S184212 4th Petition for Review

SUPREME COURT CASE NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

XUE VANG, et al.,

Defendants and Appellants.

CASE NO. D054343

San Diego County Superior Court Case No. SCD213306

SUPREME COURT
FILED
JUL 13 2010
Frederick K. Ohlrich Clerk
Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DANNY LE,

Defendant and Appellant.

CASE NO. D054636

(San Diego County Superior Court Case No. SCD213306)

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

APPELLANT SITTHIDETH'S PETITION FOR REVIEW FOLLOWING THE PUBLISHED DECISION OF THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO, AFFIRMING THE JUDGMENT OF THE COURT BELOW

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

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IN THE CALIFORNIA SUPREME COURT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. XUE VANG, et al., Defendant and Appellant.	COURT OF APPEAL CASE NO. D054343 (San Diego County Superior Court Case No. SCD213306) **APPELLANT SUNNY SITTHIDETH'S PETITION FOR REVIEW**
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, DANNY LE, Defendant and Appellant.	

TO: THE HONORABLE PRESIDING JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

COMES NOW appellant, SUNNY SITTHIDETH, by and through his appointed lawyer, Laurel M. Nelson, and respectfully petitions this Court for review following the Court of Appeal's Published Opinion filed on June 7, 2010, affirming, as modified, the judgment in Consolidated Case Numbers D054343 and D054636. The Opinion, with modification, is attached hereto as Appendix A.

Appellant Sitthideth incorporates by reference and relies upon the Petitions for Review filed by his co-appellants as they apply to his case. In addition, appellant Sitthideth respectfully points out the following.

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QUESTIONS PRESENTED

1. What is the appropriate standard of assessing prejudice resulting from the erroneous admission of improper expert testimony on the knowledge and intent of gang members?
2. Is the involvement of more than one gang member in a group fight with a non-gang member sufficient evidence from which a reasonable inference of gang benefit and intent may be drawn?
3. Is a videotape sufficiently authenticated by the photographer's representation that it accurately depicted what he observed at the location and under circumstances described by a witness?
4. Is the appropriate Evidence Code section 352 analysis of evidence proffered in support of the accused's defense the same as that of prosecution evidence? Or does the constitutional right to present a defense alter the balancing required?
5. In assessing combined evidentiary errors, is the proper standard of review limited to that for statutory error as set forth in *People v. Watson* (1956) 46 Cal.2d 818, or does the nature of the violation, when it negatively impacts the constitutional right to present a defense, warrant review as a violation of federal constitutional guarantees under *Chapman v. California* (1967) 386 U.S. 18?
6. Are the combined errors, restricting the defense while allowing prejudicial prosecution evidence of little relevance, sufficient to find a violation of due process and denial of a fair trial?
7. Do the standardized instructions on assault by force likely to cause great bodily injury sufficiently apprise the jurors of the requisite essential elements of the offense?
8. Is the court's duty to provide clarification to jurors pursuant to Penal Code section 1138 nullified if defense counsel fails to object to the lack of further instruction?

NECESSITY FOR REVIEW

Review is necessary to ensure compliance with the statutes of California. A state court's misapplication of state statutes is a deprivation of federal due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; U.S. Const., Amends. V, XIV.)

Review is necessary to ensure compliance with the holdings of this Supreme Court, as well as consistency among the courts of appeal.

Review is necessary to resolve differences among the courts of appeal in determining admissibility of evidence, as well as assessing the prejudice resulting from improper admission of evidence, including that from expert witnesses.

Review is necessary to ensure protection of fundamental constitutional protections and compliance with the decisions of this Supreme Court and the United States Supreme Court decisions interpreting them.

Review is necessary to resolve tensions between statutory law and the provisions of the United States Constitution guaranteeing criminal defendants the right to present a complete defense to the charges faced.

Review is necessary to ensure challenged verdicts and findings are upheld only upon examination of the entire record and a finding of substantial evidence of each and every essential element. A verdict or true finding based on less than evidence of guilt beyond a reasonable doubt is a denial of due process.

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STATEMENT OF THE CASE

In addition to the Procedural Background presented in the Court's Opinion, appellant Sitthideth respectfully points out the following:

When officers approached Sitthideth and his co-defendants on April 28, 2008, based on a reported "beat down," all participants were running from the scene. (RT 389, 392-393, 431-433, 484-485, 640, 670, 687, 695, 726, 731, 1022, 1058-1059, 1076-1077, 1093, 1107-1109.)

The four defendants were initially charged with assault with a deadly weapon or by force likely to cause great bodily injury, based on Collins' reporting a stick or rod was used by one individual to strike Phanakhon. (CT 1-3, 193; RT 384-386.) Following presentation of evidence at trial, the Information was amended to eliminate the charge of assault with a deadly weapon. (RT 1921.)

Prior to trial, the court held evidence of Phanakhon's drug use at the time of the offense, as well as his prior use, was not admissible. (RT 6-10, 12, 16.)

STATEMENT OF FACTS

Twenty-year-old William Phanakhon, who lived with his family in Mira Mesa, was out of school but not working. (RT 138-139.) While in school, Phanakhon had heard talk about the TOC or Tiny Oriental Crips. (RT 145-146.)

Phanakhon considered Xue Vang, Dan Ha, Danny Le, and appellant his good friends, but did not recall how they met. (RT 140-141, 143-144, 298.) The friendships were not gang-based. (RT 307-308.) Although he was hanging out with people claiming TOC, Phanakhon never claimed TOC membership, had never been jumped into the gang, had never joined, and had never been asked to join. He also had never participated in or witnessed any criminal activity involving TOC. (RT 239-240.) Phanakhon was never even asked to commit any crimes for TOC. (RT 147-148.)

