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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC JASON DELAHOUSSAYE,

Defendant and Appellant.

A105109

(San Mateo County
Super. Ct. No. SC054317)

Appellant Eric Jason Delahoussaye seeks to reverse his conviction after jury trial of two counts of assault, and one count each of participation in a criminal street gang and possession of methamphetamine, along with criminal street gang enhancement allegations, for which he was sentenced for a total of 11 years. Appellant contends there was not sufficient evidence that he possessed a “usable” quality of methamphetamine or had specific intent to promote, further, or assist in criminal gang activity, and that the court committed prejudicial error by failing to adequately instruct the jury about the definition of “primary activities” in determining the criminal street gang count and the two enhancement allegations. Appellant also contends that the trial court violated his constitutional rights when it imposed upper term and consecutive prison sentences for his convictions.

In a prior opinion filed on November 8, 2005, we rejected appellant’s arguments and affirmed all of his convictions. However, on January 22, 2007, the United States Supreme Court issued its mandate in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*), which reversed the judgment in this matter and remanded it to

this court for further consideration in light of *Cunningham*. Accordingly, the remittitur issued by this court on February 6, 2006 was recalled, and the parties were asked to file, and subsequently did file, supplemental briefs addressing the effect of *Cunningham* on the sentencing issues presented in this appeal. On July 19, 2007, the California Supreme Court issued its opinions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), which are directly relevant to the issues raised in this appeal as well, and which we discuss, *post*.

We affirm the trial court's judgment in all respects other than sentencing. Regarding sentencing, pursuant to *Cunningham, supra*, 549 U.S. ___ [127 S.Ct 856], and *Black II, supra*, 41 Cal.4th 799, we affirm the trial court's imposition of consecutive sentences and an upper term sentence for count 1, vacate the other upper term sentences, and remand this matter for further proceedings regarding sentencing consistent with this opinion and *Sandoval, supra*, 41 Cal.4th 825.

BACKGROUND

At trial, a police officer testified that he had investigated two assaults on April 4 and 9, 2003 (there was no evidence that appellant was involved in either assault) and was an expert on criminal street gangs. He stated that, on April 4, a group of men belonging to the East Side Daly City (ESDC) gang (a "Norteno" gang that generally wears red clothing) and Fog Town gangs came upon a man, M.H., working on his car in front of his house in Daly City. The gang members surrounded M.H., beat him, and took his blue cigarette lighter before M.H.'s friends chased them away. Some of the ESDC gang members returned a few minutes later and were confronted by a gun-carrying resident of M.H.'s house. The men chased this resident into his garage and attacked him. The resident shot three of the attackers, one of whom collapsed and died about a block away. Three of the attackers were later convicted of strong-arm robbery in association with a street gang for the incident.

Six days later, around midnight on April 9, a man and a woman wearing blue shirts were washing clothes in a laundromat near where the attacker had collapsed on April 4. A group of men entered the laundromat and asked the man if he was "scrap," to

which he replied that he was not in any gang and went back to his laundry. The men attacked him from behind, knocked him down, and kicked and stomped him hard enough to leave a shoe print on the side of his head. His woman companion tried to break up the attack and was attacked herself. According to the testifying officer, two suspects identified as participating in the assault were ESDC gang members.

According to another testifying officer, the police videotaped a gathering of about 25 known or suspected ESDC and Fog Town gang members, including the appellant, among those attending a rosary for the slain attacker at a mortuary in South San Francisco on April 10. The next morning, the testifying officer learned that two more attacks had occurred in the area the previous evening after the camera had been turned off; he began investigating these as well. The evidence at trial indicated appellant played a leading role in both assaults.

The first victim was Jimmy C., a 24-year-old homeless man out on parole who was going to his aunt's house in South San Francisco around 7:30 p.m. on April 10. He was wearing a black jacket with a red "Nike" insignia. According to his trial testimony, he saw a group of people, who appeared to him to be Latino, outside a funeral home. More than six men surrounded him at the park across the street from the mortuary. After he denied being a "Norte" gang member, he was punched many times in his head, back, and legs. He fell to the ground and the group continued to kick him all over his body. He could not see who was beating and kicking him because he was trying to cover his head, and soon lost consciousness. When he regained consciousness, his jacket was gone. He was hospitalized overnight, was in pain for two weeks from a variety of injuries, and continued to suffer from severe headaches at the time of trial.

An eyewitness to Jimmy C.'s beating, Maria G., testified that she saw five young men within a surrounding group of 15 to 20 bystanders, most of whom appeared to be Hispanic, hitting someone on the ground. She crossed the street towards the scene and specifically saw appellant being pulled away from the victim, still making motions as if to hit the victim, and heard him say to the others, "Hit him. Go." She saw appellant wipe his red-stained hands and go towards the mortuary with the others. After the attackers

left, she went over and saw the victim, who she identified from photographs at trial. Maria G. walked by the mortuary on her way home and saw people involved in the attack by the funeral home. She went home and began making preparations for dinner for a friend, Jose M.

Jose M. was walking to Maria G.'s house when, according to his testimony, he saw a lot of people, appearing to be Hispanic and Filipino, coming out of the funeral home. A thin Hispanic-looking man in his twenties' unknown to Jose M., approached him. After a brief verbal exchange, the man tried to jab Jose M. with a four to five-inch knife. Jose M. ran, only to be pursued by a group that caught him, knocked him down, surrounded him, and started to beat him, punching and kicking him repeatedly mostly in his head. Jose M. did not identify anyone in the courtroom as one of the attackers.

