500, Paniagua engaged in numerous and often violent acts of misconduct, culminating in a February 2017 incident where he challenged a deputy "to see [him] in his cell for a one-on-one," answered a request to turn around and place his hands behind his back with "Fuck that, I'm not cuffing up for shit," and tried to incite other inmates "to fight deputy personnel." The following day, in compliance with the procedures set forth in Rule 8.42, the Sheriff's Department notified Paniagua it was requesting revocation of his pro per privileges. And the next day, after an administrative hearing pursuant to *Wilson v. Superior Court* (1978) 21 Cal.3d 816 (*Wilson*), a hearing officer revoked Paniagua's pro per privileges for cause.[2]

As grounds for revoking Paniagua's pro per privileges, the hearing officer cited his "propensity for violence and jail rule violations," which the officer found "present[ed] a security and

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[2] On appeal Paniagua appears to construe, as we do, the hearing officer's decision as one terminating all rights delineated "privileges" by Rule 8.42, although Paniagua sometimes fails to distinguish between those rights and others Rule 8.42 provides for or refers to but does not delineate "privileges."

safety concern for the Sheriff's Department." In addition to the February 2017 incident, the officer considered other incidents described by Sheriff's deputies in written reports:

- in January 2017 Paniagua was in the law library when he was not supposed to be and, when confronted by a deputy, became "verbal[ly] disrespectful" and "recalcitrant," refusing to return to his cell until other deputies arrived, handcuffed him, and escorted him to his cell;
- in January 2017 a deputy, while retrieving inmates from module 2500 for their law library time, caught Paniagua leaving the cell of another inmate, discovered a shank in Paniagua's possession, and after searching Paniagua's cell found (among other contraband) a four-inch piece of metal used to sharpen the shank;
- in October 2016 Paniagua and four other inmates in module 2500 attacked another inmate there, giving him a "jail house beat down," which caused the victim to give up his pro per status to avoid such altercations;
- in July 2016 deputies found Paniagua "roaming" outside his cell "at his leisure," learned he had discovered a way to open his cell gate, and were told by Paniagua, "I am facing life. I don't give a fuck. I will keep popping my gate open"; and
- in November 2015 (before moving to module 2500) Paniagua and three other inmates beat up another inmate.

The trial court reviewed the hearing officer's decision, holding a hearing at which Paniagua and Donald Hinton, a Sheriff's Department employee assigned to the jail's Legal Services Unit, testified. Hinton summarized the incidents of

misconduct and, when asked by the trial court "why from the Sheriff's Department's point of view revocation of [Paniagua's] pro per privileges is necessary," explained it was because of, among other reasons, the "safety and security risk" Paniagua posed to other inmates and jail staff. Paniagua, for his part, disputed the veracity of the underlying incident reports. Finding the reports credible and Paniagua not credible, the trial court sustained the findings of the hearing officer and ordered Paniagua's pro per privileges remain revoked. The court reminded Paniagua that, despite losing his privileges, he continued to have the right to represent himself should he wish to do so, but that the court stood ready to reappoint counsel if he desired it. In April 2017 Paniagua accepted representation again by court-appointed counsel.

2. *Substantial Evidence Supported the Trial Court's Finding There Was Cause To Revoke Paniagua's Pro Per Privileges*

Paniagua contends the trial court erred in "upholding the jail's revocation of his [pro per] privileges" and thereby "violated [his] right to due process and ultimately his Sixth Amendment right to represent himself" because his privileges "were revoked without good cause." The trial court did not err.

"When a defendant has been granted in propria persona privileges, 'the privileges initially granted him will not thereafter be restricted or terminated except for cause. . . . [V]iolation of jail rules and/or a demonstrable necessity for administrative segregation of a defendant who would otherwise constitute a threat to jail security may justify such restriction or termination.'" (*People v. Moore* (2011) 51 Cal.4th 1104, 1125-

1126; accord, *Wilson*, *supra*, 21 Cal.3d at pp. 821-822.) Due process requires judicial review of an administrative hearing officer's decision to restrict or terminate an inmate's pro per privileges. (*Moore*, at p. 1126; *Wilson*, at pp. 827-828.) On appeal from a trial court's review of a hearing officer's decision, we review the trial court's findings, including its finding of cause, for substantial evidence. (See *Moore*, at p. 1126 ["there was substantial evidence supporting a finding of cause for restricting defendant's privileges"].) "'A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question.'" (*People v. Armstrong* (2016) 1 Cal.5th 432, 450.)