Although Phanakhon at some point stopped hanging out with TOC members, he did not recall if anyone from TOC ever called to invite him to go anywhere or if he ever refused an invitation. (RT 154-155.)

At trial, Phanakhon testified he was at home watching the Lakers on television with his father about 10:00 or 11:00 p.m., on April 28, 2008, when he received a phone call asking to come over. (RT 157-159.) When speaking to police on the night of the fight, Phanakhon said the call came at 9:00 while he was watching the Lakers game with his father. (RT 221, 669, 1696.) Phanakhon's father testified they were watching the basketball game on TV between 8:00 and 9:30 p.m. that night. (RT 1695-1696.)

The record indicates more than five minutes passed between Vang's arrival at the Phanakhon residence and the fight at issue. (See Opn 4.) Detective Collins drove past the residence and saw legs inside the partially-open garage, as well as a truck in the driveway, some 20 to 25 minutes before the fight. (RT 363-364, 376-378.) Sergeant Cruz reported seeing the legs of two or three people in the garage at 10:45 p.m. (RT 637-639.) Phanakhon testified he and Vang, with the garage door partially open, talked normally in the garage. Then Phanakhon went in and out of the house to check on the score of the game and on a pizza he had cooking. (RT 160-163.) He also fetched a drink for Vang. (RT 313-314.)

Phanakhon testified that, once outside the garage, he saw two other people walking toward the corner, but did not know who they were. (RT 165.) He only agreed with the prosecutor that he had previously told police he "believed that they were Dang Ha and Sunny Sitthideth." (RT 165.) Phanakhon also testified did not recall seeing Danny Le that night. (RT 165.) After being shown his prior statement to police, Phanakhon agreed he had said he "thought" he had seen Le but saw not sure because it was dark. (RT 166.)

Phanakhon testified that, when he went around the corner with Vang,

he was struck from behind. He did not know who hit him. He did not recall feeling any pain. He was not sure if he got punched while on the ground. He did not recall trying to stand up again. He only remembered a lot of yelling until the paramedics came and asked about his injuries. (RT 167-169.)

Phanakhon did not know who or what caused his injuries. He did not know if the bruises to his head depicted in the photographs presented by the prosecution occurred as a result of being hit or when he fell and hit his head in the street. (RT 258.)

No one said why the fight occurred. (RT 322.)[1] Phanakhon could only guess about the motive. At trial he guessed he was hit because he stopped hanging out with TOC. (RT 322.) Earlier, Phanakhon had guessed he was hit because he heard something. It was Detective Solivan's guess that Phanakhon "got checked." (RT 326.)

Members of the San Diego Police Department gang unit were conducting surveillance of the Phanakhon residence at 9257 Irongate. (RT 353, 654.) Detective Collins was parked around the corner and south on Kite Hill Lane, facing away from the house under surveillance so he could follow any vehicles leaving the area in that direction. He was **not** the eyes-on member of the surveillance team; that was the sergeant. (RT 353-354, 454-455, 520.) Through his side rear-view mirror, Collins testified he saw a group of three or four males emerge into the street and start to fight, two or three of the individuals hitting one other. The group was "backlit" by a street light. Collins could not see any of them with "any real particularity." (RT 378-382.) The individual who did the original punching was wearing a hoodie; the one with the 18-inch pipe or stick wore a hoodie. Collins could not be sure they were not the same individual. (RT 387-388.) When

[1] Absent from the record was any mention of any gang slogans or names yelled by anyone, or any gang signs flashed, or any mention of gang retaliation.

arrested, appellant Sitthideth was wearing a light-colored T-shirt and denim pants. (RT 399-401, 585, 687-690; PHT 44.)

Detective Collins testified he put out on the radio information about the fight when he first saw it happen but the order to move in was given only after Collins advised the others via radio that a pipe was being used to strike the victim. (RT 389-390.) The evidence presented, including a tape recording of the radio transmissions between the officers, reflected no mention of any weapon. (RT 445, 484-485, 695.) Collins later changed his testimony, saying he notified officers of the pipe after he had executed a U-turn and was headed toward the scene of the fight. (RT 614, 619.)

Despite a careful search of the area, the weapon Collins claimed to have seen through his 3-1/2 by 4 inch mirror from 110 feet away was never found. (RT 376, 379, 392, 436, 446-447, 469-470, 593, 647-652.)

Sergeant Cruz testified he could see the driveway leading to the front of the residence, but could not see specific human beings and never saw a fight. According to his contemporaneous statements on the radio that night, it was "too dark on the target street to see what's going on." (RT 631, 640, 659-660, 671.)

Detective Yamane did not see any fight or weapon. (RT 695, 711.)

Officer Michael DeWitt was parked on Kite Hill Lane, closer to the scene than Collins, with an unobstructed view of the residence. He could see people but not what they were doing. Only when he drove closer to the area did he discern that there were five individuals. (RT 719-721, 724, 747, 750, 759-760.) DeWitt saw a single blow but no weapon. (RT 734.)

Detective Collins testified Phanakhon stumbled "from the street, up on the curb, onto the sidewalk, where he falls down." (RT 403.) Officer DeWitt saw William Phanakhon crouched down on the curb. He believed Officer Resch told Phanakhon to lay down on the ground and Phanakhon complied. (RT 729, 764.) Officer Resch was the one who actually contacted

and handcuffed Phanakhon. He found Phanakhon standing on the sidewalk and ordered him to the ground. Phanakhon got down and was handcuffed, then Resch helped him onto the curb. (RT 1061-1064, 1078-1079.) After Phanakhon was handcuffed, he appeared "out of it," his answers were slow and sometimes unintelligible. (RT 1064-1065, 1088.) When Collins returned to tell Resch he believed Phanakhon was the victim, he found Phanakhon had moved from the street to the sidewalk. (RT 402-404, 419-420.) Phanakhon was not responding to the detective's questions, so Collins administered a sternum rub. After photographing Phanakhon, Collins removed the handcuffs and the medics were called. (RT 402, 423-424.)

