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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| **PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>Plaintiff and Respondent,<br><br>v.<br><br>**XUE VANG**, et al,<br><br>Defendants and Appellants. | S. No.<br><br>Court of Appeal<br>No. D054343<br><br><br><br>San Diego County<br>No. SCD 213306 |
| **PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>Plaintiff and Respondent,<br><br>v.<br><br>**DANNY QUANG LE**,<br><br>Defendant and Appellant. | Court of Appeal<br>D054636 |



## PETITION FOR REVIEW

Appeal from the Superior Court of San Diego County
Honorable Michael Wellington, Judge Presiding

Sachi Wilson
California Bar 237874
Attorney for Danny Lê

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By Appointment of the Court of Appeal
Under the Appellate Defenders, Inc. Independent Case System

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## PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Pursuant to Rule 8.500 of the California Rules of Court, Danny Lê respectfully files this petition for review. A grant of review and resolution of these issues by this court is necessary to settle important

questions of law, and is necessarily presented to this court to preserve the issues for possible federal court review. (See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838.)

The opinion of the Court of Appeal is attached in Appendix A. The Court's ruling denying the Petitions for Rehearing and amending the opinion is in Appendix B.

## STATEMENT OF THE CASE

On June 3, 2008, the prosecution filed an amended information charging Danny Quang Lê in count 1 with assault with a deadly weapon and with force likely to cause great bodily injury, in violation of Penal Code section 245, subdivision (a)(1). (CT 8-13.) The charge also alleged that Mr. Lê committed the offense for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1), and that he committed the assault with a deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(31). (CT 9-10.) The complaint further alleged that Mr. Lê had served a prison term for a previous offense pursuant to Penal Code sections 667.5, subdivision (b) and 668; that he had a serious felony prior within the meaning of Penal

Code sections 667, subdivision (a)(1), 668, and 1192.7, subdivision (c); and that he had a strike prior pursuant to Penal Code sections 667, subdivisions (b) through (i), 1170.12, and 668. (CT 11-12.)

On November 20, 2008, the jury returned a verdict of guilty on count 1 and found that the offense was committed for the benefit of a gang. (CT 58-59.) The jury found that Mr. Lê did not personally inflict great bodily injury on the victim and that a deadly weapon was not used in the assault. (CT 58.)

On February 19, 2009, Mr. Lê was sentenced to the low term of four years for the assault, plus enhancements of three years pursuant to Penal Code section 186.22, subdivision (b)(1), and five years pursuant to Penal Code sections 667, subdivision (a), and 668. (CT 155.)

## STATEMENT OF FACTS

### A. Facts Relevant to the Crime.

William Phanakhon hung out with people who claimed they were members of Tiny Oriental Crips (TOC) in the fall of 2007. (1RT 147.) He was not a member of TOC and had not participated in any criminal activity with TOC. (2RT 239-240.) On April 28, 2008, he received a

telephone call about 10:00 or 11:00 at night.[1] (1RT 157.) He did not know who was calling, but the caller asked him if he could come over. (1RT 157.) He said "sure." About five minutes later, Xue Vang came over.[2] (1RT 158.) Mr. Phanakhon was in his garage, and the garage door was half open. (1RT 159-160.) Mr. Vang walked in through the partially opened door. (1RT 160.) After a few minutes, Mr. Vang asked Mr. Phanakhon if he wanted to go hang out with him out at the corner of the street.[3] (1RT 163-164.) They walked out of the garage to the street corner. (1RT 164.) As they were walking, Mr. Phanakhon saw Dang Ha and Sunny Sitthideth walking toward the corner as well. (1RT 164-165.) He did not see Danny Lê. (1RT 165; 2RT 246.)

After Mr. Phanakhon reached the corner, someone struck him from behind, on the back of his head. (1RT 167.) He fell down and tried to protect his head. (1RT 167.) He could not tell who hit him. (2RT 219.)

[1] Mr. Phanakhon also had given a statement to the police after the incident (2RT 233) in which he said that he received the call around 9:00 PM. (2RT 221.)

[2] Mr. Phanakon's initial statement said that Mr. Vang had come over about 20 minutes later. (2RT 224.)

[3] Mr. Phanakhon later admitted that he had been with Mr. Vang for over two hours, not simply five minutes or so. (2RT 244, but see 2RT 263.)

He did not see Danny Lê hit him. (2RT 249.) He did not know why he had been beaten. (2RT 276-279.)

On April 28, Detective Dave Collins arrived in Mira Mesa at about 11:00 PM as part of a group conducting a surveillance in the area. (2RT 346.) The purpose was to keep the Phanakhons' house under surveillance. (2RT 353; 3RT 520.) He sat in his car facing away from the house, and watched the area of the house in his rearview mirror. (2RT 376.) After 20-25 minutes he saw a group of four men walking out to the street. (2RT 377, 380; 3RT 466.) One person was in the lead, two men were on the sides, and one was in the middle. (2RT 381.) Detective Collins saw the man in the middle stumble, and then saw the other men beating him with their fists. (2RT 382, 384.) A light was behind the men fighting, and he could not see anyone's face. (3RT 454; 4RT 555.) He later estimated the distance between his rearview mirror and the scene as 110 feet. (3RT 447, 450.)

Detective Collins radioed to his colleagues that there was a beating and they had to move in. (2RT 389; 3RT 484-485.) Officer Dewitt, in a second patrol car, and Detective Collins himself responded

to the scene. (2RT 390-391, 4 RT 723.) When they arrived, Mr. Phanakhon was on the ground and the other three men began to run away. (3RT 431-432.) Detective Collins arrested Xue Vang very near the scene of the beating. (2RT 399-400.)

As Detective Collins drove up to the fight he saw the shadow of a fourth man (identified later as Mr Lê (3RT 497)) running along the fence line. (3RT 432-433, 495-496, 498.) Detective Collins did not know if Mr. Lê had been involved in the fight. (3RT 497, 504-505.) Detective Yamane, another officer in the surveillance team, saw Mr. Lê jump over a fence. (4RT 687.)

Detective Van Cruz was in charge of the surveillance. (4RT 636.) He was not able to see the assault. (4RT 641.) After the other officers responded to the assault, he stayed in his position and watched to see if anyone ran past his location. (4RT 642.) While there, he heard what sounded like someone jumping over fences, and he could hear items falling down in the backyard. (4RT 643, 663.)

Officer Michael Dewitt did not see the assault before Detective Collins reported that it was occurring. (4RT 720, 766.) He then began

driving slowly toward the fight. (4RT 723.) He said he saw four men beating up on another man. (4RT 724.) They were silhouetted against the light behind them. (4RT 767-768.) He saw Mr. Lê jogging out of a driveway and took him into custody. (4RT 731.)

Officer Ryan Hallahan did not see the fight. (5RT 1100.) When he arrived at the scene he saw Dang Ha and Sunny Sitthideth running, and took Mr. Sitthideth into custody. (5RT 1094-1095.) His partner, Officer Scott Holden, arrested Mr. Ha. (5RT 1096, 1110-1111.) Officer Hallahan also saw Mr. Lê run out from the yard of a house, and took him into custody. (5RT 1098.)

**B. Facts Relevant to the Gang Enhancement.**

The prosecution's theory of the case was that Mr. Phanakhon was a member of TOC and that he was beaten -- "put in check" -- because he had begun to distance himself from the gang. (5RT 1206-1207.) Mr. Phanakhon had testified that he was not a member of TOC and had not participated in any criminal activity with TOC. (2RT 239-240.) He did not know why he had been beaten. (2RT 322.) Dave Solivan, the investigator for the prosecution, was the person who

suggested to Mr. Phanakhon that the beating may have been to "check" him. (2RT 326.)

Because Mr. Phanakhon did not know why he had been beaten, the prosecution case rested on the opinion testimony of Detective Daniel Hatfield. (5RT 1135 *et seq.*) Detective Hatfield presented himself as an expert about the TOC, to which Mr. Lê and other of the defendants belonged. (5RT 1158-1160.) Detective Hatfield offered his opinion that Mr. Phanakhon was a member of TOC (5RT 1224) because of three contacts that the police had had with Mr. Phanakhon. (5RT 1217-1218; 6RT 1309-1310.) Having come to the opinion that Mr. Phanakhon was a member of TOC, Detective Hatfield opined that the ". . . member did something to the T.O.C. gang for him to be victimized in this case. They put him in check. They brought him back in line over some perceived wrong that this individual did to that set . . . ." (5RT 1209.)

## C. Facts Presented by the Defense.

Vu Nguyen, Xue Vang and Sunny Sitthideth testified for the defense. Mr. Nguyen testified about the picture showing Mr. Phanakhon with the other defendants. (7RT 1634.) He said it was taken after the people in the picture had been playing handball, and pointed out that one of the participants was still wearing a handball glove. (7RT 1636.) Mr. Vang testified that he was not a TOC member. (7RT 1672.) Mr. Sitthideth testified that the defendants had been fishing together (7RT 1699) and that afterwards they had headed over to Mr. Phanakhon's house around 9 PM. (7RT 1699-1700.) He said that Mr. Phanakhon brought something out of his pocket,[4] and that Mr. Phanakhon and Mr. Vang started arguing and calling each other names. (7RT 1701-1702.) They began getting mad at each other, and Mr. Phanakhon then challenged Mr. Vang to a fight. (7RT 1702.) The two

[4] The trial court had previously ruled that the defense could not bring in evidence of Mr. Phanakhon's use of methamphetamine. (1RT 10.) Thus, the witness could not testify that the "something" was methamphetamine.

walked out to the corner, where they fought. (7RT 1703.)[5]

## ARGUMENT

## I.

## MR. LÊ JOINS THE ARGUMENTS PRESENTED IN HIS CO-APPELLANTS' PETITIONS FOR REVIEW.

Mr. Lê joins in each of the arguments raised by the other appellants in their petitions for review, pursuant to California Rules of Court, Rule 8.200, subdivision (a)(5). (*People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

[5] Mr. Lê did not testify, but the statement that he gave for the pre-sentencing report was substantially the same as Mr. Sitthideth's testimony. (CT 67.)

## II.

## THE COURT OF APPEAL ERRED BY APPLYING AN INCORRECT STANDARD OF REVIEW IN HOLDING THAT THE *KILLEBREW* ERROR WAS HARMLESS. GIVEN THE PAUCITY OF OTHER EVIDENCE THAT THE CRIME WAS GANG-RELATED, UNDER THE CORRECT STANDARD OF REVIEW THE GANG ENHANCEMENTS MUST BE REVERSED.