At the hearing in the trial court, Hinton testified that revoking Paniagua's privileges was "necessary" to ensure the safety of other inmates and jail staff. That testimony was supported by Paniagua's history of rule violations and violent misconduct while using the law library and living in the pro per module, a history documented in reports Paniagua no longer disputes. Hinton's testimony and Paniagua's documented misconduct were substantial evidence supporting the court's finding there was cause to revoke Paniagua's pro per privileges. (See *People v. Moore*, *supra*, 51 Cal.4th at pp. 1124-1126 [where the Sheriff's department revoked the defendant's pro per privileges, and the trial court refused his request to reinstate some of them, the defendant's possession of a sharpened rod from a typewriter was substantial evidence supporting a finding of cause]; *Wilson*, *supra*, 21 Cal.3d at p. 826 [limiting or eliminating pro per privileges may be based on "considerations of

administrative necessity involving continuing concerns of jail security"].)

Paniagua challenges the trial court's cause finding on the ground "the security concerns his behavior created could have been addressed by restricting some of his pro per privileges rather than revoking them entirely." The first problem with this argument is that Paniagua did not raise it either before the hearing officer or in the trial court, and he does not "offer any reason for us to deviate from the general rule that "'[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings [in connection with relief sought or defenses asserted], where an objection could have been, but was not presented to the lower court by some appropriate method.'"" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1000.) Therefore, he has forfeited the argument. (See *People v. Ringo* (2005) 134 Cal.App.4th 870, 876 ["[b]ecause of the lack of a timely objection[ ] and the failure to request a specific remedy," the defendant forfeited his contention he was unconstitutionally denied access to the law library and other resources for preparing his defense].)

Second, Paniagua has not met his "burden to affirmatively demonstrate error" (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 227) because he has not identified which pro per privilege(s) the trial court supposedly restricted unnecessarily. He comes closest when arguing that, "[w]hile the judge's findings may well have justified banning Paniagua from the law library, there is no clear connection between the behavior problems Paniagua exhibited and, say, his right to issue subpoenas, have access to legal forms, make use of a licensed investigator or legal runner, obtain funds for legal purposes, or have access to legal documents." But Paniagua leaves it to us to choose which right

(or rights) in this list of possibilities was (or were) unnecessarily restricted[3]—or to imagine others of which the list is perhaps merely illustrative.

Third, Paniagua cites nothing in the record to support his central premise, i.e., that some (unidentified) set of his pro per privileges presented no security concerns. (See *People v. Tully* (2012) 54 Cal.4th 952, 1011 [rejecting the defendant's argument on appeal where he failed "to provide any citation in the record that would support his claim"]; *People v. Pettie* (2017) 16 Cal.App.5th 23, 74 [same].) For this additional reason Paniagua has failed to demonstrate error.

People v. Doss (2014) 230 Cal.App.4th 46 (*Doss*), the principal case on which Paniagua relies, does not dictate a different result. As an initial matter, it is distinguishable because the "sole issue" before the court was "whether the trial court applied an incorrect legal standard in revoking [the defendant's] right to represent himself." (*Id.* at p. 49.) The holding in *Doss* thus concerned revocation of a defendant's right to represent himself, not, as here, revocation of pro per privileges. (See *id.* at pp. 49, 52 [revocation of "[p]ro per status" distinguished from revocation of pro per privileges].)

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[3] Indeed, the record suggests some privileges in this list were not restricted at all. As noted, Paniagua construes the revocation here as extending to all (and only) those rights delineated "privileges" by Rule 8.42. But not all the rights in Paniagua's quoted list—for example, the right to issue subpoenas (on forms furnished by the Sheriff) and use of a state-licensed investigator—were delineated "privileges" under Rule 8.42. Rule 8.42 provided for those rights, but not in the section the Legislature headed "Privileges."