Prior to taking Phanakhon into custody, Resch saw no blood or cuts or swelling on Phanakhon. Only later did he see any scrapes on Phanakhon. (RT 1083.) After Phanakhon had been cuffed, Detective Collins saw a linear mark on the left side of Phanakhon's head that was starting to swell. (RT 425-426.) Collins saw no blood on Phanakhon's body or clothing. (RT 426, 627-628.) There was a minor cut on his lip. (RT 427.)

The defense.

Twenty-two-year-old Vu Nguyen testified he knew Phanakhon and all four defendants; Le since childhood and the others since high school. (RT 1632-1635.) He identified a photograph showing Phanakhon with the defendants, taken after they had been playing handball. One of the participants was still wearing a handball glove. (RT 1634-1636.) Nguyen never knew of anyone trying to get Phanakhon to join TOC. (RT 1639.)

Co-defendant Vang testified he was not a member of TOC, was not in any of the photographs with TOC gang members, and his name and phone number were not on Ha's cell phone list. He does hang out with people who are TOC members. (RT 1671-1672, 1675.)

Sky Phanakhon, the victim's father, testified he was watching a basketball game on TV with his son, William, between 8:00 and 9:30 p.m.

on April 28, 2008. (RT 1695-1696.)

Appellant SITTHIDETH testified, after fishing with Vang, Ha, and Le earlier that day, they drove to Phanakhon's house. Sitthideth and Ha stayed a few minutes, then drove Vang's truck to Ha's house so Ha could change clothes. Vang and Le stayed at the Phanakhon residence. Appellant and Ha returned to Phanakhon's house about 9:00 p.m. and went into the garage where they ate pizza with Phanakhon. (RT 1698-1699, 1703-1710.) When Phanakhon took the "stuff" out of his pocket,[2] Vang and Phanakhon began arguing and calling each other names. Phanakhon challenged Vang to a fight. Appellant followed Vang and Phanakhon outside. Phanakhon and Vang started fighting one-on-one; no one else was involved. Appellant threw no punches and saw no weapon. He had no argument with either; they were both his friends. (RT 1701-1703.) When a police car with no headlights approached, everyone ran. (RT 1717-1719.)

POINTS AND AUTHORITIES

I.

APPELLANT SITTHIDETH JOINS THE ARGUMENTS PRESENTED IN HIS CO-APPELLANTS' PETITIONS FOR REVIEW

As they are relevant to his case, appellant SITTHIDETH joins in the arguments of other appellants in their petitions for review. (Calif. Rules of Court, rule 8.200, subd. (a)(5); *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

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[2] There had been a prior ruling barring mention of Phanakhon's drug possession or use. (RT 6-10, 12, 16.)

II.

REVIEW OF THE OPINION'S STANDARD FOR DETERMINING PREJUDICE RESULTING FROM ADMISSION OF IMPROPER GANG EXPERT TESTIMONY IS NEEDED.

Detective Hatfield, the prosecution's gang "expert," was allowed to testify to the gang's motivation, knowledge and intent, albeit in response to extremely detailed and thinly-disguised "hypothetical" questions. In its Opinion, the Court "agree[d] with the rule of *Killebrew* that an expert witness may not offer an opinion on what a particular is thinking" and that the "prosecutor may not circumvent that rule by asking the expert a hypothetical question that thinly disguises the defendants' identity." (Opn 9; citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, 647.) Then, however, the Court of Appeal found that opinion testimony "harmless in the circumstances of this case." (Opn 9.)

As appellant Le has pointed out, the standard utilized in this case does not comport with that used to assess prejudice under the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 837. (See Le's Petition for Review, pp 11-15.) Appellant Sitthideth joins in that argument and additionally points out the following.

A. REVIEW IS NEEDED TO ADDRESS THE APPROPRIATE STANDARD OF REVIEW.

Although a modification to the Opinion states prejudice based on the erroneous admission of the gang expert's testimony is assessed using the "*Watson* standard prejudice – not the substantial evidence standard of review" (Mod. Opn, p. 15, line 6; citing *People v. Watson, supra,* at p. 836), the analysis employed appears to be a modified sufficiency of the evidence test. That analysis, rather than employing the "reasonable probability" test mandated by *Watson,* actually relied on a diluted "some" or "enough," rather than "substantial" evidence test.

In explaining its determination of harmless error, the Opinion laid out the test: "The [] 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 [citation], 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)." (Opn 14; citing *People v. Gardeley* (1996) 14 Cal.4th 605, 617; emphasis added.) This standard appears inconsistent with that utilized by this Court and other courts of appeal.

1. The *Watson* standard.

This Court has held reversal is appropriate in cases involving trial errors under California law when a "miscarriage of justice" has occurred, based on the reviewing court's finding that, "'after an examination of the entire cause, including the evidence,' . . . it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra,* 46 Cal.2d at pp. 835-836.) More recently, this Court has explained a "reasonable probability" means "merely a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; citing *People v. Watson, supra,* at p. 837; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

2. The *Chapman* standard.

Appellant's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution require the prosecution to prove beyond a reasonable doubt each essential element of a charged crime. (*In re Winship* (1970) 397 U.S. 358, 364.) The Sixth Amendment further guarantees him the right to have the jury make that determination. (*United*

States v. Gaudin (1995) 515 U.S. 506, 522-523.) The improper admission of the "expert opinions" of the prosecution's gang expert concerning subjective knowledge and intent in this case effectively lowered the burden of the State to prove the intent of the defendants, as well as their "knowledge" of the intent of others in the group – substituting Detective Hatfield's opinion for that of the jury's unanimous findings. A violation of the defendant's rights under the United States Constitution, if "'simply an error in the trial process,' [citation] is subject to harmless error analysis under the standard the high court announced in *Chapman v. California* (1967) 386 U.S. 18." (*People v. Epps* (2001) 25 Cal.4th 19, 29; cited in *Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at p. 801, fn. 6.)

