**PEOPLE v. HONG**

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*THE PEOPLE, Plaintiff and Respondent, v. JUSTIN SUNG HONG, Defendant and Appellant.*

Court of Appeals of California, Second District, Division Eight.

Filed May 26, 2010.

***Attorney(s) appearing for the Case***

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

BIGELOW, P. J.

Justin Hong, a known associate of the Koreatown Gangstas (KTG), participated in a barroom brawl that resulted in the murder of Brian Chin by Anfferney Kim. Under an aiding and abetting theory, a jury found Hong guilty of first degree murder with a true finding that the offense was committed for the benefit of a criminal street gang. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (b).)[1](https://www.leagle.com/decision/incaco20100526037#fid1) On appeal, he contends the trial court committed multiple instructional and evidentiary errors. We affirm.

**FACTS**

During the course of a three week trial, evidence was presented as follows:

**I. The Events Leading to the Murder**

On July 14, 2006, Brian Chin met with a group of friends, including Jun Min, Hogan Shin, Daniel Lee, Deitehr Schleicher and Michael Kim, to celebrate the birth of his first child at a Koreatown bar called Bohemia. At midnight, the group moved on to a bar called Blink, where a group of 15 to 20 other people were celebrating Hong's birthday, including David Kim,[2](https://www.leagle.com/decision/incaco20100526037#fid2) Daniel Kang, Chris Shin, Hanul (Arnold) Kim and Anfferney Kim (aka Ronald Rhee).[3](https://www.leagle.com/decision/incaco20100526037#fid3) The birthday party group's raucous celebration bothered Brian Chin and his friends, who frequently glanced at them. At one point, David Kim "mad-dogged"[4](https://www.leagle.com/decision/incaco20100526037#fid4) Jun Min and kicked his chair. In response, Jun Min punched David Kim in the face, causing him to fall to the ground with a bloody nose. No one immediately retaliated though the two groups began cursing at one another. Hanul Kim, believing a fight was imminent, went to his car to retrieve a crowbar.

Brian Chin and his friends began to leave Blink about two minutes after Jun Min punched David Kim. On their way out, Brian Chin's group encountered Hanul Kim coming up the escalator. Thinking that he had a gun, Brian Chin grabbed Hanul Kim while his friends attempted to take away what they thought was a gun. They released Hanul Kim when they realized he only had a crowbar. Anfferney Kim, a former Marine and member of the KTG, helped Hanul Kim off the ground.

As the birthday party group continued to curse at them, Hogan Shin, a member of Brian Chin's group, grabbed Chris Shin and pushed him towards the window of Blink. Hogan Shin then took off his shirt and challenged anyone in the crowd to a fight. When no one accepted the challenge, he and the rest of Brian Chin's group walked away, but the two groups continued to curse and spit at each other. According to members of Brian Chin's group, someone asked them, "Where are you from?" as they went down the escalator. Hogan Shin responded, "`I'm from Hell,' and I'll take [you] there."

When a security guard from Blink attempted to stop the birthday party group from following Brian Chin and his friends, David Kim "took a swing at" the guard. As Brian Chin's group walked down the street to their cars in the Chapman Plaza parking lot, they noticed that a number of people were following them. The second group caught up with them as they entered the parking lot. Two members of Brian Chin's group ran to get help from the security guards.

At Chapman Plaza, Hogan Shin again challenged anyone to a fight but two people sprayed him and Michael Kim with mace or pepper spray while another person threatened Jun Min with a three to four inch pocket knife. Jun Min saw a group of people surrounding Brian Chin and heard people yelling, "Get him. Shank him." Hanul Kim saw Brian Chin on the ground bleeding and he kicked him. Hanul Kim[5](https://www.leagle.com/decision/incaco20100526037#fid5) later told police that Hong, David Kim and Anfferney Kim were "pounding on" Brian Chin but he recanted this statement at trial.

Chris Shin testified that he saw Anfferney Kim stab Brian Chin. In an interview with police, Chris Shin also said he thought he saw Hong and David Kim attacking Brian Chin while he was on the ground bleeding. At trial, however, he testified that he was intimidated by the police and when the police suggested that Hong and David Kim participated in the attack, he agreed in order to help himself.

