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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. JAMES HERBERT LOCKHEART et al., Defendants and Appellants.	B255880 (Los Angeles County Super. Ct. No. TA125699)

APPEALS from judgments of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed in part and reversed in part with directions.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant James Herbert Lockheart.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant Dominique Derone Jones.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Victoria B. Wilson and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants James Herbert Lockheart (Lockheart) and Dominique Derone Jones (Jones) appeal from judgments of conviction entered after a jury found them guilty on two counts of attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 664) of Robert Holloway (Holloway) and Marvin Jefferson (Jefferson). The jury found true the allegations defendants personally used and discharged firearms causing great bodily injury in the commission of the crimes (*id.*, § 12022.53, subds. (b), (c), (d)). The jury also found true the allegations the crimes were committed for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)). The trial court sentenced defendants to consecutive terms of 15 years to life for the attempted murders, with an additional 25 years to life on the firearm use enhancements, for total terms of 80 years to life in state prison.

On appeal, Lockheart contends the evidence is insufficient to support the finding the attempted murder of Jefferson was deliberate and premeditated and the finding that the crimes were committed for the benefit of a criminal street gang. Both defendants also challenge the exclusion of evidence regarding Holloway's ability to identify defendants. Finally, they contend the trial court erroneously believed it was required to impose

consecutive sentences. We affirm the convictions, but reverse as to sentencing and remand for resentencing.

FACTS

A. *Prosecution*

1. *The Shootings*

At about 8:00 p.m. on September 30, 2012, Holloway was at his aunt's house on West Douglas Street in the City of Compton. His cousin, Donnel Holloway (Donnel), lived at the house. While Donnel was a member of the Fruit Town Pirus gang, Holloway was not a gang member.

About 18 months earlier, Holloway had been shot while sleeping in the converted garage at his aunt's house; a bullet had come through the wall of the garage and hit him. Holloway had met Jefferson for the first time that night, as Jefferson had also been hit by a bullet. He and Jefferson had spoken twice since then, but they were not friends. Holloway did not know if Jefferson was a gang member but assumed he was, since Jefferson knew Donnel. Despite having been shot, Holloway was not afraid to visit his aunt's house, because he believed the prior shooting was a fluke and he was not a gang member.

After Holloway arrived at his aunt's house on September 30, Donnel arrived. Donnel told him that Jefferson was outside, so Holloway went out to say hello. He saw Shavon Hill (Hill) and a man identified only as "V" sitting in chairs by the garage. He walked to the fence where Jefferson was standing inside the gate. The two men hugged and began to talk, standing together in an area to the right of the house.

Holloway noticed Lockheart and Jones walking toward the house. The taller man, Lockheart, resembled Holloway's cousin Kejuan. Believing the two men were Kejuan and a friend coming to visit, Holloway walked toward the front gate to greet them. As Lockheart and Jones neared the gate, they drew guns from their waistbands. At that point, Holloway realized Lockheart was not his cousin; he had never seen Lockheart or Jones before. The two men were 19 to 20 feet away from Holloway when he saw them both pull out guns at the same time and begin shooting toward the garage where Hill and V were sitting.

Holloway dropped to the ground and began to crawl toward safety. He looked toward the shooters, who were both still firing toward the garage. Holloway heard Hill shout, "He has a gun." Holloway saw Lockheart and Jones then turn their aim toward the middle of the yard where he and Jefferson were located. Lockheart and Jones began shooting in the direction of Holloway and Jefferson. Holloway saw Lockheart point a gun toward him and shoot; the shot struck him in the leg. He heard Jefferson say that he had been shot. All together, Holloway thought about 15 to 20 shots were fired.

Lockheart and Jones then ran away. Jefferson walked back to the house. Holloway attempted to get up but had difficulty because he could not feel his legs. Eventually, he made it to the house. He saw Jefferson with the side of his jaw hanging down and blood squirting from the back of his head.

