LIU. J.

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S198324

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. SERAFIN SANTANA, Defendant and Appellant.	Case No.

SUPREME COURT
FILED
DEC - 1 2011
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Deputy

Fourth Appellate District, Division One, Case No. D059013
Riverside County Superior Court, Case No. RIF139207
The Honorable Mark E. Johnson, Judge

PETITION FOR REVIEW

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent, the People of the State of California, respectfully petitions this Court to grant review in this matter pursuant to rule 8.500(b) of the California Rules of Court. In a partially-published opinion, authored by Justice Cynthia Aaron and filed on October 26, 2011, the Court of Appeal, Fourth Appellate District, Division One, reversed appellant's conviction for attempted mayhem. Justice Patricia Benke filed a dissenting opinion. A copy of the opinion is attached to this petition as Exhibit A.

ISSUE PRESENTED

Does CALCRIM No. 801, which purports to define the crime of mayhem, incorrectly require that the prosecutor prove the additional element that a defendant caused "serious bodily injury"?

STATEMENT OF THE CASE

Appellant shot the victim three times in the leg with a handgun at close range. At the time, the victim was lying on the ground after having been beaten by several of appellant's friends. (1 RT 58-62, 68, 150-151.) The victim's wounds were through-and-through and they required no stitches. (1 RT 70-71; 2 RT 265.)

Relevant here, appellant was charged, in count 1, with attempted mayhem, in violation of Penal Code[1] sections 203 and 664, subdivision (a)(2). It was further alleged, as to count 1, that appellant personally used

[1] Unless otherwise specified, all statutory references are to the Penal Code.

a firearm causing great bodily injury and personally inflicted great bodily injury.[2] (§§ 12022.53, subd. (d),12022.7.) (1 CT 93-95.)

At trial, the jury was instructed with a modified version of CALCRIM No. 460, in pertinent part, as follows:

> The defendant is charged in Count 1 with attempted mayhem.
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant took a direct but ineffective step toward committing the crime of mayhem;
>
> AND
>
> 2. The defendant intended to commit mayhem.

(1 CT 213.)

Additionally, the trial court instructed the jury on the crime of mayhem with a modified version of CALCRIM No. 801 as follows:

> To prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury when he unlawfully and maliciously disabled or made useless part of someone's body and the disability was more than slight or temporary.
>
> Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.
>
> A serious bodily injury means a serious impairment of physical condition. *Such an injury may include a gunshot wound.*

(1 CT 214, emphasis added.)[3]

---

[2] Appellant was additionally charged, in count 2, with assault with a firearm (§ 245, subd. (a)(2)) regarding conduct involving the same victim. Count 3 also charged appellant with assault with a firearm arising from when appellant pistol whipped a second victim.

[3] The unmodified version of CALCRIM No. 801 states as follows:

(continued...)

The jury convicted appellant of all charges and found all enhancements true. (1 CT 165-166.)

Appellant argued on appeal that the trial court's modification of the mayhem instruction was argumentative and created an imbalance in the prosecution's favor by stating that a serious bodily injury "may include a

---

(...continued)

The defendant is charged [in Count ______] with mayhem [in violation of Penal Code section 203]. [¶]To prove that the defendant is guilty of mayhem, *the People must prove that the defendant caused serious bodily injury* when (he/she) unlawfully and maliciously: [¶][1. Removed a part of someone's body(;/.)][¶] [OR] [¶][2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)][¶] [OR] [¶] [3. Permanently disfigured someone(;/.)][¶] [OR] [¶] [4. Cut or disabled someone's tongue(;/.)[¶]][OR] [¶] [5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)][¶] [OR] [¶] [6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[A serious bodily injury means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[________________ <Insert description of injury when appropriate; see Bench Notes> is a serious bodily injury.]

[A disfiguring injury may be permanent even if it can be repaired by medical procedures.]

(CALCRIM No. 801, emphasis added.)

gunshot wound." He further argued the instruction directed a verdict in favor of the prosecution by suggesting to the jury it needed to find only that appellant inflicted a gunshot wound in order to find him guilty of attempted mayhem.

In a partially-published decision issued October 26, 2011, the Court of Appeal concluded that the trial court's insertion of the phrase "a gunshot wound" as an example of what may constitute a serious bodily injury, directed the jury to focus on the means by which the defendant intended to inflict the wound, rather than the nature and severity of the wound, and provided a grossly misleading and argumentative instruction that favored the prosecution. (Slip Opn. at p. 13.) The Court of Appeal reversed the jury's finding of attempted mayhem. (Slip Opn. at pp. 3-20.) The dissenting opinion concluded that the jury was properly instructed on attempted mayhem and, in any event, there was no probability that the instructional error identified by the majority influenced the jury's verdict. (Dissent at p. 1.)

Respondent filed a petition for rehearing, pointing out that the statutory definition of mayhem does not contain the additional element of serious bodily injury and therefore appellant could not have been prejudiced by the court's instruction. The majority denied the petition; in dissent, Justice Benke voted to grant it.

REASONS FOR GRANTING REVIEW

Review is necessary to settle an important question of law as to whether CALCRIM No. 801, purporting to define the crime of mayhem, incorrectly requires that the prosecutor prove the additional element that a defendant caused serious bodily injury.

Respondent respectfully submits that the requirement that the prosecutor prove appellant intended to cause "serious bodily injury" was superfluous to the requirement that it must prove appellant intended to

"maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." Moreover, because serious bodily injury is not a requirement of mayhem, appellant suffered no prejudice from the Court's instruction in which it defined the term, even if incorrectly.

A. CALCRIM No. 801, Purporting To Define The Crime Of Mayhem, Incorrectly Requires That The Prosecutor Prove The Additional Element That A Defendant Caused Serious Bodily Injury

Penal Code 203 provides:

> Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

Mayhem includes three elements: (1) an unlawful act by means of physical force; (2) resulting in an injury which "deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip . . . ;" and (3) done "maliciously," defined as "an unlawful intent to vex, annoy, or injure another person." (*People v. Ausbie* (2005) 123 Cal.App.4th 855, 861, citing Pen. Code, § 203.) Hence, there is no requirement of a serious bodily injury over and above the specific injuries that are part of the second element.

Former CALJIC No. 9.30 defined the crime of mayhem consistent with the statutory elements:

> [Defendant is accused [in Count[s]] of having committed the crime of mayhem, a violation of § 203 of the Penal Code.]
>
> Every person who unlawfully and maliciously deprives a human being of a member of [his] [her] body, or disables, permanently disfigures, or renders it useless, or who cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of the crime of mayhem in violation of Penal Code § 203.

> In order to prove this crime, each of the following elements must be proved:
>
> 1. One person unlawfully and by means of physical force [deprived a human being of a member of [his] [her] body or, disabled, permanently disfigured, or rendered it useless;] [or] [of a human being;] and
>
> 2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person.
>
> [It is not a defense that a disfigurement has been or may be medically alleviated.]

However, the current CALCRIM No. 801, provided in this case, additionally requires that the People prove the defendant caused "serious bodily injury," defined by the instruction as:

> A serious bodily injury means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement)

Thus, while the CALCRIM instruction on mayhem requires the jury to find the defendant caused "serious bodily injury" (CALCRIM No. 801), its predecessor, CALJIC No. 9.30, as noted above, contained no such instruction; it simply mirrored the statutory language.

To prove the crime of attempted mayhem, however, the prosecution here was not required to show appellant caused or even attempted to cause "serious bodily injury." The mayhem statute contains no such requirement. (Pen. Code, § 203.) That is because any such definition would be redundant. Depriving a human being of a body part; disabling, disfiguring or rendering useless a body part; cutting or disabling the tongue; putting out an eye; or slitting the ear, nose or lip are all actions that necessarily involve significant (or "serious" or "great") bodily injury. In

short, it is an exercise in redundancy for CALCRIM No. 801 to append an additional requirement of a serious bodily injury.

Respondent recognizes that several cases have stated that mayhem includes a great bodily injury component. (See e.g. *People v. Brown* (2001) 91 Cal.App.4th 256, 272; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1575; *People v. Keenan* (1991) 227 Cal.App.3d 26, 36; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559-1560.) However, these cases arose in the context of sentencing. They hold that for purposes of sentencing (and specifically the rule against double-counting sentencing factors) it is improper to add a great bodily injury enhancement to mayhem, because great bodily injury is inherent in mayhem. In other words, the cases do not hold that the People must prove great bodily injury to prove mayhem, but rather they hold that by proving mayhem, the People have necessarily proved great bodily injury, and therefore it is erroneous to impose an enhancement for great bodily injury under section 12022.7. (See *People v. Brown, supra*, 91 Cal.App.4th 256, 272["Mayhem cannot be committed without the infliction of great bodily injury. The sentence prescribed for mayhem, therefore, necessarily includes consideration of the injury and it would be an application of double punishment to apply a great bodily injury enhancement to it."]

Apparently, these sentencing cases provided the genesis for the serious bodily injury element added to CALCRIM No. 801. Because there is no basis for such a requirement in either statutory or case law, the addition of a new element is unwarranted. Review by this Court is necessary to correct this error in the standardized jury instructions – an error that unnecessarily increases the burden on the prosecution and could well evade further review.

B. There Is No Reasonable Likelihood That The Jury Applied The Instruction On Mayhem As Suggesting It Could Find Appellant Guilty If He Merely Intended To Inflict A Gunshot Wound

Contrary to the Court of Appeal's conclusion, there is no reasonable likelihood that the jury applied the instruction on mayhem as suggesting it could find appellant guilty if he merely intended to inflict a gunshot wound. The majority concluded that the trial court's instruction removed from the jury's consideration the "key question" of whether Santana intended to inflict a wound that would seriously impair Vallejo's physical condition by disabling him. (Slip Opn. at p. 17.) Not so. The jury here was instructed that appellant had to intend to "unlawfully and maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." The instruction that a serious bodily injury "may include a gunshot wound" did not obviate this requirement.