Jun Min testified that everyone suddenly ran from the parking lot and he saw Brian Chin lying face down on the ground with blood all over his white shirt. Brian Chin ultimately died of multiple stab wounds. It was later determined that he was stabbed 12 times with a knife that was at least five inches long. A shoe containing the DNA of David Kim was found in the bushes on the side of the Chapman Plaza parking lot.

The day after the murder, Anfferney Kim confessed to Kevin Kim that he stabbed Brian Chin numerous times. He appeared stressed and on the verge of tears. Anfferney Kim said that he had made a big mistake and was leaving that same day for South Korea. Customs records indicate that Anfferney Kim left for Seoul on a one-way ticket that day.

At around 4:00 a.m. in the morning after the murder, a police detective was conducting an investigation at the Chapman Plaza parking lot when Hong drove by with a female companion. When questioned by the detective, Hong said that he wanted to get something to eat even though there were no nearby restaurants open at that time. Hong initially denied being at Blink but later admitted that he was there. In a later interview on February 14, 2007, he admitted he was at the parking lot with the others but denied participating in the attack on Brian Chin. During the course of the investigation, Hong told the detective that Anfferney Kim killed Brian Chin. The police conducted a search of Hong's room and discovered photographs of Hong with David Kim and Anfferney Kim. Hong did not testify at trial.

On July 27, 2006, David Kim, who was previously in the Army Reserves, asked to be enlisted into active duty and was placed into active duty on August 17, 2006. At trial, David Kim testified that he was at Blink on the night in question when he got into an argument with Daniel Kang. Afterwards, he walked over to apologize to Daniel Kang when "some[one] just got up from the table and punched me in the face." He did not retaliate even though he had blood on his face. He later saw two groups of people heading towards Chapman Plaza and decided to follow them, expecting to see a fight. In reviewing the videotape from the security camera at Chapman Plaza, David Kim further testified that he saw people surrounding one person and when he realized there was blood, he "backed off." He lost his shoe when he was running from the parking lot. He denied participating in the attack on Brian Chin and testified he did not see Hong participate either.

**II. Gang Evidence**

Detective Ken Yueng, assigned to the Asian gang unit for the Los Angeles Police Department, testified for the prosecution as a gang expert. Yueng testified that he received training on gangs at the police academy, had experience investigating over 100 Asian gangs and served as an instructor at law enforcement seminars on gang culture. Yueng observed that Asian gang members were usually affluent and well educated, attending colleges such as UCLA, UC Riverside and USC and entering the military. They usually did not claim territory, like Latino or African-American gangs. Instead, members often joined a gang for "the thrill of it," for respect and for dating purposes because women liked the "bad boy image."

Detective Yueng further testified that the KTG was formed in early 2000 or 2002 with 15 to 20 members that mainly gathered in bars and clubs in Koreatown. Detective Yueng also believed Hanul Kim and Chris Shin were associated with KTG.

Although Detective Yueng was not aware Hong or David Kim were KTG members, he believed they associated with the gang because there were photographs of Hong and others making KTG gang signs. Hong also had cigarette burns on his body that signified gang affiliation. Yueng further testified to an incident involving Hong and a KTG member. On April 16, 2006, Hong was with a KTG member when the KTG member got into a fight with Peter Roh at a nightclub in Koreatown. When it appeared that Roh was winning, Hong joined in and stabbed Roh in the arm with a pocketknife. Hong was charged as a minor and it was found true that he had committed an assault with a deadly weapon. Detective Yueng further testified to additional assaults and robberies committed by other KTG members.

Detective Yueng opined Brian Chin's murder was committed for the benefit of KTG in order to save face after David Kim, a KTG associate, initially lost in his confrontation with Jun Min.

The defense presented expert testimony from Craig Babcock, a defense investigator with certifications and experience with Asian gangs. He testified that David Kim provided information in a previous case against the Mental Boyz, another Korean gang, to the prosecution's gang expert, who disclosed his name in open court. As a result, David Kim was beaten by members of the gang and he stopped participating in the gang. Babcock further testified that Hong had associated with or had been a member of the KTG at some point. Babcock opined that Brian Chin's murder was "clearly some kind of drunken brawl" and not gang related.

**III. The Verdict and Sentence**

The jury found Hong guilty as described above. Probation was denied, and the trial court sentenced Hong to a term of 25 years to life in prison for the first degree murder conviction. The court imposed and stayed the term on the gang enhancement. Hong was ordered to pay a restitution fine of $5,000 and victim restitution of $6,583.43. (§§ 1202.4, subd. (b), (f).) The court also imposed but stayed a parole revocation fine of $5,000. (§ 1202.45.)