On appeal, the appellants each challenged Detective Hatfield's opinion testimony on the grounds that it violated *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). The Court of Appeal agreed with the appellants' argument that the prosecution violated *Killebrew* by asking Detective Hatfield to give his opinion about the intent of the defendants by means of a hypothetical question. (Slip opinion, p. 9.) However, the Court held that the error was harmless. (Slip opinion, pp. 14-15.) In its opinion, the Court said:

> The next question is whether the error was harmless, that is, **whether there is enough evidence**, including testimony that Detective Hatfield was permitted to offer concerning the general culture and habits of TOC (*Gardeley, supra*, 14 Cal.4th at p. 617), **from which a reasonable jury could infer** defendants committed the assault "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by

> gang members" within the meaning of section 186.22, subdivision (b)(1).

(Slip Opinion, p. 14; emphases added.) The standard of review applied by the court thus was the **substantial evidence** standard. Using this standard, the Court cited the following facts as sufficient to declare the error harmless:

> The record reveals the following admissible evidence relevant to the issue of knowledge and intent. First, the phone call from an unidentified "familiar" voice, Vang's arrival and suggestion that they leave the garage to "hang out," and the assault by other known gang members at a nearby corner could support an inference that Phanakhon was "set up." Second, Phanakhon's two "guesses" for why he was assaulted - that he had disassociated himself from TOC or heard something he was not supposed to hear - linked the assault to the gang. Indeed, Phanakhon testified that although he was not afraid of the defendants, he was afraid of TOC. Third, Detective Collins observed that the victim of the assault did not fight back, consistent with the theory that the beating was some kind of group punishment rather than a simple fight between Phanakhon and Vang as portrayed by Sitthideth. Based on this record, we conclude the error in admitting Detective Hatfield's opinions as to the defendants' subjective state of mind was harmless. *(People v. Watson*, (1956) 46 Cal.2d 818, 836.)

(Slip Opinion, pp. 14-15.)

Mr. Lê and other of the appellants petitioned for rehearing, pointing out that the proper standard of review was whether it was

reasonably probable than not that an outcome more favorable to defendants could have resulted in the absence of the evidentiary error. (*People v. Watson*, (1956) 46 Cal.2d 818, 836.) The Court of Appeal denied the petitions for rehearing, but modified one sentence to state the correct standard of review under *Watson:*

> On page 15, line 6, delete the sentence beginning "Based on this record ..... and replace it with a new sentence, which reads: Applying the *Watson* standard of prejudice-not the substantial evidence standard of review - we conclude on this record that it is not reasonably probable that an outcome more favorable to defendants would have resulted in the absence of the evidentiary error. (*People v. Watson*, (1956) 46 Cal.2d 818, 836.)

(Appendix B.) Despite this modification, the statement of the test applied by the court on page 14 of the opinion -- that the test was whether there was "enough evidence" "from which a reasonable jury could infer" that the defendants had an intent to benefit the gang -- and the discussion of the facts on pages 14-15, were not changed. There was no reconsideration of the facts under the correct *Watson* standard.

The *Watson* standard was premised on the requirements of a fair trial and due process. As *Watson* said,

> The controlling consideration in applying the section is whether the error has resulted in a "miscarriage of justice." In determining the meaning of this phrase, the reviewing courts have stated the test to be applied in varying language. Emphasis in the main, however, has been placed on the constitutional requirements of a fair trial and due process, which emphasis is found in decisions resulting in reversals . . . as well as in decisions resulting in affirmances . . . .

(*People v. Watson*, *supra,* 48 Cal.2d at pp. 835-836; citations omitted.)

> Giving due consideration to the varying language heretofore employed in relating the constitutional amendment to the particular situations involved, it appears that the test generally applicable may be stated as follows: That a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

A reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

In its decision, the Court of Appeal applied a patently incorrect standard of review to determine whether the *Killebrew* error was harmless. The substantial evidence test applied by the court is, of course, the correct standard for review of a claim of insufficient evidence to support a jury verdict. Using the correct standard of review

as set out in *Watson*, it should be apparent that there is a "reasonable probability" -- or a "reasonable chance, more than an abstract possibility " -- that without the opinion testimony of Detective Hatfield, the slim evidence that the crime was gang-related would have led to a different result on the gang enhancement. This Court is respectfully requested to accept review, reassert the standard of review set out in *Watson*, and reverse the decision of the Court of Appeal.

## III.

## MR. LE'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A TRUE FINDING ON THE GANG ALLEGATION.

### A. Introduction to the Argument.

When the prosecution alleges a violation of Penal Code section 186.22(b)(1), it must prove beyond a reasonable doubt that (1) the offense at issue was committed "for the benefit of, at the direction of, or in association with any street gang," and (2) the defendant committed the offense with "the specific intent to promote, further, or assist in any criminal conduct" by members of the gang. (*People v. Gardeley,* (1996) 14

Cal.4th 605, 616-617.) The prosecution's burden is not met simply when an active gang member committed a crime. (*People v. Gardeley, supra,* 14 Cal.4th at 622-623; *People v. Briceno* (2004) 34 Cal.4th 451, 456.)

Again, the prosecution's theory was that Mr. Phanakhon was a member of TOC and that he was "put in check" because he had begun to distance himself from the gang. (5RT 1206-1207.) The hypothetical framed by the prosecutor, upon which Detective Hatfield gave his opinion that the beating was for the benefit of the gang and that the defendants had the specific intent to assist in criminal conduct by gang members,[6] **assumed** that Mr. Phanakhon was a member of TOC:

> I want to move on to the area of the benefits of criminal activity by T.O.C. All right? I would like for you to assume the following hypothetical. A young baby gangster in T.O.C. had begun hanging out with T.O.C. since perhaps October and maybe as long as August of 2007. That by approximately March or April of 2008, however, that young baby gangster within T.O.C. had not been putting in any work for T.O.C. and had suddenly stopped hanging out with T.O.C. and was not talking to T.O.C. any longer. I would like you to further assume that four members from T.O.C, three baby gangsters and one O.G., sought out that young baby gangster who had stopped associating with T.O.C. to beat him up.

[6] For convenience, the remainder of the brief will refer to both elements as "for the benefit of" the gang.

(5RT 1206-1207.) Based on this hypothetical, Detective Hatfield opined that Mr. Phanakhon "did something to the T.O.C. gang for him to be victimized in this case.[7] They put him in check. They brought him back in line over some perceived wrong that this individual did to that set . . . ." (5RT 1209.)

An expert's opinion, of course, is only as good as the facts on which it depends. (*People v. Gardeley, supra,* 14 Cal.4th at 618.) However, the prosecution presented no evidence whatever to support Detective Hatfield's opinion that Mr. Phanakhon was a member of TOC. To the contrary, the evidence showed at most that Mr. Phanakhon was an acquaintance of the defendants. As a consequence, there is no evidence supporting either the hypothetical or Detective Hatfield's opinion that the assault was for the benefit of TOC. Because there is insufficient evidence to justify the true finding, the enhancement must be stricken.

**B. Standard of Review For Insufficiency of Evidence Claims.**

The federal Constitution's Fifth Amendment right to due process

[7] Note that Detective Hatfield, by his words "in this case," was giving his opinion expressly about the assault of Mr. Phanakhon.

and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove every element of a crime beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) In reviewing an insufficiency of evidence claim, an appellate court must determine whether, viewing the evidence in a light most favorable to the prosecution, a reasonable trier of fact could have found that the prosecution sustained its burden beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) If the admissible evidence is insufficient to support the trier of fact's true findings, the due process clause of the Fourteenth Amendment is violated. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319.)

The jury's conclusions must be supported by "substantial evidence," which is defined as evidence that "reasonably inspires confidence and is of solid value." (*People v. Morris* (1988) 46 Cal.3d 1, 19; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681; *People v. Javier A.* (1985) 38 Cal.3d 811, 819; *People v. Johnson, supra,* 26 Cal.3d at p. 576.)

This same standard applies to a claim of insufficiency of the evidence to support a gang enhancement. (*People v. Vy* (2004) 124 Cal.App.4th 1209, 1224; *People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

A finding based on conjecture or surmise -- such as Mr. Phanakhon's guesses regarding the cause of the fight -- cannot be affirmed. (*People v. Memro* (1985) 38 Cal.3d 658, 694.) This is because suspicion is not evidence; it only raises a possibility, which will not support an inference of fact. To justify a conviction, the trier of fact must be persuaded to a near certainty. Even a strong suspicion is insufficient to support the finding. (*People v. Thompson* (1980) 27 Cal.3d 303, 324.)

> The critical word in this test is substantial. . . . [S]uch evidence must be of ponderable legal significance. Obviously, the word cannot be deemed synonymous with any evidence. It must be reasonable in nature, credible, and of solid value; it must be substantial proof of the essentials which the law requires in a particular case.

(*People v. Basset* (1968) 69 Cal.2d 122, 138-139.)

## C. Facts Relevant to the Issue.

Mr. Phanakhon knew the four defendants in this case. (1RT 140-144.) He began hanging out with some of them in fall of 2007. (1RT 147.) He said that this meant going out to eat, hanging around, doing normal teenager things. (1RT 148-149.) He insistently denied being a TOC member, and said he had not done anything illegal with them. (1RT 148; 2RT 239-240.)

There was no evidence that Mr. Phanakhon had admitted being a TOC member, been fingered as a TOC member by anyone else, been jumped into the gang, participated in any criminal activity of the gang, or worn any gang clothing or paraphernalia or flashed any gang signs. (1RT 148-149; 2RT 239-240; see 6RT 1309-1310.)

Despite this, Detective Hatfield gave the opinion that Mr. Phanakhon was a member of TOC. (5RT 1224.) He explained that his opinion depended entirely on three contacts that the police had had with Mr. Phanakhon. (5RT 1217-1218; 6RT 1309-1310.) The three contacts were (1) an incident in which Mr. Ha's cell phone was found to have Mr. Phanakhon's number in its address book (5RT 1217; 6RT

1311-1312);[8] (2) an incident in which Mr. Phanakhon was driving in a car with a young woman (not herself a gang member) whose purse held a picture of a gang member (5RT 1518; 6RT 1318-1320); and (3) the beating here at issue itself. (5RT 1218.)

### D. Detective Hatfield Based His Opinion on Department of Justice Guidelines for *Documenting* Persons' Contacts with Gangs.

The reason Detective Hatfield believed these three contacts were sufficient to show that Mr. Phanakhon was a TOC member was based, not on any experience he had with gangs, but on the Department of Justice guidelines as implemented by the San Diego Police Department. These guidelines provided that three contacts of the sorts he listed were enough for a person to be **documented** as a "member" of a gang. (5RT 1178-1179; 6RT 1302.)

> Q. You made reference to documentation of gang members. **Is that a term of art, documentation of a gang member?**
> A. Yes.
> Q. And what does it take in order for you, as law enforcement, to make the determination or arrive at the determination that an individual is a gang member?

[8] Only 17 of the 50 or so listings in this address book were known TOC members. (6RT 1361.)