Hill also saw Lockheart and Jones walking toward the house after the motion sensor light on a neighbor's house went on and drew her attention. The two men were wearing baseball caps and black hoodies which covered the tops of their heads. They

stopped at the gate and looked toward the house. Seconds later, they drew guns and began firing in her direction.

As soon as Hill saw the guns, she dove to the ground between two cars parked in the driveway and got under one of the cars. She heard more shots, but all she could see were people's feet. Eventually the shooting stopped, and she saw two people on the ground. She heard the sound of running feet and saw Lockheart and Jones running away.

Hill made her way into the house. She saw Jefferson in the kitchen holding his head, and there was blood everywhere. She held a towel to his face until the paramedics arrived.

The paramedics took Holloway and Jefferson to the hospital. Holloway was hospitalized for three days. His wound was treated, but metal fragments remained in his legs. As a result, he could not use his left leg properly and could no longer work as a truck driver. Jefferson remained in the hospital for more than two weeks.

2. *The Investigation*

Los Angeles County Sheriff's Deputy Dru Strong arrived at the West Douglas Street house at about 8:30 p.m. in response to a "shots fired" call. There were people outside the house waving their hands and saying there were people inside who had been shot. Deputy Strong asked where the shooters were, and the people said they left.

Deputy Strong went into the house and found Jefferson seated in a chair, bleeding heavily from his face; there was blood everywhere. Holloway was also there, holding his leg and moaning. A woman who said she was a nurse told him that

Jefferson needed medical help; Deputy Strong knew that the paramedics were already on their way.

Once he determined that no one else had been shot, Deputy Strong called for additional units and began to secure the crime scene. He searched the area and recovered 17 9-millimeter shell casings. A criminalist later determined the casings were from bullets used in semiautomatic pistols. Ten had been fired from one gun, and seven had been fired from a different gun.

Detective Raul Magadan, the lead investigator in the case, prepared photographic lineups to show to the witnesses. He included photographs of Lockheart and Jones whom he believed to be active members of the Tree Top Pirus gang, in two different lineups. He showed the photographic lineups to Hill, who identified Lockheart in the first one and Jones in the second one.[1]

Detective Magadan showed the photographic lineups to Holloway several days later. Holloway also identified Lockheart and Jones as the shooters.[2]

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[1] Hill testified that she thought she had seen both men at various locations in Compton near her home, but she identified them in the lineups because they were the shooters, not because she had anything against them. She also identified them at the preliminary hearing and at trial. Because she lived near the crime scene and had identified defendants, Detective Magadan arranged for her to be relocated for her safety.

[2] Detective Magadan made one attempt to interview Jefferson after the shooting, but Jefferson had difficulty speaking. After that initial interview, Detective Magadan was unable to locate Jefferson.

3. *Holloway's Identification Testimony*

In addition to identifying defendants from the photographic lineups, Holloway identified them at the preliminary hearing and at trial. At trial, Holloway testified that the taller man was wearing all black. He believed he had given the same information to the police, but he could not be certain as more than a year had passed since the shootings. He described the shorter man as wearing a baseball shirt, with sleeves a different color than the body. He also remembered the second man wearing a hat. When asked if the man could have been wearing a hoodie, Holloway testified: "It was, like I say, a year and some change ago. The clothing wasn't what actually caught my eye. But it was—I remember a baseball-type shirt and the hat. And now that you say 'hoodie,' a black-and-gray striped hoodie also comes to mind. . . ." On cross-examination, Holloway said he did not remember testifying at the preliminary hearing that the shorter man was wearing a hat and a hoodie.

Holloway testified that both men had darker complexions than his own, and the shorter man had very dark skin. He remembered the shorter man's eyebrows and lips stood out, and he identified Jones from the photographic lineup based on those features and not based on the fact Jones had the darkest complexion of everyone in the lineup.

Holloway also testified that, at the time of the shootings, the shorter man had a moustache. He did not remember testifying at the preliminary hearing that the shorter man had no facial hair.