3. The sufficient evidence standard.

When assessing the sufficiency of the evidence, the "substantial evidence" standard is used. That standard, as the Opinion explained elsewhere, "presume[s] in support of the judgment existence of every fact the jury could reasonably deduce from the evidence." (Opn 15-16; citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) Even under that deferential standard, the entire record rather than only that favorable to the respondent is considered and it must reflect substantial, rather than merely "some" evidence supporting each essential finding. (*People v. Barnes* (1986) 42 Cal.3d 1284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 577.) To be substantial, the evidence must be of "solid probative value" and of a nature that "maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v. Connor* (1983) 34 Cal.3d 141, 149.)

The Opinion's consideration of the prejudicial effect of the improper expert opinion testimony looked to whether there was "enough" other evidence properly presented "from which a reasonable jury could infer defendants committed the assault" for the requisite gang-related reasons.

(Opn 14.) It is unclear if "enough" equaled "substantial." Indeed, the "facts" on which the Court found "enough" evidence would indicate, in light of the Opinion's utter failure to consider evidence not favorable to respondent, that it was based neither on the entire record nor on the type of evidence deemed of "solid probative value" necessary to a review of the sufficiency of evidence.

B. REVIEW IS WARRANTED IN LIGHT OF THE BASES FOR THE OPINION'S CONCLUSION IT WAS NOT REASONABLY PROBABLE AN OUTCOME MORE FAVORABLE TO THE DEFENDANTS WOULD HAVE RESULTED IN THE ABSENCE OF THE EVIDENTIARY ERROR.

The Opinion points to three points of "admissible evidence relevant to the issue of knowledge and intent" sufficient to supply those requisite elements: (1) that Vang's phone call and the following assault at a nearby corner support an inference Phanakhon was "set up"; (2) Phanakhon's "guesses" that he was assaulted for not hanging out with TOC members or because he might have overheard something he should not have heard; and (3) he did not, according to Collins, fight back. (Opn 14-15.) In so doing, it fails to consider the *entire* record and all the evidence reflected therein.

1. The "set up" theory lacks factual support.

The Opinion appears to rely on a timeline showing just five minutes between Vang's arrival and the fight as support for its theory the jury could have found Phanakhon was set up for a gang beating. However, although Phanakhon testified at trial that Vang called sometime around 10:00 or 11:00 p.m. on the night of April 28, 2008, he also explained he was watching the Lakers game on television that night. (RT 157-159.) That explanation is consistent with Phanakhon's earlier statements to police that Vang called at 9:00 while he was watching the Lakers game with his father. (RT 221, 669, 1696.) It was also consistent with the testimony of Phanakhon's father, with whom he was watching the game, that the Lakers

were on television between 8:00 and 9:30 that night. (RT 1695-1696.) And it was consistent with appellant Sitthideth's testimony that he and Ha arrived at Phanakhon's house about 9:00 p.m. and went into the garage where they, along with Vang and Le, ate pizza with Phanakhon. (RT 1700 - 1701, 1710.) The testimony of prosecution witnesses Collins and Cruz, both of whom reported seeing multiple people in Phanakhon's garage as much as a half hour before the fight was first reported at 11:15, supports this version of events. (RT 640, 670.) Detective Yamane also saw three individuals in the driveway at 10:50 or 10:55 p.m. (RT 681-683.)

A review of the *entire* record reflects far more evidence pointing away from the prosecution's theory that Vang called and immediately lured Phanakhon out for a gang beat down than there was supporting it. There was *some* evidence in support of the "set up" theory, but the *substantial* evidence indicated otherwise.

2. Phanakhon could only guess why he was hit.

The Opinion next looks to Phanakhon's "guesses" that he was assaulted because he was not hanging out with TOC members any more or because he might have overheard something he was not supposed to hear. (Opn 15.) Phanakhon's guess that he might have heard something he should not have heard was undermined by uncontroverted testimony that he had never committed crimes with the gang, had never seen them commit crimes, was never jumped into the gang, and was not even asked to join TOC. (RT 234, 235, 1301, 1351, 1632-1635.) Phanakhon had no gang paraphernalia, no gang clothing, and no gang tattoos. (RT 1310, 1351.) Detective Hatfield acknowledged Phanakhon did not consider himself a TOC member. (RT 1301, 1351.) Importantly, even Detective Hatfield, the prosecution's gang expert, admitted the gang only believes a person is a member of the gang after being jumped in. (RT 1302.) Hatfield had no evidence Phanakhon had been initiated into the gang. He had only his law enforcement criteria for

documenting gang members– something no one indicated the gang used.

Furthermore, Hatfield's three criteria for believing Phanakhon a TOC member – riding in a car with a woman who had a picture of a gang member in her purse, the presence of Phanakhon's name on the list of more than 50 contacts on Ha's cell phone, and being with gang members on the night of the fight here at issue (RT 1218, 1312, 1318-1319) – provided nothing to indicate what or why Phanakhon might have overheard any sensitive information prior to that fight.

The record as a whole also indicates Phanakhon's speculation that the fight might have occurred because he wasn't talking to anybody did not constitute reliable evidence from which to reasonably infer the necessary gang-related intent. In fact, Phanakhon specifically testified he could not recall if any TOC member ever called to invite him to go anywhere or do anything or if he ever refused such an invitation. (RT 154-155.)