A. That individual has to meet certain criteria in order for us to go ahead and document him into a particular gang set.
Q. What are some of the criteria?
A. Well, the criteria is set down by the Department of Justice for us to be able to do that. one of them is the individual must claim a certain gang set. The individual must have clothing, tattoos, or gang paraphernalia that only depicts that certain gang that individual claims to be part of. The individual's caught displaying some type of gang sign that is associated with that individual. Police records or observations tell us that that individual is a gang member or that the individual is caught with other known gang members, either participating in delinquent or criminal activities. And then lastly, we get information from a confidential informant that tells us that person is a gang member. They have to meet these criterias in order for us to -- they don't have to meet all of them. They have to meet a certain amount of them.
Q. How many of those listed criteria would an individual have to meet before he be deemed under Department of Justice guidelines to be a gang member?
A. Well, Department of Justice is a little bit more lax. They are a little bit more -- they give you a minimum compared to San Diego P.D. policy. Our policy is that you have to have at least three of these criterias within three contacts, or three of these criterions within one contact in order to document that individual as a gang member. The Department of Justice says you can document it under one if it's a custodial interview of this individual where he claims. If you don't have that, then you can document it under two criterias on two separate contacts.

(5RT 1178-1179; emphasis added.)

Detective Hatfield agreed that the guidelines he used to document a person as a gang member are different from how the gang itself might consider a person to be a member:

Q. Okay. Now, nevertheless, despite the fact that he has said that he has never been a member, it is your opinion that he was; correct?
A. Yes, sir.
Q. And the reason for that is the San Diego Police Department's guidelines for documenting a person as a member may be different from what the group itself considers to be a member; is that true?
A. Yeah, I would say. Yes.
Q. There is a process known as jumping in, for example?
A. Yes.
Q. Which means essentially that a person is formally initiated -- formally, for lack of a better word, initiated into the group and recognized as a member by the others; correct?
A. Yes.
Q. Now, according to the police department, you do not have to be initiated in that fashion to be documented; true?
A. Correct.
Q. You can have a certain number of contacts that make you a member in the police department's view; right?
A. Correct, sir. yes.
Q. But you have to actually be jumped in to become a gang member in the gang's view; true?
A. In the gang's view, yes.

(6RT 1301.) Detective Hatfield further admitted that his opinion -- that the assault was intended as gang discipline -- would be valid only if TOC itself saw Mr. Phanakhon as a member:

Q. And all of the expectations that we were just talking about pertain to if you are a gang member in T.O.C.'s view; true?
A. Yes.
Q. So the premise, in your opinion, of gang discipline is that Mr.

Phanakhon was a gang member; right?
A. Yes.
Q. But in order for these premises of gang discipline to apply, he needs to be a gang member in the view of the gang itself; right?
A. Correct.
Q. If he is simply documented due to these various contacts, but not a gang member in T.O.C.'s view, then this same notion of discipline has less force; true?
A. I would agree with that.

(6RT 1304.)

Thus, Detective Hatfield's opinion that Mr. Phanakhon was a TOC member was based, not on an objective analysis of the facts of the case, but on the guidelines for **documenting** a person for law enforcement purposes. Further, he admitted that these standards were not useful for the purpose of determining whether Mr. Phanakhon was a member, because his opinion about the gang element had validity only if TOC itself saw Mr. Phanakhon as a member.

In short, the prosecution's proof may have met the Department of Justice guidelines, but it did not meet the very different standards of the law. The Department of Justice guidelines may be of value for law enforcement in tracking and responding to gangs, but the fact of **documentation** under those very lax guidelines is not evidence that

Mr. Phanakhon was in fact a member of the gang.

### E. Because Detective Hatfield's Opinion that Mr. Phanakhon Was a Gang Member Had No Support in Evidence, His Opinion Cannot Support the Jury's Findings.

Viewed without regard to the documentation guidelines, Mr. Phanakhon's contacts with the gang members were insufficient to support Detective Hatfield's opinion that he was a member. Again, (1) Mr. Ha's cell phone had Mr. Phanakhon's number (along with the numbers of many other non-TOC members) in its address book (5RT 1217; 6RT 1311-1312); (2) Mr. Phanakhon was driving in a car with a woman whose purse held a picture of a gang member (5RT 1518; 6RT 1318-1320); and (3) Mr. Phanakhon was beaten by members of TOC. (5RT 1218.) The prosecution also introduced a picture in which Mr. Phanakhon stood with others, including members of the gang. (1RT 149-153.)

Based on this evidence, it is clear that Mr. Phanakhon knew some of the TOC members. He also knew other people (such as the woman in his car) who knew gang members. Knowing gang members - even socializing with them on occasion - is insufficient to prove that a

person is a member of the gang.[9] And it is bootstrapping to assert that being a victim of a crime by gang members qualifies that person as a gang member. At best, on these slim facts an assertion that Mr. Phanakhon was a member is speculative.

An expert "cannot indulge in 'fantasy.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 735.) The evidence must support the expert's opinion, or the opinion will be insufficient to support any essential element in the case. (See *J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1028.)

Detective Hatfield's opinion was only as good as the facts on which it was based. Because there are no facts to support his opinion that Mr. Phanakhon was a member of TOC, his opinion that the crime was for the benefit of the gang itself is speculative and fails to provide sufficient evidence to support the jury's true finding with regard to the enhancement.

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[9] The idea that mere association is sufficient to prove knowledge and intent strikes at the very heart of our First Amendment freedoms because it amounts to "guilt by association." (*Scales v. United States* (1960) 367 U.S. 203, 228-230.)

As the court said in *People v. Ramon* (2009) 175 Cal.App.4th 843, speculation is not substantial evidence:

> The People's expert simply informed the jury of how he felt the case should be resolved. This was an improper opinion and could not provide substantial evidence to support the jury's finding. There were no facts from which the expert could discern whether Ramon and Martinez were acting on their own behalf the night they were arrested or were acting on behalf of the Colonia Bakers. While it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation. Speculation is not substantial evidence.

(*People v. Ramon*, *supra*, 175 Cal.App.4th at 851.)

Similarly, *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931, held that the opinion of the prosecution's drug expert, by itself, was not sufficient to find the charged drug offense was gang related. Ferraez, a known gang member, was arrested holding a baggie containing 26 small pieces of rock cocaine. The gang expert opined the drugs were intended to be sold for the benefit of Ferraez's gang, that the proceeds of the drug sales would be used to benefit the gang through the purchase of weapons or narcotics, or as bail for a fellow gang member, and that the sale of drugs promotes, furthers, and assists criminal conduct by the gang. *(Ibid.)*

Addressing the sufficiency of the evidence that Ferraez's crime was "for the benefit of the gang," the court of appeal concluded that:

> Undoubtedly, the expert's testimony alone would not have been sufficient to find the drug offense was gang related. But here it was coupled with other evidence from which the jury could reasonably infer the crime was gang related. Defendant planned to sell the drugs in Las Compadres gang territory. His statements to the arresting officer that he received permission from that gang to sell the drugs at the swap mall and his earlier admissions to other officers that he was a member of Walnut Street, a gang on friendly terms with Las Compadres, also constitute circumstantial evidence of his intent.

(*Ferraez, supra,* 112 Cal.App.4th at 931.) In Mr. Lê's case, unlike *Ferraez*, the gang expert's opinion was not coupled with other evidence (*i.e.*, that Mr. Phanakhon was a TOC member) from which the jury could reasonably infer that the offense was gang-related.

Similarly, in *In re Frank S.* (2006) 141 Cal.App.4th 1192, there was no substantial evidence that the defendant's criminal conduct was for the benefit of a gang. Frank S. was stopped for riding his bicycle through a red light. Methamphetamine, a 5-½ inch fixed blade knife, and a red bandanna were found in his possession. Frank S. told the

arresting officer he had been jumped two days prior and needed the knife for protection against "the Southerners" who believed him to support the northern street gangs. (*Id.* at 1195.) The prosecution did not present any evidence that Frank S. "was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Ibid.*) The prosecution attempted to provide evidence of gang benefit and intent through its gang expert, who testified that the minor possessed the knife to protect himself, a gang member would use a knife for protection from rival gang members and to assault rival gangs, and that the minor's possession of the knife benefitted the Norteños since "it helps provide them protection should they be assaulted by rival gang members." (*Id.* at 1195-1196, 1199.)

The court of appeal held that this was not substantial evidence of specific intent under Penal Code section 186.22(b). "To allow the expert to state the minor's specific intent for the knife [to benefit the Norteños because it helps provide them protection against rival gang members] without any other substantial evidence opens the door for

prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Ibid.*)

Here, the same conclusion must be reached. Evidence that Mr. Phanakhon hung out with TOC members on occasion does not constitute substantial evidence that he was a member of that gang. To the contrary, Detective Hatfield's opinion that the offenses were gang related is mere speculation on his part. "Expert evidence is really an argument of an expert to the court and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions." (*People v. Martin*, (1948) 87 Cal.App.2d 581, 584.) As the California Supreme Court noted in *Gardeley, supra,* Cal.4th at p. 618:

> Of course, any material that forms the basis of an expert's opinion must be reliable . . . for the law does not accord the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.

Beyond Detective Hatfield's unsupported opinion, the prosecution presented no evidence that the charged offenses were gang-related. And again, the mere fact that Mr. Lê and other defendants are gang

members cannot support the gang finding. This Court should accept review of the case and reverse the Court of Appeal's decision affirming the gang enhancement in this case.

## IV.

## MR. LE'S RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO BIFURCATE THE TRIAL ON THE GANG ENHANCEMENT.

### A. Relevant Proceedings.

Defense counsel moved jointly to bifurcate the gang allegation from the assault count. (1RT 69-70.) In response, the prosecution asserted that the evidence would come in anyway:

> The Court: Maybe you can help me with — be clearer about what evidence would have to come in anyway.
> Ms. Israel: Well, the evidence that I would suggest would come in anyway is the — each defendant's membership in the gang, the fact that T.O.C is a criminal street gang, the types of activity T.O.C engages in in terms of how it's structured and how it keeps its own members in check, how it treats its members that — that don't put in work or that start to fall away and aren't associating with the gang anymore, the mindset of the gang when an individual does start to drift away from the group. There's a suspicion always that that person is going to be cooperating with law enforcement either on information it knows generally

> intelligence-wise with respect to the gang or in any specific conduct that the gang has been engaged in, and that then raises the motive to retaliate and bring that person back in line. As well, the — the fact that the victim in this case was admittedly associating with the gang. His own gang association is relevant as a circumstantial bit of evidence; the fact that you don't have four unrelated defendants and, in combination, four unrelated defendants and an unrelated victim coming from all different walks of life.

(1RT 73.) Even though the evidence identified by the prosecution was relevant entirely to the gang allegation, and not the substantive charge, the trial court declined to bifurcate the gang allegation. (1RT 83.)