C.S., an eyewitness to a part of the attack on Jose M., identified appellant as leading a group running away from the mortuary. She saw the group, appellant included, hovering over some bushes and kicking and punching someone on the ground, as a young man in a red hooded sweatshirt kept watch about four feet from the beating. The attackers ran in the direction of the mortuary as the victim, stumbling and appearing disoriented, pointed and shouted at his attackers.

A bloodied Jose M. arrived at Maria G.'s house at about 9:00 p.m. Together they went back to the area of the funeral home and found six South San Francisco officers. Other officers had already detained and were questioning appellant, whom Maria G. recognized.

Appellant told police at the scene that several of his friends were running down the street near the time of the "fight," but that he did not know their names or remember exactly who they were. After appellant agreed to a search, police found in his jacket pocket a cigarette pack with a clear plastic bag containing a crystal-like substance inserted between the box and the wrapper. According to an officer who testified at trial, appellant indicated it was his and that it was methamphetamine. He admitted that he had "smoked some of that shit earlier" and pleaded with officers to "just cite [him] out . . .

give [him] a ticket.” He was placed under arrest and taken to county jail. A criminalist testified at trial that the baggy contained .03 grams of methamphetamine.

Appellant was charged with one count of assault by means of force likely to produce great bodily injury for each of the attacks on Jimmy C. and Jose M. in violation of Penal Code section 245, subdivision (a)(1); participation in a criminal street gang in violation of Penal Code section 186.22, subdivision (a); and possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). It was also alleged that the assaults were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1).

A jury found appellant guilty on all counts, and also found the enhancement allegations to be true. Among other things, the trial court denied appellant probation and sentenced him to an 11-year prison term, imposing the upper term of four years, and a consecutive upper term enhancement of four years, for count 1, the assault on Jimmy C.; stayed an upper term of three years for the gang participation count; imposed a consecutive term of one year one-third the mid-term, and a consecutive term of one year, four months, one third of the upper term for the enhancement allegation, for the assault on Jose M. The court imposed a consecutive eight-month term, one third of the mid-term, for possession of methamphetamine. This timely appeal followed.

DISCUSSION

I. Appellant’s Insufficient Evidence Contentions Lack Merit

Appellant makes two contentions that are governed by the substantial evidence standard of review. “The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to

determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.]’ ” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.)

“ ‘The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation omitted.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.’ ” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

“ ‘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.’ [Citation.] Simply put, if the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Farnam* (2000) 28 Cal.4th 107, 143.)¹ “Substantial evidence may consist of the testimony of a single witness or even the testimony of a party.” (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 518.)

A. Substantial Evidence Supporting the Possession Conviction

Appellant contends there was insufficient evidence that he possessed an amount of methamphetamine that was “usable for consumption or sale,” requiring reversal of his conviction. He is not correct.

The essential elements of possession of a controlled substance are “dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially.” (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.)

¹ This is the governing law for purposes of appellate review, notwithstanding the suggestion in appellant’s opening brief that we should reverse “where the proven facts give equal support to two inconsistent inferences,” because neither is established. This is a function of the jury, not the appellate court.

Health and Safety Code section 11377, subdivision (a), criminalizes the possession of methamphetamine, without any mention of a minimum amount. Our Supreme Court has interpreted the statute as requiring that the substance not be “useless traces or residue.” (*People v. Leal* (1966) 64 Cal.2d 504, 505.) More recently, the Supreme Court has made clear that the prosecution does *not* need to establish the amount of the illegal substance necessary to produce a narcotic effect in order to establish that the substance is “usable.” (*People v. Rubacalba* (1993) 6 Cal.4th 62, 65.) “ ‘It is not scientific measurement and detection which is the ultimate test of the known possession of a narcotic, but rather the awareness of the defendant of the presence of the narcotic. . . . *The presence of the narcotic must be reflected in such form as reasonably imputes knowledge to the defendant.*’ ” (*Id.* at p. 67, quoting *People v. Aguilar* (1963) 223 Cal.App.2d 119, 122-123.)

Appellant misreads *People v. Rubacalba, supra*, 6 Cal.4th 62, by arguing that there cannot be a conviction here because the small amount of methamphetamine found, .03 grams, was among the kind of “substances useless in form or quantity” contemplated in that case. (*Id.* at p. 65.) Putting aside whether or not the evidence supported his contention, the *Rubacalba* court used the phrase to refer to quantities that were far less than what was uncovered here, such when the substance is “a blackened residue or a useless trace.” (*Id.* at p. 66; see also *People v. Karmelich* (1979) 92 Cal.App.3d 452, 456 [“The decision in *Leal* must be limited to such cases, where only a residue unusable for any purpose, is found.”])

There was a good deal of substantial evidence in the present case to support appellant’s conviction. This included the police officer’s testimony that appellant acknowledged to the police when the plastic baggy of methamphetamine was found in his cigarette pack that it was methamphetamine, that he had smoked some of that “shit” earlier in the day, and that he pleaded for a ticket for the possession, from which it can be inferred that he was aware that he was in possession of a controlled substance. Respondent also presented testimony from a criminalist that the substance was indeed

found to be methamphetamine, in an amount which the criminalist was capable of manipulating.