The correctness of jury instructions is determined from the entire charge of the court, not from a consideration of parts of an instruction or from one particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

> "'In reviewing [a] purportedly erroneous instruction [], "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.? [Citation.] In conducting this inquiry, we are mindful that " 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " [Citations.]' [Citation.] 'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

(*People v. Castaneda* (2011) 51 Cal. 4th 1292, 1320-1321.)

Here, as explained above, CALCRIM No. 801 unnecessarily includes a "serious bodily injury" requirement. The instruction did not, however,

inform the jury that it could find appellant guilty merely if he intended to inflict a gunshot wound. Nor is there a reasonable likelihood that the jury would have understood the instruction in such a manner. The instruction clearly required that the prosecution also prove appellant intended to "unlawfully and maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." This was all that was required under the terms of the statute. Although the instruction included the unnecessary requirement that the prosecution prove appellant attempted to commit serious bodily injury, viewing the instructions on attempted mayhem as a whole, there could be no confusion.

In any event, the language "Such an injury may include a gunshot wound" certainly did not focus the jury's attention on the manner in which the injury was inflicted rather than on the nature and severity of the injury appellant attempted to inflict. The trial court did not instruct the jury that a gunshot wound was, in fact, a serious bodily injury. Rather, the jury was instructed that such an injury may include a gunshot wound, but it was up to the jury to make that determination. The jury was still required to find that appellant's conduct in shooting the prone victim three times in the leg was an attempt to" unlawfully and maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." The court's instruction that a serious bodily injury "may" include a gunshot wound did not direct a verdict in favor of the prosecution, nor did it relieve the prosecution from proving the nature and severity of the injury appellant attempted to inflict. That determination was clearly and unequivocally left purely within the jury's discretion.

CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests this Court grant review in the present case.

Dated: November 29, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains **2,702** words.

Dated: November 29, 2011

KAMALA D. HARRIS
Attorney General of California

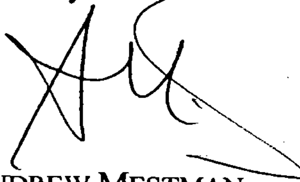

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EXHIBIT A

Filed 10/26/11

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SERAFIN SANTANA, Defendant and Appellant.	D059013 (Super. Ct. No. RIF139207)

APPEAL from a judgment of the Superior Court of Riverside County, Mark E. Johnson, Judge. Reversed in part, affirmed in part, and remanded for further proceedings.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dana R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Andrew S. Mestman and Gil Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part III.B., C., D., E., and F.

I.

INTRODUCTION

Defendant Serafin Santana appeals his convictions and sentence for attempted mayhem and two counts of assault with a firearm. Santana contends (1) that the trial court erred in instructing the jury on the offense of mayhem, as part of its instruction on the charged offense of attempted mayhem, by specifically telling the jury that "a gunshot wound" could be a "serious bodily injury"; (2) that the trial court erred in failing to instruct the jury sua sponte on the offense of attempted battery resulting in serious bodily injury, as a lesser included offense of attempted mayhem; (3) that the court erred in failing to instruct the jury on three of the four elements of the offense of assault with a firearm; (4) that the court abused its discretion in admitting in evidence testimony from a witness regarding a threat that that witness received from an unknown person who told the witness to tell one of the victims not to come to court; (5) that a juror committed misconduct by failing to promptly disclose that she knew the victim to be a student at the school where she worked as an instructional aide; (6) that the court erred in imposing a concurrent three-year term for a Penal Code[1] section 12022.7 great bodily injury enhancement as to the attempted mayhem count because the court had already imposed a 25-year-to-life term for a section 12022.53, subdivision (d) great bodily injury enhancement as to that count; (7) that the court erred in ordering Santana to reimburse the county for fees for the services of his appointed counsel without holding a hearing or

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1 Further statutory references are to the Penal Code unless otherwise indicated.

determining whether he had the ability to pay those fees; (8) that the abstract of judgment is "a complete mess" and requires correction since it "is a virtual impossibility to discern precisely what the trial court ultimately intended in terms of a final sentencing minute order and complete abstract of judgment"; and (9) that the cumulative prejudice caused by the trial court's numerous errors requires reversal.

We conclude that the trial court erred in failing to properly instruct the jury with respect to the charge of attempted mayhem, and further conclude that this error requires reversal of Santana's conviction for this offense. Since we are reversing Santana's attempted mayhem conviction, we need not consider Santana's claim of error regarding his sentence on that count, nor his request that the court issue a corrected abstract of judgment. With respect to Santana's complaint regarding the court's order requiring him to reimburse the county for fees for his appointed counsel, we instruct the trial court that it must hold a hearing and make the requisite findings before it may enter a similar order after remand. We reject Santana's other claims of error, and therefore affirm Santana's convictions on counts 2 and 3. We remand the case to the trial court for further proceedings as may be necessary given our reversal of his conviction on the attempted mayhem charge.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On August 12, 2007, Juan Gomez was having a party at his house in Moreno Valley. Santana, Gomez's friend and coworker to whom Gomez referred as "Junior," attended the party with some younger people whom Gomez did not know.

At approximately 2:00 a.m. on August 13, 15-year-old Bryan Vallejo, a neighbor of Gomez's who lived three houses down, was in his front yard with two friends. A group of four or five Hispanic men walked from Gomez's house over to where Vallejo and his friends were congregated. The men had an ice chest with them. One of the men was chubby and had a goatee, and was wearing a blue Dodgers hat and a blue shirt. He was subsequently identified as Santana.

Santana and his friends struck up a friendly conversation with Vallejo and his friend, Andy Ortiz. At one point, one of the men who was with Santana asked Vallejo about the possibility of getting marijuana. Vallejo said that he would try to get some. After Vallejo told the men that he would not be able to get the drugs, the men threw trash on Vallejo's lawn, and an argument ensued. One of the taller men from Santana's group and Vallejo exchanged words, and someone then suggested that the men fight. Santana indicated that they should move up the street. Santana's group, and Vallejo and Ortiz, walked up the street, where Vallejo and the tall man began to fight.

Some of the other men from Santana's group—but not Santana—joined in and began to fight with Vallejo. When Ortiz started to move toward Vallejo, Santana pointed

a gun at Ortiz's head and said, " 'This bitch ain't gonna do nothing.' " Santana then hit Ortiz on the back of the head and on the forehead with the gun.

After striking Ortiz with the gun, Santana ran toward Vallejo, and Ortiz yelled out, "He ha[s] a gun." Vallejo was hit with an object that felt like metal. Vallejo decided to get on the ground. He curled up in a fetal position, and the men continued to beat him. The men then ran off and got into a white Cadillac that was parked nearby.

At some point, Santana was the only one of his group who was still outside of the Cadillac. He walked toward Vallejo, who was lying on the ground, and, using a small black revolver, shot Vallejo in the leg multiple times. After shooting Vallejo, Santana ran across the street and got into a green or blue car, which then drove away.

Ortiz ran over to Vallejo and told him that he had been shot. Vallejo did not initially believe Ortiz. Ortiz helped Vallejo as he attempted to stand up. Vallejo's leg felt numb, and he realized he had in fact been shot. Ortiz saw blood "everywhere," including on Vallejo and on the ground underneath him.

Vallejo was taken to the hospital and treated for his injuries. He had been shot three times in the leg and buttock area. The wounds were through-and-through wounds, i.e., each had an entry and exit point, and they required no stitches. However, Vallejo experienced pain when he changed the bandages. In addition, for a period of time he needed a cane to walk, and had to wear slippers. Walking and sitting caused him pain, and he was unable to play football when he returned to school.

Gomez knew that there had been a shooting on the night of the party because someone ran to Gomez's backyard and said that "someone got shot in the front." On the

night of the shooting, Gomez told a police officer that he believed that "Junior" had been the shooter, and explained that "Junior" was a coworker of his in Rialto.[2] "Junior" was Santana's nickname. The next day, Gomez spoke with Vallejo, and Vallejo described the person who had shot him. Gomez recognized the description, and believed that the shooter had been Santana. Vallejo had told Gomez that the shooter had that said he was from Rialto, and Gomez only knew one person from Rialto—Santana. Gomez also told Vallejo that in the past, he had seen Santana carrying a revolver.

The following Monday, Gomez spoke with Santana at work and asked Santana why Santana had shot his friend. Santana denied being the shooter.

Police officers executed a search warrant at Santana's residence. A bag containing 50 live .38-caliber bullets was found in the garage.

In September 2007, Vallejo identified Santana in a photographic lineup. Vallejo said that he was 80 percent sure of his identification of Santana as the person who shot him. Ortiz was also shown a photographic lineup. He, too, identified Santana as the shooter, although he wrote on the back of the paper with the photographs on it that he was only "pretty sure."

After Santana was arrested, a man whom Gomez did not know showed up at Gomez's workplace and asked Gomez, "Are you Juan, Juan Gomez?" The man then told Gomez to tell Vallejo not to show up in court. This incident frightened Gomez, and caused him to "have second thoughts about what [he was] going to testify to."

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2 It is not clear from Gomez's testimony what led him to believe that Santana was the shooter.

B. *Procedural background*

The Riverside County District Attorney filed an amended information on March 9, 2009, charging Santana with one count of attempted mayhem as to Vallejo (§§ 203 & 664, subd. (a)(2); count 1) and two counts of assault with a firearm as to Vallejo and Ortiz (§ 245, subd. (a)(2); counts 2 & 3). With respect to count 1, it was also alleged that Santana personally used a firearm resulting in great bodily injury (§ 12022.53, subd. (d)), and that he personally inflicted great bodily injury (§ 12022.7). As to count 2, the information alleged that Santana personally inflicted great bodily injury (§ 12022.7) and personally used a firearm (§ 12022.5). With respect to count 3, the information alleged that Santana personally used a firearm (§ 12022.5).