### B. Standard of Review.

The court reviews a court's decision not to bifurcate gang enhancements for an abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.)

### C. Because the Gang Evidence Was Minimally Relevant to the Underlying Assault, the Trial Court Abused Its Discretion by Failing to Order Bifurcation.

Bifurcation of a gang enhancement is proper and required where there is a substantial risk of undue prejudice from the presentation of gang evidence during the trial of the substantive counts. Where the

gang evidence evidence is not sufficiently relevant, its admission is prejudicial error. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345 [majority of gang officer's testimony was irrelevant and should have been excluded; defendant was prejudiced thereby.])

The primary consideration for the trial court in ruling on a request to bifurcate an enhancement is whether the admission of evidence relating to the enhancement during the trial on the charged offenses would pose a substantial risk of undue prejudice to the defendant. (*People v. Calderon* (1994) 9 Cal.4th 69, 77-78; *People v. Burch* (2007) 148 Cal.App.4th 862, 866.) The court should consider factors that affect the potential for prejudice, including the relative seriousness or inflammatory nature of the evidence proposed to be admitted to prove the enhancement. (*People v. Calderon, supra,* 9 Cal.4th at p. 79.)

Evidence of a defendant's gang membership is well-recognized as having a highly inflammatory impact on the jury, with the potential of creating undue prejudice when compared with its probative value. (*People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Williams* (1997) 16 Cal.4th 153, 193.) "Undue prejudice" means evidence that uniquely tends to

evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1396, citing *People v. Karis* (1988) 46 Cal.3d 612, 638.) Such "evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Carter* (2003) 30 Cal.4th 1166, 1194, citing *People v. Williams, supra;* see also *People v. Gurule* (2002) 28 Cal.4th 557, 653). Therefore, even where gang membership is relevant to a material issue, trial courts should carefully scrutinize such evidence before admitting it.

Where the evidence on the gang enhancement "threatens to sway the jury to convict regardless of the defendant's actual guilt," it should be bifurcated. (*People v. Hernandez, supra,* 33 Cal.4th 1040, 1049.) Nonetheless, gang evidence may be admissible where it is relevant to issues, for example, motive and intent. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) Under the facts of this case, the gang testimony was primarily relevant to the gang enhancement, and minimally (if at all) relevant to the defendants' guilt or innocence to the charges. Indeed,

the prosecution identified no reason the gang evidence was relevant to the charges. Although there was some ambiguity over who hit Mr. Phanakhon, there was no question that the three persons who had been directly involved in the assault were among the four defendants in the case. Further, there was no reason to put on evidence of a motive or intent to prove a charge of assault. Thus, in this case, the prejudicial effect of the gang evidence far overrode the minimally relevant aspects of the evidence, and the trial court abused its discretion in permitting the prosecution to put on that evidence.

*People v. Albarran* (2007) 149 Cal.App.4th 214 forcefully reaffirmed the requirement that the prejudicial impact of gang evidence must be balanced carefully against relevance. (*Albarran, supra,* 149 Cal.App.4th 223-224.) "[E]ven if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*Albarran, supra,* at 224.)

Of course there are cases in which motive and intent need to be explained to the jury in the context of gang affiliation. Examples include

a killing that is a result of gang rivalries (*People v. Sandoval* (1992) 4 Cal.4th 155, 175); assaults or other violent crimes in gang territorial disputes (*People v. Carter, supra,* 30 Cal.4th at pp. 1194-1196); or the tagging or crossing out of gang graffiti, which is indicative of a boundary dispute between two gangs (*People v. Olguin, supra,* 31 Cal.App.4th at pp. 1369-1370). But the assault in this case is not one of them. The court erred in permitting the gang evidence to be admitted, and that error requires reversal of Mr. Lê's conviction for assault.

## V.

## BECAUSE ABSENT THE ERRONEOUS GANG TESTIMONY THERE IS NO SUBSTANTIAL EVIDENCE THAT MR. LÊ WAS INVOLVED IN THE BEATING, THE ERRORS WITH RESPECT TO THE GANG EVIDENCE ALSO REQUIRE REVERSAL OF MR. LÊ'S CONVICTION ON THE UNDERLYING ASSAULT.

The evidence at trial was that three people were beating Mr. Phanakhon. The three people (Mr. Ha, Mr. Sitthideth, and Mr. Vang) who surrounded Mr. Phanakhon ran once the officers moved in, and they were almost immediately captured near the site of the assault. Mr. Phanakhon also said that he did not see Mr. Lê. The evidence regarding

Mr. Lê at trial was that he was seen in the shadows on the sidewalk along the fence, away from the beating itself, and that he ran away and was captured on another street. The only evidence to the effect that Mr. Lê was a participant came from Detective Hatfield's testimony that he was an "O.G." (original gangster) and that he would be the shot-caller who, in that capacity, presumably had directed the assault.

On this evidence, the jury found that Mr. Lê had not personally inflicted great bodily injury on Mr. Phanakhon. (CT 58.) The verdict of guilt for the assault, therefore, was likely based on the jury's belief that Mr. Lê aided in the assault, not that he had directly participated. Because the only evidence of aiding or abetting was through Detective Hatfield's testimony about how original gangsters called the shots, the court's errors with respect to the gang enhancement also render invalid Mr. Lê's conviction for the assault.[10]

The words "promote, further and assist" used in the specific intent clause of the gang enhancement statute is similar to the language

[10] To be precise, these errors include the *Killebrew* issues raised in the other appellants' briefs, as well as Issues II and III of Mr. Lê's brief.

used in case law describing aiding and abetting. (*In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1322.) Thus, cases discussing the liability of an abettor are useful.

In order to hold an accused as an aider and abettor the test is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures. (*People v. Villa* (1957) 156 Cal.App.2d 128, 134.) The mere presence of a defendant at the scene of a crime does not establish that he was an abettor. (*Id.* at 134-135.) A defendant charged with abetting a crime can be found guilty only if it is shown he or she acted with knowledge of the criminal purpose of the perpetrator. (*People v. Herrera* (1970) 6 Cal.App.3d 846, 852; *People v. Durham* (1969) 70 Cal.2d 171, 181; *People v. Villa, supra,* 156 Cal.App.2d at 133-134.)

As noted above, the only evidence (such as it was) to tie Mr. Lê to the assault as an abettor was Detective Hatfield's speculation that Mr. Lê was an "original gangster," a shot caller who would tell other gang members what to do. The simple evidence that Mr. Lê was there was insufficient to show that he was an abettor. As a consequence, if

this court rules that the trial court erred in respect to the *Killebrew* issue raised in the other appellants' opening briefs or in denying the motion to bifurcate the gang enhancement, or if the court rules that there was insufficient evidence to support the gang enhancement, Mr. Lê's conviction also must be overturned and remanded for a new trial.

## CONCLUSION

For the foregoing reasons, Mr. Lê respectfully that this Court accept review of the Court of Appeal decision, reaffirm the proper standard of review, and reverse the gang enhancement. Furthermore, Mr. Lê's conviction for the underlying assault was infected by the court's errors with respect to the gang testimony, and his conviction should be overturned and remanded for a new trial.

DATED: 30 June 2010 Respectfully submitted,

Sachi Wilson
Attorney for Danny Lê

## CERTIFICATE OF WORD COUNT

SACHI WILSON, under penalty of perjury, certifies that the word count of the Petition for Review as determined by Nisus Writer is 7752.

DATED: 30 June 2010

Respectfully submitted,

Sachi Wilson
Attorney for Danny Lê

# APPENDIX A

## Court of Appeal Decision

# Court of Appeal Decision

Filed 6/7/10

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v<br><br>XUE VANG et al.,<br><br>Defendants and Appellants. | D054343<br><br><br><br>(Super. Ct. No. SCD213306) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v<br><br>DANNY LÊ,<br><br>Defendant and Appellant. | D054636 |

CONSOLIDATED APPEALS from an order of the Superior Court of San Diego County, Michael D. Wellington, Judge. Affirmed as modified.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant Xue Vang.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant Dang Ha.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant Sunny Sitthideth.

Sachi Wilson, under appointment by the Court of Appeal, for Defendant and Appellant Danny Lê.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Steve Oetting, Supervising Deputy Attorney General and Eric Swenson, Deputy Attorney General, for Plaintiff and Respondent.

The principal issue in this appeal is whether the court erred in admitting the gang expert's opinion regarding defendants' knowledge and intent in committing the underlying assault over defense objections that the testimony exceeded the limits set forth in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). One or more defendants also raise evidentiary issues, dispute the sufficiency of the evidence to support the verdicts, ask that we review the police officer personnel records viewed in camera by the trial court pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), challenge a probation condition, and assert that any failure to make timely and specific objections or motions should be deemed ineffective assistance of counsel. We conclude that the court erred in admitting expert opinion on defendants' knowledge and intent in response to two hypothetical questions, but the error was harmless. We modify item 12G of the probation order for one defendant as agreed by the parties, and affirm the judgment as modified.

## PROCEDURAL BACKGROUND

Police arrested Xue Vang, Sunny Sitthideth, Dang Ha and Danny Lê after breaking up a street fight in which William Phanakhon was knocked out, but not

seriously injured. The jury convicted the four defendants of assault by means of force likely to cause great bodily injury, and found true the gang enhancement allegation. The jury found *not true* the special allegations that defendants personally inflicted great bodily injury and used a deadly weapon in the commission of the assault.

Vang, Sitthideth and Ha received prison sentences which included two or three years for the gang enhancement imposed under the Street Terrorism Enforcement and Prevention Act (STEP Act). (Pen. Code, § 186.20 et seq., undesignated statutory references are to the Penal Code.) The court sentenced Vang to a total of six years, Sitthideth to four years, and Lê to 12 years based on his admission that he had one prior strike. It suspended execution of Ha's sentence and placed him on probation with various conditions, including one year of jail custody. All four defendants appeal. Sitthideth and Lê expressly join in relevant arguments presented by their codefendants.

## FACTUAL BACKGROUND

The victim, 20-year-old William Phanakhon, lived with his family in Mira Mesa. After graduating from high school, Phanakhon began hanging out with members of the Tiny Oriental Crips or "TOC" criminal street gang. At trial, Sitthideth, Ha and Lê stipulated to being members of TOC. However, Vang denied any gang connections. Phanakhon also denied gang membership. He stated he committed no crimes, and simply went out to eat, drink or hang around with people who were TOC members. Phanakhon met the four defendants in the fall and winter of 2007. Sitthideth, Ha and Vang were often present when Phanakhon was with members of TOC. However, Phanakhon recalled meeting Lê on just one occasion. Eventually, Phanakhon began declining

invitations to go out with gang members because "[t]his is not where [he] wanted [his] life to go."