Moreover, the dicta in *Doss*, *supra*, 230 Cal.App.4th 46 on which Paniagua relies does not support his argument the trial court erred here. In *Doss* the trial court revoked the defendant's pro per status because of his misconduct in jail. The court of appeal held the trial court erred because it incorrectly evaluated the defendant's misconduct under *Wilson*, *supra*, 21 Cal.3d 816, "which allows in propria persona privileges to be revoked based on out-of-court misconduct without regard to the misconduct's effect on the court proceedings," rather than under *People v. Carson* (2005) 35 Cal.4th 1, which permits revocation of pro per status for conduct that "'seriously threaten[s] the core integrity of the trial.'" (*Doss*, at p. 57, italics omitted.) The court of appeal stated it was "also unable to affirm the ruling because the trial court failed to adequately consider[, as *Carson* requires,] 'the availability and suitability of alternative sanctions.'" (*Doss*, at p. 57.)

In making the latter point, the court in *Doss* stated: "Almost all the out-of-court misconduct related to Doss's in propria persona status involved his in propria persona telephone privileges, but the court never considered the possibility of revoking or limiting only those privileges. Indeed, even if the only issue before the court had been whether to revoke Doss's in propria persona privileges instead of his status, it would still have been required to choose[, as stated in *Wilson*, *supra*, 21 Cal.3d at p. 824, fn. 7,] 'the appropriate disciplinary sanction . . . with a view to that which is least burdensome on the exercise of the privileges and yet still permits meaningful sanction.'" (*Doss*, *supra*, 230 Cal.App.4th at p. 57.) Citing the second sentence in this passage, Paniagua argues the trial court here erred because it did not determine whether, instead of revoking all his pro per

privileges, "a less burdensome option" was available to address his misconduct.

But the *Doss* court, in the sentence in question, was reciting a requirement from *Wilson*, *supra*, 21 Cal.3d at p. 824 that relates to a different situation than the one here: It relates to "restriction of pro. per. privileges as an incidental result of the imposition of jail disciplinary sanctions for jail misconduct." (*Id.* at p. 824.) As the Supreme Court in *Wilson* explained: "Pro. per. status should not give an inmate immunity from disciplinary sanctions that would normally be imposed for jail misconduct. By this we mean that a pro. per. inmate should not be relieved of a disciplinary punishment solely because the punishment might interfere with the exercise of his pro. per. privileges. A pro. per. inmate may be subjected to the same sanctions that are imposed on other inmates for similar misconduct." (*Id.* at pp. 824-825.) However, the Supreme Court in *Wilson* suggested (introducing the language at issue here) that, "because of the importance of pro. per. privileges to the right of self-representation, the appropriate disciplinary sanction in such a situation should be selected with a view to that which is least burdensome on the exercise of the privileges and yet still permits meaningful sanction." (*Id.* at p. 824, fn. 7.)

The Supreme Court in *Wilson* separately addressed a different situation, which is the one at issue in this case: restriction of pro per privileges, not as an incidental result of imposing disciplinary sanctions, but from "considerations of administrative necessity involving continuing concerns of jail security." (*Wilson*, *supra*, 21 Cal.3d at p. 826.) Jails generally address this situation, the Supreme Court explained, by administrative measures that "necessarily" limit or eliminate an

inmate's pro per privileges. (*Ibid.*) The Supreme Court held that in this situation procedural due process required a "determination of cause" for restricting pro per privileges. (*Ibid.*) It also noted that a decision to impose such restrictions "should be made only upon a showing of demonstrable necessity for institutional security" and that "[s]uch a decision must be related to security needs and should not be punitive." (*Id.* at p. 827.)

Here, Paniagua's pro per privileges were not incidentally restricted as a result of a disciplinary sanction; they were revoked out of concern for jail security, upon a showing of demonstrable necessity to preserve that security, and the trial court agreed, if impliedly, the measure was indeed "necessary" to preserve jail security.[4] Paniagua essentially challenges that factual finding of necessity, arguing the jail need only have revoked some, not all, of his pro per privileges to ensure jail security. But for the reasons discussed, that argument fails.