4. *Gang Evidence*

Detective Eric Gomez of the Los Angeles County Sheriff's Department testified as a gang expert. He explained that the Fruit Town Pirus and the Tree Top Pirus were rival Compton gangs, claiming adjacent territories. The West Douglas Street house was a Fruit Town Pirus hangout, as well as the home of Donnel, who was a member of that gang. Detective Magadan had arrested Lockheart and Jones at a house on Oleander Avenue in Compton which was known to be used by the Tree Top Pirus. In 2012, there was an outbreak of feuding between the two gangs.

Detective Gomez had had prior contacts with Lockheart and Jones at the Oleander Avenue house. Based on these prior contacts, as well as recorded telephone conversations, and contacts between Lockheart and Jones and other officers, Detective Gomez was of the opinion that Lockheart and Jones were members of the Tree Top Pirus. Detective Gomez acknowledged that Lockheart did not have any gang tattoos and did not live in gang territory but stated that not all gang members have gang tattoos.

According to Detective Gomez, the Tree Top Pirus had about 96 members, used the letters "TTP" as part of their graffiti, and their hand sign was four fingers. Their primary activities included robbery, assault with a deadly weapon, handguns, and dealing and transporting narcotics. In December 2011, Tree Top Pirus member Demetri Devon Gales committed attempted murder and shooting at an inhabited dwelling. In July 2012, Tree Top Pirus member Daniel Paxton was convicted of assault with a deadly weapon, possession of a firearm, and shooting in a school zone.

Detective Gomez explained that gang members commit crimes in rival gangs' territory to gain respect. Further, "the more brazen the act, the more street credit or respect that they get from their own gang as well as other gangs." Gang members commit crimes together.

In response to a hypothetical question based on the facts of this case, Detective Gomez opined that the shootings would have been committed for the benefit of a criminal street gang. By going into rival gang territory, going to a known rival gang member's house, and trying to kill rival gang members, the shooters would bolster their own status within their gang. They would also bolster their gang's status by increasing its reputation as a violent gang, increasing fear in the community, and discouraging people from reporting the gang's activities to law enforcement.

B. *Defense*

The defendants did not testify. Landy Jones, defendant Jones' father, testified that Jones has had facial hair—specifically a moustache and a goatee—since he was in junior high school and that he had facial hair in 2012 at the time of the shootings.

DISCUSSION

A. *Sufficiency of the Evidence to Support the Finding that the Attempted Murder of Jefferson Was Deliberate and Premeditated*

An attempted murder is willful, deliberate and premeditated when it results from preexisting reflection rather than unconsidered or rash impulse. (*People v. Hughes* (2002) 27

Cal.4th 287, 370; *People v. Pride* (1992) 3 Cal.4th 195, 247.) Although deliberation and premeditation require careful thought and a weighing of considerations, they do not "require any extended period 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." (*Hughes*, *supra*, at pp. 370-371, internal quotation marks and citations omitted.) Additionally, a "[d]efendant's guilt of attempted murder must be judged separately as to each alleged victim." (*People v. Bland* (2002) 28 Cal.4th 313, 331, fn. omitted.) The doctrine of transferred intent does not apply. (*Ibid*.) "Generally, the question whether the defendant harbored the required intent must be inferred from the circumstances of the shooting. [Citation.]" (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.)

"'Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence. . . . Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]'" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1463, disapproved on another ground in *People v. Mesa* (2012) 54 Cal.4th 191, 199, quoting from *People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

Lockheart concedes that "[t]here was evidence, from Holloway's testimony, that [he] considered his actions before

firing on Hill, on V, and on [Holloway]."[3] He claims, however, "[t]here is nothing in the evidence that would indicate that [he] premeditated and deliberated before attempting to kill Jefferson. The evidence tends to show that [he] formed the intent to kill, if he did so at all, only when he was startled and realized that there were people besides Hill and V present." In Lockheart's view, "'[T]he [attempted] murder [of Jefferson] was more of a spontaneous reaction than a premeditated and deliberated plan to end the victim's life.' ([*People v.*] *Rowland*[(1982)] 134 Cal.App.3d [1,] 9.) There was no evidence that [Lockheart] had a prior relationship with Jefferson, or even knew who he was, and that he was a gang member. There was strong evidence of a considered attempt to kill Hill, V, and Holloway. Jefferson appeared to have simply found himself in the line of fire."