Phanakhon was at home watching television between 10:00 and 11:00 on the night of April 28, 2008, when he received a phone call. The caller, whose voice sounded familiar, asked to come over. Phanakhon thought it was a neighbor and agreed. He went to his garage and Vang arrived a short time later. Phanakhon also saw Lé peek inside the garage. About five minutes later, Vang asked Phanakhon if he wanted to go hang out. Phanakhon followed Vang down the street. He also saw Ha and Sitthideth walking towards the corner. When Phanakhon rounded the corner, someone struck him in the back of the head from behind. He fell down and tried to protect his head from continued punches. Phanakhon was unable to describe anything about the assault because he lost consciousness until assisted by police and paramedics.

By coincidence, members of the San Diego Police Department gang unit were conducting surveillance near the scene of the assault. Detective Dave Collins was seated in an unmarked car watching the intersection through his side rear view mirror. Detective Collins was the only officer with a clear view of the incident, being situated approximately 110 feet away from the corner which was illuminated by a street light. There was a second street light approximately 10 to 20 feet away from Detective Collins.

Detective Collins watched as four males approached the corner. Suddenly, three of the men began beating the fourth, but the victim did not fight back. At one point, the victim fell to the ground, but two of the assailants pulled him up and hit him again. Detective Collins observed two of the men back up while the third pulled out a stick or

pipe and used it to strike the victim on the head. The victim fell to the ground a second time. Detective Collins broadcast that he was witnessing a "beat down." Officer Michael Dewitt, also part of the surveillance team, responded and was the first to arrive on the scene. He saw four men beating the victim.

As additional members of the surveillance team moved in, the assailants fled. Detective Collins arrested Vang after a short chase. Ha, Sitthideth and Lê were arrested nearby. However, a search of the scene failed to locate anything resembling the stick or pipe that Detective Collins described.

When Officer Jacob Resch arrived, he saw Phanakhon sitting upright on the curb. Detective Collins, who arrived after Officer Resch, observed that Phanakhon was nonresponsive to questioning even after Detective Collins worked to revive him. Detective Collins also observed that the left side of Phanakhon's face had begun to swell. Paramedics transported Phanakhon to the hospital where he was examined for head injuries, then released.

Phanakhon offered at least two "guesses" for why he was assaulted by the defendants. First, he believed he was attacked for "disassociating" himself from TOC, even though he testified that he had never been a member of the gang. Second, Phanakhon suggested that he got "checked" because he heard something he was not supposed to hear. Phanakhon stated that he was not afraid of the defendants. He was, however, afraid of TOC and what might happen to him or his family if he testified at trial.

The prosecution called Detective Daniel Hatfield as its expert witness on criminal street gangs. Detective Hatfield testified about the culture and habits of gangs, including member-on-member discipline for no longer hanging out with the gang or not "putting in work." Turning to TOC, he described it as a predominantly Laotian group that split off from a larger gang set in the early 1990's and claimed Linda Vista as its territory. Detective Hatfield identified three separate predicate offenses committed by its members and opined that TOC was a criminal street gang. Given the stipulation, there was no dispute that Ha, Sitthideth and Lê were members of TOC. Detective Hatfield believed that Vang and the victim Phanakhon were also gang members. He described the Department of Justice guidelines and San Diego Police Department guidelines for documenting "contacts" with suspected gang members. He testified that although Vang had not identified himself as a gang member, he met all the Department of Justice guidelines. As to Phanakhon, Detective Hatfield stated that he met the San Diego Police Department guidelines based on his association with TOC. On cross-examination, Detective Hatfield testified that the three "contacts" with Phanakhon included (1) the April 28, 2008 incident at issue here; (2) a traffic stop in March 2008 in which San Diego police officers found a picture of a gang member in his passenger's purse, but no one in the car was identified as a gang member, and (3) the discovery in October 2007 of Phanakhon's number along with at least 50 others on Ha's cell phone. Detective Hatfield acknowledged that the San Diego Police Department guidelines for documenting gang members might differ from those the gang used to define its membership.

Over defense objection, Detective Hatfield responded to two hypothetical questions from the prosecution that tracked the facts of the case. Detective Hatfield opined that if a "young baby gangster" in TOC was not putting in work or hanging out with TOC members, a physical assault on that "young baby gangster" was designed to put the person "in check" and bring him back in line with the gang's expectations. He stated that the assault would benefit TOC and was committed in association with TOC and at the direction of TOC members. Detective Hatfield also opined that, based on a second hypothetical that included Detective Hatfield's opinions as to the hypothetical parties' gang membership, the attack on the "young baby gangster" was gang motivated. When questioned further by the prosecution, Detective Hatfield responded that the hypothetical facts told him that "this is a gang-motivated incident. It wasn't about friends fighting among one another."

Vang testified at trial against the advice of his attorney. The court warned Vang that in addition to allowing impeachment with prior felony convictions, his testimony might open the door to questioning that could cause unnecessary damage to his own defense and that of the other defendants. Thereafter, Vang briefly testified that he was not a member of TOC, had no tattoos, and was not in any of the gang photos introduced at trial. On cross-examination, Vang acknowledged his priors. He also acknowledged that he hung out with members of TOC. Over defense objection that the question exceeded the scope of direct, Vang testified that he was hanging out with members of TOC on April 28, 2008. The court cautioned the prosecutor about the scope of direct examination and there were no further questions about the events of that date.

However, Sitthideth did testify about events that occurred in Phanakhon's garage before the fight on the street. Contrary to Phanakhon's testimony, Sitthideth stated that he, Vang, Ha and Lê went to Phanakhon's house around 9:00 p.m., where they all ate pizza in the garage. When Phanakhon brought "something" out of his pocket, he and Vang started calling each other names. Phanakhon challenged Vang to a fight, and the group went outside to watch the one-on-one fight between Phanakhon and Vang at the corner.

## DISCUSSION

### I. *The Gang Enhancement*

#### A. Admission of the Gang Expert's Opinion on Defendants' Knowledge and Intent

As we explained, the information included the special allegation that defendants committed the assault "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist criminal conduct by gang members within the meaning of" section 186.22, subdivision (b)(1). Defendants argue that the trial court abused its discretion when it allowed Detective Hatfield to testify in response to a hypothetical question that the assault on Phanakhon, thinly disguised in the hypothetical as "young baby gangster," was for the benefit of TOC and was gang motivated. Defendants contend Detective Hatfield's testimony was mere speculation and the ultimate issues of knowledge and intent were for the jury to decide.

Resolution of the question requires us to consider the gang testimony in light of rules that usually permit experts to testify on ultimate issues through hypothetical questions (Evid. Code, § 801; *People v. Gardeley* (1996) 14 Cal.4th 605, 618

(*Gardeley*)), but disallow expert testimony on a specific defendant's knowledge and intent that "'amounts to no more than an expression of his general belief as to how the case should be decided . . .' [Citation ]" (*Killebrew*, *supra*, 103 Cal.App.4th at pp. 647, 651.) We are also mindful of the common use of a fiction which Ha's defense counsel aptly described when objecting to Detective Hatfield's testimony

> "[W]hen a hypothetical is crafted so carefully that it is transparent to everybody in the courtroom, including the jury, that we are talking about the facts of this very case, I think that crosses the line and it becomes [*Killebrew* error] rather than an expert witness answering the general hypothetical. . . . And I think that what that does is pay lip service to the rule that you can offer a hypothetical, while in reality, as is perfectly apparent to every juror what you are really doing is asking the witness to opine on his [subjective] thoughts and ideas of the defendants . . . "

Although a bright line between gang expert testimony which is or is not admissible to show knowledge and intent may be elusive, we conclude that Detective Hatfield's testimony crossed it. We agree with the rule of *Killebrew* that an expert witness may not offer an opinion on what a particular defendant is thinking. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 647.) And more importantly here, the prosecutor may not circumvent that rule by asking the expert a hypothetical question that thinly disguises the defendants' identity. We also conclude that the error in admitting Detective Hatfield's responses to the hypothetical questions was harmless in the circumstances of this case.

Under California law, a person with "special knowledge, skill, experience, training, or education" in a particular field may qualify as an expert witness and give testimony in the form of an opinion. (Evid. Code, §§ 720, 801.) However, expert testimony is admissible only if it relates to a subject "sufficiently beyond common

experience that the opinion of an expert would assist the trier of fact " (Evid. Code, § 801.) The culture and habits of criminal street gangs are appropriate subjects for expert testimony and therefore admissible (*Gardeley, supra*, 14 Cal.4th at p. 617.) Expert opinion on a specific defendant's subjective knowledge and intent is not (*Killebrew, supra*, 103 Cal.App.4th at pp. 647, 651.)

The trial court has "considerable discretion" to control how the expert is questioned "'to prevent the jury from learning of incompetent hearsay.' [Citation.]" and "'to weigh the probative value of inadmissible evidence relied upon by an expert witness against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.]" (*Gardeley, supra*, 14 Cal.4th at p. 619.) We review the trial court's rulings on the admissibility of expert testimony for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) Here, the trial court abused its discretion by admitting Detective Hatfield's testimony regarding defendants' knowledge and intent based on its apparent belief that such testimony was admissible so long as it was presented in the form of a hypothetical. As we explain, the prosecution may not use a hypothetical question to conceal an expert's improper testimony on the real defendants' subjective knowledge and intent.

The prosecution typically offers expert testimony on criminal street gangs in two forms: (1) the expert's description of a particular gang's colors, territory, typical crimes, and other matters relating to gang culture or psychology based on "material not admitted into evidence" as long as it is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" (Evid. Code,

§ 801; see e.g., *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1545 [prison activities of the "Mexican Mafia"]) and (2) the expert's opinion in response to a hypothetical question based on facts shown by the evidence which asks the expert to assume their truth (*Gardeley, supra*, 14 Cal.4th at p. 618). On direct examination, the expert may describe the reasons for his or her opinion and the matter on which the opinion is based. (Evid. Code, § 802.) As long as that material meets a threshold requirement of reliability, "matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony." (*Gardeley, supra*, 14 Cal.4th at p. 618, italics in original.)

"Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) However, courts cannot allow experts to express *any* opinion they may have about gangs and gang activities. (*Killebrew, supra*, 103 Cal.App.4th at pp. 651, 654.) The defendant in *Killebrew* was one of several men arrested in connection with a drive-by shooting. He was not inside any of the three cars police suspected were involved, but was standing on a nearby corner when police stopped one of the cars. The discovery of a handgun at a nearby taco stand and in at least one of the cars formed the basis for Killebrew's prosecution for conspiring to possess a handgun. (*Id.* at pp. 647-649.) The court reversed his conviction on appeal. (*Id.* at p. 647.) The error identified in *Killebrew* was that "in response to hypothetical questions, the People's gang expert exceeded the permissible scope of expert testimony by opining on 'the subjective *knowledge and intent* of each' of the gang members involved in the crime. [Citation.]" (*People v. Gonzalez, supra*, 126 Cal.App.4th at pp. 1550-1551, italics in original.)