Furthermore, both the criminalist and a detective provided testimony from which it could be reasonably inferred that the amount found in appellant's possession *was* in fact usable as a narcotic. The criminalist was specifically asked about .01 grams, "So it's an amount that could be picked up and put into a cigarette and smoked; is that correct?" She responded, "Yes."

A detective with the Daly City Police Department who had formal training regarding the use and identification of methamphetamine and arrested approximately 25 people under the drug's influence testified as well:

"Q. Detective . . . , directing your attention specifically to the off-white crystalline substance that's in the plastic bag. Based upon your training and experience, is that a *usable amount of that substance*? [¶] . . . [¶]

"A. Yes.

"Q. How could that be *used*?

"A. Very easily. *Open up the bag and dump the contents of it into a pipe on a piece of tin foil or in a cigarette.*

"Q. Are there any other methods of *using* methamphetamine? *Can you actually ingest it?*

"A. You can. It's not commonly done. It's not the most efficient way of doing it.

"Q. So despite the amount of the apparent crystal methamphetamine that you have in that bag, *is that enough that you could actually pick it up and put it into a pipe or a cigarette?*

"A. *Right, correct.*" (Italics added.)

Appellant's trial counsel followed this exchange immediately with his cross-examination as follows:

"Q. I take it, officer, your testimony regarding that exhibit that if it, in fact, is methamphetamine, *it could be used* in that way?

“A. Correct. I’m making an assumption that that has been analyzed and determined to be methamphetamine. It certainly looks like it, but I haven’t seen a lab report or anything of that sort. [¶] . . . [¶]

“Q. Now, what is your definition for usable amount?

“A. Something that you can see, manipulate.

“Q. Is there any minimal amount of quantity that you would use as a cutoff for that definition?”

“A. I don’t know if I could quantify that into grams. But what I believe to be a *usable amount* is something that you can pinch, move around, manipulate, *put into a smoking device or onto a spoon to heat up. Something that you can use.*”

(Italics added.)

Appellant would have us believe that the detective’s testimony was merely that he “considered any amount that could be seen and manipulated a usable quantity.” This ignores the remainder of the detective’s testimony, the context of his statements, and even the opening question by appellant’s own trial counsel, from which it can be inferred that the detective equated “use” with smoking the methamphetamine in a pipe or cigarette to obtain a narcotic effect. This evidence, as well as the criminalist’s testimony, appellant’s own statements, and the physical evidence itself fatally undermine appellant’s contention that the evidence was insufficient to support his possession conviction.²

B. Substantial Evidence of Appellant’s Specific Intent

Appellant asserts that the evidence of his specific intent to promote the interests of a gang was insufficient to support the gang enhancements to his aggravated assault convictions. This is incorrect.

Penal Code section 186.22, subdivision (b)(1) provides in relevant part that “any person who is convicted of a felony committed for the benefit of, at the direction of, or in

² Given this finding, we need not address another of respondent’s arguments, namely that appellant’s admission that he had smoked some of the methamphetamine earlier in the day was sufficient evidence to affirm his possession conviction.

association with any criminal street gang, with the *specific intent* to promote, further, or assist in any criminal conduct by gang members” shall be subject to certain sentence enhancements. (Italics added.)

Appellant relies on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, to argue that the specific intent to further a gang’s goals cannot be inferred from appellant’s leading role in the April 10 assaults as described herein with other ESDC gang members, coupled with expert testimony on how ESDC benefited from these and other such crimes. Appellant’s reliance on *Garcia* is misplaced. He makes much of the fact that *Garcia* asks whether there was sufficient evidence of “intent to ‘promote, further, or assist in’ other criminal activity of the gang apart from the robbery of conviction” (*id.* at p. 1101), arguing that there was no evidence that any participation by him in the assaults was intended to do so. However, appellant ignores the fact that our Supreme Court, in *People. v. Gardeley* (1996) 14 Cal.4th 605, 622, has held that such specific intent may be found based upon the combination of participation in the current offense and expert testimony about the benefits to the criminal gang of such activities. Indeed, *Gardeley* is cited favorably by *Garcia v. Carey, supra*, 395 F.3d at page 1104, and the *Garcia* court’s holding was consistent with *Gardeley*’s legal standard.³ While the *Garcia* court did grant an inmate’s writ of habeas corpus regarding a sentence enhancement for gang-related activity because it found insufficient evidence of specific intent, it did so because the very limited expert testimony at trial had failed to connect the robbery with potential gang objectives, such as intimidation or protection of its turf. (*Garcia*, at pp. 1103-1104.) Here, the evidence of appellant’s gang activities was quite clear, and the expert testimony unquestionably connected these activities with ESDC’s criminal gang objectives.

³ Even if appellant were correct in his view of the import of *Garcia v. Carey, supra*, 395 F.3d 1099, we would not follow such an interpretation by the Ninth Circuit in the face of governing California Supreme Court authority that states otherwise. (*Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal.App.4th 345, 355-356.) California Supreme Court opinions are binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant was known to frequent Daly City since 1998 as shown in police reports and field identification cards filled out by police officers to document contacts with suspected gang members. The testifying gang expert, gang liaison for the police department since 2002, personally encountered appellant 12 times beginning in late 2000, and was given information in October 2001 from another police gang expert that appellant was in the ESDC gang. Appellant's field identification cards included the designation "known gang member" by October 2001. Furthermore, 42 of these field identification cards were filled out by officers having contact with appellant from 1998 to 2003. Appellant was noted as wearing the color red 16 times, and contacted in the presence of other ESDC gang members 17 times.