B. *The Trial Court Did Not Err in Instructing on Attempted Murder*

In counts two, three, and four, the People charged Paniagua with the attempted murder of Pantoja, Ponce, and Renderos, respectively. On these counts the trial court instructed the jury, pursuant to CALCRIM No. 600, as follows: "The defendant is charged in counts two, three, and four with attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove that, one, the defendant took at least one direct but ineffective step toward

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[4] Paniagua does not argue, and the court in *Doss*, *supra*, 230 Cal.App.4th 46 did not suggest, the trial court had to make any express findings.

killing another person and, two, the defendant intended to kill that person. A direct step requires more than merely planning or preparing to commit murder or attempting or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt."

Paniagua argues this instruction was erroneous. Observing "attempted murder requires the defendant intend to kill the specific victim, not someone else" (see *People v. Bland* (2002) 28 Cal.4th 313, 331 ["the doctrine of transferred intent does not apply to attempted murder"]), he complains the court's instruction "said nothing about Paniagua's intending to kill the victim named in a given count." That omission, he argues, likely misled the jury into thinking it needed only find Paniagua intended to kill one of the victims named in the three counts—most likely Pantoja, the only one wounded—to satisfy the intent element for all three counts.

"We review de novo whether a jury instruction correctly states the law." (*People v. Bates* (2019) 35 Cal.App.5th 1, 9.) "'When we review challenges to a jury instruction as being incorrect or incomplete, we evaluate the instructions as a whole, not in isolation. [Citation.] "For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction."'" (*People v. Nelson* (2016) 1 Cal.5th 513, 544.) "The relevant inquiry here is

whether, 'in the context of the instructions as a whole and the trial record, there is a reasonable likelihood that the jury was misled to defendant's prejudice.' [Citation.] Also, ""we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."""" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475; see *Bates*, at p. 9 ["'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction"'].) "If reasonably possible, we interpret instructions to support the judgment rather than to defeat it." (*Bates*, at p. 9.)

The trial court's instruction did not misstate the law. (See *People v. Smith* (2005) 37 Cal.4th 733, 739 ["'[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing"']; *People v. Ramos* (2011) 193 Cal.App.4th 43, 47 ["CALCRIM No. 600 correctly states the law of attempted murder."]; *People v. Lawrence* (2009) 177 Cal.App.4th 547, 557 ["CALCRIM No. 600 correctly states the law"].) Indeed, despite an effort to disguise the fact, Paniagua does not really argue the instruction misstated the law. Rather, he argues the trial court should have clarified or elaborated on the instruction by (in some unspecified way) pointing out that, for each attempted murder count, the first element's mention of "another person" referred to the victim named in the count.

Paniagua concedes, however, that he did not raise this issue in the trial court. "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; see *ibid.* ["If defendant believed the [pattern jury instruction given] required elaboration or clarification, he was obliged to request such elaboration or clarification in the trial court."]; see also *People v. Whalen* (2013) 56 Cal.4th 1, 81 ["Although defendant essentially contends the [pattern jury instruction, which accurately stated the law,] was ambiguous, he did not request a clarifying instruction at trial. Accordingly, he has forfeited his claim for purposes of appeal."]; *People v. Souza* (2012) 54 Cal.4th 90, 120 ["Defendant did not object to or request amplification of the instructions provided and accordingly his claim that they were inadequate and misleading is forfeited on appeal."].) Therefore, Paniagua forfeited this argument. (See *Souza*, at pp. 119-120 [defendant forfeited contention that model instruction on attempted murder misleadingly suggested doctrine of transferred intent applied].)

Paniagua's argument also fails on the merits. Whereas the trial court instructed the jury on the doctrine of transferred intent in connection with the murder count, it did not do so with the attempted murder counts. Other instructions emphasized that "each of the counts charged in this case is a separate crime" and that, for each crime charged, the "specific intent and mental state required are explained in the instruction for that crime or allegation." In arguing the murder count during closing, the prosecutor introduced the doctrine of transferred intent and stated it was "very particular to murder." He did not refer to the doctrine when arguing the attempted murder counts or in any way suggest the jury could find Paniagua guilty on all three of those counts based on a finding he intended to murder Pantoja. Rather, the prosecutor argued Paniagua demonstrated the

requisite intent when, on October 6, 2015, he "shot at the three individuals in the car" because he thought they were rival gang members. In this context, it is not reasonably likely the jury misunderstood or misapplied the attempted murder instructions in the manner Paniagua suggests. (See *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220 ["'any theoretical possibility of confusion [may be] diminished by the parties' closing arguments'"], disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Souza*, *supra*, 54 Cal.4th at p. 121 ["it is not reasonably likely that the jury applied the transferred intent instruction to the attempted murder counts"].)