**DISCUSSION**

**I. Instructional Errors**

**A. Natural and Probable Consequence Instruction**

Appellant first claims the trial court improperly instructed the jury on the natural and probable consequences doctrine of aiding and abetting. Relying on *People v. Hart* (2009) [176 Cal.App.4th 662](https://www.leagle.com/cite/176%20Cal.App.4th%20662) (*Hart*), a recent opinion from the Third District, Hong contends the instruction erroneously fails to advise the jury that he could be found guilty of a lesser included offense even if the jury found that the perpetrator committed a first degree murder.[6](https://www.leagle.com/decision/incaco20100526037#fid6) He further contends it presented the jury with an all or nothing choice in that it failed to include voluntary manslaughter and involuntary manslaughter as alternative natural and probable consequences. We disagree.

At trial, the jury was instructed that:

To prove that the defendant is guilty of murder, voluntary manslaughter, or involuntary manslaughter under the natural and probable consequences doctrine of aiding and abetting, the People must prove that:1. The defendant is guilty of simple assault, or assault by means likely to produce great bodily injury;2. During the commission of simple assault, or assault by means likely to produce great bodily injury a coparticipant in that simple assault, or assault by means likely to produce great bodily injury, committed the crime of murder;AND3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the simple assault, or assault by means likely to produce great bodily injury.A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the simple assault, or assault by means likely to produce great bodily injury, then the commission of murder was not a natural and probable consequence of simple assault, or assault by means likely to produce great bodily injury.To decide whether the crime of murder, voluntary manslaughter, or involuntary manslaughter was committed, please refer to the separate instructions that I will give you on those crimes.The People are alleging the defendant originally intended to aid and abet either simple assault, or assault by means likely to produce great bodily injury.A defendant is guilty of murder, voluntary manslaughter, or involuntary manslaughter if you decide that the defendant aided and abetted one of these crimes and that murder, voluntary manslaughter, or involuntary manslaughter was the natural and probable result of one of these crimes. However, you do not need to agree about which of these two crimes the defendant aided and abetted.

The jury was also instructed on the elements of murder, premeditation and deliberation, and the lesser crimes of voluntary and involuntary manslaughter. It was instructed on the required mental states for each of those offenses as well as the mental state for assault.

In *Hart,* an accomplice was convicted of premeditated attempted murder when his codefendant shot the owner of a liquor store during the course of their armed robbery. (*Hart, supra,* 176 Cal.App.4th at p. 665.) The jury was given instructions that it could find the defendant guilty of attempted murder if it found that it was a natural and probable consequence of attempted robbery. On appeal, the accomplice argued, as Hong does here, that the instructions erroneously precluded the jury from finding him guilty of any lesser degree of murder. The Third District found that the instructions were insufficient. It held that the instructions failed to inform the jury that in order to find the accomplice guilty of attempted premeditated murder "it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." (*Id.* at p. 673) The evidence could have supported a finding that attempted unpremeditated murder was a natural and probable consequence of the attempted robbery, but not attempted premeditated murder.

The court reasoned: "The trial court properly instructed the jury concerning premeditation and deliberation, as it relates to the attempted murder, stating in essence, that it is a subjective state of mind. However, in determining whether the premeditation and deliberation element was a natural and probable consequence of the attempted murder, the jury does not look at the aider and abettor's subjective state of mind. Therefore, the general instruction concerning the premeditation and deliberation element of attempted murder did not properly inform the jury concerning its duty with respect to the natural and probable consequences doctrine." (*Hart, supra,* 176 Cal.App.4th at p. 673.) *Hart* concluded, given the evidence, that the defendant was prejudiced because the trial court "failed to inform the jury that it could convict [the defendant] of a lesser crime than [the perpetrator's] crime under the natural and probable consequences doctrine." (*Id.* at p. 674.)