As already discussed, there was substantial evidence that four assaults by ESDC gang members occurred from April 4 to April 10, 2003. Eyewitnesses saw appellant play a leading role in the two April 10 assaults, for which he was charged. These April 10 assaults occurred in the area of a mortuary where funeral activities for one of the participants in the April 4 assault were taking place. Appellant was among ESDC gang members at the mortuary, led a group that included gang members from the mortuary to assault Jose M. and, as can be inferred from the evidence, was in the group that demanded of Jimmy C. whether he was a gang member just before beating him.

Respondent's expert on the ESDC gang testified that Norteno gangs "commit violent crimes to maintain control of their area." He stated that members advance and gain respect within a gang by committing violent acts, which acts also gain fear and respect for the gang in the community, testifying that "[t]he more violent crimes they commit, the more fear they have from the junior members of the gang thus earning respect. Fear with rival gangs, again earning respect, also the fear that they instill in the community and the law abiding citizens that reside in the areas of their turf to maintain their control. That's all how they accumulate the respect."

The expert testified about ESDC's criminal activities, including those incidents described herein. He stated that the primary criminal activities of the ESDC gang were assaults with a deadly weapon and with force likely to produce great bodily injury, and

strong-arm robbery. ESDC gang members typically surrounded a single victim and beat them with hands and fists, as well as weapons such as bottles or bats, surrounding their victims in order to intimidate them, and “so that other subjects can’t butt into the middle . . . and stop the beating,” with those on the periphery acting as lookouts. This was entirely consistent with the April 2003 assaults described herein, including those for which appellant was charged. The expert further stated that in his opinion the April 10 assaults were motivated by revenge for the death of the April 4 attacker, and to rehabilitate ESDC’s image, and that Jimmy C. may have been attacked because he had “disrespected” ESDC to the extent he wore the ESDC red gang color.

It can reasonably be inferred from this extensive evidence that appellant participated in ESDC gang-related assaults on April 10, and that he did so with the specific intent of promoting, furthering, and assisting ESDC’s criminal activities. Under *People v. Gardeley, supra*, 14 Cal.4th 605, the jury’s findings about appellant’s specific intent were well-supported by substantial evidence. Appellant’s contention to the contrary is without merit.

II. The Trial Court Instructions to the Jury Regarding “Primary Activities”

Appellant contends the trial court committed prejudicial error by its failure to adequately define the term “primary activities” to the jury as that term relates to the criminal street gang count and enhancement allegations. This also is incorrect.

A trial court must instruct the jury on “ ‘those principles of law commonly or closely and openly connected with the facts of the case before the court.’ ” (*People v. Hood* (1969) 1 Cal.3d 444, 449.) A trial court also has a duty to instruct sua sponte on particular defenses relied upon or which are supported by substantial evidence and are not inconsistent with the defendant’s theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

However, “[a]s a general rule, in the absence of a request for amplification, the language of a statute defining a crime or defense usually is an appropriate basis for an instruction. If a statutory word or phrase is commonly understood and is not used in a technical sense, the court need not give any sua sponte instruction as to its meaning. If,

however, a word or phrase is used in a technical sense differing from its commonly understood meaning, clarifying instructions are appropriate and should be given on the court's own motion." (*People v. Rodriguez* (2002) 28 Cal.4th 543, 546-547.) "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning." (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Furthermore, "we are mindful that 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" (*People v. Frye* (1998) 18 Cal.4th 894, 957.)

Count 2 charged appellant with participation in a "criminal street gang" in violation of Penal Code section 186.22 (section 186.22), subdivision (a), and the enhancement allegations attached to counts 1 and 3 (each for assault) alleged that appellant committed offenses to benefit a "criminal street gang" in violation of section 186.22, subdivision (b). Section 186.22, subdivision (f) stated, at the time of the trial,⁴ "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Italics added.)

The trial court informed the jury about this "primary activities" provision in its instructions about count 1 and the enhancement allegations. However, the court's *definition* of "primary activities" was somewhat imperfect. Regarding count 1, subject to section 186.22, subdivision (a), the trial court omitted from its oral and written instructions to the jury the definition of "primary activities" altogether, such as the following CALJIC definition:

⁴ Section 186.22, subdivision (f), has since been amended to add reference to certain provisions irrelevant to this matter.

“The phrase ‘primary activities,’ means that the commission of one or more of the crimes identified in this instruction, be one of the group’s ‘chief’ or ‘principal’ occupations. This would of necessity exclude the occasional commission of the identified crimes by the group’s members. In determining this issue, you should consider any expert opinion evidence offered, as well as evidence of past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crime[s] charged in this trial.” (CALJIC No. 6.50.)