The Opinion fails to deal with the nature of Phanakhon's opinions and their speculative nature. Speculation and suspicion will not support an inference of fact. (*People v. Martin* (1973) 9 Cal.3d 687, 695.) A hunch or guess is not evidence. (See *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

C. REVIEW IS NEEDED.

It appears the Opinion relied on an improper standard of review in assessing the prejudice flowing from the admission of improper gang expert testimony. Additionally, the Opinion looked only to evidence favorable to the respondents, while overlooking the substantial evidence supporting the defense and indicating the closeness of the case – including the lengthy deliberations (CT 449-453), the material conflicts in Phanakhon's various accounts of the events, and the not-true findings as to deadly weapon use and resulting great bodily injury (CT 454, 456, 458, 460) indicating rejection of much of Detective Collins' claims.

III.

REVIEW OF THE OPINION'S STANDARD FOR FINDING SUFFICIENT EVIDENCE IN SUPPORT OF THE GANG ENHANCEMENT TRUE FINDING IS NEEDED.

In its Opinion, the Court of Appeal noted in reviewing a challenge to the sufficiency of the evidence, its role is to "'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.'" (Opn 15; citing *People v. Kraft* (2000) 23 Cal.4th 978, 1053; citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Also cited was the rule presuming "in support of the judgment existence of every fact the jury could reasonably deduce from the evidence." (Opn 16; citing *People v. Pensinger, supra,* 52 Cal.3d 1210, 1237.) Absent from the Opinion, however, is the important rule enunciated by this Court that neither speculation nor hunch constitutes evidence sufficient to support a conviction. (See *People v. Martin, supra,* 9 Cal.3d 687, 695; *Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th 634, 651.)

The Opinion found "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." (Opn 16.) That evidence, according to the Opinion, consisted of:

- the phone call to Phanakhon from an unidentified "familiar" voice, followed by Vang's arrival and subsequent suggestion that they leave the garage and the assault by other known gang members at a nearby corner, indicating Phanakhon was "set up";

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- Phanakhon's "guesses" that he might have been assaulted because he disassociated himself from TOC members or had hear something he was not supported to hear;
- Detective Collins' observation that the victim of the assault did not fight back, consistent with the theory that the beating was some kind of group punishment; and
- the presence of Le at the scene, whose tattoos led Hatfield to opine Le was a "shot caller" in the gang. (Opn 15-16.)

As already explained in Section II, above, the first two bases lack credible foundation in the record. What is left, then, as "evidence" in support of the true finding is Collins' observation that Phanakhon did not fight back and the presence of a gang member with tattoos. Other courts of appeal have held a gang enhancement cannot be found merely because the underlying offense was perpetrated by someone belonging to the gang. (See *People v. Schoppe-Rico* (2006) 140 Cal.App.4th 1370, 1379, fn. 9.) And this Court has long held that speculation or hunch – that an individual would not fight back if attacked for the benefit of the gang – does not constitute the requisite "substantial" evidence. (*People v. Martin, supra,* 9 Cal.3d 687, 695; *People v. Connor, supra,* 34 Cal.3d 141, 149.)

A conviction or true finding of guilt without proof beyond a reasonable doubt of each and every essential element of the charge or allegation is a denial of due process. (See *In re Winship, supra,* 397 U.S. 358, 364; U.S. Const., Amends. V, XIV.) Review is needed.

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IV.

REVIEW OF THE EXCLUSION OF DEFENSE EVIDENCE AND THE ADMISSION OF PROSECUTION EVIDENCE, AND THE CUMULATIVE EFFECT THEREOF, IS NEEDED.

Not only were the People allowed to present their case – including their apparently divine insight into the knowledge and intent of all the parties – via their "gang expert," they were further assisted by the one-sided introduction of visual representations of the scene that went to the credibility of key witness Detective Collins and prohibited evidence that would have substantiated for the jury an alternative basis for the fight at issue. The evidentiary rulings barring admission of evidence of Phanakhon's methamphetamine use and a defense video of the crime scene at night, however, were found "correct" by the Court of Appeal. (Opn 19.)

A. EVIDENCE OF PHANAKHON'S METHAMPHETAMINE USE.

The Opinion found the trial court correctly ruled "Phanakhon's prior drug use was irrelevant." (Opn 23.) It also concluded appellant "Sitthideth fail[ed] 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 [sic] to the fight." (Opn 23.)

Prior to trial, the trial court held "that the victim's prior drug use generally [was] irrelevant to this case" although if there "was a basis to believe that [Phanakhon[had drugs in his system at the time of the incident, then that would be something we should talk about." (RT 6.)[3] Although appellant's lawyer conceded Phanakhon's medical records did not

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[3] The prosecutor admitted Phanakhon had a history of prior drug use. (RT 7.)

document drug use on April 28, 2008, a co-defendant's defense counsel noted Phanakhon's "medical vitals" were "consistent with the use of methamphetamine," as well as with someone having been in a fight. (RT 7.) Then Vang's counsel advised the court Phanakhon had admitted to Vang that he had "just previously ingested methamphetamine." (RT 8.) All evidence of Phanakhon's drug use or related arrests was ruled inadmissible as it was "irrelevant" although the issue could be reconsidered if Vang testified. (RT 12, 16.)[4]

Appellant Sitthideth, testifying on his own behalf, attempted to explain that the fight at issue was between Vang and Phanakhon, occurring when Vang took the "stuff" – methamphetamine – from his pocket. (See RT 1701.) The prosecutor immediately objected, noting "a prior ruling in this regard." (RT 1701.) Although he testified that Vang and Phanakhon began calling each other names and eventually went outside to fight (RT 1702-1703), Sitthideth believed himself precluded, based on the trial court's previous ruling, from explaining the actual cause of the fight – a belief shared by his own lawyer, as well as the prosecuting attorney.