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Specifically, the expert testified that each of the individuals in a caravan of three cars knew there were guns in two of the cars and jointly possessed the guns with everyone else in the three cars for mutual protection. (*Id.* at p. 1551.) However, "*Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial. [Citation.]" (*Ibid.*)

With two exceptions, post-*Killebrew* jurisprudence has been left entirely in the hands of the intermediate appellate courts. The Supreme Court distinguished *Killebrew* in *People v. Ward* (2005) 36 Cal.4th 186, 210, noting that the expert opinions at issue fell within the gang culture and habit evidence approved in *Gardeley*. *Killebrew* received slightly more than a passing reference in *People v. Gonzalez* (2006) 38 Cal.4th 932, where the Supreme Court again distinguished the circumstances of the case. In rejecting the defendant's claim of *Killebrew* error in the guilt phase, the Supreme Court noted that the challenged testimony was "quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 945.) "[W]ithout deciding" whether *Killebrew* was correct "in this respect," the *Gonzalez* court read the case as "merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 946.) The Supreme Court attempted to clarify its comments in dicta included in a footnote. "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be

incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*Id.* at p. 646, fn. 3.) Neither *Ward* nor *Gonzalez* addressed the issue presented here - whether an expert witness can offer an opinion in response to a hypothetical question as to a defendant's mental state where he cannot testify *directly* regarding a specifically named defendant's mental state

Reversal was required in *Killebrew* because the gang expert's testimony was the only evidence offered by the prosecution to establish the elements of the crime and there was no other evidence from which a reasonable jury could infer intent. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658; see also *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-662 (*Ochoa*) [nothing in the circumstances of the carjacking sustained the expert witness's inference that it was gang-related]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 850-851 [no facts from which the expert could discern whether the defendants were acting on their own behalf or on behalf of the gang]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*) [no evidence apart from expert testimony to establish that the minor possessed a knife for the benefit of the gang].) "'[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.' [Citation.]" (*Ochoa*, *supra*, 179 Cal.App.4th at p. 657.) "To allow the expert to state the minor's specific intent . . . without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank S.*, *supra*, 141 Cal.App.4th at p.

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1199.) However, prejudicial error does not result in every case in which a gang expert offers testimony on an ultimate issue such as knowledge or intent - at least not in cases where there is other evidence to support an inference that the alleged crime was committed for the benefit of the gang. (See, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931 ["Undoubtedly, the expert's testimony alone would not have been sufficient to find the drug offense was gang related"].)

Here, Detective Hatfield's testimony in response to the two hypothetical questions violated the rule in *Killebrew*. The only apparent difference between the trial testimony and the hypothetical was the names of the parties. In the hypothetical question, the prosecution called the victim "young baby gangster" instead of Phanakhon and called the four defendants "three baby gangsters and one O.G.," that is, "original gangster." Indeed, one of the defense attorneys reported hearing "laughter or tittering from the jury" when Ha's defense attorney objected to the use of the hypothetical at an earlier stage in Detective Hatfield's testimony.

The next question is whether the error was harmless, that is, whether there is enough evidence, including testimony that Detective Hatfield was *permitted* to offer concerning the general culture and habits of TOC (*Gardeley, supra*, 14 Cal.4th at p. 617), from which a reasonable jury could infer defendants committed the assault "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b)(1). (*Gardeley, supra*, 14 Cal.4th at p. 617.) The record reveals the following admissible evidence relevant to the issue of

knowledge and intent. First, the phone call from an unidentified "familiar" voice, Vang's arrival and suggestion that they leave the garage to "hang out," and the assault by other known gang members at a nearby corner could support an inference that Phanakhon was "set up." Second, Phanakhon's two "guesses" for why he was assaulted - that he had disassociated himself from TOC or heard something he was not supposed to hear - linked the assault to the gang. Indeed, Phanakhon testified that although he was not afraid of the defendants, he was afraid of TOC. Third, Detective Collins observed that the victim of the assault did not fight back, consistent with the theory that the beating was some kind of group punishment rather than a simple fight between Phanakhon and Vang as portrayed by Sitthideth. Based on this record, we conclude the error in admitting Detective Hatfield's opinions as to the defendants' subjective state of mind was harmless (*People v. Watson* (1956) 46 Cal 2d 818, 836.)

B. Sufficiency of the Evidence To Support the True Finding

Our conclusion that the error in admitting Detective Hatfield's testimony on defendants' knowledge and intent was harmless also supports the conclusion there was sufficient evidence to support the jury finding that the special gang allegation was true (§ 186.22, subd. (b)(1).)

When a defendant challenges the sufficiency of the evidence, we "must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - evidence that is reasonable, credible and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal 4th 978, 1053 (*Kraft*), citing *People v. Johnson*

(1980) 26 Cal.3d 557, 578.) We presume in support of the judgment existence of every fact the jury could reasonably deduce from the evidence. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237 (*Pensinger*).) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Krafi, supra*, 23 Cal.4th at pp. 1053-1054.)

Both Lê and Sitthideth assert that Phanakhon disclaimed membership in TOC and, after excluding the improper opinion testimony, there was no other evidence to support Detective Hatfield's opinion to the contrary. Lê argues that the evidence showed only that Phanakhon was an acquaintance of the defendants and there was no other evidence to show the purported retaliatory assault on him was for the benefit of or with the intent to promote TOC. The record does not support these arguments.

As we explained, there was evidence apart from Detective Hatfield's inadmissible testimony from which a reasonable jury could infer the facts necessary to prove the gang enhancement. (*Ante*, pp. 14-15.) In addition, the presence of Lê at the scene, whose tattoos led Detective Hatfield to opine he was an "Original Gangster" or "shot caller," also supports the retaliation theory. Regardless of whether Phanakhon was an actual member of TOC or merely an associate with some knowledge of gang activities, a reasonable jury could conclude that the purpose of the attack was the same, that is, to maintain discipline for the benefit of the gang. Thus, we conclude that evidence *apart*

from Detective Hatfield's inadmissible opinion on defendants' knowledge and intent, and the inferences reasonably drawn from that evidence, were sufficient to sustain the true findings.

II. *Motion to Bifurcate Trial of the Gang Enhancement*

Defendants moved in limine to bifurcate the gang enhancement allegations from the trial of the underlying assault. Alternatively, Ha represented that he would stipulate that TOC met the statutory definition of a criminal street gang, and that he was a gang member, thereby obviating the need for prejudicial expert testimony on the details of defendants' involvement in the gang. Defendants argue that the court abused its discretion in denying the motion. We conclude the ruling was proper.

In *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*), the Supreme Court described the possible prejudice where a gang enhancement allegation is tried at the same time as the substantive crime. "The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Hernandez, supra*, at p. 1049.) At the same time, evidence of gang culture, habits and membership is often relevant and admissible as to the charged offense. Thus, "[e]vidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the

like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.) The Supreme Court concluded that "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation." (*Hernandez, supra*, at p 1050.) As with motions for severance, the burden is on the defendant to persuade the court that considerations favoring a single trial "are outweighed by a substantial danger of undue prejudice," and the decision to bifurcate is left to the trial court's discretion. (*Id.* at pp. 1048-1049.)

Here, the court observed that even without the gang enhancement allegation, gang evidence would likely come in to show defendants' motive for assaulting Phanakhon, and it wondered how much time would actually be saved by bifurcation. Based on the considerations identified in *Hernandez*, the court carefully questioned the prosecutor about the evidence she intended to introduce, including evidence on the predicate offenses. It then expressed concern that one of the predicate offenses involved a gang member with the same last name as defendant Danny Lê, but unrelated to him, who pleaded guilty to assault with a deadly weapon. The court ultimately ruled that as long as someone was prepared to provide a non-hearsay factual summary of that predicate

offense which omitted reference to the victim being shot eight or nine times, it would not bifurcate trial of the gang enhancement allegations. On this record, we conclude there was no abuse of discretion.

III *Exclusion of Defense Evidence*

Defendants challenge two evidentiary rulings apart from those we already considered in connection with the gang expert's opinion testimony. They assert that the trial court erred in excluding: (1) Phanakhon's methamphetamine use and (2) a defense video of the crime scene at night. We conclude that both rulings were correct.

A. Evidence of Phanakhon's Methamphetamine Use

Sitthideth asserts that the court's exclusion of evidence of Phanakhon's methamphetamine use violated his due process right to present a complete defense and the right to confront and cross-examine witnesses. Specifically, he contends the court improperly precluded him from questioning Phanakhon about his prior drug-related arrest and the role of methamphetamine in the fight with Vang, and therefore prevented Sitthideth from fully presenting his version of events to the jury. Sitthideth maintains that the excluded evidence would have provided a non-gang-related motive for the fight, explained Phanakhon's apparent loss of consciousness and difficulty speaking, and undermined Phanakhon's credibility and the prosecution's case against Sitthideth. We conclude: (1) Sitthideth failed to preserve the issue of Phanakhon's methamphetamine use; (2) in any event, the court did not abuse its discretion in excluding evidence of past and current drug use; and (3) defense counsel's failure to preserve Sitthideth's claim of error did not constitute ineffective assistance of counsel.

The prosecution moved in limine to exclude evidence of Phanakhon's prior drug use. At the same time, Sitthideth filed an in limine motion to allow the defense to cross-examine Phanakhon about a March 28, 2008 drug-related arrest. The trial court observed at the hearing that the victim's *prior* drug use was irrelevant, and continued. "If there was a basis to believe that he had drugs in his system at the time of the incident, then that would be something we should talk about." Lê's counsel responded that Phanakhon's vital signs after the assault were consistent with methamphetamine use, but noted that no "tox screens" were done on the victim. Vang's counsel added that there was a "possibility" that his client could testify that Phanakhon admitted ingesting methamphetamine the night of the attack. The court rejected that suggestion as speculative, and responded that Phanakhon's elevated vital signs were also consistent with his having just been attacked. Contrary to Sitthideth's representation on appeal, no one argued at the in limine hearing that there was evidence that a dispute over drugs precipitated the fight. The court ruled that pending Vang's decision to testify, and absent any solid evidence of Phanakhon's drug use the night of the attack, references to past or present methamphetamine use would be excluded as irrelevant. It also ruled the misdemeanor drug charge was inadmissible for purposes of impeachment.

Vang testified in compliance with the court's rulings, avoiding any reference to Phanakhon's past or present drug use. Sitthideth's testimony for the defense moved closer to the line. On direct examination he stated that while defendants were in the garage, Phanakhon brought "something" out of his pocket. Sitthideth did not elaborate on the nature of the "something," but continued. "I don't know if I can say it or not here." The

prosecutor objected, saying: "I think there has been a prior ruling in this regard." Without ruling on the objection, the court asked defense counsel to restate the question. The following exchange took place:

> "[DEFENSE COUNSEL]: I think the question was what happened next?
>
> "THE COURT: What happened next?
>
> "[SITTHIDETH]: After he brought the stuff out of his pocket?
>
> "THE COURT: Yes.
>
> "[SITTHIDETH]: They started arguing, calling each other names and stuff."