Under *Hart,* a trial court has the sua sponte duty, when a defendant's liability for attempted first degree murder is as an accomplice under a natural and probable consequences theory, to instruct the jury that it must determine whether premeditation and deliberation, as it relates to the attempted murder, was a natural and probable consequence of the target crime when the evidence would support a finding that a lesser degree of attempted murder was foreseeable and that the greater degree of the crime was not foreseeable. (*Hart, supra,* 176 Cal.App.4th at p. 673.) If the trial court fails to do so, it leaves the jury with the erroneous impression that it may not find the aider and abettor less culpable than the principle. (*Ibid.*)

Even if we were to follow *Hart,* we find it distinguishable here because the trial court gave the jury the option of convicting him of the lesser crimes of voluntary and involuntary manslaughter under the natural and probable consequence doctrine. The jury rejected that option.

*Hart* is also distinguishable insofar as it held that the instructions failed to inform the jury that in order to find the accomplice guilty of attempted premeditated murder "it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." (*Hart, supra,* at p. 673) Here, the jury had to make reference to the definition of either first or second degree murder equally by looking to other properly given instructions. The jury was not simply informed that attempted murder had to be evaluated to determine if it was a natural and probable consequence of the target crime and yet not told that attempted premeditated murder also must be likewise considered. Here, the jury was instructed that it must determine if murder was a natural and probable consequence, and the definition of both murder in the first and second degree were equally accessible to the jury under other properly given instructions. Even if there were an error under *Hart,* it simply is not present here.

However, we find the case of *People v. Cummins* (2005) [127 Cal.App.4th 667](https://www.leagle.com/cite/127%20Cal.App.4th%20667), 680 (*Cummins*), the better reasoned decision in this area. There, Division One of this District found that the trial court did not have to specifically instruct the jury that it must find premeditated attempted murder was a natural and probable consequence of the target crime. The court determined that an aider and abettor need not have acted with premeditation and deliberation in order to be convicted of attempted premeditated murder under the natural and probable consequences doctrine. The *Cummins* court found that when a jury is properly instructed on the elements of attempted premeditated murder and the natural and probable consequences doctrine, nothing more is necessitated. The *Cummins* court rejected the need for a *Hart*-type instruction. The court found that because the jury was properly instructed on the elements of attempted premeditated murder, "[n]othing more was required." (*Cummins, supra,* [127 Cal.App.4th 667](https://www.leagle.com/cite/127%20Cal.App.4th%20667), 681.)

*Cummins* also found the accomplice in that case "was a willing and active participant in all the steps that led to the attempt on [the victim's] life." (*Cummins, supra,* 127 Cal.App.4th at p. 680.) The defendants had kidnapped the victim, taken him to the edge of a cliff, and then one of the defendants pushed him off. *Cummins* concluded that, "[a]lthough the evidence did not conclusively determine which defendant had physical contact with the victim when he was pushed," the accomplice's conduct made him "no less blameworthy than" the actual perpetrator. (*Id.* at pp. 680-681.) Unlike in *Hart,* the evidence in *Cummins* supported a finding that a greater degree of murder was foreseeable.

As in *Cummins,* we conclude that the evidence supports a finding that first degree murder was foreseeable here. Despite Hong's contention, this was no mere drunken barroom brawl. This was a criminal street gang and one of its members had lost a physical altercation; they made the decision to save face and regain any lost respect by retaliating. They followed Brian Chin and his friends from Blink, down the escalator and down the street to Chapman Plaza. Along the way, the guard at Blink tried to stop them, but they were undeterred. They incapacitated Brian Chin's friends, who could have helped him, by using mace or pepper spray on two of them and by threatening a third with a knife. Hong admitted he followed Brian Chin to Chapman Plaza. Two witnesses told the police that they saw Hong participating in the attack on Brian Chin. At the time of the attack, people were shouting "Shank him," indicating someone had a knife and others knew about it. Hong also told the police Anfferney Kim killed Brian Chin.

Under these circumstances, it was reasonable for the jury to find that a reasonable person in Hong's position would have or should have foreseen premeditated murder. Although murder may not always be a natural and probable consequence of an assault, under certain factual circumstances, particularly in the gang context, a jury is entitled to find that it was. (*People v. Medina* (2009) [46 Cal.4th 913](https://www.leagle.com/cite/46%20Cal.4th%20913), 927-928.) Such was the case here.

As to Hong's contention that the instruction improperly presented the jury with an all or nothing choice because it failed to include involuntary and voluntary manslaughter as choices for the natural and probable consequences, as we have noted, any error was corrected by the instruction itself. The instruction clearly advises the jury they must determine that: "A defendant is guilty of murder, voluntary manslaughter, or involuntary manslaughter if you decide that the defendant aided and abetted one of these crimes and that murder, voluntary manslaughter, or involuntary manslaughter was the natural and probable result of one of these crimes." There was no prejudice. (*People v. Breverman* (1998) [19 Cal.4th 142](https://www.leagle.com/cite/19%20Cal.4th%20142), 165.)