However, the trial court provided an essentially identical definition in its written instructions for the criminal street gang enhancements, contained in CALJIC No. 17.24.2, except that the first sentence of the court’s definition stated, “The phrase ‘primary activities,’ *as used in this allegation*, means that the commission of one or more of the crimes identified in this *allegation*” (Italics added.) Appellant points out, however, that the court in its oral instructions omitted the phrase, “This would of necessity exclude the occasional commission of identified crimes by the group’s members.”

Appellant contends that under these circumstances, the trial court failed in its duty to instruct the jury regarding the definition of “primary activities” with regard to both count 1 and the enhancement allegations. Appellant argues that the trial court’s omissions violated his federal constitutional rights, relying principally on *People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*), which held that the failure to instruct on the element of “primary activities” as applicable to an enhancement alleged pursuant to section 186.22, subdivision (b), was an error of federal constitutional dimension. We disagree for two reasons.

First, the trial court did not have a duty to instruct the jury regarding the definition of “primary activities.” In *Sengpadychith, supra*, 26 Cal.4th 316, our Supreme Court held that the jury can consider the crimes charged against the defendant in determining whether the commission of the statutorily enumerated crimes is one of the gang’s “primary activities.” (*Id.* at pp. 320, 323-324.) The analysis followed in *Sengpadychith* establishes the reason appellant’s contention should be rejected, as the court provided a definition of “primary activities” from a dictionary, stating that the term, “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. (See Webster's Internat. Dict. (2d ed. 1942) p. 1963 [defining 'primary'].) That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . ." (*Id.* at p. 323.) The very fact that the *Sengpadychith* court relied on a dictionary definition demonstrates that the phrase "primary activities" does not have a technical, legal meaning. A lay juror would readily understand, without being told, that the "chief" or "principal" occupations of a group constitute its "primary activities." Under these circumstances, the trial court did not have a sua sponte duty to instruct the jury regarding the definition of "primary activities."

Second, assuming for the sake of argument that the court somehow failed in some obligation to instruct the jury here, any error, be it under the federal or state standards for error,⁵ was harmless because the court *did* give the jury a definition of the phrase "primary activities" as it related to criminal gang activities, contained in the written instructions the court gave to the jury that followed CALJIC No. 17.24.2. Juries are presumed to read their written instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 687 [regarding instructions orally misstated], citing *People v. Crittenden* (1994) 9 Cal.4th 83, 138.) Appellant gives us no reason to find otherwise.

Furthermore, given that a " ' pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit . . . two . . . offenses, provided . . . the offenses were committed on separate occasions, or by two or more

⁵ The parties disagree as to whether to apply the state or federal standard to determine if any error that occurred here was harmless. Appellant argues error should be analyzed under the federal standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, which requires reversal if respondent proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*People v. Mower* (2002) 28 Cal.4th 457, 468.) Respondent contends the errors complained of should be evaluated under *People v. Watson* (1956) 46 Cal.2d 818, 836, which requires reversal only if it is reasonably probable that a result more favorable to the appealing party would have benefited in the absence of the error. (*Ibid.*) We need not resolve this dispute, as we find no error could have occurred here under either standard.

persons” (section 186.22, subd. (e)), the evidence that appellant and the ESDC were engaged in the assaults for which appellant was charged, the evidence of ESDC participation in the April 4 and April 9 incidents, and the expert testimony of ESDC’s repeated criminal activities, was overwhelming. Accordingly, we have no doubt that any instructional error did not contribute to the verdict obtained.

III. *The Trial Court’s Imposition of Consecutive and Upper Term Sentences*

In his initial briefs to this court, appellant contends his upper term and consecutive sentences violate his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, relying on *Blakely, supra*, 542 U.S. 296. In his supplemental brief, appellant also argues that, pursuant to *Cunningham, supra*, 549 U.S. ____ [127 S.Ct 856], the trial court violated his federal constitutional rights to due process and a jury trial under the Sixth and Fourteenth Amendments by imposing upper term sentences based on circumstances in aggravation which were neither admitted nor found by a jury beyond a reasonable doubt.

We conclude, based upon *Cunningham, supra*, 549 U.S. ____ [127 S.Ct 856], and *Black II, supra*, 41 Cal.4th 799, that the trial court erred when it imposed the upper term sentences at issue here based upon the particular aggravating circumstances it cited. However, the trial court was entitled to impose consecutive sentences as it did, and its imposition of a four-year upper term for count 1, the assault on Jimmy C., was harmless error. Accordingly, we reverse the court’s imposition of upper term sentences for the gang enhancement related to count 1, the gang enhancement related to count 3, and count 2. The Attorney General’s argument that appellant forfeited his constitutional claims by failing to first raise them before the trial court lacks merit.

A. *Legal Standards*

In *Blakely, supra*, 542 U.S. 296, the United States Supreme Court held that a Washington State court denied a criminal defendant his constitutional rights to a jury trial by increasing the defendant’s sentence for second degree kidnapping from the “standard range” of 49 to 53 months to 90 months based on the trial court’s finding that the defendant acted with “deliberate cruelty.” (*Id.* at pp. 303-304.) The *Blakely* court found

that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), that “ ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ ” (*Blakely*, at p. 301.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the “statutory maximum” is “not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose, *without* any additional findings.” (*Blakely*, at pp. 303-304.)