At no time did defense counsel proffer new evidence of Phanakhon's drug use the night of the attack, argue its relevance in precipitating the fight, or otherwise challenge the court's in limine rulings. Accordingly, Sitthideth forfeited his challenge to the exclusion of evidence of Phanakhon's drug use. (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3.) "The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*Ibid.*) For the same reason, we reject Sitthideth's argument that any objection or offer of proof would have been futile.

Sitthideth blames trial counsel for his failure to make "timely and specific objections" regarding admissibility of evidence showing Phanakhon's present or past methamphetamine use. In reviewing a claim of ineffective assistance, we begin with the presumption "that counsel rendered adequate assistance and exercised reasonable

professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) To prove ineffective assistance, Sitthideth must show that (1) counsel's performance fell below an objective standard of reasonableness based on the performance expected of a reasonably competent attorney and (2) he was prejudiced in that there is a reasonable probability the result would have been different absent counsel's unprofessional errors. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*); *People v. Berryman* (1993) 6 Cal.4th 1048, 1081 (*Berryman*), overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800, 822-823.) Sitthideth fails to establish either prong of the *Strickland* test.

The record does not reveal the reasons trial counsel failed to renew his objection to the in limine rulings and/or argue the relevance of drugs in Sitthideth's account of the event. The point where the prosecutor reminded the court of the ruling regarding Phanakhon's current drug use would have been an appropriate time to do so. Absent more, we can only presume that Sitthideth's counsel had no new, relevant and non-speculative evidence to offer, or had tactical reasons for not pursuing the matter. If the record on appeal fails to show why counsel acted or failed to act in the manner challenged, we will affirm unless counsel was asked for an explanation and failed to provide one, or there "'simply could be no satisfactory explanation.' [Citation.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) And where the record is silent on these points, a claim of ineffective assistance is more appropriately pursued in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)

In any event, Sitthideth fails to show that he was prejudiced by the court's decision to exclude references to Phanakhon's methamphetamine use or evidence suggesting that the drugs precipitated the argument that lead to the fight. The trial court was correct in ruling that Phanakhon's prior drug use was irrelevant. After speculating at the hearing on in limine motions that Phanakhon's vital signs were consistent with *current* methamphetamine use, defendants never made an offer of proof at trial that methamphetamine could cause a person to fall in and out of consciousness or that Phanakhon was under the influence of methamphetamine at the time of the attack. Moreover, Sitthideth's account of the events of the night was unconvincing in the face of other evidence introduced at trial. His testimony that all the defendants were hanging out in Phanakhon's garage contradicted Phanakhon's testimony that only Vang and Lê were present. And his testimony that the fight was between Vang and Phanakhon was inconsistent with Detective Collins's and Officer Dewitt's observations that Phanakhon never threw a punch and was assailed by the four others who were present. Sitthideth exaggerates the potential impact of Phanakhon's drug use in the face of this and other evidence that supports the verdicts. And it was irrelevant whether Vang and Phanakhon argued over drugs, women or who would pay for the pizza, inasmuch as the jury rejected Sitthideth's testimony that it was only a fight between the two of them and not gang-related.

B. Rulings on Pictures of the Scene of the Assault

Sitthideth next contends that the court abused its discretion and violated his due process rights by *excluding* a video of the crime scene at night and *admitting* daylight

photos of the same location. He argues that the rulings resulted in the jury having a one-sided and misleading impression of what Detective Collins could see through his side view mirror the night of the assault. We conclude there was no abuse of discretion in either ruling, and reject Sitthideth's argument that the combined rulings warrant reversal.

Ha's defense counsel asked an investigator to prepare a video to recreate what Detective Collins would have seen through his side view mirror the night of the assault. It was offered to help the jury understand what the lighting would have been like and to cast doubt on Detective Collins's description of the events. At the Evidence Code section 402 hearing, Detective Collins testified that the video was too dark and out of focus, and did not accurately depict what he saw that night. Detective Collins described the location of the street lights and testified that the scene was back-lit. In response to further questioning by the court, Detective Collins stated that the street lights allowed him to distinguish figures but not faces of those involved in the assault. At the close of Detective Collins's testimony, the prosecutor argued that the video was not relevant because it did not accurately depict the lighting conditions at scene of the crime. She also asserted that the video's depiction of the street lights as specks was misleading based on common experience that street lights illuminate an area, and maintained the video should be excluded under Evidence Code section 352. The court agreed with the prosecution and excluded the video as "fundamentally misleading."

At trial, Detective Collins testified that the group of guys was backlit. He determined they were males, but he could not see anyone's face. Detective Collins stated that the victim and two of the assailants were wearing hoodies, but he could not

distinguish any other details of their appearance. Later in Detective Collins's testimony, the prosecutor sought to introduce three daylight photographs taken of the crime scene *two days before* from Detective Collins's actual vantage point. She argued there was no prejudice because the photographs were substantially similar to photographs previously provided. Ha's defense counsel objected on grounds the prosecution was attempting to create new evidence after the close of discovery in response to what was going on at trial. The court overruled the objection, stating there was no discovery violation because the evidence was obtained in response to matters that developed during defense cross-examination. At the point in redirect when the prosecution questioned Detective Collins about the new photographs, Lê's defense counsel made an unspecified objection and requested a sidebar, but the court overruled the objection. Counsel did not put the basis for his objection on the record.

We begin with the rule that only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court has broad discretion in deciding whether challenged evidence is relevant and therefore admissible. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) In exercising its discretion to admit or exclude evidence, the court must at times consider the constraints of Evidence Code section 352, under which evidence is excluded if its probative value is outweighed by undue prejudice. In this context, the term "prejudice" refers to evidence "which uniquely tends to evoke an emotional bias against one party as an individual and which has very little effect on the issues." (*People v. Wright* (1985) 39

Cal 3d 576, 585.) "Prejudicial" is not synonymous with "damaging." (*People v. Karis* (1988) 46 Cal 3d 612, 638.) We review rulings on relevance and undue prejudice for abuse of discretion. (*People v. Kipp* (1998) 18 Cal 4th 349, 369, *People v. Cain* (1995) 10 Cal.4th 1, 33.)

In *People v. Gonzalez, supra*, 38 Cal 4th 932, the Supreme Court upheld exclusion of the defendant's videotape of the crime scene. (*Id.* at p. 952.) It explained that "'To be admissible in evidence, an audio or video recording must be authenticated. [Citations.] A video recording is authenticated by testimony or other evidence "that it accurately depicts what it purports to show." [Citation.]' [Citation.] 'In ruling upon the admissibility of a videotape, a trial court must determine whether: (1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them.' [Citation.]" (*Ibid.*) Here, the testimony at the Evidence Code section 402 hearing supports the court's determination that the video proffered by the defense did not accurately depict what Detective Collins would have seen the night of the assault. For that reason, it was not relevant and would not assist the jury in deciding the facts of the case. The investigator had attempted in the first part of the video to replicate Detective Collins's view through the side view mirror. As Detective Collins testified, the first part of the video was dark and "so blurry you can't even see down the street." The court noted that "it doesn't take an expert to know that the problem there is that the picture was being taken through a mirror and the auto focus doesn't know whether to focus on the image in the mirror or the bezzle around the mirror, and so it is totally out of focus." The camera

angle shifted in the second half of the video, but the scene was still darker than it appeared in real life. The court again noted the difference between a video camera and the human eye. "[T]he camera can't see the range of contrast the human eye can. So a simple answer to this is anybody who's ever been in a residential street at night knows that you can see more than what can be seen in this picture." The court concluded that it was not "fair or accurate" to say that "this faithfully shows what the scene would look like to a human being on the scene. . . ."

As to the three photographs introduced during redirect examination of Detective Collins, the defense unsuccessfully objected on grounds they violated discovery rules. Because the defense never objected to the photographs on grounds they were "much more 'misleading' than anything offered by the defense," the issue is forfeited. (Evid. Code, § 353; See *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) There can be no serious argument that admission of the three photographs prejudiced defendants, and therefore we also reject Sitthideth's claim that failure to object constituted ineffective assistance of counsel.

IV. *Sufficiency of the Evidence of Assault*

Defendants contend there is insufficient evidence to support two additional aspects of the verdicts. (1) Lê's conviction of assault in the face of evidence he was a bystander and (2) defendants' conviction of assault with force likely to produce great bodily injury. Applying the standard of review set forth in *Kraft, supra*, 23 Cal.4th at page 1053, we conclude there is substantial evidence to support the guilty verdicts.

A. Lê's Conviction for Assault

The information charged defendants with assault "with a deadly weapon or instrument . . . or by any means of force likely to produce great bodily injury . . ." (§ 245, subd. (a)(1).) Lê contends there is no evidence to show he was involved in the beating of Phanakhon and therefore the evidence did not support his conviction for assault. He notes that the officers who witnessed the assault indicated that Lê was on the sidewalk in the shadows along a fence away from where his codefendants were assaulting Phanakhon in the street. Thus, the only evidence to suggest he was an aider and abettor in the assault was Detective Hatfield's testimony that, based on his tattoos, he was an "O.G." and "shot-caller." Lê adds that "the court's errors with respect to the gang enhancement also render invalid [his] conviction for the assault." We disagree.

The prosecutor argued that Lê was criminally liable for the assault as a direct participant based on Officer Dewitt's testimony that he saw four men beating Phanakhon when he drove up to the scene. Although the court instructed the jury on aider and abettor liability, the prosecutor did not present that theory in her closing remarks and there is no indication the prosecution argued anything other than Lê's direct physical involvement in the crime. The jury was left with the task of resolving the conflict in the number of assailants and the jury resolved it against Lê. We conclude there is sufficient direct and circumstantial evidence, including the admissible testimony of Detective Hatfield, to support the verdict.

B. Assault With Force Likely to Produce Great Bodily Injury

Next, Sitthideth contends there is insufficient evidence to support defendants' conviction of assault "by any means of force likely to produce great bodily injury" (§ 245, subd. (a)(1)), because the prosecution failed to prove that "the force used *was* likely to cause *great* bodily injury . . ." (Italics in original.) In support of this argument, he notes that the jury found *not true* the special allegations that defendants used a deadly weapon and personally inflicted great bodily injury in the commission of the assault. Alternatively, Sitthideth contends the court had a duty to clarify the meaning of "great bodily injury" when asked by the jury. Neither argument has merit.