C. *The Trial Court Erred in Failing To Give a Unanimity Instruction Regarding Count Nine (Felon in Possession of a Firearm), Which Requires Reversal of the True Finding on the Gang Allegation*

The People charged Paniagua in count nine with being a felon in possession of a firearm on October 13, 2015. When instructing on that count, however, the trial court did not refer to a specific date (or firearm).[5] Paniagua argues that, because the evidence showed two occasions on which he possessed a firearm (the October 6, 2015 shooting and the October 13, 2015 shooting), the trial court erred in not giving a unanimity instruction on

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[5] The trial court instructed the jury: "The defendant is charged in count nine with unlawfully possessing a firearm. To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant possessed a firearm; two, the defendant knew that he possessed the firearm; and, three, the defendant had previously been convicted of a felony." The parties stipulated Paniagua was previously convicted of a felony.

count nine. Our review is de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568 (*Hernandez*).)

"In California, a jury verdict in a criminal case must be unanimous. [Citation.] Thus, our Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the *specific* offense he is charged with." (*Hernandez*, *supra*, 217 Cal.App.4th at p. 569.) Therefore, "[a]s a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*); accord, *Hernandez*, at p. 569.) "The unanimity instruction must be given sua sponte, even in the absence of a defense request to give the instruction." (*Hernandez*, at p. 569.)

The People contend a unanimity instruction was not required because the prosecutor referred to the October 13 shooting when, during closing argument, he argued Paniagua's guilt on count nine, which the People suggest constituted "a formal election of the act underlying [that] count." Here's what the prosecutor said, having just discussed the murder and attempted murder charges and the gang allegations relating to the October 6 shooting: "So now we're going to go to the shooting at an occupied vehicle. First, there's—the last charge in this case [i.e., count nine] is easy because we know he had a gun. The felony conviction has been admitted, so, therefore, we know that he's guilty of that one. But in terms of the 13th, how do we know it's him, and what is the law behind this?"

The prosecution can indeed make an election in closing argument by "'tying each specific count to specific criminal acts'" shown by the evidence (*People v. Brown* (2017) 11 Cal.App.5th 332, 341), but to do so "its statement must be made with as much clarity and directness as would a judge in giving instruction" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539). The prosecutor's statement here was not clear enough. For one thing, the portion of the prosecutor's argument on which the People rely does not provide an obvious transition from discussing the events of October 6 to discussing those of October 13 because the crime of shooting at an occupied vehicle was charged in connection with both shootings. For another, the prosecutor's reference to "the 13th" did not clearly exclude the October 6 shooting as another, i.e., alternative, basis for convicting on count nine.

The People also invoke the "same-defense" exception: "There . . . is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime." (*Jennings*, *supra*, 50 Cal.4th at pp. 679-680.) They argue Paniagua used the same defense in denying he was the shooter on October 6 and October 13—namely, "he did not commit either shooting and was misidentified by eyewitnesses"—and therefore no unanimity instruction was required.

But Paniagua's defense to the charge he was the shooter on October 6 and his defense to the charge he was the shooter on October 13 challenged entirely different prosecutorial presentations—different eyewitnesses, different forensic evidence—relating to entirely different shootings. Thus, the defenses were not the "same" in the sense of necessarily standing or falling together, that is, in the sense of leaving no ground on

which the jury could find he was the shooter on one of the two dates but not the other. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 879 ["a unanimity instruction is not required if 'the defendant offered the same defense to both acts constituting the charged crime, so no juror could have believed defendant committed one act but disbelieved that he committed the other'"]; *People v. Davis* (2005) 36 Cal.4th 510, 562 [same]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100 [unanimity instruction is not required "when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them"].) The same-defense exception therefore did not apply, and the trial court erred in failing to give a unanimity instruction.