Lockheart takes too narrow a view of the evidence. There was no evidence that he and Jones had a prior relationship with any of the people they shot at. Rather, the evidence showed they entered rival gang territory, went to a house known to be a hangout for rival gang members, and began shooting at the people they saw there within "seconds" of arriving at the house, without any interaction or provocation of any kind. The intent to kill was formed before they aimed their guns at their potential victims.

Defendants began shooting at Hill and V first, possibly because they were the initial people defendants saw. According to Holloway, when Hill shouted, "He has a gun," defendants "both

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[3] On appeal, Jones does not challenge the sufficiency of the evidence to support the finding of attempted premeditated murder of Jefferson and Holloway.

seemed startled that [Jefferson] and myself were actually standing on the other side." At that point, "they looked in our direction and both turned their aim towards where we were in the middle of the yard." At that time, Holloway was still standing next to where Jefferson was standing. Defendants began firing toward Holloway and Jefferson. Holloway saw Lockheart look straight at him and fire in their direction, striking Holloway in the leg.

Jefferson could not be located and so was unable to testify that either defendant looked at him and fired in his direction. However, it is reasonably inferable that when defendants saw that Holloway and Jefferson were standing in the yard, they began shooting at them, intending to kill both of them as they had intended to kill their initial targets, Hill and V. There was no evidence of anything occurring which would have changed or affected their state of mind from the moment they opened fire at Hill and V to seconds later when they changed their line of fire and began shooting at Holloway and Jefferson, other than Hill's shout. Accordingly, there is substantial evidence to support the jury's finding the attempted murder of Jefferson was deliberate and premeditated. (See, e.g., *People v. Ramos*, *supra*, 121 Cal.App.4th at pp. 1207-1208 [evidence that gang members brought weapons to party and shot at perceived rival gang members following a fight sufficient to support finding of attempted premeditated murder]; *People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1463-1464 [drive-by shooting at rival gang's hangout in midst of a gang war].)

B. *Exclusion of Evidence Holloway Was Unable To Identify Defense Counsel as Having Represented Defendants at the Preliminary Hearing*

In this case, the identification of defendants by Holloway and Hill was crucial, as there was no physical evidence connecting defendants to the shootings. As discussed above, there were some inconsistencies in Holloway's testimony regarding defendants' appearance. As counsel for Jones was cross-examining Holloway regarding his preliminary hearing testimony, he asked how many Black men were sitting at the counsel table at the preliminary hearing. Holloway said there were three: Lockheart, Jones, and "[o]ne other person that I don't remember." The prosecutor objected on the ground of relevance, and the trial court sustained the objection. Counsel then asked if Holloway remembered the prosecutor or who the defense counsel was, and he said he did not. Holloway acknowledged that counsel for both defendants asked him questions, but he said he did not recollect who they were. Counsel began to request that the court take judicial notice, but the trial court stopped him and called a sidebar.

Counsel stated that the record would show that he and counsel for Lockheart also represented the defendants at the preliminary hearing. He stated, "I think it's relevant on his ability to make an identification when he had more than plenty of opportunity to observe both me and [Lockheart's counsel], and at this time he can't identify who the lawyers were." The court responded, "Absolutely not. What you're doing here is you're making an experiment and testing him on that experiment. . . . The circumstances are totally different when somebody . . . is pointing a gun at you, or where someone is asking you questions

in a courtroom. So absolutely not." The court added that counsel could examine Holloway regarding his prior inconsistent statements at the preliminary hearing.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id*., § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id*., §§ 400, 402.) The trial court is vested with broad discretion in performing this duty. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) We review the trial court's exercise of discretion in admitting or excluding evidence for abuse, and we will not disturb its determination "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; accord, *Harris*, *supra*, at p. 337.)