1. Elements of the Crime

Section 245, subdivision (a)(1) punishes an assault committed "by any means of force likely to produce great bodily injury . . ." No weapon or instrument is required and the criminal force often consists of kicks or blows by the fist. (See *People v. Tallman* (1945) 27 Cal.2d 209, 212.) "Although neither physical contact nor injury is required for a conviction, if injuries result, the extent of such injuries and their location are relevant facts for consideration." (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086.) The question at trial is whether the force was *likely* to produce great bodily injury, and whether the victim actually suffered harm is immaterial. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Thus, in *People v. Hahn* (1956) 147 Cal.App.2d 308, the court found sufficient evidence of aggravated assault under section 245, where the defendant struck the victim on the head four times with a beer can. The victim never lost consciousness and the cuts on his head did not require sutures or follow-up treatment.

(*Id.* at pp. 309-311.) The court explained: "While the wounds on [the victim's] head did not appear to be incurable, they were such as to require medical attention and because life-long nervous disorders are known to have resulted from no more violence than was applied to [the victim], it required no great strain of the deductive processes to infer that the force used upon him was 'likely to produce great bodily injuries.'" (*Id.* at p. 312.) Whether or not the force used was likely to produce great bodily injury is a question of fact based on all the evidence, including but not limited to evidence of the injury actually inflicted. (*People v. Chavez* (1968) 268 Cal.App.2d 381, 384.)

2. The Record Supports the Verdicts

Sitthideth cites the testimony of various officers along with hospital records to support his claim that Phanakhon's injuries were "simple injuries" and "not the type of great or serious injury" contemplated by section 245, subdivision (a)(1). He also argues there was no evidence that he personally hit Phanakhon or actively aided and abetted anyone else's assault on Phanakhon. Sitthideth's argument does not directly address the question whether there was evidence from which a jury could reasonably infer the defendants' actions were *likely* to produce great bodily injury.

The record in this case shows that defendants beat Phanakhon. Although Phanakhon was crouching on the curb when Officer Dewitt arrived at the scene, his condition appeared to worsen as the other officers arrived. Officer Resch described Phanakhon as "out of it" and "slipping in and out of consciousness" when he placed handcuffs on Phanakhon. Detective Collins approached to find Phanakhon handcuffed, on the ground, nonresponsive, and breathing heavily. After Detective Collins applied a

sternum rub, Phanakhon partly revived, but was unresponsive to questions and provided only garbled responses. Detective Collins observed that the left side of Phanakhon's face had already begun to swell. Photos taken at the hospital revealed cuts and bruises on Phanakhon's head and face.

Although Phanakhon's actual injuries did not turn out to be severe, defendants' beating left him unconscious. Whether defendants used a pipe or stick or their fists, we conclude there is substantial evidence to support the jury's determination that they used force *likely* to produce great bodily injury. Moreover, the jury's findings that defendants did not *personally* inflict great bodily injury within the meaning of sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8) are *not* inconsistent with the guilty verdict on count 1 given the different statutory language in those enhancements.

3. Response to Jury's Request for Clarification

The court instructed on the elements of section 245 in accordance with CALCRIM No. 875, including proof that "[t]he force used was likely to produce great bodily injury." The instruction provided the following additional points for guidance of the jury: "No one needs to actually have been injured by defendants' act. But if someone was injured, you may consider that fact, along with all the other evidence in deciding whether the defendant committed assault. And if so, what kind of assault. [¶] *Great bodily injury means significant or substantial physical injury. It's an injury that is greater than minor or moderate harm.*" (Italics added.) The court also instructed the jury with CALCRIM No. 3160 which includes the same definition of great bodily injury, this time in the context of the section 1192.7 and section 12022.7 enhancements. During deliberations,

the jury inquired: "Is there any further clarification on what is great bodily injury? What is considered mild or moderate vs. something greater?" Counsel agreed with the court's proposed response which the court then read to the jury:

> "The law provides no more specific definition of Great Bodily Injury than what is in your instructions. The words 'minor,' 'moderate' and 'great' as well as 'significant' and 'substantial' as used in the instruction (number 3160) have no special legal meaning. They are to appl[y] using their ordinary, everyday meanings.
>
> "Whether the injuries are 'great' as opposed to 'minor' or 'moderate' is a factual judgment for you to make. In order for you to find the allegation true, you must unanimously find that it has been proved beyond a reasonable doubt."

Sitthideth contends that the court had a mandatory duty to define "great bodily injury" in response to the jury's request for clarification. He argues that the court was mistaken in saying the law gives no special meaning to the term, and continues: "Had the jury known simple injury is that requiring special medical attention and 'great bodily injury' is substantially greater than that, it is reasonably likely [Sitthideth] would have been found not guilty of the charge in Count 1 or of only the lesser-included simple assault charge."

Sitthideth forfeited any claim of error by agreeing to the court's written response. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 373, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) We nonetheless consider and reject his argument on the merits in light of his claim of ineffective assistance of counsel.

The trial court has a duty to instruct sua sponte on "general principles of law that are closely and openly connected with the facts presented at trial" (*People v. Ervin* (2000)

22 Cal 4th 48, 90), including terms that have a "technical meaning peculiar to the law" (*People v. Reynolds* (1988) 205 Cal.App 3d 776, 779, overruled in part on a different ground in *People v. Flood* (1998) 18 Cal 4th 470, 480 ) The duty to elaborate or clarify does not extend to non-technical terms such as "great bodily injury " (*People v. La Farque* (1983) 147 Cal App.3d 878, 886-887 (*La Farque*) ) Moreover, if "the original instructions are themselves full and complete," the question whether additional explanation is required "to satisfy the jury's request for information" is a matter left to the trial court's discretion (*People v. Gonzalez* (1990) 51 Cal 3d 1179, 1213 ) Indeed, "'comments diverging from the standard are often risky.' [Citation.]" (*People v. Solis* (2001) 90 Cal App.4th 1002, 1015 (*Solis*), see *People v. Montero* (2007) 155 Cal App 4th 1170, 1179 [court did not abuse its discretion in advising the jury to re-read the form instruction] ) At the same time, courts have cautioned that "'[a] definition of a commonly used term may nevertheless be required if the jury exhibits confusion over the term's meaning.' [Citation.]' [Citation.]" (*Solis, supra*, 90 Cal App 4th at p. 1015, see, e.g., *People v. Ross* (2007) 155 Cal App 4th 1033, 1047 [where self-defense at issue in prosecution for assault and battery, court erred in failing to instruct on the meaning of "mutual combat"] )

"Great bodily injury," the term at issue here, "has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration." (*La Farque, supra*, 147 Cal.App.3d at pp. 886-887 ) Our courts have also rejected the claim that the term "great bodily injury" is unconstitutionally vague and overbroad as used in sections 245

and 12022.7. (See *People v. Guest* (1986) 181 Cal.App.3d 809, 812; *People v. Roberts* (1981) 114 Cal.App.3d 960, 962-963 (*Roberts*).) In *Roberts*, which also rejected the claim that the court should have instructed sua sponte on the meaning of "great bodily injury," the court explained:

> "In our case, the kicking on the head and torso of a largely defenseless man on the ground appears to us to be unmistakably an assault which a jury could reasonably find was likely to produce great bodily harm. And here, of course, the injuries inflicted bear out that fact. In addition to the cuts and bruises and the unconsciousness produced, the victim received a blow to the forehead which produced a large welt. If this blow had struck the nearby eye, it might well have produced blindness in that eye, surely a great bodily injury.
>
> "We do not believe that any instructional amplification on the words 'likely' or 'great bodily injury' would have significantly enlightened the jury. In the last analysis, it is the jury's province to determine what the ultimate product of the assault might have been. It was clearly within the jury's province to determine that appellant intended to kick his victim with whatever force was required to permit appellant to accomplish his purpose, the robbery of his victim. No amount of 'hair splitting' would or should have deterred the jury from its task of deciding whether the assault as the jury heard it described was likely to have resulted in 'great bodily injury.'" (*Roberts, supra*, 114 Cal.App.3d at p. 965.)

Based on the foregoing, we conclude the court did not abuse its discretion in responding to the jury's request for clarification of "great bodily injury" in this case by directing it to consider the "ordinary, everyday" meaning of the term as set forth in the "full and complete" instructions on assault. Accordingly, counsel's performance did not fall below that expected of a reasonably competent attorney, and Sitthideth did not receive ineffective assistance. (*Strickland, supra*, 466 U.S. at pp. 687-688, 693-694; *Berryman, supra*, 6 Cal.4th at p. 1081.)

V. *Ha's Probation Condition*

Ha's probation order included the following condition: "Not be in possession of any cell phone or paging device except in course of lawful employment." Ha contends the condition is facially overbroad and therefore unconstitutional. The Attorney General responds that Ha is challenging the condition *as applied* and forfeited it by failing to object on that ground at sentencing. However, the parties nonetheless agree that we can resolve the issue by modifying the probation condition to read: "Not use a cell phone to communicate with any known gang member, or a paging device, except in the course of lawful employment." We agree that modification is appropriate.

VI. *Review of Pitchess Materials*

Before trial, Ha filed a *Pitchess* motion in which he sought discovery of the personnel records of Officer Scott Holden and Officer Michael Dewitt. The court reduced the scope of the request in response to the People's opposition, and reviewed the records in camera to determine whether there were any discoverable files, specifically (1) as to Officer Holder, files showing "excessive force, aggressive conduct, unnecessary violence, unnecessary force . . . [or] false statements in reports" and (2) as to Officer Dewitt, files showing "false statements in reports." The court determined that nothing was discoverable as to Officer Dewitt, but ordered release of the names, addresses and phone numbers contained in one file pertaining to Officer Holden.

On appeal, Ha asks that we review the materials in camera to determine whether the court followed the procedures set forth in *People v. Mooc* (2001) 26 Cal.4th 1216,

1226-1229, and made the required-on-the record inquiry. We reviewed the officers' personnel records in camera and are satisfied that the court complied with *Mooc*.

DISPOSITION

Ha's probation order is modified and the court is directed to amend item 12G of that order to read: "Not use a cell phone to communicate with any known gang member, or a paging device, except in the course of lawful employment." The judgment is affirmed as modified.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

# APPENDIX B

## Court of Appeal Order Modifying Decision

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUN 25 2010

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>XUE VANG et al.,<br><br>Defendants and Appellants. | D054343 & D054636<br><br>(Super. Ct. No. SCD213306)<br><br>ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING<br><br>[No Change in Judgment] |

THE COURT:

It is ordered that the opinion filed herein on June 7, 2010, be modified as follows:

On page 15, line 6, delete the sentence beginning "Based on this record . . . " and replace it with a new sentence, which reads:

> Applying the *Watson* standard of prejudice—not the substantial evidence standard of review—we conclude on this record that it is not reasonably probable that an outcome more favorable to defendants would have resulted in the absence of the evidentiary error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

There is no change in the judgment. Appellants' petitions for rehearing are denied.

McConnell

McCONNELL, P. J.

Copies to: All parties