As it relates to Paniagua's conviction for the substantive offense of being a felon in possession of a firearm, however, that error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [827 S.Ct. 824, 828] (*Chapman*); *Hernandez*, *supra*, 217 Cal.App.4th at p. 577 [because erroneous failure to give a unanimity instruction "violates federal constitutional rights, the *Chapman* standard applies"].)[6] A

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[6] Courts are divided on the standard of prejudice to apply to the failure to give a unanimity instruction, with some applying the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, and others the standard for federal constitutional error in *Chapman*, *supra*, 386 U.S. at p. 24. (See *Hernandez*, *supra*, 217 Cal.App.4th at pp. 576-577 [discussing split].) We follow the majority in applying the *Chapman* standard, concluding that failing to give the unanimity instruction can lower the prosecution's burden of proof in a criminal case, an error of federal constitutional dimension. (See *Hernandez*, at p. 576.)

unanimous jury found Paniagua, a felon, shot a nine-millimeter handgun at an occupied motor vehicle on October 13, 2015. There is therefore no reasonable doubt all 12 jurors agreed Paniagua was guilty of being a felon in possession of a firearm on that date. (See *People v. Wright* (2006) 40 Cal.4th 81, 99 [failure to instruct was harmless under *Chapman* because "'the jury necessarily resolved, although in a different setting, the same factual question that would have been presented by the missing instruction' [citation], in a manner adverse to defendant"]; *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1353 ["[F]ailure to give an instruction is harmless error if 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context'"]; cf. *People v. Jones* (2002) 103 Cal.App.4th 1139, 1147 [defendant "necessarily must have had either actual or constructive possession of the gun while riding in the car, as evidenced by his control over and use of the gun during the shooting" at an inhabited dwelling]; *People v. Buyle* (1937) 20 Cal.App.2d 650, 658 ["While possession may be said very properly not to necessarily include use and handling, on the other hand there can be no use and handling without possession."].)[7]

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[7] Paniagua argues the trial court's error was harmless only if the record "affirmatively show[s] that no jurors based their verdict on the October 6 possession." Both his opening brief and his reply brief base this contention on the following statement in *People v. Aledamat* (2018) 20 Cal.App.5th 1149: "When an appellate court determines that a trial court has presented a jury with two theories supporting a conviction—one legally valid and one legally invalid—the conviction must be reversed 'absent a

We are not as confident all jurors agreed Paniagua's possession of a firearm on October 13, 2015 met the requirements for a gang enhancement under section 186.22, subdivision (b)(1). It concerns us, in particular, that all 12 jurors did not agree his shooting at an occupied motor vehicle on October 13 met those requirements, as evidenced by the not true finding on the gang allegation relating to that offense. Therefore, we must reverse the true finding on the gang allegation relating to count nine.

D. *The Jury's Verdict on the Murder Count Was Not Unintelligible*

1. *The Jury Convicted Paniagua of Second Degree Murder*

On the murder count, the trial court instructed the jury on the elements of both first degree and second degree murder. The court then stated: "You will be given verdict forms for guilty and not guilty of first degree murder and second degree murder. You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of

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basis in the record to find that the verdict was actually based on a valid ground.'" (*Id.* at p. 1153, italics omitted.) More than two months before Paniagua filed his opening brief, however, the Supreme Court granted review of that opinion (*People v. Aledamat*, review granted July 5, 2018, S248105), a fact Paniagua's appellate counsel (and the People) failed to mention. (See Cal. Rules of Court, rule 8.1115(e)(1).) Indeed, also not mentioned by either party, the Supreme Court has since reversed the decision in *People v. Aledamat*, *supra*, 20 Cal.App.5th 1149 on exactly the point in question, holding a so-called "alternative-theory error is subject to the more general *Chapman* harmless error test." (*People v. Aledamat* (2019) 8 Cal.5th 1, 13.)

second degree murder only if all of you have first found the defendant not guilty of first degree murder." The court directed the jury to "follow these instructions before you give me any completed and signed verdict forms" concerning the murder count:

"Number one: If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms for count one.

"Two: If all of you cannot agree whether the defendant is guilty of first degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms as to that count.

"Three: If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and the form for guilty of second degree murder. Do not complete or sign any other verdict forms for that count.