**B. Aider and Abettor Instruction**

Hong next asserts the trial court committed instructional error when it gave the jury the standard aiding and abetting instruction embodied in CALCRIM No. 400. We disagree.

The trial court instructed the jury with CALCRIM No. 400 as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." According to Hong, CALCRIM No. 400 misled the jury into believing that an aider and abettor must be found "equally guilty" of the crime committed by the perpetrator. As a result, if the jury found Anfferney Kim to be guilty of first degree murder, it would necessarily have had to find Hong guilty of first degree murder as well.

Our Supreme Court has made it clear that an accomplice may be convicted of a greater offense than the actual perpetrator under an aiding and abetting liability. (*People v. McCoy* (2001) [25 Cal.4th 1111](https://www.leagle.com/cite/25%20Cal.4th%201111), 1116-1117.) In *People v. Samaniego* (2009) [172 Cal.App.4th 1148](https://www.leagle.com/cite/172%20Cal.App.4th%201148), 1162-1167, Division Two of this District expanded on that ruling and determined an accomplice may be convicted of a lesser offense than the perpetrator as well. We agree with our colleagues in *Samaniego* that CALCRIM No. 400 is problematic because it suggests to jurors that an aider and abettor must be found "equally" guilty of the same crime as the perpetrator. (*Id.* at pp. 1164-1165.)

We note, however, that Hong forfeited his claim of error on appeal by failing to object or request a modification of the standard instruction at trial. (*Samaniego, supra,* 172 Cal.App.4th at p. 1163.) But even if he had properly preserved the issue for review, there was no prejudicial error.[7](https://www.leagle.com/decision/incaco20100526037#fid7) To the extent the instructional error affected Hong's constitutionally guaranteed trial rights, we must examine the effect of this error against the harmless error test set forth in *Chapman v. California, supra,* 386 U.S. at page 24. Under this test, we may not find the error harmless unless we are convinced beyond a reasonable doubt that the jury's verdict would have been the same absent the asserted error. (See. e.g., *People v. Samaniego, supra,* 172 Cal.App.4th at p. 1165.)

In this situation, CALCRIM No. 400 had the potential to suggest that Hong's liability for murder — as an aider and abettor — was "equal" to that of Anfferney Kim, the stabber, whether or not he shared the same mental state for murder as Anfferney. The error was harmless beyond a reasonable doubt, however, because the jury necessarily resolved the issue of Hong's mental state against Hong under other properly given instructions.

The jury was not instructed with CALCRIM No. 400 in a vacuum. Instead, the trial court included other instructions which correctly and adequately described the mental state required to find Hong guilty. These instructions included CALCRIM No. 401, which explained to the jury that: "To prove the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that . . . [t]he defendant knew the perpetrator intended to commit the crime," and that, "[b]efore or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime." The court then instructed with CALCRIM No. 520, further explaining to the jury: "To prove that the defendant is guilty of [murder], the People must prove that . . . [t]he defendant committed an act that caused the death of another person" and that, "[w]hen the defendant acted, he had a state of mind called malice aforethought." The court also instructed with CALCRIM No. 521, which states: "[The] defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." The jury was also provided instructions on the mens rea required for voluntary manslaughter and involuntary manslaughter. The court instructed the jury on the effect of voluntary intoxication, stating, "You may consider evidence, if any, of a defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation."

By convicting Hong of first degree murder rather than second degree murder or manslaughter, the jury necessarily found that Hong had acted, either of his own accord or in the aid and assistance of another, willfully and with the intent to kill. The trial court's instructions on the general principles of aiding and abetting as outlined in CALCRIM No. 400 did not relieve the jury, under the court's other instructions, of finding that Hong had the intent to kill at the time of Brian Chin's murder.