The Court of Appeal found appellant Sitthideth "exaggerates the potential impact of Phanakhon's drug use in the face of [the] evidence that supports the verdicts" and found "irrelevant" evidence of "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." (Opn 23.) What the Opinion overlooks, of course, is the impact evidence of the actual cause of the fight would have had on the jury's assessment of the State's case versus Sitthideth's explanation.

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[4] Vang testified, but he failed to relate Phanakhon's admission about using methamphetamine that night.

If Sitthideth's account of the events of the night was "unconvincing," it was in large part because of the lack of any reasonable explanation. As explained later to probation, Vang and Phanakhon were fighting over methamphetamine that Vang believed Phanakhon had wrongfully taken from him. (See CT 161; *People v. Le,* Case D054636, CT 67 [Vang reported to Le that he had left some methamphetamine at Phanakhon's house and believed Phanakhon, who appeared under the influence, had smoked some of it].) In light of Phanakhon's admitted methamphetamine use and prior drug offense, that explanation was reasonable. It may not have been consistent with Detective Collins' "observations" (Opn 23), but the jury was denied an opportunity to make that factual finding with full information. Sitthideth's version of events, the Opinion notes, "contradicted Phanakhon's testimony that only Vang and Le were present [in the garage]." (Opn 23.) It was, however, consistent with Phanakhon's original version of events as provided to officers just after the fight – when he said Vang first came over about 9:00 when the basketball game was still on, indicating they had been in the garage for a couple of hours. (See RT 669, 704-705.)

Evidence of motive was not irrelevant; it was crucial. It is the very fact Sitthideth's testimony was inconsistent with that of the prosecution witnesses that made its exclusion so damaging. The defense was precluded from explaining *why* the fight occurred – a reason having nothing to do with gangs at all.

B. VIDEOTAPED EVIDENCE OF THE SCENE.

As the Opinion notes , the defense investigator prepared 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." (Opn 24.) The Opinion then goes on to note the many complaints of Detective Collins about the videotape – it was "too dark and out of focus, and did not accurately depict what he saw that night." (Opn 24.) Not considered, however, was defense counsel's representation that, if called to testify, the investigator would explain the videotape recreated what could be seen through a rear view mirror at night; that the video was taken through the rear view mirror while parked at the spot Detective Collins had described, and that, after a few minutes, the investigator moved the camera, pointing it directly down the street toward the scene of the fight. (RT 181-184.)

1. Was the defense videotape relevant?

Relevant evidence is, of course, admissible. (Evid. Code sec. 350.) As the Opinion acknowledges, "[e]vidence 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.'" (Opn 25; citing Evid. Code sec. 210.) Because Detective Collins – the very witness whose testimony was to be impeached by the videotape – claimed it did not "accurately depict" what he saw the night of the fight, the Opinion concluded "it was not relevant and would not assist the jury in deciding the facts of the case." (Opn 26.) Therefore, the Opinion found the trial court correctly concluded the video showed "the scene [] darker than it appeared in real life" and 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 . . . .'" (Opn 27.)

Was the dark videotape, which the photographer would have authenticated, relevant to assessing the credibility of Detective Collins? Was it within the trial court's discretion to rule the videotape irrelevant and inadmissible under Evidence Code sections 210 and 352?

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2. Who must authenticate the proffered evidence?

Evidence Code section 1401 requires "[a]uthentication of a writing is required before it may be received in evidence." Photographs and videotapes are writings. (Evid. Code sec. 250; *People v. Bowley* (1963) 59 Cal.2d 855, 858; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440; *People v. Rich* (1988) 45 Cal.3d 1036, 1086, fn. 12; *People v. Beckley* (2010) 185 Cal.App.4th 509, 514.) A videotape is authenticated "if the proponent makes a showing the videotape is an accurate portrayal of what it purports to be." (*Jones v. City of Los Angeles, supra,* at p. 440.) That foundation may be established by testimony that it "accurately reproduces phenomena actually perceived by the witness," usually the photographer. (*Ibid.*; citing McCormick on Evidence (3d ed. 1984), sec. 214, pp. 673-674, fns. omitted; 2 Witkin, Cal. Evidence (3d ed. 1986) sec. 843, pp. 809, 810; see also *People v. Beckley, supra,* 185 Cal.App.4th at pp. 514-515; citing *People v. Bowley, supra,* 59 Cal.2d 855, 859 "It is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence"].)

In the Law Revision Commission Comments of 1965 to Evidence Code section 1400, it was noted that, "[b]efore any tangible object may be admitted into evidence, the party seeking to introduce the object must make a preliminary showing that the object is in some way relevant to the issues to be decided in the action." (Emphasis added.) Once that preliminary "authentication" has been made, "the judge admits the writing into evidence for consideration by the trier of fact." "[A]ll that the judge has [thus] determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic. The trier of fact independently determines the question of authenticity, and, if the trier of fact does not believe the evidence of authenticity, it may find that the

writing is not authentic" regardless of the court's ruling admitting it into evidence. (*Ibid.*)

It was defense counsel who represented to the trial court that his investigator prepared the video based on the reports and testimony of Detective Collins. (RT 181-184.) It was Detective Collins – whose testimony the defense sought to impeach via the videotape – who was questioned by the trial court concerning its accuracy. (RT 186-189, 196-200.) Did this comport with rules of evidence envisioned by the Legislature in California?