The California Supreme Court, in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), held that “the judicial fact finding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant’s Sixth Amendment right to a jury trial. (*Id.* at p. 1244.) In reaching this conclusion, the *Black I* court expressly stated that, under California’s determinate sentencing law (DSL), “the upper term is the ‘statutory maximum’ and a trial court’s imposition of an upper term sentence does not violate a defendant’s right to a jury trial under the principles set forth in *Apprendi*[, *supra* 530 U.S. 466], *Blakely*[, *supra*, 542 U.S. 296], and [*United States v.*] *Booker* [(2005) 543 U.S. 220].” (*Black I*, at p. 1254.)

On January 22, 2007, the United States Supreme Court issued *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856]. The high court held that *Black I, supra*, 35 Cal.4th 1238, was a misapplication of *Blakely, supra*, 542 U.S. 296, determining that, “[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.” (*Cunningham*, at p. ____ [127 S.Ct. at p. 871].) *Cunningham* concluded that the DSL violates a defendant's right to jury trial because “under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.” (*Cunningham*, at pp. ____ [127 S.Ct. at pp. 863-864].) As the California Supreme Court explained in *Black II, supra*, 41 Cal.4th at pp. 809-810:

“[T]he high court disagreed with our conclusion in *Black I*, finding determinative the circumstances that ‘[u]nder California’s DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance,’ and that an ‘element of the . . . offense’ determined by the jury verdict ‘does not qualify’ as an aggravating circumstance. (*Cunningham, supra*, 549 U.S. at p. ____ [127 S.Ct. at p. 868].) ‘Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum.’ (*Ibid.*) Thus, the high court concluded that ‘[b]ecause the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment.’ (*Id.* at p. ____ [127 S.Ct. at p. 870].)”

Nonetheless, the United States Supreme Court plainly indicated that the trial court may determine the fact of a defendant’s prior conviction. It stated that “the Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant.” (*Cunningham, supra*, 549 U.S. at p. ____ [127 S.Ct. at p. 860], *Italics added.*) However, the high court did not directly address whether a trial court’s finding of *numerous* prior convictions or other recidivism-related facts, such as regarding a defendant’s prior performance on probation, were included within this entitlement.

On July 19, 2007, the California Supreme Court issued *Black II, supra*, 41 Cal.4th 799, in which it determined a number of issues in light of *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856]. Among other things, it held “that as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi*[, *supra*, 530 U.S. 466] and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant’s right to jury trial.” (*Black II, supra*, at p. 812.) The court also held that one such aggravating circumstance could be a trial court’s finding, by a preponderance of the

evidence standard, that a defendant's criminal history includes numerous prior convictions. (*Id.* at pp. 819-220.) Our Supreme Court reasoned:

“The determinations whether a defendant has suffered prior convictions, and whether those convictions are ‘numerous or of increasing seriousness’ (Cal. Rules of Court, rule 4.421(b)(2)), require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is ‘quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.’ ” (*Black II, supra*, 41 Cal.4th at pp. 819-820.)

However, our Supreme Court did not directly address whether or not a trial court may impose an upper term sentence based on findings about the defendant's prior performance on parole or probation. (See Cal. Rules of Court, rule 4.421(b)(5).) The court has asked for additional briefing on this question, among others, in a case pending before it. (*People v. Towne* (February 7, 2007, 3125677) ___ Cal.4th ___ [2007 Cal. Lexis 1437].)

Our Supreme Court also rejected Black's argument that the trial court's reliance on its findings about his criminal history violated his due process rights because the trial court presumably made its findings by applying a “proof by a preponderance of the evidence” standard pursuant to California Rules of Court, rule 4.420(b), rather than a “beyond a reasonable doubt” standard. (*Black II, supra*, 41 Cal.4th at p. 820, fn. 9.)

Moreover, contrary to appellant's “structural error” argument, the California Supreme Court, in *Sandoval, supra*, 41 Cal.4th 825, issued on the same day as *Black II, supra*, 41 Cal.4th 799, determined that “[t]he denial of the right to a jury trial on aggravating circumstances is reviewed under the harmless error standard set forth in *Chapman*[, *supra*, 386 U.S. 18], as applied in *Neder v. United States* (1999) 527 U.S. 1.” (*Sandoval, supra*, 41 Cal.4th at p. 838.) The court explained:

“In *Neder*, the United States Supreme Court held an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. [*Neder, supra*, 527

U.S.] at pp. 8-15.) The court stated that such an omission ‘does not *necessarily* render a criminal trial fundamentally unfair or . . . unreliable.’ (*Id.* at p. 9.) Such an error is reviewed to determine whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ (*Chapman, supra*, 386 U.S. at p. 24; see *Neder, supra*, 527 U.S. at p. 15.) The reviewing court must ‘ask[] whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.’ (*Neder, supra*, 527 U.S. at p. 19.) In *Neder*, the court concluded that the trial court’s failure to submit to the jury an element of the offense was harmless, because the evidence supporting the element was ‘uncontested.’ ” (*Ibid.*)

Our Supreme Court also explained in *Sandoval, supra*, 41 Cal.4th 825, how trial courts are to proceed with resentencing in certain cases which require reversal pursuant to *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856]. As stated in *Sandoval* after *Cunningham* was issued the California Legislature amended the DSL to establish constitutional sentencing procedures in light of that opinion. Our Supreme Court found that “[i]t is unclear whether the Legislature intended the recent amendments of the DSL to apply to resentencing hearings in cases like the present one” (*Sandoval*, at p. 845), which, like the case before us, involved a trial court’s imposition of an upper term sentence prior to *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856] and the Legislature’s changes to the DSL. (See *Sandoval*, at p. 837.) Our Supreme Court determined the procedure trial courts should follow in such cases, which essentially is to follow the amended DSL guidelines. (*Id.* at pp. 843-852.)