**C. Accomplice Instruction**

Hong next contends that the evidence established by a preponderance of the evidence that Chris Shin was an accomplice in the murder of Brian Chin. Because "an accomplice has a natural incentive to minimize his own guilt before the jury and to enlarge that of his cohorts[,]" a conviction may not be based on the uncorroborated testimony of an accomplice. (§ 1111; *People v. Brown* (2003) [31 Cal.4th 518](https://www.leagle.com/cite/31%20Cal.4th%20518), 555.) Accordingly, the trial court was required to instruct the jury to find whether Chris Shin was an accomplice in the murder of Brian Chin and if it so found, not to consider any statements by Chris Shin unless they were corroborated by independent evidence. (§ 1111; *People v. Felton* (2004) [122 Cal.App.4th 260](https://www.leagle.com/cite/122%20Cal.App.4th%20260), 268.) The trial court instructed the jury on accomplice testimony as to Hanul (Arnold) Kim but not Chris Shin.

Even assuming Chris Shin was an accomplice, an issue which we need not reach, Hong suffered no prejudice because independent evidence corroborated Chris Shin's testimony. (§ 1111;*People v. Sully* (1991) [53 Cal.3d 1195](https://www.leagle.com/cite/53%20Cal.3d%201195), 1228.) Corroborating evidence "`"must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged."'" (*People v. Bunyard* (1988) [45 Cal.3d 1189](https://www.leagle.com/cite/45%20Cal.3d%201189), 1206.) Corroborating evidence may be slight, may be entirely circumstantial and entitled to little consideration when considered alone. Further, it need not be sufficient to establish every element of the charged offense. (*People v. Lewis* (2001) 26 Cal.4th 334, 370; *People v. Avila* (2006) [38 Cal.4th 491](https://www.leagle.com/cite/38%20Cal.4th%20491), 563.)

Here, Chris Shin's testimony was sufficiently corroborated by Hong's own conduct. When he was interviewed, he initially denied being at Blink, claiming he learned about Brian Chin's murder from the newspaper. He then admitted that he was at Blink but lied about leaving the bar after the initial altercation between Jun Min and David Kim. As explained by our Supreme Court, "[d]efendant's initial attempt to conceal from the police his involvement in the activities culminating in the murders implied consciousness of guilt constituting corroborating evidence." (*People v. Avila, supra,* 38 Cal.4th at p. 563.)

**II. Evidence of Gang Allegation**

**A. Expert Testimony Regarding Hong's Subjective Motive and Intent**

Hong next challenges the following testimony provided by Detective Yueng, the prosecution's expert on Asian gangs:

Q And in the context of — now, I'm strictly talking about Justin Hong's prior stabbing of Peter Roh, and I only want you to talk about the motive in that attack and the intent in that attack and how it relates to the present crime.What was Justin Hong's motive in attacking Peter Roh as he was beating up Justin's homeboy, Sang Han, what was his motive and his intent?A. His motive would have been to step up to the plate to protect his fellow gang members and his intent was to maintain the respect of the gang. The reputation of the gang.Q So basically, would you say part of his motive was also retaliation?A Correct.Q And what's the difference between retaliation and saving face?A Retaliation is part of the act of saving face. So I don't think there is a difference. But to save face, you can do different things. You can beat down the other guy. You can curse the other guy back or — but to save face ultimately is considered as retaliation. Because someone does someone wrong, `A' does `B' wrong or disrespects `B' and `B' has to do something in return, so to me, that's retaliation.Q Last Question.With respect to Justin Hong only and his motive and intent in the murder of Brian Chin, what does his prior act of stabbing and slashing, however you want to put it, Peter Roh, tell you about Justin Hong's motive and intent in participating in the attack and murder of Brian Chin?A Again, in the murder of the victim Brian Chin, Mr. Hong's role would be to step up to the plate, to provide assistance to a fellow gang member who was given a bloody nose basically who lost the fight, and also at the same time, to do that to maintain the respect and honor of the gang.

Hong contends that Yueng improperly testified to his subjective motive and intent, an ultimate fact to be decided by the jury. In support of his argument, Hong relies on *People v. Killebrew* (2002) [103 Cal.App.4th 644](https://www.leagle.com/cite/103%20Cal.App.4th%20644), 652 footnote 7, where a gang expert opined that every gang member travelling in a convoy of three cars would know there was a gun in two of the cars and would mutually possess those guns. The *Killebrew* court found that the expert's testimony "was the only evidence offered by the People to establish the elements of the crime [of conspiring to possess a handgun.] As such, it is the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded." (*Id.* at p. 658.) The *Killebrew* court noted that "[a] bright line cannot be drawn to determine when opinions that encompass the ultimate fact in the case are or are not admissible. The issue has long been a subject of debate. . . .' We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved.'" (*Id.* at pp. 651-652.)