A first trial ended in a mistrial when the jury was unable to reach a verdict. A second jury found Santana guilty on all counts, and found true all of the enhancement allegations.

The trial court sentenced Santana to 25 years to life, plus four years four months in state prison.

Santana filed a timely notice of appeal on August 18, 2009.

III.

DISCUSSION

A. *The trial court prejudicially altered the instruction on mayhem*

1. *Additional background*

The trial court instructed the jury with a modified version of CALCRIM No. 460, pertaining to the charge of attempted mayhem, as follows:

"The defendant is charged in Count 1 with attempted mayhem.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant took a direct but ineffective step toward committing the crime of mayhem;

"AND

"2. The defendant intended to commit mayhem.

"A direct step requires more than merely planning or preparing to commit mayhem or obtaining or arranging for something needed to commit mayhem. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit mayhem. It is a direct movement towards 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 circumstance outside the plan had not interrupted the attempt.

"To decide whether the defendant intended to commit mayhem, please refer to the separate instructions that I will give you on that crime.

"The defendant may be guilty of attempt even if you conclude mayhem was actually completed."

The court also instructed the jury on the offense of mayhem, using a modified version of CALCRIM No. 801, as follows:

"To prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury when he unlawfully and maliciously disabled or made useless part of someone's body and the disability was more than slight or temporary.

"Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

"A serious bodily injury means a serious impairment of physical condition. *Such an injury may include a gunshot wound.*" (Italics added.)

2. *Analysis*

Santana contends that the trial court's instruction on mayhem was argumentative and created an imbalance in the prosecution's favor by stating that a serious bodily injury "may include a gunshot wound."[3] He points out that the court's instruction improperly directed the jury's attention to the evidence of the existence of the gunshot wounds, as opposed to the severity of any of Vallejo's wounds, which, he asserts is the actual focus of CALCRIM No. 801. Santana argues that the instruction tended to direct a verdict in favor the prosecution by suggesting to the jury that it needed to find only that Santana inflicted a gunshot wound in order to find him guilty of mayhem, rather than requiring the jury to focus on whether Santana intended that Vallejo suffer a disabling injury as a result of the gunshot wounds to his leg.

CALCRIM No. 801, the instruction pertaining to mayhem, proposes the following instructional language:

"The defendant is charged [in Count ____] with mayhem [in violation of Penal Code section 203].

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3 Trial counsel did not challenge the instruction on these grounds. However, we address this contention on appeal because the court's error affected Santana's substantial rights. (See § 1259 ["The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

"To prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury when (he/she) unlawfully and maliciously:

"[1. Removed a part of someone's body(;/.)]

"[OR]

"[2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]

"[OR]

"[3. Permanently disfigured someone(;/.)]

"[OR]

"[4. Cut or disabled someone's tongue(;/.)]

"[OR]

"[5. Slit someone's (nose[,]/ear[,]/[or] lip)(;/.)]

"[OR]

"[6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

"Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

"[A *serious bodily injury* means a serious impairment of physical condition. Such injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/a wound requiring extensive suturing/[and] serious disfigurement).]

"[__________ *<Insert description of injury when appropriate; see Bench Notes>* is a serious bodily injury.]

"[A disfiguring injury may be permanent even if it can be repaired by medical procedures.]" (CALCRIM No. 801.)

The Bench Notes that accompany this sample instruction contain the following directives for the trial court: "Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph." (CALCRIM No. 801, Bench Notes.)

The trial court appropriately selected the first bracketed paragraph, since Santana had not entered into any stipulation with respect to the seriousness of the intended injury. However, the trial court failed to follow the instructions provided in the Guide for Using Judicial Council of California Criminal Jury Instructions (Guide) in setting forth the language of that first bracketed paragraph. The Guide, which instructs users on how to complete the instructions when alternatives and/or options are provided for in the text, states,

> "When the user must choose one of two or more options in order to complete the instruction, the choice of necessary alternatives is presented in parentheses thus: *When the defendant acted, George Jones was performing (his/her) duties as a school employee.*
>
> "The instructions use brackets to provide optional choices that may be necessary or appropriate, depending on the individual circumstances of the case: *[If you find that George Jones threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]*
>
> "Finally, both parentheses and brackets may appear in the same sentence to indicate options that arise depending on which necessary alternatives are selected: [*It is not required that the person killed be*

> *the (victim/intended victim) of the (felony/[or] felonies).*]" (CALCRIM (2011) Guide at p. xxiv.)

The relevant portion of CALCRIM No. 801 provides:

> "[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/a wound requiring extensive suturing/[and] serious disfigurement).]"

According to the Guide, the trial court was to choose one, two or all three of the options provided in the parentheses, i.e. "protracted loss or impairment of function of any bodily member or organ," "a wound requiring extensive suturing," and/or "serious disfigurement." However, instead of selecting one or more of these options, the court provided its own example of a serious bodily injury by inserting the phrase "a gunshot wound" in place of the options provided, ultimately stating:

> "A serious bodily injury means a serious impairment of physical condition. Such an injury may include *a gunshot wound*." (Italics added.)

The trial court thus departed from the standard instruction with respect to this aspect of the mayhem instruction by inserting in the *first* bracketed paragraph defining "serious bodily injury" a "description of injury." (CALCRIM No. 801.) However, the trial court is to provide a "description of injury" to the jury only if the *second* bracketed paragraph defining "serious bodily injury" is given (*ibid.*), and the second bracketed paragraph defining "serious bodily injury" (*ibid.*) is to be given only when the parties "stipulate that the injury suffered was a serious bodily injury" (CALCRIM No. 801

Bench Notes.) Because there was no such stipulation here, the court should not have provided any description of the injury at issue.

The trial court's altered instruction regarding mayhem was particularly problematic in two respects. First, the court's instruction misdirected the jury with respect to an element of the offense—i.e., the specific intent required to find the defendant guilty of attempted mayhem. By omitting the examples of the types of serious bodily injury provided in the CALCRIM instruction, i.e., "protracted loss or impairment of function of any bodily member or organ/a wound requiring extensive suturing/[and] serious disfigurement," the trial court failed to inform the jury concerning the defining characteristic of the offense of attempted mayhem, i.e., the nature and severity of the type of injury that the defendant intended to inflict. The nature and severity of the type of injury inflicted on a victim is the factor that distinguishes mayhem from other crimes in which the defendant intended to touch a victim in an unlawful way or intended to injure the victim. The trial court's omitting the examples provided in the instruction and, at the same time, inserting the phrase "a gunshot wound" as an example of what may constitute a serious bodily injury within the meaning of the mayhem statute, directed the jury to focus on the *means* by which the defendant intended to inflict the wound, rather than the nature and severity of the wound.

The other problem with the trial court's mayhem instruction is that in specifying that a gunshot wound, i.e., the type of wound inflicted in this case, could constitute serious bodily injury within the meaning of the mayhem statute, the court provided a grossly misleading and argumentative instruction that favored the prosecution. The

altered instruction improperly diverted the jury from considering the nature or severity of the wounds that Santana intended to inflict, and instead, directed the jury to focus on the fact that the victim in the attempted mayhem count suffered a gunshot wound, which was undisputed.

a. *The court misdirected the jury's attention from the element that distinguishes mayhem from other assaultive offenses, and, thus, misinformed the jury as to the specific intent necessary to convict Santana of attempted mayhem*

The element that distinguishes mayhem from other assaultive offenses, such as battery, is not the force required to complete the act, but, rather, the type and extent of the resulting injuries: "The statute itself does not define the nature of force required but focuses instead on the nature of the injuries inflicted." (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 861, disapproved on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228.) The relevant paragraph of the instruction at issue is intended to focus the jury's attention on the nature of the injuries by defining "serious bodily injury" as "a serious impairment of physical condition," and proceeding to give one or more examples of the nature of injuries that could constitute a serious bodily injury for purposes of a mayhem conviction, such as "protracted loss or impairment of function of any bodily member or organ," "a wound requiring extensive suturing," and/or "serious disfigurement."[4] (CALJIC No. 801.) Of significance is that none of these examples

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4 With respect to the offense of mayhem, because "serious bodily injury" is defined to mean "a serious impairment of physical condition" (see CALCRIM No. 801), we use the phrases "serious bodily injury" and "serious impairment of physical condition" (or similar phrasing) interchangeably.

identifies the means by which the injury may have been suffered. Rather, the focus of all of the examples is the severity or nature of the wound.

The trial court's example, i.e., "a gunshot wound," stands in stark contrast to the examples proffered in the pertinent paragraph in the CALCRIM No. 801 instruction. By omitting the key portion of the mayhem instruction that informs the jury as to the nature and severity of injuries that might constitute mayhem, the court's instruction offered no guidance as to the main issue with respect to what may be deemed a serious bodily injury for purposes of the offense of mayhem. Instead, as noted, *ante*, the instruction improperly misdirected the jury to focus on the means by which the injury was inflicted in this case. However, the means by which a defendant inflicts a wound, whether it be by utilizing a gun, a knife or any other weapon, is not what distinguishes mayhem from simple battery or even from battery resulting in serious bodily injury. Rather, it is the unique seriousness and debilitating and/or disfiguring nature of the wound inflicted that is what sets the offense of mayhem apart from other assaultive crimes. (See *People v. Ausbie*, *supra*, 123 Cal.App.4th at pp. 860-861.)

b. *The trial court's modification was unfairly argumentative*

Argumentative instructions that unfairly highlight particular facts favorable to one side are improper. (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) The trial court's decision to instruct the jury that a gunshot wound could be a serious bodily injury within the meaning of the mayhem statute was just such an argumentative instruction because the only "example" of "a serious impairment of physical condition" that the trial court provided was the type of wound that the perpetrator in this case undisputedly inflicted—a

gunshot wound. There was no dispute that a gun was fired; if the jury believed that Santana was the shooter, the only real question remaining with respect to the attempted mayhem charge was whether he had the requisite intent to inflict the kind of injury that could result in a conviction for mayhem. By suggesting to the jury that if Santana intended to inflict *a gunshot wound* on the victim, he could be found to have harbored the requisite intent to commit the completed offense of mayhem, the trial court invited the jury to focus on the prosecution's evidence that Santana shot his gun at Vallejo, and based on that evidence, infer that Santana had the necessary intention to inflict on Vallejo the type of injury that would result from the completion of the offense of mayhem.