C. THE EVIDENTIARY RULINGS CONFLICT WITH APPELLANT'S RIGHT TO PRESENT A COMPLETE DEFENSE.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusation." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) That right, in turn, contemplates a "meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Davis v . Alaska* (1974) 415 U.S. 308.) Due process requires the criminal defendant be afforded the "right to present [his] version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 18.)

The trial court in this case severely curtailed the right of the defense to present appellant's version of the facts to the jury – by excluding evidence of Phanakhon's methamphetamine use, appellant Sitthideth's perceived reason for the fight, and evidence to undermine the claims of Detective Collins that he could see details of a fight in the dark from 110 feet away looking through a small rear view mirror on his police car.

A trial court's authority to exclude evidence – if relevant and material – must yield to a criminal defendant's constitutional right to

present a defense. (*Washington v. Texas, supra,* 388 U.S. at p. 23. As this Court has noted, "'Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684; quoting *People v Reeder* (1978) 82 Cal.App.3d 543, 553.) "'[T]rial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence as well as in determining its weight.'" (*People v. Wright* (1985) 39 Cal.3d 576, 584-585; citing *People v. Murphy* (1963) 59 Cal.2d 818, 829.) "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it." (*People v. McDonald* (1984) 37 Cal.3d 351, 372.) The court must consider the "reason" for excluding evidence under section 352, as well as the importance of the evidence to the proponent's case. (*People v. Wright, supra,* at p. 585.)

This Court has previously held a "refinement" of the *Watson* standard warranted in certain cases. "Where the evidence," even if sufficient to sustain the verdict against a sufficiency of evidence challenge, "is extremely close, 'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.'" (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; *People v. Briggs* (1962) 58 Cal.2d 385, 407.) Review is needed to determine if this "modified *Watson* standard" remains viable and whether it is appropriate in the instant case in light of the totality of the errors.

D. REVIEW OF THE TRIAL COURT'S RULING ADMITTING DAYTIME PHOTOGRAPHS OF THE SCENE, TAKEN AFTER COLLINS TESTIFIED, TO BOLSTER HIS TESTIMONY, IS NEEDED.

Mid-trial, the prosecutor sought to introduce photographs taken in daylight with the assistance of Detective Collins to "depict generally" what

could be seen from his patrol car on the night of April 28, 2008. Defense counsel objected to the last-minute photos, particularly when that witness assisted in creating the photographs to buoy up his testimony. The trial court ruled the photographs admissible, noting they had been provided "at the next court day after the photos were taken" and were "in response to defense developments" during cross-examination. (RT 533-536.)

The Court of Appeal found no error because (1) the defense failed to object to them on grounds they were more misleading than probative and (2) could not have prejudiced the defendants. (Opn 27.)

It would appear, however, that defense counsel's complaints that the photographs were simply being offered to bolster Collins' claims, although they were taken in daylight, included, by inference at least, an objection under Evidence Code section 352. Moreover, the prejudice, termed not a "serious argument" by the Court of Appeal (Opn 27), is but one component of the prejudicial rulings challenged by appellant Sitthideth on appeal. (See AOB pp. 41-51; ARB pp. 30-34.)

E. REVIEW OF THE CUMULATIVE EFFECT OF THE COURT'S RULINGS IS ALSO NEEDED.

Appellant asks this Court review not just each isolated evidentiary ruling, but to consider the cumulative effect of the several rulings and the prejudice resulting therefrom. When error is pervasive, as in this case, it may result in a constitutionally-infirm trial and a denial of fundamental due process and the right to a fair trial. (See *Manson v. Brathwaite* (1977) 432 U.S. 98, 113-114; *United States v. Lovasco* (1977) 431 U.S. 783, 790; *Rochin v. California* (1952) 342 U.S. 165, 170-172; *Estelle v. McGuire* (1991) 502 U.S. 62, 75; U.S. Const., Amend. XIV.)

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V.

REVIEW OF APPELLANT'S CONVICTION FOR ASSAULT WITH FORCE LIKELY TO PRODUCE GREAT BODILY INJURY IS NEEDED IN THIS CASE.

On appeal, appellant Sitthideth argued the conviction on Count 1 for assault by means of force likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1), should be reversed. The evidence did not support the charge, as supported by the jury's failure to find appellant either used a deadly weapon or personally inflicted great bodily injury in the commission of the assault. Additionally, the trial court's failure to respond appropriately to the jury's request for clarification of the term "great bodily injury" was error under Penal Code section 1138 and resulted in prejudice to appellant.

A. SUFFICIENCY OF THE EVIDENCE.

As the Opinion acknowledges, the question for the jury was whether the "force was *likely* to produce great bodily injury." (Opn 29; citing *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) However, as also acknowledged in the Opinion, "if injuries result, the extent of such injuries and their location are relevant facts for consideration." (Opn 29; citing *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086.) In support of its finding that the aggravated assault charge was properly found, the Opinion cites *People v. Hahn* (1956) 147 Cal.App.2d 308, in which the conviction was upheld although the wounds to the victim's head were not incurable, but 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. . . ." (Opn 30 29-30; citing *People v. Hahn, supra,* at p. 312.)

Review of the sufficiency of the evidence in the instant case is needed. The Opinion's reliance on *People v. Hahn, supra,* and its holding

that similar wounds "have been known to have resulted" from similar violence, appears contrary to the holdings of other reviewing courts and decisions, as well as the statute itself, requiring proof the force used "was likely" to result in great bodily injury. (See Pen. Code sec. 245, subd. (a)(1); *People v. Covino* (1980) 100 Cal.App.3d 660, 667; *People v. Yancy* (1959) 171 Cal.App.2d 371, 374; *People v. Savedra* (1993) 15 Cal.App.4th 738, 744; *People v. Russell* (2005) 129 Cal.App.4th 776, 787.) "Likely" means to have a high probability, rather than some possibility. (Merriam-Webster Online Dictionary.) Penal Code section 243, subdivision (f)(5) defines "injury" as "any physical injury which requires professional medical treatment." "Great bodily injury" is necessarily greater or more "remarkable in magnitude [or] degree." (Merriam-Webster Online Dictionary.)