Though Yueng may have improperly testified to the specific intent or motive of a specific individual in this brief colloquy, we find any error in its admission to be harmless given the circumstances and the context in which the testimony was given. We evaluate the admission of expert testimony for harmless error under the standard announced in *People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818). (*People v. Prieto* (2003) [30 Cal.4th 226](https://www.leagle.com/cite/30%20Cal.4th%20226), 247.) Here, Yueng had already testified extensively, and without objection,[8](https://www.leagle.com/decision/incaco20100526037#fid8) to general characteristics of Asian gangs, KTG's activities, Hong's gang ties and the concept of losing face in Asian gang culture. Yueng was also asked about a hypothetical involving the same facts as this case and opined that it was committed to benefit a gang by helping the gang save face. Further, the jury was admonished to evaluate the believability of expert testimony based on his qualifications, experience and the basis for his opinion. We presume the jury understood and followed these instructions. (*People v. Williams* (2009) [170 Cal.App.4th 587](https://www.leagle.com/cite/170%20Cal.App.4th%20587), 613.)

**B. Gang Enhancement**

The information alleged that Brian Chin's murder was "committed 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 in criminal conduct by gang members." To prove the gang enhancement allegation, the prosecution had to show beyond a reasonable doubt that, among other things, the gang "has, as one or more of its primary activities, the commission of murder, attempted murder, assault with a deadly weapon, or burglary." (*People v. Sengpadychith* (2001) [26 Cal.4th 316](https://www.leagle.com/cite/26%20Cal.4th%20316), 323-324 (*Sengpadychith*).)

The California Supreme Court was called upon to construe the "primary activities" element of section 186.22(f) in *Sengpadychith.* There, the court explained: "The phrase `primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's `chief' or `principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . `Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a primary activity of the department. Section 186.22 . . . requires that one of the *primary activities* of the group or association itself be the commission of [specified] crime[s]. . . . Similarly, environmental activists or any other group engaged in civil disobedience could not be considered a criminal street gang under the statutory definition unless one of the primary activities of the group was the commission of one of the enumerated crimes found within the statute.'" (*Sengpadychith, supra,* 26 Cal.4th at pp. 323-324, quoting *People v. Gamez* (1991) [235 Cal.App.3d 957](https://www.leagle.com/cite/235%20Cal.App.3d%20957), 970-971.)

Hong contends that there is no substantial evidence that one of the primary activities of KTG consisted of murder, attempted murder, assault with a deadly weapon, or burglary to support a true finding on the gang enhancement allegation. *In re Alexander L.* (2007) [149 Cal.App.4th 605](https://www.leagle.com/cite/149%20Cal.App.4th%20605), 611 and *People v. Perez* (2004) [118 Cal.App.4th 151](https://www.leagle.com/cite/118%20Cal.App.4th%20151), 159-160, the two cases relied upon by Hong, are instructive on this point.

In *In re Alexander L.,* a sheriff's deputy opined that graffiti sprayed by the defendant benefitted his gang because it might intimidate rival gangs. "When asked about the primary activities of the gang, he replied: `I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' No further questions were asked about the gang's primary activities on direct or redirect examination. [¶] [The] entire testimony on this point is quoted above-he `kn[e]w' that the gang had been involved in certain crimes." (*Id.* at p. 611.) Without any foundation for his knowledge, the appellate court held the testimony by the gang expert failed to provide substantial evidence that the gang engaged in one of the enumerated crimes as its primary activity. (*Id.* at p. 614.)

In *People v. Perez, supra,* 118 Cal.App.4th at page 159, the prosecution presented evidence that the gang had participated in a beating six years before the subject crime and four shootings less than a week before the subject crime with no evidence of any crime in between those incidents. This was held insufficient to establish predicate crimes were one of the "primary activities" of the gang. (*Ibid.*)

Here, Yueng testified as to KTG's activities as follows:

Q Now, what sort of crimes do KTG members commit?A As far as I know, murder, the present case. Attempted murder, burglary, possession of weapons. Driving stolen vehicles. I think that's all I know.Q How about assault?A Assault with a deadly weapon, yes.