While a defendant has the right to present evidence relevant to the theory of his defense, this right "does not require 'the court [to] allow an unlimited inquiry into collateral matters.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) The proffered evidence must be of more than slight or limited probative value. (*Ibid*.) Trial courts do not abuse their discretion in excluding evidence marginally relevant for impeachment purposes in order "'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral . . . issues.' [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 946.)

A collateral issue is "'one that has no relevancy to prove or disprove any issue in the action.' [Citation.] A matter collateral

to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue; always relevant for impeachment purposes are the witness's capacity to observe and the existence or nonexistence of any fact testified to by the witness. (Evid. Code, § 780 . . . .) As with all relevant evidence, however, the trial court retains discretion to admit or exclude evidence offered for impeachment. (Evid. Code, § 352 . . . .)" (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 9, citations omitted.)

Evidence Code section 780, subdivision (c), provides that the trier of fact "may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including [¶] . . . [¶] . . . [t]he extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies." Jones cites *People v. Manson* (1976) 61 Cal.App.3d 102, 158 for the proposition that "[t]he ability of a witness to identify in court someone who they have met and is associated with the case, but who is not a defendant or witness in that action 'is an accepted method of testing a witness' competency and credibility.'" *Manson* does not so hold. It simply states that "[d]uring the course of cross-examination, Danny DeCarlo was asked to identify Charles Tex Watson.[4] At the request of Krenwinkel's attorney and over Manson's objection, Watson was produced in court. We find no error in this procedure. In-court identification

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4 Danny DeCarlo and Charles Tex Watson were members of Charles Manson's "Family." Patricia Krenwinkel was also a Family member and a codefendant along with Manson. (*People v. Manson*, *supra*, 61 Cal.App.3d at pp. 127-128.)

is an accepted method of testing a witness' competency and credibility. (Evid. Code, § 780, subd. (c).)" *Manson* does not hold that a witness may be asked to identify anyone he has met who is "associated with the case," including counsel, for the purpose of testing that witness's ability to perceive and recollect.

We agree with the trial court that what Jones's counsel was attempting to do was, in essence, conduct an experiment as to Holloway's ability to recollect in general, not his "capacity to perceive, to recollect, or to communicate any matter about which he testifies." (Evid. Code, § 780, subd. (c).) "It was within the discretion of the trial judge to determine whether the conditions of the experiment and the conditions of [the shootings] to which [Holloway] testified were sufficiently similar that the evidence of the experiment would aid rather than confuse the jury. [Citations.]" (*People v. Roberts* (1953) 40 Cal.2d 483, 491; see also *People v. Collier* (1952) 113 Cal.App.2d 861, 870-871 [no abuse of discretion in excluding evidence of investigator's experiments regarding possibility of identifications, "since the real question involved was what this woman was able to see after the man came face to face with her, and while she was struggling with him"].) We perceive no abuse of discretion in the trial court's exclusion of the evidence. The conditions were different, and Holloway's failure to recall the attorneys who questioned him at the preliminary hearing does not disprove his ability to recall the defendants who shot at him, who he knew he would be asked to identify at a later time. (See *People v. Manson* (1977) 71 Cal.App.3d 1, 44-45 [no abuse of discretion in refusing request for a "'screaming line-up,'" as the ability to identify an individual's voice depends on characteristics of and familiarity with that voice, so "[i]dentification or failure to identify one human voice

does not necessarily prove or disprove the ability to identify another human voice"].)

C. *Sufficiency of the Evidence To Support the Findings the Crimes Were Committed for the Benefit of a Criminal Street Gang*

Under Penal Code section 186.22, subdivision (b)(1), a criminal street gang enhancement applies to a "person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." A "criminal street gang" is an organization which has as one of its primary activities the commission of specified criminal acts, and whose members have engaged in a pattern of criminal gang activity. (*Id.*, subd. (f).) The commission of two or more of the predicate criminal acts by gang members committed on separate occasions or by two or more persons within a three-year period constitutes a pattern of criminal gang activity. (*Id.*, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 9.)