The question with respect to an argumentative instruction is whether the instruction was " ' "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." ' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 486.) In telling the jury that a serious bodily injury may include a gunshot wound—i.e., the type of wound that the victim suffered in this case—the trial court's instruction invited the jury to draw an inference favorable to the prosecution based on the evidence that Santana shot a gun at the victim.

Whether Santana intended to inflict a serious bodily injury of the type sufficient to support a conviction for mayhem was a factual question for the jury. However, by informing the jury that a gunshot wound could be a serious bodily injury within the meaning of the mayhem statute, and at the same time, omitting the portion of the instruction that provides examples of the nature or severity of the injury required for a conviction for mayhem (such as "protracted loss or impairment of function of any bodily

member or organ," "a wound requiring extensive suturing", and/or "serious disfigurement"), the court focused the jury's attention on the manner in which the injury was inflicted rather than the nature and severity of the injury that the defendant intended to inflict. The court's erroneous instruction essentially suggested to the jury that it could find Santana guilty of attempted mayhem if it found merely that he intended to inflict a gunshot wound. The instruction thus removed from the jury's consideration the key question whether Santana intended to inflict a wound that would seriously impair Vallejo's physical condition by disabling him.

The dissent quotes at length the trial court's comments, made at the hearing on Santana's motion for a new trial, concerning the trial court's views as to whether Santana harbored the specific intent to commit mayhem when he shot Vallejo in the leg. The trial court's opinion that there was *sufficient* evidence to establish intent is not a substitute for a properly instructed jury's determination of that issue beyond a reasonable doubt — which the court's instructional error precluded. Santana had a constitutional right to have his jury properly instructed as to the elements of the crime of mayhem so that *the jury*, and not the trial court, could determine whether he harbored the requisite intent.

The dissent also asserts that our conclusion that the trial court's mayhem instruction removed from the jury's consideration the key question of whether Santana intended to inflict a disabling wound is "stunning" in that we "expressly assume the existence of a class of criminals who shoot firearms at victims, wound their victims, but somehow do not intend to inflict serious bodily injury." (Dissent, at p. 5.) In making this assertion, the dissent loses sight of the fact that section 203 defines mayhem as

"unlawfully and maliciously *depriv[ing] a human being of a member of his body, or disabl[ing], disfigur[ing], or render[ing] useless, or cut[ting]s or disab[ing]s the tongue, or put[ting] out an eye, or slit[ting] the nose, ear, or lip,* " and that "serious bodily injury" for purposes of the offense of mayhem does not mean merely "serious harm," but rather, is specifically defined as "a serious impairment of physical condition" that may include, but is not limited to, "protracted loss or impairment of function of any bodily member or organ/a wound requiring extensive suturing/[and] serious disfigurement." The nature of the injury is thus clearly the defining element that distinguishes mayhem from other assaultive offenses in which the victim is injured. The dissent's suggestion that in any situation in which the perpetrator fires a gun and seriously harms the victim, the perpetrator must have harbored the specific intent required for attempted mayhem, is simply incorrect. [5]

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5 With respect to the offense of attempted mayhem, it has long been the rule that the specific intent to the commit attempted mayhem includes the specific intent to cause a serious bodily injury of the type identified in the mayhem statute:

> "As a witness in his own behalf, defendant denied having had any intention to commit a homicide; but, considering the evidence which related to the attack made by defendant upon the woman, it is obvious that it furnished a substantial basis for the implied conclusion reached by the jury that the declaration made to the victim that 'I have not marked you yet, but I will,' was but expressive of his intention to 'put out an eye,' or, in its legal result, to commit the crime of mayhem. *And if from the evidence it may be inferred that it was the intention of defendant to 'mark' the woman, and that in accordance with the several statutory definitions of mayhem, of 'attempt' generally, and of the legal consequence which follows from an attempt to commit mayhem, the attack made by defendant in law constituted an attempt to commit the crime of mayhem*; and that,

2. *Prejudice*

" '[I]nstructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to *Chapman*[6] review on direct appeal.' [Citations.] Accordingly, 'we proceed to consider whether it appears beyond a reasonable doubt that the error did not contribute to this jury's verdict.' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 211-212.)

We cannot conclude that the trial court's error in including the statement that a serious bodily injury "may include a gunshot wound" in the instruction on attempted mayhem did not contribute to the jury's finding that Santana intended to commit mayhem. Again, the instruction erroneously highlighted the prosecution's evidence, and at the same time, failed to provide the jury with an accurate example of the nature of an injury that might be considered a "serious bodily injury." The instruction thus failed to

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> although, even as a matter of fact, defendant was unsuccessful in his attempt to commit mayhem, the homicide was the result of such unlawful act; it would seem clear that the several provisions of the Penal Code to which attention has been directed would authorize the giving of the instruction of which appellant complains." (*People v. Nolan* (1932) 126 Cal.App. 623, 638, italics added.)

Further, CALCRIM No. 460, the instruction pertaining to attempt, requires that the jury specifically find that the defendant intended to commit the underlying crime, even though he or she may not have completed the underlying crime. When read together, the instructions regarding "attempt" and "mayhem" inform a jury that in order to convict a defendant of attempted mayhem, the jury must find that "[t]he defendant intended to commit [the substantive crime of] mayhem" (*ibid.*) i.e., that the defendant intended to "cause[] serious bodily injury when (he/she) unlawfully and maliciously: [¶] . . . [¶] [2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]" (CALCRIM No. 801).

6 *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

the assist the jury in its consideration of whether Santana intended to inflict a wound that would meet the standard of injury required for a mayhem conviction, and improperly suggested to the jury that as long as it found that Santana intended to inflict a gunshot wound, it could convict him of attempted mayhem. We are not convinced that the jury would not have understood the instruction this way, or that the jury did not convict Santana of attempted mayhem based on a belief that he intended to inflict one or more gunshot wounds, rather than a belief that he intended to inflict an injury of the type described in the mayhem instruction.

Because we cannot conclude beyond a reasonable doubt that the trial court's erroneous instruction on the offense of mayhem did not contribute to Santana's conviction for attempted mayhem, we must reverse his conviction on count 1.

3. *Additional claim of instructional error with respect to the mayhem count that could recur on remand*

Santana also challenged his conviction for attempted mayhem on the ground that the trial court failed to instruct the jury, sua sponte, on the offense of attempted battery resulting in serious bodily injury as a lesser included offense of attempted mayhem. In their initial briefing in this court, the People conceded that the offense of attempted battery resulting in serious bodily injury does exist, and that it is a lesser included offense of the offense of attempted mayhem, but contended that the evidence in this case did not support giving a lesser included offense instruction on attempted battery resulting in serious bodily injury. However, at oral argument, the People retracted their concession

and, instead, contended that there is no offense of attempted battery resulting in serious bodily injury.

After oral argument, we requested that the parties submit supplemental briefing addressing whether attempted battery resulting in serious bodily injury is or is not an existing offense, and, if so, whether that offense is a lesser included offense of attempted mayhem. After considering the supplemental briefing, we conclude that there is no authority to support the existence of the offense of "attempted battery resulting in serious bodily injury" under California law. We reach this conclusion on the ground that there is no offense of "attempted battery" without the present ability to commit the battery. (See *In re James M.* (1973) 9 Cal.3d 517, 522.) "[T]here is a clear manifestation of legislative intent under [the] doctrine [of manifested legislative intent] for an attempt to commit a battery *without present ability* to go unpunished. [Citation.]" (*Ibid.*, italics added.) If there is no offense of simple "attempted battery," it is difficult to conceive of how there could be an offense of "attempted battery resulting in serious bodily injury."

For this reason, we reject Santana's contention that the trial court erred in failing to instruct the jury on attempted battery resulting in serious bodily injury as a lesser included offense of attempted mayhem.

B. *The trial court's error in failing to instruct the jury on three of the four elements of assault with a firearm does not require reversal*

In counts 2 and 3, Santana was charged with assault with a firearm, in violation of section 245, subdivision (a)(2). The trial court instructed the jury with a modified version of CALCRIM NO. 875 as follows:

"The defendant is charged in Counts 2 and 3 with assault with a firearm in violation of Penal Code section 245.

"To prove that the defendant is guilty of this crime, the People must prove that:

"The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person;

"The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

"The touching can be done indirectly by causing an object to touch the other person.

"The People are not required to prove that the defendant actually touched someone.

"The People are not required to prove that the defendant actually intended to use force against someone when he acted.

"No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion."

The elements of an assault with a deadly weapon are: (1) the defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; (2) the defendant was aware of facts that would lead a reasonable person to realize such nature of the deadly weapon; (3) the defendant did the

act willfully; and (4) the defendant had the present ability to apply force with the deadly weapon. (§§ 240, 245, subd. (a)(1); *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*); CALCRIM No. 875 ["1. The defendant did an act with [a firearm] that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, [he] was aware of facts that would lead a reasonable person to realize that [his] act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, [he] had the present ability to apply force [with a firearm] to a person"].)