B. *The Parties’ Consecutive Term and Forfeiture Arguments*

We address certain other arguments made by the parties before addressing appellant’s upper term sentences. First, the Attorney General argues that appellant forfeited his jury trial claims by failing to object on that constitutional ground before the trial court. As the Attorney General acknowledges, however, appellant was sentenced in November 2003, after the United States Supreme Court issued *Apprendi, supra*, 530 U.S. 466, but before it issued *Blakely, supra*, 542 U.S. 296. Under similar circumstances, our Supreme Court rejected a forfeiture argument in *Black II, supra*, 41 Cal.4th 799:

“*Apprendi* was assumed to apply to the determination of sentence enhancements, but not to aggravating circumstances or other sentencing decisions. We agree with the assessment of a federal court that ‘[w]ith its clarification of a defendant’s Sixth Amendment rights, the *Blakely* court worked a sea change in the body of sentencing law.’ [Citation.] The circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated the high court’s decision in *Blakely*. We conclude that, at least with respect to sentencing proceedings similar to the one here at issue, preceding the *Blakely* decision, a claim of sentencing error premised upon the principles established in *Blakely* and *Cunningham* is not forfeited on appeal by counsel’s failure to object at trial.” (*Black II, supra*, 41 Cal.4th at pp. 811-812.)

We follow this holding and conclude appellant did not forfeit his constitutional arguments by his failure to object to his sentencing in the trial court based on *Apprendi v. New Jersey, supra*, 530 U.S. 466. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Second, appellant argues the trial court violated his federal constitutional rights to a jury trial by its imposition of consecutive sentences. In *Black II, supra*, 41 Cal.4th 799, our Supreme Court made clear that *Cunningham, supra*, 549 U.S. ___ [127 S.Ct 856], did not affect its previous determination that a trial court’s imposition of consecutive sentences does not implicate a defendant’s jury trial rights:

“The high court’s decision in *Cunningham* does not call into question the conclusion we previously reached regarding consecutive sentences. The determination whether two or more sentences should be served in this manner is a ‘sentencing decision[] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense’ and does not ‘implicate[] the defendant’s right to a jury trial on facts that are the functional equivalent of elements of an offense.’ (*Black I, supra*, 35 Cal.4th at p. 1264.)” (*Black II, supra*, 41 Cal.4th at p. 823.)

Accordingly, we conclude the trial court's imposition of consecutive sentences did not violate appellant's constitutional rights. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

C. The Trial Court's Imposition of Upper Term Sentences

At the November 2003 sentencing hearing, the trial court first denied appellant probation, and then stated its sentencing determinations. The court stated a different basis for each ruling.

The court based its denial of probation on numerous factors. These included that "defendant's prior record as an adult and juvenile, including the recency and frequency of his prior crimes, indicates a pattern of regular and increasingly serious criminal conduct."

The court then turned to the counts and related enhancements, finding there were no mitigating circumstances. The court imposed the upper term of four years in state prison for count 1⁶ based on the aggravating circumstance "that the facts of this crime disclose a high degree of cruelty, viciousness and callousness on the part of the defendant." It imposed the upper term of four years in state prison for the related gang enhancement because "the defendant induced and led others to participate in what amounted to a cowardly pack attack on the victim."

For count 3, the assault on Jose M., the court imposed one-third the mid-term, which was one year in state prison. It imposed one-third of the upper term, amounting to one year and four months, for the related gang enhancement because "the defendant has engaged in violent conduct which indicates that he is a serious danger to society."

For count 2, the gang participation count, the court also imposed an upper term of three years, based on the aggravated circumstance "that defendant's prior performance on probation was unsatisfactory." The court stayed this count pursuant to Penal Code section 654.

⁶ The court set the sentence for count 1, the assault on Jimmy C., as the principal term because, with the enhancement, it had the greatest term of imprisonment.

1. The Trial Court Erred in Imposing the Upper Term Sentences

The trial court's stated aggravated circumstances for count 1, its related enhancement, and for the count 3 enhancement relate to the particular crimes appellant committed, and go beyond those either admitted by appellant or found by the jury. Pursuant to *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856] and *Black II, supra*, 41 Cal.4th 799, the trial court was not entitled to rely on these circumstances in setting upper term sentences. The court's stated justification for imposing an upper term sentence for count 2, defendant's poor prior probation performance, relates to defendant's criminal history. However, absent instructions from our Supreme Court that such a finding falls within the "fact of a prior conviction" exception referred to in *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856], we conclude that *Cunningham* necessitates we vacate this sentence. We base this conclusion on *Cunningham*'s reference to an exception for a "prior conviction" only, and the *Cunningham* majority's rejection of Justice Kennedy's dissenting view that a trial court, while it should be prohibited from making findings for those matters outlined in California Rules of Court, rule 4.421, subdivision (a), should be allowed to do so for those matters outlined in rule 4.421, subdivision (b), which includes prior probation performance (*Cunningham*, at p. ____ [127 S.Ct. at p. 869, fn. 14] [stating that *Apprendi, supra*, 530 U.S. 466, "leaves no room for the bifurcated approach Justice Kennedy proposes"]).