To prove the existence of a criminal street gang, "'the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called "predicate

offenses") during the statutorily defined period.' [Citations.]" (*People v. Sanchez* (2016) 63 Cal.4th 665, 698.)[5]

Defendants contend the evidence is insufficient to support the findings the crimes were committed for the benefit of a criminal street gang, because there is no substantial evidence that the Tree Top Pirus met the statutory definition of a criminal street gang. The evidence is clearly sufficient, however. Detective Gomez testified that (1) the Tree Top Pirus had about 96 members, used the letters "TTP" as part of their graffiti, and their hand sign was four fingers; (2) their primary activities included robbery, assault with a deadly weapon, handguns, and dealing and transporting narcotics (§ 186.22, subd. (e)(1), (2), (4) & (23)); (3) in December 2011 a Tree Top Pirus member committed attempted murder and shooting at an inhabited dwelling, and in July 2012 another Tree Top Pirus member was convicted of assault with a deadly weapon, possession of a firearm, and shooting in a school zone. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

What defendants are actually challenging is the trial court's instruction as to the criminal street gang enhancement, to which they apparently did not object. The trial court instructed the jury pursuant to CALCRIM No. 1401 that: "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of

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5 The primary activities enumerated in the statute include "[a]ssault with a deadly weapon," and "[s]hooting at an inhabited dwelling," among many others. (§ 186.22, subd. (e)(1) and (5).)

attempted murder, shooting at an inhabited dwelling and assault with a firearm AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity."

Defendants contend that "[i]n so instructing [the jury,] it appears that the trial court conflated 'primary activities' with 'predicate offenses.' While the trial court instructed as to these three offenses as the primary activity of the gang, no evidence was presented that either attempted murder or shooting at an inhabited dwelling was a primary activity of the group. . . . [¶] To be sure[,] there was evidence, the predicate crimes, that members of this group had committed attempted murder and fired at an inhabited dwelling but no evidence that this was a primary activity of the gang as opposed to something which was occasionally committed by the group's members. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at [p]p. 323, 324.)"

We note that the trial court did, in fact, instruct the jury pursuant to CALCRIM No. 1401 that "[i]n order to qualify as a primary activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group." Nonetheless, we agree with defendants that the instruction given did conflate "primary activities" with "predicate offenses."

It is clear from the fact that defendants phrase their contention in the form of a challenge to the sufficiency of the evidence that they recognize that any challenge to the instruction itself was forfeited by their failure to object. (*People v. Lucas* (2014) 60 Cal.4th 153, 291, fn. 51, disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19; *People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) If an erroneous instruction

affected defendants' substantial rights, we may review a claim of instructional error even though defendants did not object to the instruction in trial court. (Pen. Code, § 1259; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132, 1138; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1233.) "Substantial rights" are equated with errors that result in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. (*Valenzuela*, *supra*, at p. 1233; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.) That is, defendants' substantial rights are affected if it is reasonably probable that absent the erroneous instruction defendants would have obtained a more favorable result. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146; see *Watson*, *supra*, at p. 836.)

We conclude it is not reasonably probable the jury would have found the gang enhancement allegation untrue had it been properly instructed. First, the jury was instructed it could find assault with a firearm to be a primary activity within the meaning of the statute, and Detective Gomez did testify that assault with a deadly weapon was one of the gang's primary activities. Second, as stated above, there is substantial evidence to support a finding that the Tree Top Pirus are a criminal street gang under Penal Code section 186.22. Accordingly, any instructional error was harmless.

D. *Imposition of Consecutive Sentences*

The People filed a sentencing memorandum in which they stated that defendants were ineligible for probation, listed five circumstances in aggravation and none in mitigation, and recommended indeterminate terms of 80 years to life for both defendants. At the sentencing hearing, Jones' counsel stated: "It was my intention to continue the sentencing so I could be able to

go through that and appropriately respond; however, the People indicated to me in an off-the-record discussion that the sentencing, in the court's mind, is pretty set by law, that regardless of the sentencing memorandum, one way or the other, the sentence was going to be the same so there's really nothing for me to respond to. Is that correct?" The trial court responded, "That is correct. This is all mandatory sentencing by statute. There's not much discretion that the court could actually exercise in these type of crimes or convictions of charges." Defense counsel agreed to go ahead with sentencing. The court then proceeded to sentencing, reiterating that it "did, in fact, consider the sentencing memorandum; however, like I indicated, there's not much discretion left for the court based on the statute. . . ." In the sentencing which followed, the court made no mention of having any discretion as to any aspect of the sentences imposed.