The People concede that the trial court failed to instruct the jury on elements 2 through 4. The People assert, however, that the error must be assessed under the *Chapman* standard of harmless error review, and that under this standard, it is clear that the error was harmless beyond a reasonable doubt. Santana contends that the trial court's failure to instruct the jury on three out of the four elements of the offense should be subject to per se reversal.

An instruction that omits an element of the charged offense violates a defendant's rights under the federal and state Constitutions. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–278; *People v. Cole* (2004) 33 Cal.4th 1158, 1208.) "In *Neder* [*v. United States* (1999) 527 U.S. 1 (*Neder*)], the United States Supreme Court held an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. [Citation.] The court stated that such an omission 'does not necessarily render a criminal trial fundamentally unfair or . . . unreliable.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 838.) Rather, "[s]uch an error is reviewed to determine whether it appears

'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*Ibid.*, citing *Chapman, supra,* 386 U.S. at p. 24 and *Neder, supra*, at p. 15.) "The reviewing court must 'ask[] whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.' [Citation.]" (*Sandoval, supra*, at p. 838.)

In other words, "even when jury instructions completely omit an element of a crime, and therefore deprive the jury of the opportunity to make a finding on that element, a conviction may be upheld under *Chapman* where there is no 'record . . . evidence that could rationally lead to a contrary finding' with respect to that element. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 564.) "In *Neder*, the court concluded that the trial court's failure to submit to the jury an element of the offense was harmless, because the evidence supporting the element was 'uncontested.' [Citation.]" (*Sandoval, supra*, 41 Cal.4th at p. 838.)

Santana urges this court to apply a per se reversal standard in this case, citing *People v. Cummings* (1993) 4 Cal.4th 1233, 1315 (*Cummings*). In *Cummings*, the Supreme Court rejected the People's argument that a harmless error standard was appropriate in a situation in which the trial court failed to instruct the jury on four of the five elements of robbery. Instead, the Supreme Court applied a per se reversal standard. (*Id.* at pp. 1313-1315.) In rejecting the authorities that the People cited in favor of a harmless error standard, the *Cummings* court stated, "These decisions make a clear distinction between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect of an element. Moreover,

none suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*Id.* at p. 1315.)

Cummings was decided before the United States Supreme Court held in *Neder* that a trial court's error in omitting an element of an offense in a jury instruction is reviewed for prejudice under the *Chapman* standard. Although no case has directly overruled or disapproved of the portion of the *Cummings* decision in which the court applied a per se reversal standard, the reasoning on which the *Cummings* court relied is of questionable continuing validity, since *Neder* made it clear that an instructional error that entirely precludes jury consideration of an element of an offense (and not merely one that affects only an aspect of an element) is subject to harmless error review. (See *Neder*, *supra*, 527 U.S. at p. 9.) We see no reason to apply a rule different from the one set forth in *Neder* merely because the trial court failed to instruct on more than one element of an offense. In our view, the relevant factor is *which* element or elements were omitted from a trial court's instruction, not the number of elements omitted. For example, in this case, it would have been a much more significant error if the trial court had failed to instruct the jury on the one element on which it *did* instruct, i.e., that "defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person," but had instructed the jury on the other three elements of the crime.

We conclude that the fact that the trial court omitted three out of four elements, in itself, does not require application of a per se reversal standard. In our view, the

appropriate standard of harmlessness review under these circumstances is the *Chapman* standard.

In order to have properly instructed the jury on the offense of assault with a deadly weapon (CALCRIM No. 875), the trial court should have included the following language as to counts 2 and 3:

> "2. The defendant did that act willfully;
>
> "3. When the defendant acted, [h]e was aware of facts that would lead a reasonable person to realize that [his] act by its nature would directly and probably result in the application of force to someone;
>
> "AND
>
> "4. When the defendant acted, [he] had the present ability to apply force [with a firearm] to a person." (*Ibid.*)

In considering these elements, we conclude that there is no evidence in this record that could rationally lead to a contrary finding with respect to any of these three omitted elements.

For example, with respect to victim Vallejo, the prosecution relied on Santana's act of using the gun to shoot at Vallejo three times, for purposes of the assault with a firearm count. The only question raised by the defense in this case was whether Santana was the person who did the shooting. It was undisputed that someone pointed a gun at Vallejo from five feet away and pulled the trigger three times, and that whoever did the shooting did it willfully, with an awareness of facts that would lead a reasonable person to realize that pulling the trigger multiple times would directly and probably result in the

application of force, by way of bullets, to Vallejo. Clearly, the shooter also had the present ability to apply force, since he did so—three times.

A similar analysis applies with respect to victim Ortiz. The evidence demonstrated that the perpetrator pointed the gun at Ortiz and then used the butt of the gun to strike Ortiz in the head after saying, " 'This bitch ain't gonna do nothing.' " Given this evidence, no reasonable person could have concluded that the perpetrator did not willfully strike Ortiz, or was not aware that by striking Ortiz with the butt of the gun he would probably apply force to Ortiz. Nor could a reasonable person have concluded that the perpetrator did not have the present ability to apply force (since he obviously did apply force). Thus, the only real question as to the offense of assault with a firearm was whether Santana was the perpetrator, and the instruction that the trial court gave asked the jury to decide this question.

We therefore conclude that the trial court's failure to submit to the jury three elements of the offense of assault with a firearm was harmless.

C. *The threat evidence*

Santana contends that the trial court erred in allowing the prosecution to present evidence that after Santana's arrest, an unknown person approached Gomez and told him to tell his neighbor, Vallejo, not to testify.

1. *Additional background*

At trial, Gomez testified that based on the information and description of the shooter that Vallejo provided, Gomez thought that Santana was the shooter. Gomez also

testified that on the night of the shooting, he told police officers that he thought the shooter was his coworker, "Junior," i.e., Santana.

During cross-examination, Gomez testified that he had later told police that Santana left Gomez's party two hours before the shooting occurred. Gomez also acknowledged that sometime after the night of the shooting, he told police that his "gut feeling" was that Santana had not been the shooter.

On redirect, Gomez clarified that on the night of the shooting, he had assumed that Santana was the shooter, but that a month later he told the detective "something totally different." The prosecutor asked Gomez whether he had spoken with anyone other than Santana about the shooting and Gomez replied, "No." The prosecutor then asked, "Did anybody ever come and talk to you about the shooting?" Gomez responded, "To work or—." At this point, the prosecutor said, "Well, okay. Let's go there. Did anybody come to work to talk to you?" Gomez responded, "Yes." The prosecutor asked the court whether she could proceed, and the court replied, "[N]o, not right now." The prosecutor continued questioning Gomez about what he had told police on the night of the shooting.

After further redirect and recross-examination of Gomez, the trial court started to ask Gomez questions that appear to have been submitted by jury members. Among the questions that the court asked was, "Mr. Gomez, why did you change your mind [regarding who was the shooter]?" Gomez responded that "Junior" was "the only person I knew from Rialto," and later explained that someone had mentioned that a person from Rialto had been involved in the shooting. The court then returned to the original

question, and again asked Gomez why he had changed his mind about whom the shooter was. After the court posed this question, the following colloquy occurred:

> "THE COURT: So why did you think—why did you change [your mind]?
>
> "THE WITNESS: Because there was a lot of people at that party.
>
> "THE COURT: Okay. I'm not sure that answers the question. Why did you change your mind?
>
> "THE WITNESS: I don't know.
>
> "THE COURT: Okay. You don't know?
>
> "THE WITNESS: No."

After this exchange, the court asked the jurors whether they had any additional questions. Upon receiving no audible response, the court asked the prosecutor if she had any additional questions to ask Gomez, based on the court's questioning of the witness. The prosecutor then began questioning Gomez again.

At the conclusion of this questioning, outside the presence of the jury, the trial court conducted a hearing pursuant to Evidence Code section 402 regarding "what this potential threat was or whatever from Mr. Gomez's lips." The prosecutor's first question to Gomez was, "Are you afraid of testifying here today?" Gomez answered, "Yes, I am." Gomez initially stated that the reason he was afraid to testify was "[b]ecause I work in Rialto, and I don't want anything to happen to me and my son or anybody." After further questioning by the prosecutor, Gomez testified that a man whom he had never seen before "went to [his] work and told [him] to tell [Vallejo] to not show up to court." The

man had been waiting for Gomez outside of Gomez's workplace and came right up to Gomez as soon as Gomez walked outdoors.

The prosecutor asked Gomez whether this incident had "cause[d] [him] to feel afraid" and whether it was "part of the reason why [he] didn't want to testify." Gomez responded in the affirmative to these questions, and admitted that this incident was "part of the reason why [he didn't] want to say anything negative about the defendant."

Gomez testified that the incident occurred before he spoke with Detective Anderson in September 2007, and said that it made him hesitant to point out Santana as the possible shooter. Gomez also said that the incident made him afraid to appear in court. He stated that he feared for his life and the lives of his family members.

At the conclusion of the hearing, the trial court indicated that it thought that the evidence of the threat was "probably admissible." The court stated, "[I]t's clear the man, I felt, was reluctant, especially as the testimony was going on. I didn't believe some of his I don't remembers. I think the evidence is probably admissible. And he's given us the reason why he is reluctant: Because somebody came to work. And while, yes, the threat was directed toward Bryan [Vallejo], I think the implied threat was, I think that you ought to keep your mouth shut as well." The court gave the parties time to research the issue and identify relevant authority on the admissibility of the threat evidence.