B. THE TRIAL COURT'S FAILURE TO PROVIDE CLARIFICATION OF THE TERM "GREAT BODILY INJURY" AS REQUESTED BY THE JURY.

During deliberations, the jury delivered a note to the court asking for "further clarification" on what was meant by the term "Great Bodily Injury." (CT 45, 451.) The trial court responded by telling the jury the only definition appeared in the instructions already given and that whether the injuries are "great" or "minor or moderate" was a factual judgment for them to make. (CT 46, 451.) That response, however, was erroneous, as noted above. It also violated the duty imposed on the courts by Penal Code section 1138.

Penal Code section 1138 directs: "After the jury have retired for deliberation, . . . if they desire to b informed on any point of law arising in the case, they must require the officer to conduct them into court," where, "the information required must be given . . . ." (See also *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047.) As this Court has explained: "The court has a primary duty to help the jury understand the legal principles it is

asked to apply." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) If asked for additional instruction, the trial court "must do more than figuratively throw up its hands and tell the jury it cannot help." (*Ibid.*) The duty imposed under Penal Code section 1138 is mandatory. (*People v. Ross, supra,* at p. 1047; citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) It is intended to protect the right of the jury and should not be dependent upon a defendant's objection to the court's failure to meet its burden. (See *People v. Butler* (1975) 47 Cal.App.3d 273, 281.) According to other courts of appeal, even a "'definition of a commonly used term may [] be required if the jury exhibits confusion over the terms' meaning.'" (*People v. Ross, supra,* at p. 1047; citing *People v. Solis* (2001) 90 Cal.App.4th 1002, 1015.)

The Opinion, however, found appellant Sitthideth forfeited any claim of error by agreeing to the court's response – or lack of response. (Opn 32; citing *People v. Bohana* (2000) 84 Cal.App.4th 360, 373; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) In fact, a careful reading of this Court's holding in *Rodrigues* does not support the conclusion in *Bohana* or the instant case. Defense counsel in *Rodrigues* actually "suggested" the response given by the court. (*People v. Rodrigues, supra,* at p. 1193.) Furthermore, the question went not to clarification of an element of the charge but only on the possible consequences of a possible deadlock. (*Ibid.*) Similarly, in *People v. Bohana, supra,* defense counsel had actually objected to instructions on involuntary manslaughter, the subject of the jury's inquiry. (84 Cal.App.4th at p. 853.)

The Opinion also found 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." (Opn 34.) That conclusion was based on the fact the phrase "'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.'" (Opn 33; citing *People v. La Farque* (1983) 147 Cal.App.3d 878, 886-887.) Nor, the Opinion notes, is it a term that is either "unconstitutionally vague and overbroad" or on which the court must provide further instruction *sua sponte*. (Opn 33-34; citing *People v. Guest* (1986) 181 Cal.App.3d 809, 812; *People v. Robert* (1981) 114 Cal.App.3d 960, 962-963.) Again, the Opinion appears inconsistent with the language of the statute and its standard of review inconsistent with that of other courts.

Review is needed to ensure consistency among the courts regarding the scope of the trial court's duty under Penal Code section1 1138 and whether clarification of terms may be required despite the fact they have been used in the law for many years and deemed sufficiently precise to withstand constitutional challenge.

CONCLUSION

For all the above reasons, petitioner asks this Court grant review in this case.

Respectfully submitted,

Dated: July 12, 2010

LAUREL M. NELSON
Attorney for Appellant
SUNNY SITTHIDETH, by
appointment of the Court of
Appeal under the Appellate
Defenders, Inc.,
Independent Case System

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT SITTHIDETH'S PETITION FOR REVIEW in the matter of *People v. Xue Vang,* Court of Appeal Case Number E048072, and *People v. Danny Le,* Court of Appeal Case Number D054636, produced in Times Roman 13-point type, consists of 8,332 words.

Dated: 12 July 2010

Respectfully submitted,

LAUREL M. NELSON
Attorney for Appellant/Petitioner
By Appointment of the Court of Appeal, under the Appellate Defenders, Inc., Independent Case System

APPENDIX

Filed 6/7/10

CERTIFIED FOR PUBLICATION

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

THE PEOPLE, Plaintiff and Respondent, v. XUE VANG et al., Defendants and Appellants.	D054343 (Super. Ct. No. SCD213306)
THE PEOPLE, Plaintiff and Respondent, v. DANNY LÊ, 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 Lê 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.)

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.

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. Kraft*, *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.

Filed 6/25/10

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. XUE VANG et al., Defendants and Appellants.	D054343 & D054636 (Super. Ct. No. SCD213306) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [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, P. J.

Copies to: All parties

PROOF OF SERVICE BY MAIL

I, the undersigned, am a citizen of the United States, residing in the State of California; I am over eighteen years old and not a party to this action. My business address is P.O. Box 101355, Denver, CO 80250-1335in the County of Denver.

On July 12, 2010, I served the APPELLANT SITTHIDETH'S PETITION FOR REVIEW in the matter of PEOPLE v. XUE VANG, Court of Appeal Number D054343 and PEOPLE V. DANNY LE, Court of Appeal Case No. D054636, by placing a copy thereof with postage prepaid in the U.S. mail, addressed as follows:

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[I also served a copy electronically at eservice-criminal@adi-sandiego.com]

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I declare under penalty of perjury that the foregoing is true and correct. Executed at Denver, Colorado, on July 12, 2010.