Defendants contend that while Penal Code section 12022.53, subdivision (d), requires the trial court to impose consecutive firearm enhancements, the courts have determined that "a trial court can mitigate concerns about sentencing inequities by imposing concurrent, rather than consecutive, sentences where multiple subdivision (d) enhancements are found true." (*People v. Oates* (2004) 32 Cal.4th 1048, 1060.) Defendants argue that because the trial court was unaware it had this discretion, the case must be remanded to allow the trial court the opportunity to exercise its discretion.

As the People point out, however, defendants did not raise this issue in the trial court or request that the trial court exercise its discretion to impose concurrent sentences. "A party in a criminal case may not, on appeal, raise 'claims involving the trial court's failure to properly make or articulate its discretionary

sentencing choices' if the party did not object to the sentence at trial. [Citation.]" (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751; accord, *People v. Scott* (1994) 9 Cal.4th 331, 353.) The People contend defendants have therefore forfeited the issue.

Defendants rely on *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181, 1182 and *People v. Phong Bui* (2011) 192 Cal.App.4th 1002 for the proposition that the issue is not forfeited. The court in *In re Sean W.* concluded that counsel's failure to object in the trial court did not waive defendant's right to appeal the court's failure to exercise the discretion vested in it. There, the record supported the appellant's claim that the trial court did not believe it had any discretion with respect to the maximum term of confinement it could impose. "'"Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]"'" (*Id.* at p. 1182.)

In *Phong Bui*, the record showed that the trial court erroneously believed consecutive sentences were required on the underlying crimes. (*Id.* at pp. 1013-1014.) Defense counsel made an objection for the record but agreed with the trial court that case law mandated consecutive sentences. (*Id.* at p. 1013.) The court concluded that the case had to be remanded for the trial court to consider whether one of the sentences should be stayed under Penal Code section 654 "and, if not, whether to impose a consecutive or concurrent sentence" for the additional count. (*Id.* at p. 1016.) In doing so, the court noted that a remand for resentencing is appropriate where the trial court is mistaken as to the scope of its discretionary powers. (*Id.* at p. 1016.)

Here, the record contains strong support that the trial court misunderstood its sentencing discretion. The court stated

that "[t]his is all mandatory sentencing by statute. There's not much discretion that the court could actually exercise in these type of crimes or convictions of charges." While the court did not specifically state that it had no discretion to impose concurrent sentences, its repeated statement that it had no discretion raises sufficient concerns about fair procedure to warrant reversal even without an objection in the trial court. Under these circumstances, the forfeiture rule does not apply and the matter must be remanded for resentencing. (See, e.g., *People v. Deloza* (1998) 18 Cal.4th 585, 600 [remand for resentencing required where trial court's statements indicated "that the trial court misunderstood the scope of its discretion to impose concurrent sentences for defendant's current convictions, and erroneously believed consecutive sentences were mandatory"]; *People v. Downey* (2000) 82 Cal.App.4th 899**,** 912 ["'A ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law'"].)[6]

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[6] Although Lockheart did not raise this issue on appeal, we remand for resentencing as to both defendants under our authority to "correct a legal error resulting in an unauthorized sentence . . . at any time." (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13.) Because we remand for resentencing, we do not address the argument raised by the People that the sentence originally imposed was not authorized under Penal Code sections 186.22, subdivision (b)(5), and 664, subdivision (a).

DISPOSITION

The judgments of guilt are affirmed. The matter is remanded for resentencing of both defendants in accordance with this opinion.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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