There was a question as to when this threat occurred. Defense counsel pointed out that although the witness had said that the threat occurred approximately a month after the shooting, this did not make sense because Santana "wasn't arrested until over two months" after the shooting. The prosecutor explained that she believed that Gomez's

testimony "was it didn't happen before the prelim, that it happened a month after the defendant was arrested." The trial court said that "the issue really is not even that so much," and proceeded to explain that Gomez "has given us the reason why his testimony has changed, why he feels afraid to testify." The court further stated, "He basically said, I changed my testimony, I did all of these things because I felt the lives of myself and my family were threatened. It seems like that's relevant. But if you want to convince me otherwise, fine."

During the lunch recess, the prosecutor filed a written motion regarding the admissibility of the threat evidence, citing *People v. Olguin* (1994) 31 Cal.App.4th 1355. In the presence of the attorneys and Santana, the trial court explained:

> "[T]his is what I thought: I wouldn't have said this in about the first 20 minutes of Mr. Gomez's testimony, but it did seem to me that once he started getting down to some of the critical facts, I found his testimony to be evasive, and also he seemed to lack memory on things that were getting down to a lot of the critical facts in this case.
>
> "I know there was also evidence that shortly after the incident he made a statement that he felt Mr. Santana was involved in this to the police, and then after the threat he makes a comment that he believes or I guess he just felt—I can't remember his exact terms, but it was almost like on further ref[lection] he had changed his mind, that he felt that Mr. Santana was not involved. In fact, he was almost ready to testify to character evidence at that point, which seemed to be diametrically opposed to his statement to the police shortly after it happened.
>
> "I think that Mr. Santana—or his exact words were something like implying that he felt that Mr. Santana was the prime suspect. Those are my words. Those are not his words, but that's what I took from it.
>
> "So I found his testimony to be evasive. I also thought I didn't believe him. My impression was one of the jurors was concerned as

> well. So that last question appeared to me almost like how is it that he can't remember this, [i.e.] what [Santana] was wearing.
>
> "Then he testified to the evidence of the threats. Actually, that's one area I found him to be quite candid as he testified that someone came up to him. He took it as a threat. I would too. I mean, I think that's reasonable in this case, a threat to a chief witness that, hey, this is what we're willing to do. He said he was scared, he was concerned about his family. I actually found him to be quite candid on that point. I think he honestly was quite scared. I frankly was a little surprised just how candid he was on his fear and the effect this had on him, and he seemed to be agreeing that it would have affected his testimony."

After further discussion with defense counsel, the trial court specifically found that the probative value of the evidence concerning the threat outweighed any prejudicial impact. The court agreed to provide the jury with a limiting instruction to consider this evidence solely as to it pertained to Gomez's state of mind and his credibility as a witness.

Prior to Gomez retaking the witness stand, the trial court instructed the jury as follows:

> "Ladies and gentlemen, you're going to hear some questioning now that I don't know if you heard one of my—or if you remember, one of my initial instructions is that sometimes evidence is admitted for a limited purpose, and the testimony you're going to hear in this questioning coming up is going to be limited to some particular issues: Mr. Gomez's demeanor and also his state of mind, his attitude, actions, his bias or prejudice in this action. It's up to you to decide the weight of this evidence and whether it's relevant or not on these issues. That's your call as a juror. What you are not to consider the evidence on is the issue of [the] guilt of Mr. Santana. [¶] Does everybody understand that? This goes to Mr. Gomez here. It's not as to explain some things [sic], and it's not going to the issue of Mr. Santana's guilt."

Gomez then testified that between the time of the shooting and the first time he testified in court, someone whom he did not know approached him at work, addressed him by name, and told him to tell Vallejo not to show up at court. Gomez clarified that he believed that this incident occurred after Santana had already been arrested for the shooting. Gomez testified that this event frightened him, caused him to have second thoughts about his testimony, and had an effect on what he said in court. Gomez also admitted that the perceived threat was "part of the reason why when the defense attorney was asking [him] questions [he was] just agreeing with [the defense attorney]." Gomez went so far as to agree with the prosecutor's statement that the threat was "part of the reason why [Gomez wasn't] completely honest when [he was] answering the defense attorney's questions."

On cross-examination, Gomez testified that the threat occurred after Santana had been arrested, and, therefore, that it occurred *after* Gomez had spoken with Detective Anderson in September 2007, rather than before, which Gomez had suggested on direct examination. Defense counsel proceeded to go through Gomez's statements to Detective Anderson, pointing out that Gomez had already slightly backed off of the statements that he made on the night of the shooting implicating Santana in the shooting incident.

Later, the court posed questions to Gomez that the jurors had submitted. One question was "Are you or are you not afraid?" Gomez responded, "Yes, I am afraid." On redirect, Gomez admitted to being afraid of Santana's friends because of the events about which he was testifying at trial.

2. *Legal standards*

Evidence Code section 780 provides that absent some other statutory exception, "the court or jury 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 . . . ." Among other things, a jury may consider the "existence or nonexistence of a bias, interest, or other motive" on the part of a witness. (*Id.*, subd. (f).) "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his] credibility and is well within the discretion of the trial court. [Citations.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 869 (*Burgener*).)

"For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1142, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "It is not necessarily the source of the threat—but its existence—that is relevant to the witness's credibility." (*Burgener*, *supra*, 29 Cal.4th at p. 870.)

3. *Analysis*

Santana makes two related arguments as to why the trial court's ruling with respect to the threat evidence constituted an abuse of discretion. Santana first contends that the factual basis for the trial court's ruling was incorrect, and second, that Gomez's testimony was not "changed" or inconsistent. Santana maintains that this case is thus virtually

identical to *People v. Brooks* (1979) 88 Cal.App.3d 180, in which the court reversed a defendant's conviction on the ground that the trial court admitted threat evidence that the appellate court concluded was irrelevant. Neither argument is persuasive.

Santana makes much of the supposed "incorrect" factual basis for the trial court's ruling, arguing that the trial court "relied substantially on the fact that [Gomez] initially . . . suggested to police the shooter might be appellant based on Vallejo's description and report of the shooter's reference to Rialto; and his later statement to Anderson that he doubted it was appellant." However, the court did not in fact "rel[y] substantially" on the timing of the incident or whether the threat was made before or after Gomez spoke with Detective Anderson. Rather, the court relied heavily on the fact that Gomez admitted, under oath, that his testimony *at trial* had been influenced by the fear he experienced after receiving this perceived threat. Defense counsel was free to point out that by the time Gomez spoke with Detective Anderson (which was before the threat incident), Gomez had already backed off of the statements that he made immediately after the shooting that suggested that Santana was the shooter.

With respect to Santana's contention that Gomez's testimony was "neither 'changed' nor inconsistent," we disagree. First, it is clear that Gomez initially told police that he believed Santana was the shooter. By the time of trial, he was no longer saying this. Gomez essentially admitted that he was reluctant to point the finger at Santana, as he had initially, due at least in part to the threat. Second, Gomez repeatedly claimed to have a lack of memory of details about the incident, and the trial court found that Gomez's responses about not remembering certain important facts were not credible. "A

claimed lack of memory can give rise to an implied inconsistency. [Citations.]" (*People v. Collins* (2010) 49 Cal.4th 175, 215 (*Collins*).) Beyond this, it is entirely possible that a witness may give statements at different times that are consistent in substance, but with a changed demeanor, such that the overall effect of the testimony differs over time, despite the substance of the testimony being similar. Thus, a witness need not have given factually inconsistent statements in order for threat evidence to be relevant and admissible with respect to the witness's credibility. (See, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 280-281 [evidence of threat admissible to show why the witness "had not come forward sooner"]; *People v. Olguin, supra,* 31 Cal.App.4th at pp. 1368-1369 [same].)

The threat evidence in this case tended to show that Gomez had a particular motivation *not* to implicate Santana. In fact, Gomez essentially admitted that the fear that he felt as a result of this threat caused him to alter his testimony by simply agreeing with defense counsel on cross-examination. The evidence of the threat was thus relevant to the credibility of Gomez's trial testimony; the fact that Gomez may have already started to change his story prior to receiving the threat (i.e., when he spoke with Detective Anderson a month after the shooting, but before the threat was made) did not render the evidence of the threat less probative as to Gomez's credibility at trial.

Santana's reliance on *Brooks*, *supra*, 88 Cal.App.3d at page 187 is unavailing. In *Brooks*, the appellate court determined that "the 'threat' evidence was immaterial to any issue and irrelevant to the case" because "[n]o inconsistent testimony had preceded the prosecutor's questioning of Harris; there was no issue of credibility (or 'state of mind' as

the trial court termed it)." (*Ibid.*) *Brooks* was decided before more recent cases discussed a broader understanding of the relevance of threat evidence to witness credibility. (See, e.g., *Burgener*, *supra*, 29 Cal.4th at p. 869; *Guerra*, *supra*, 37 Cal.4th at p. 1142.) We question the *Brooks* court's conclusion that in the absence of prior inconsistent testimony by a witness, there can be no issue as to the witness's credibility. The Evidence Code clearly does not limit the admission of evidence of threats made to a witness to situations in which the witness makes inconsistent statements. We therefore reject Santana's contention that this court should follow *Brooks*, *supra*, at page 187 and reverse his convictions on the ground that the threat evidence was not properly admitted since Gomez had not provided inconsistent testimony.[7]

D. *Santana's juror misconduct argument fails*

1. *Additional background*

On the first day of trial, Vallejo was the first witness called by the People. The court took a lunch recess at the conclusion of the prosecutor's questioning of Vallejo. During that lunch recess, outside the presence of the other jurors, the trial court questioned Juror No. 5 on the record concerning events that had just been brought to the court's attention. In response to the court's questioning, Juror No. 5 indicated to the court

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7 Again, the factual premise of Santana's argument that Gomez did not make inconsistent statements is unsound. There can be no doubt that Gomez initially believed that Santana was the shooter and was willing to share that belief with police, and that he became reluctant to voice a similar belief by the time of trial. Gomez's denial of any memory of significant events on the evening of the shooting incident was, in and of itself, inconsistent with his prior statements to police. (See *Collins*, *supra*, 29 Cal.4th at p. 215.)

that Vallejo attended the school where she worked as an instructional aide. Juror No. 5 did not think that she had ever taught Vallejo, and indicated that she was surprised to see him. The juror stated that she would not favor either side because Vallejo attended the school where she worked, and indicated that she did not "really know [Vallejo] that well." Juror No. 5 said that she thought that by the time she would go into the school, Vallejo "is ready to go out," as in, already leaving school. Juror No. 5 told the court that she felt she could render a fair verdict based on the evidence.