"Four: If all of you agree that the defendant is not guilty of first degree murder but you cannot agree whether the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms for that count.

"Five: If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the verdict forms for not guilty of both. Do not complete or sign any other verdict forms for that count."

The jury returned two completed verdict forms relating to the murder count, both signed and dated by the jury foreperson. One form was titled "NOT GUILTY VERDICT / COUNT 1 / FIRST DEGREE." The text in the body of that form read: "We the jury in the above entitled action, find the defendant, [Paniagua], not guilty of the crime of MURDER, in violation of Penal Code Section 187(a), a felony, as charged in Count 1 of the . . . Amended Information."

The other form was titled "GUILTY VERDICT / COUNT 1 / SECOND DEGREE." The text in the body of this form read: "We the jury in the above entitled action, find the defendant, [Paniagua], GUILTY of the crime of SECOND DEGREE MURDER of EDUARDO REBOLLEDO, in violation of Penal Code Section 187(a), a felony, as charged in Count 1 of the Amended Information." The text in this form also included the related allegations for firearm and gang enhancements, each followed by a blank line on which was written "TRUE."

The trial court asked the courtroom clerk to read the verdict forms aloud "as they are to be recorded." The clerk first read aloud the text in the body of the verdict form titled "NOT GUILTY VERDICT / COUNT 1 / FIRST DEGREE," but without reading aloud the title of that form. The clerk next read aloud the text in the body of the form titled "GUILTY VERDICT / COUNT 1 / SECOND DEGREE" (including the allegations and true findings for the enhancements), but again without reading aloud the title of the form. After reading the remaining forms aloud, the clerk asked the jurors if this was their verdict, and they answered "yes." The court asked counsel for Paniagua if she would like to have the jury polled, and she declined. The court then thanked and excused the jury.

2. *The Murder Verdict Was Not Unintelligible*

Paniagua contends we must reverse the verdict on the murder count because it was unintelligible. Observing that the clerk read aloud only the text in the body of the two verdict forms—one of which stated the jury found Paniagua "not guilty of the crime of murder," the other stating it found Paniagua "guilty of the crime of second degree murder"—Paniagua argues this "oral pronouncement of the verdict controls." This means, according to him, the jury found him both guilty and not guilty on the same count, a verdict that cannot stand. This argument is meritless.

"'"'A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.' [Citations.]" [Citations.] "The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]" [Citation.] "[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice.'"' (*People v. Jones* (2014) 230 Cal.App.4th 373, 378-379 (*Jones*); accord, *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272-1273 (*Camacho*).)

The trial court gave the jury clear and detailed instructions for returning a verdict of second degree murder, and the jury followed those instructions "to a 'T.'" (*People v. Carter* (2003) 30 Cal.4th 1166, 1190.) The jury's intent to convict Paniagua of second degree murder (and not first degree murder) was unmistakably clear, and any defect in recording that verdict did not prejudice Paniagua's substantial rights. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1259 [jury's intended verdict was

unmistakably clear because of the court's instructions]; *Jones*, *supra*, 230 Cal.App.4th at p. 379 [jury's intent to convict on first degree murder, not second degree murder, was unmistakably clear because it followed the court's instructions for doing so]; *Camacho*, *supra*, 171 Cal.App.4th at pp. 1271, 1273-1274 [although the completed verdict form, which was read aloud and on which the jury was polled, mistakenly identified the offense as carjacking, the jury's intent to convict the defendant of robbery was unmistakably clear from the trial record, including the court's instructions].)

We agree with the People that Paniagua essentially argues "verdict forms cannot be considered in determining the jury's intent." And no case he cites says this. (Cf. *Camacho*, *supra*, 171 Cal.App.4th at p. 1272 ["[v]iewing the record as a whole" in determining jury's unmistakable intent was to convict on robbery].) Any such prohibition would in fact seem impossible to observe where, as here, the verdict forms are so thoroughly bound up with """"the issues submitted to the jury and the instructions of the court""" (*Jones*, *supra*, 230 Cal.App.4th at p. 379)—which indisputably we may, indeed must, consider.