Yueng further testified that KTG was created in 2000 or 2002 and consisted of 15 to 20 members. Yueng testified that Hong and another KTG member committed an assault with a deadly weapon in 2006. Other KTG members were convicted of assault with a deadly weapon in 2002 and residential burglary in 2003.

The difference between the evidence provided in *In re Alexander L.* and *People v. Perez* is quite apparent. While there was no foundation for the expert's testimony in *In re Alexander L.,* there is no contention that Yueng's testimony lacked foundation. Yueng's opinions were the product of both practical and academic training, hands-on police experience with gangs and investigations of over 500 gangs, of which over 100 were Asian. In short, Yueng was eminently qualified to give the opinions that he gave. Moreover, this is not a case where Yueng failed to show the KTG consistently and repeatedly engaged in murder, attempted murder, assault with a deadly weapon or burglary like in *People v. Perez.* Given the small number of KTG members and the short amount of time they have been in existence, Yueng's testimony regarding the specific crimes committed by KTG members provides substantial evidence to support the true finding on the gang enhancement allegation. The use of any magic words, such as "primary activity," is not required.

**III. Cumulative Error**

Hong further contends that the cumulative prejudice from the instructional and evidentiary errors require reversal of his conviction. "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) [17 Cal.4th 800](https://www.leagle.com/cite/17%20Cal.4th%20800), 844.) While no trial is perfect, and this one is no exception, any errors were harmless and did not amount to a clear miscarriage of justice, as discussed at length above. (*People v. Bradford* (1997) [14 Cal.4th 1005](https://www.leagle.com/cite/14%20Cal.4th%201005), 1064.)

**IV. Sentencing Error**

The record shows the trial court's oral pronouncement of judgment differs markedly from the minute order on the sentencing hearing and the abstract of judgment. None, however, correctly apply the sentence for the gang enhancement under section 186.22. In the transcript of its oral pronouncement, the trial court imposed and stayed "an additional term of 50 years to life pursuant to Penal Code section 186.22(b)." The minute order imposes and stays an "additional 15 years to life." The abstract of judgment merely reflects that the gang enhancement was stayed.

Hong seeks to amend the abstract of judgment to clarify that a true finding on the gang enhancement is subject to a 15-year minimum eligible parole date under section 186.22, subdivision (b)(5). (*People v. Lopez* (2005) [34 Cal.4th 1002](https://www.leagle.com/cite/34%20Cal.4th%201002), 1007.) The Attorney General agrees, as do we. Because Hong was convicted of first degree murder and sentenced to the mandatory 25 years to life, however, the 15-year minimum parole eligibility date will have no effect on his sentence. (*Id.* at p. 1010.)

**DISPOSITION**

The judgment is modified to reflect that the gang enhancement is subject to a 15-year minimum eligible parole date under section 186.22, subdivision (b)(5). The clerk of the superior court is directed to correct the abstract of judgment to reflect this modification and forward the corrected abstract to the Department of Corrections. As modified, the judgment is affirmed.

We concur.

FLIER, J.

LICHTMAN, J.[\*](https://www.leagle.com/decision/incaco20100526037#fid9)

**FootNotes**

1. All further section references are to the Penal Code.

2. David Kim was tried alongside Hong. His appeal is currently pending before this court in Case No. B211454.

3. Because many of the individuals involved in this matter share the same first or last names, we will refer to each by their first and last names.

4. "Mad-dog" is an expression used by gang members to describe certain behaviors, including looking at someone to intimidate them. (*People v. Torres* (2008) [163 Cal.App.4th 1420](https://www.leagle.com/cite/163%20Cal.App.4th%201420), 1423.)

5. Hanul Kim was granted immunity for his testimony.

6. The Attorney General initially contends that Hong has forfeited his contention because he failed to object to the instruction or request a modification during trial. However, a defendant's contention that an instruction misstated the law or violated his right to due process "is not of the type that must be preserved by objection." (*People v. Smithey* (1999) [20 Cal.4th 936](https://www.leagle.com/cite/20%20Cal.4th%20936), 976, fn. 7; § 1259.) As a result, we consider Hong's argument on the merits.

7. Because we reach the merits of the issue, we need not address Hong's alternative argument that he received ineffective assistance of counsel.

8. We note that Hong failed to object to the testimony of which he now complains. Accordingly, he forfeited his right to raise the issue on appeal. We, however, reach the merits of the issue considering his alternative argument of ineffective assistance of counsel.

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