Defense counsel did not ask Juror No. 5 any questions. The court instructed the juror not to discuss the matter with the other jurors. Juror No. 5 stated that she was "a little bit surprised" when Vallejo took the witness stand and she recognized him, and said that she guessed that "[Vallejo] was [surprised] too."

After the trial court excused Juror No. 5 from the courtroom, the court indicated that it found her credible "when she says she's just seen him, doesn't really know much about the boy." The court went on to say, "I don't see any reason to excuse her. I think she can still be a fair juror."

The prosecutor then explained, for the record, how the issue had come to her attention. The prosecutor had seen Juror No. 5 make eye contact with Vallejo as she exited "the box" and smile "like she recognized him." The prosecutor further explained that she saw Vallejo do the same, so she asked Vallejo if he knew the juror. Vallejo said he knew her from school, and that he knew her name. After the prosecutor related these events to the court, the courtroom deputy told the court that Juror No. 5 "approached and

said she needed to speak to me," and that the deputy then spoke with the juror in the hallway about this issue.[8]

The trial court repeated, "I just don't think there's any issue there. I thought that before, and I don't see any reason to change that." Defense counsel objected, stating that it was not "fair to keep her as a juror," and requested that the court replace her with an alternate juror. The court denied this request.

2. *Standards*

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) "When misconduct involves the concealment of material information that may call into question the impartiality of the juror, we consider the actual bias test of *People v. Jackson* (1985) 168 Cal.App.3d 700, 705, adopted by this court in *People v. McPeters* (1992) 2 Cal.4th 1148, 1175." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644 (*San Nicolas*).)

" 'Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not accorded the same effect. "[T]he proper test to be applied to unintentional 'concealment' is whether the juror is sufficiently biased to constitute good cause for the court to find under Penal Code

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8 Although the deputy does not expressly state on the record what he or she spoke with Juror No. 5 about, from the context of the discussion, including the trial court stating, "I appreciate you both bringing that to the Court's attention," the implication is that Juror No. 5 informed the deputy about her familiarity with Vallejo during their discussion in the hallway.

sections 1089 and [former] 1123 that he is unable to perform his duty." (*People v. Jackson, supra,* 168 Cal.App.3d at p. 706.) [¶] Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court. Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination. [Citations.]' [Citation.]" (*San Nicolas*, *supra*, 34 Cal.4th at p. 644.)

3. *Analysis*

Santana insists on appeal that Juror No. 5 committed misconduct, and uses this assertion as the basis for the further presumption that the juror was biased. Applying the rules set forth above, we conclude that the trial court did not abuse its discretion in finding that any potential nondisclosure on the part of Juror No. 5 was inadvertent and, further, in implicitly finding no express or implied bias on her part.

Santana asserts that "the issue was not precisely how well Juror Number Five knew Vallejo; rather it was whether Juror Number Five had engaged in misconduct by failing to promptly disclose the fact that she knew Vallejo." In fact, Santana contends that "[t]he record on appeal unequivocally demonstrates implied bias on the part of Juror Number Five as a matter of law. The implied bias was shown by the fact that the juror sat through an hour of Vallejo's testimony without apprising the trial judge of her familiarity with Vallejo, and even when the proceedings recessed for the lunch hour break the juror kept silent." However, Santana's version of what occurred is entirely speculative.

Contrary to Santana's contention that Juror No. 5 "kept silent" when the proceeding recessed for the lunch break, the court minutes suggest that the court and both attorneys discussed this issue in chambers at the beginning of the lunch recess. Further, the later statement by the deputy indicates that Juror No. 5 brought the issue to the deputy's attention during the lunch break.[9] There is no indication on this record that Juror No. 5 failed to disclose relevant information about her familiarity with Vallejo once she recognized him.[10] There is thus no evidence of misconduct on the part of the juror, and the trial court therefore did not abuse its discretion in implicitly finding no express or implied bias on her part.

We further conclude that the court did not err in the manner in which it conducted its inquiry into Juror No. 5's possible relationship with Vallejo, as Santana suggests. The court immediately had the juror brought into the courtroom and asked questions to discern exactly what had transpired, as well as to determine the extent of her familiarity, if any, with Vallejo. The court also inquired into any possible bias that Juror No. 5 might

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9 The court minutes state that at noon, "Court and Counsel Confer regarding: in chamber re juror issue." The next entry is at 1:45 p.m., and states, "Out of the Presence of the Jury, the following proceedings were held: as follows: [¶] Court examines juror #5 re relationship to victim." It seems apparent from these minutes, as well as both the prosecutor's and deputy's statements on the record, that this issue was raised as soon as there was a break in the proceedings that morning.

10 To the extent that Santana complains that Juror No. 5 sat through approximately an hour of Vallejo's testimony and waited for a break in the proceedings to inform the deputy that she recognized Vallejo, in our view, it would not be reasonable to conclude that a juror commits intentional concealment of information merely because the juror does not interrupt the proceedings and instead, waits until the first break in testimony to inform the court about that she recognizes the witness.

have had as a result of her recognizing Vallejo. It became clear that Juror No. 5 had very limited knowledge of Vallejo, and she affirmed that she would not favor either side due to the fact that she recognized him from her workplace. The court's inquiry with respect to this issue was sufficient.

E. *The trial court failed to hold a hearing or to make the necessary findings before ordering Santana to reimburse the county for appointed counsel fees*

Santana challenges the trial court's order requiring him to reimburse the county for fees paid to his appointed attorney. Pursuant to section 987.8, subdivision (b), a defendant has the right to a hearing regarding the reimbursement of court-appointed attorney fees, including the question of the defendant's present ability to pay all or a portion of the costs of that legal assistance. Further, there exists a statutory presumption that a defendant who has been sentenced to state prison does not have an ability to pay "[u]nless the Court finds unusual circumstances" that demonstrate otherwise. (*Id.*, subd. (g)(2)(B).) Thus, when a defendant has been sentenced to state prison, the trial court must make an express finding that unusual circumstances exist before the court may order a defendant to pay a portion of the cost of the legal assistance provided him. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537.) The People concede that no evidence was presented at the sentencing hearing as to Santana's ability to pay or even as to the amount of legal fees incurred by his appointed counsel. The People therefore concede that the court's order must be reversed.

Because we are reversing the judgment, the court's order regarding these fees is necessarily also reversed. On resentencing, before the court may order Santana to

reimburse the county for fees paid to his appointed attorney, the trial court must first hold a hearing on the matter. Only if the court expressly finds that Santana has an ability to pay the fees may the court, in accordance with the requirements of section 987.8 and *Lopez, supra,* 129 Cal.App.4th at pages 1536-1537, order reimbursement.

F. *There is no cumulative error*

Santana claims that to the extent this court concludes that no individual error merits reversal, the cumulative error doctrine requires reversal of the judgment. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) We have concluded that all but one of Santana's asserted claims of error with respect to his convictions are without merit; as to that claim of error, we conclude that reversal of that count is warranted. In the absence of any additional errors, we conclude that there is no cumulative error on which to base a reversal of Santana's convictions on counts 2 and 3.

IV.

DISPOSITION

The conviction on count 1 (attempted mayhem) is reversed. The convictions on counts 2 and 3 (assault with a deadly weapon) are affirmed. The sentence is vacated. The case is remanded to the trial court for further proceedings.

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AARON, J.

I CONCUR:

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McDONALD, J.

BENKE, J., dissenting.

I dissent.

The record shows Serafin Santana shot 15-year-old Bryan Vallejo three times in the leg with a .38 caliber revolver at close range while Vallejo lay on the ground in a fetal position after being beaten by other attackers. Thus on this record there is overwhelming evidence supporting Santana's conviction of attempted mayhem. (Pen. Code,[1] §§ 203, 664.)

More importantly, the record shows the trial court properly instructed the jury on attempted mayhem and, in any event, there is no probability the instructional error identified by the majority influenced the jury's verdict. Accordingly, I would affirm Santana's conviction on count 1.

A. *Brief Additional Background*

Because it is helpful in considering not only the propriety of the instructions the trial court gave on attempted mayhem, but also in assessing any potential harm from the defect the majority has found in those instructions, I begin my analysis with the trial court's ruling on the motion to dismiss Santana made following the close of evidence. Santana moved under section 1118.1 for acquittal on count 1 only, arguing the evidence was insufficient to support a conviction for attempted mayhem because Vallejo allegedly did not suffer permanent injury. In denying the motion, the trial court stated:

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1 All further statutory references are to the Penal Code unless otherwise indicated.

"THE COURT: Well, but . . . if the injury [to Vallejo] was permanent, we would have a completed mayhem. *The issue is whether there is intent.*

"I can tell you what's persuasive to me is a defendant standing there and putting three bullet right into the same place on the leg. It does appear to me that there was an attempt to unlawfully and maliciously deprive Mr. Vallejo of a member of his body, in this case his leg, or disable or disfigure him. I mean, how do you get around the idea of three bullets right in . . . the same limb.