Moreover, the cases on which Paniagua principally relies are distinguishable. For example, he cites *People v. Valenzuela* (2018) 23 Cal.App.5th 82 for its statement that, "[r]egardless of what verdict forms are returned, the jurors' oral declaration is the true return of the verdict." (*Id.* at p. 85.) But that case concerned the effect of a verdict form the jury did not orally confirm. (*Id.* at pp. 84-85.) The jury orally confirmed both forms at issue here.

Similarly, in *People v. Soto* (1985) 166 Cal.App.3d 428 the jury returned and orally confirmed, on a murder count, a single

completed verdict form stating the jury found the defendant "not guilty of murder as charged in count I . . . and [fixed] the degree of the offense as murder in the second degree." (*Id.* at pp. 435-436.) The court "conclude[d] that because the verdict form expressly found appellant 'not guilty' of murder and did not expressly find him 'guilty' of second degree murder, we may not construe the verdict to find appellant guilty of second degree murder." (*Id.* at p. 438.) Here, the jury expressly found Paniagua guilty of second degree murder, and the supposedly inconsistent finding was on a separate verdict form, the title of which made clear it was not an inconsistent finding at all.

Finally, in *People v. Brown* (2016) 247 Cal.App.4th 211, when the jury returned two completed verdict forms on first degree murder, one for guilty and one for not guilty, the trial court, without inquiring of the jury or discussing with counsel, decided the not guilty verdict was a mistake and recorded only the guilty verdict. (*Id.* at p. 230.) The court of appeal reversed, explaining "there is no recordable verdict when the jury purports to find the defendant guilty and not guilty on the same count, and the court does not get to pick the verdict to be entered based on its conclusion that that verdict is the correct one and the other was erroneously made." (*Id.* at p. 232.) The trial court here did not pick one verdict to record in favor of another, and as discussed, the jury did not purport to find Paniagua guilty and not guilty on the same count.

E. *The Trial Court Must Correct Its Minute Order and Paniagua's Sentence To Reflect the Jury's Not True Finding on the Gang Allegation Relating to Count Seven*

Although the jury returned a not true finding on the gang allegation relating to count seven (shooting at an occupied motor vehicle), the trial court's minute order reflects a true finding on that allegation. Paniagua contends, the People concede, and we agree that the minute order is incorrect in that respect and that the sentence the court imposed on count seven, which included a gang enhancement, was unauthorized. On remand, the trial court must correct its minute order and the unauthorized sentence imposed on count seven.

F. *Remand Is Appropriate To Allow the Trial Court To Exercise Its Discretion Whether To Strike the Prior Serious Felony Conviction*

The trial court imposed a five-year enhancement under section 667, subdivision (a)(1), on each of counts one, two, three, four, and seven. At the time, section 1385, which gives a trial court "the power to strike or dismiss a sentencing enhancement allegation" in furtherance of justice (*People v. Fuentes* (2016) 1 Cal.5th 218, 225; § 1385, subd. (a)), did not allow the court to do so for enhancements under section 667 (see former § 1385, subd. (b)). "Effective January 1, 2019, recent amendments to sections 667 and 1385 delete language prohibiting a judge from striking a prior serious felony conviction for purposes of eliminating a five-year sentence enhancement. Instead, the court now may exercise discretion to strike a prior serious felony in the interest of justice. (§§ 667, 1385, as amended by Stats. 2018, ch. 1013, § 2.)" (*People*

v. Pride (2019) 31 Cal.App.5th 133, 142.) Paniagua contends, the People concede, and we agree these recent amendments apply retroactively. (*Ibid.*) Therefore, we remand for the trial court to consider whether to exercise its discretion to strike Paniagua's prior serious felony conviction for purposes of the enhancement under section 667, subdivision (a)(1).

DISPOSITION

The true finding on the gang allegation relating to the conviction for possession of a firearm by a felon is reversed, and the matter is remanded for resentencing. The trial court is directed to correct the minute order that incorrectly reflects the jury returned a true finding on the gang allegation relating to count seven (shooting at an occupied motor vehicle), to correct the unauthorized sentence imposed for the conviction on that count, and to exercise its discretion whether to strike the serious felony prior conviction for purposes of sentence enhancement. The court can also consider the effect, if any, of Senate Bill 136 on the enhancement under section 667.5, subdivision (b). In all other respects, the judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J. FEUER, J.