"I frankly was wondering, what little I know of the case, why this wasn't filed as a completed mayhem. And Mr. Vallejo is obviously one of the sturdiest young men I have seen. He gets three bullets in the leg and . . . leaves the hospital without a stitch. I think the evidence is very sufficient for an attempted mayhem." (Italics added.)

The trial court also reviewed one of the cases Santana relied on in support of his section 1118.1 motion and found it distinguishable:

"THE COURT: Okay. Right now I'm looking at People versus Hill [(1994) 23 Cal.App.4th 1566]. Well, if this was a mayhem case, not attempted mayhem . . . , this [case] might be applicable because there could be, I think, probably a pretty good argument here that [Vallejo] didn't suffer any permanent injury somehow. I don't know how that happened. I mean, I don't know how you can say that this is not an attempt to cause permanent injuries when you put there bullets into the same limb.

"[Defense counsel]: Well, it goes to the *specific intent.* You have to be in the brain of the shooter, and the shooter has to think, I am shooting you in this one leg with the specific intent so that you will never use this leg ever again.

"THE COURT: Right. It kind of looks like it to me, quite honestly. I see three bullets going into the same leg. I don't mean to laugh, I just think so.

"[Defense counsel]: Right. And the court[] in [another case] talk[s] about how it has to be malicious intent to disable. I don't know if the Court can infer that just from the injuries itself [sic] by looking at three bullets in the leg that that satisfied the malice element.

"THE COURT: Let me just look for the wording under [section] 1118.1. [¶] 'Insufficient to sustain a conviction.' To be honest, I don't think that argument's close. In fact, one bullet, two, three all in the same spot indicates to me an intent to disable a person. The fact that the perpetrator in this case -- obviously there is a dispute among you two, but the fact that in this case the perpetrator, in a sense, got lucky and managed to shoot and not cause serious injuries, I almost think it's a miracle when I look at the holes in that boy's leg. I think easily under [section] 1118.1 there is sufficient evidence to sustain a conviction on appeal in this case. I don't even think it's a close case."

B. *Instructions Given*

The parties do not dispute the trial court *properly* instructed the jury with a modified version of CALCRIM No. 460. That instruction required the People to prove:

"1. The defendant took a direct but ineffective step toward committing the crime of mayhem;

"AND

"2. The defendant intended to commit mayhem."

CALCRIM No. 460, as modified here, further directed the jury "[t]o decide whether the defendant *intended* to commit mayhem, please refer to the separate instructions that I will give you on that crime." (Italics added.)

Using a modified version of CALCRIM No. 801, the trial court instructed the jury regarding mayhem: "To prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury when he unlawfully and maliciously disabled or made useless part of someone's body and the disability was more than slight or temporary. [¶] Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else. [¶] A serious bodily injury means a serious impairment of physical condition. *Such an injury may include a gunshot wound.*" (Italics added.)

Santana's counsel did not object to the modified version of CALCRIM No. 801 given by the trial court or offer any alternative, presumably because the sole defense offered was one of identity.[2]

C. *The Instructions Were Proper*

My colleagues contend the modified version of CALCRIM No. 801 is defective because it: "[E]ssentially suggested to the jury that it could find Santana guilty of attempted mayhem if it found merely that he intended to inflict a gunshot wound. The instruction thus removed from the jury's consideration the key question whether Santana

2 Indeed, during closing defense counsel argued to the jury that this case involved "one question: [i]dentity. *Nothing else.*" (Italics added.)

intended to inflict a wound that would seriously impair Vallejo's physical condition by disabling him." (Majority opn., p. 17.)

With due respect, this criticism of the instruction the trial court gave, especially in the context of the injuries Vallejo endured, is stunning. The majority expressly assumes the existence of a class of criminals who shoot firearms at victims, wound their victims, but somehow do not intend to inflict serious bodily injury. The majority does not cite, and I have been unable to find, any case which, in any context, has indulged the possibility a defendant intended to shoot a victim with a .38 revolver, in fact inflicted multiple wounds, but nonetheless did not intend serious harm.

However, even if the possibility the majority espouses—that a defendant may intend to wound with a firearm but not seriously harm—had any precedent, it would have no bearing on the particular instructions the trial court gave here. By their terms the trial court's instructions did not eliminate the possibility the majority relies upon. Rather, contrary to the majority's conclusion, the trial court's instructions on this issue were entirely permissive—"[s]uch an *injury* may include a gunshot *wound*" (italics added)—and did not compel the jury to draw a connection between the wounds Santana inflicted and his intention to seriously harm Vallejo.

If there is any compulsion in this record, it is solely the compulsion of common human experience: people who shoot other people usually intend fairly serious harm. I find no error in the trial court's instruction which merely permitted the jury to bring that experience to bear in determining Santana's guilt or innocence.

D. *Absence of Prejudice*

In finding the deficiency they have identified in the trial court's instructions prejudiced Santana, the majority cites *People v. Huggins* (2006) 38 Cal.4th 175, 211-212 (*Huggins*) for the proposition that such instructional error is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824] (*Chapman*). Preliminarily, I note that the majority's basis for employing *Chapman's* constitutional error analysis is at times vague and inconsistent. More importantly, my colleagues do not examine the impact of the perceived constitutional error against the context of the full trial record. In this regard they part company with the court in *Huggins,* which, although it found instructional error, found no prejudice in light of the manner in which the case was presented to the jury. As I interpret *Huggins,* it prevents any finding of prejudice here.

In *Huggins* the defendant was convicted of murder. In his defense he argued that he accidentally shot the victim. During its deliberations the jury asked the trial court a question with respect to the intent to kill needed for murder. In response the trial court advised the jury that it could find an intent to kill if it found that the defendant acted in a certain manner knowing that the result of his act was "likely" to be death. This instruction was erroneous. (*Huggins, supra,* 38 Cal.4th at p. 211.) Intent, in that context, may only be found where there is a "substantial certainty" of death. (*Ibid.*)

In nonetheless finding the instructional error harmless beyond a reasonable doubt, the court in *Huggins* stated: "It is clear that the trial court's error in using the term 'likely'

rather than the term 'substantial certainty' did not contribute to the jury's finding that defendant intended to kill [the victim]. The prosecution contended that defendant shot the victim at close range, intending to kill her. Defendant claimed that the gun discharged accidentally. By accepting the prosecution's version, the jury necessarily concluded that defendant intended to kill the victim. *The jury was not presented with any version of the facts that required it to determine whether defendant committed an act knowing that it was substantially certain to kill the victim, rather than knowing that it was merely likely to kill her.* We find beyond a reasonable doubt that the error did not contribute to the verdict." (*Huggins, supra,* 38 Cal.4th at p. 212, italics added.)

Here, the only version of events presented to the jury was one in which the perpetrator stood over Vallejo and fired three .38 caliber bullets into his leg at fairly close range. Unlike the defendant in *Huggins,* Santana did not argue the shots were accidental; rather, in his defense Santana simply argued he was not the shooter. In any event, the jury was not presented with any evidence or argument in support of what would have plainly been a less than credible defense: that the shooter did not intend a "serious" wound with any of the three shots he fired. Thus, as in *Huggins,* the issue which is the subject of the asserted instructional error—the infinitesimal possibility Santana did not intend to seriously injure Vallejo—was not in controversy. Given these circumstances, as in *Huggins,* there is no reasonable probability the defect the majority advances had any significant influence on the verdict.[3]

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3 The majority acknowledges by way of footnote that there was no objection by defense counsel regarding the meaning of "serious bodily injury" or the giving of

Finally, even assuming the trial court erred when it instructed the jury on attempted mayhem, and even assuming *Chapman* and not *Watson* governs this case, I would conclude that error does not require reversal of Santana's attempted mayhem conviction. In addition to the fact that the intention of the shooter was never in controversy below, I would also point out that the jury found true the enhancements charged in count 1 that Santana "personally inflict[ed] great bodily injury" on Vallejo and "personally and intentionally discharge[d] a firearm and proximately caused great bodily injury to [the victim]." As to both enhancements the jury was instructed that "great bodily injury" meant "significant or substantial physical injury," as opposed to "minor or moderate harm." The terms "serious bodily injury" and "great bodily injury" have substantially the same meaning. (*People v. Burroughs* (1984) 35 Cal.3d 824, 831, disapproved on another ground as stated in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; see also *People v. Moore* (1992) 10 Cal.App.4th 1868, 1871.) Santana has not challenged these findings on appeal.

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modified CALCRIM No. 801, presumably because that was not at issue below. When, as here, a party argues on appeal that an instruction otherwise correct in law was too general or incomplete, and therefore in need of clarification, that party must first request such a clarification at trial. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

However, pursuant to sections 1259 and 1469, an appellate court may review any instruction given even in the absence of an objection if a defendant's claim of error would affect his or her substantial rights. (See *People v. Hart* (1999) 20 Cal.4th 546, 622.) The substantial rights of the defendant are affected if the instructional error resulted in a miscarriage of justice, that is, the error made it reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*People v. Elsey* (2000) 81 Cal.App.4th 948, 953-954, fn. 2; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) The appropriate test is therefore guided by *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *People v. Rivera* (1984) 162 Cal.App.3d 141, 146; accord *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

In the end, to paraphrase the trial court, I am at a loss to understand how this court can say the trial court's instruction, whether deficient or not, had any bearing on the verdict when Santana put three bullets into the same limb. I would affirm the judgment of conviction in its entirety.

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BENKE, Acting P. J.

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Santana** No.: ________

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 30, 2011, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Carl Fabian, Attorney at Law
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San Diego, CA 92103-5702
Attorney for Serafin Santana
(2 Copies)

The Honorable Mark E. Johnson
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Riverside Hall of Justice
Department 31
4100 Main Street
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Paul E. Zellerbach, District Attorney
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **November 30, 2011** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 30, 2011, at San Diego, California.

D. Perez
Declarant

Signature

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