The Attorney General argues we should affirm all of the trial court's upper sentence determinations. He first argues that we should affirm them because only "a single aggravating circumstance is sufficient to render a defendant *eligible* for the upper term."⁷ He reasons that the trial court, in denying appellant's probation, essentially found "the fact of a prior conviction" by its references to appellant's "recency and frequency of

⁷ The Attorney General filed his supplemental brief before the California Supreme Court reached this same conclusion in *Black II, supra*, 41 Cal.4th 799, but argued this position based on certain California appellate court opinions.

his prior crimes,” and his “pattern of regular and increasingly serious criminal conduct.”⁸ The Attorney General is of the view that, given this finding, the trial court was entitled to impose all of the upper term sentences involved, and could make additional findings to justify its imposition of upper sentences without committing constitutional error.

We reject the Attorney General’s argument because the court relied on its “recency and frequency of [appellant’s] prior crimes” finding to deny *probation*, but did *not* rely on it as an aggravated circumstance in setting *any* of the upper term sentences. Neither *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856], nor *Black II, supra*, 41 Cal.4th 799, allow us to infer from a court’s statements elsewhere in the record regarding a defendant’s past “crimes” a finding of a “fact of prior conviction” aggravated circumstance. Our review is of the trial court’s sentencing determinations pursuant to Penal Code section 1170, which called for the trial court to “set forth on the record the facts and reasons for imposing the upper or lower term.” (Pen. Code, § 1170, subd. (b).)⁹ We are unaware of any authority which allows us to affirm the imposition of upper term sentences merely because the record discloses a potential aggravated circumstance, even though the trial court did not state on the record that it was relying upon this circumstance to impose these sentences.¹⁰

⁸ The Attorney General also relies on the court’s finding that appellant’s prior probation performance was unsatisfactory, which we have already discussed.

⁹ We cite here as did the court in *Black II, supra*, 41 Cal.4th 799: “In response to *Cunningham, supra*, 127 S.Ct. 856, our Legislature recently amended the DSL effective March 30, 2007. (Stats. 2007, ch. 3.) References to Penal Code section 1170 are to the law as it read prior to these amendments. In response to the Legislature’s amendment of the DSL, the Judicial Council amended the sentencing rules effective May 23, 2007. References to the California Rules of Court are to the rules as they read prior to those amendments.” (*Id.* at p. 808.)

¹⁰ Appellant also argues that the trial court could not have relied on the same fact to impose the upper terms for counts 1 and 2 on the one hand and the enhancements on the other, or for both enhancements (citing Pen. Code, § 1170, subd. (b) and *People v. Flores* (1981) 115 Cal.App.3d 67, 79-80 [indicating the use of the same fact for multiple enhancements is prohibited]). We do not need to address this argument in light of our ruling.

The Attorney General also argues that certain other factors used by the court were “necessarily also found by the jury.” Regarding the “violent conduct which indicates that [appellant] is a serious danger to society” aggravated circumstance,¹¹ upon which the court based the count 3 enhancement upper term, appellant contends the jury’s findings that appellant assaulted both Jimmy C. and Jose M. by use of force likely to cause great bodily injury inherently included a finding that he acted violently. He further contends that since only one proper aggravated circumstance is necessary to make appellant eligible for all the upper terms imposed here, the jury’s violence findings are sufficient to render appellant eligible for all the upper terms the trial court imposed. We agree that the jury necessarily found appellant had acted violently. However, there is no indication that the jury found that appellant’s violence “indicates he is a serious danger to society.” The Attorney General’s argument must be rejected for this reason alone.¹²

2. Harmless Error Analysis

The Attorney General next argues that any trial court error was harmless under *Chapman, supra*, 386 U.S. at page 24. We agree this is the case for the count 1 upper term sentence, but not for the remainder.

a. The Upper Term Imposed for Count 1

The trial court based its upper term sentence for count 1, the assault on Jimmy C., on the aggravated circumstance “that the facts of this crime disclose a high degree of cruelty, viciousness and callousness on the part of the defendant.” The evidence of the assault was undisputed at trial. Jimmy C. testified that he was confronted as he walked

¹¹ The Attorney General also refers to the trial court’s determination to make the count 3 term consecutive based on its finding of separate acts of violence against separate victims and its determination that the acts involved in count 3 demonstrated planning and criminal sophistication. We need not discuss these further in light of our determination that the trial court could impose consecutive sentences, discussed *ante*.

¹² As we indicate in footnote 9 above, appellant also argues that the trial court could not rely on the same aggravated circumstance to impose upper terms for both counts 1 and 2 and the gang enhancements, an argument we do not need to address in light of our ruling.

by the area of the mortuary and, after denying he was a “Norte” gang member, was punched many times by his attackers. After he fell to the ground, he was repeatedly kicked all over his body. He lost consciousness, was hospitalized overnight, was in pain for two weeks, and continued to suffer from severe headaches at the time of trial. There was no evidence that Jimmy C. did anything to provoke the attack.

Although Jimmy C. could not identify his attackers, Maria G., an eyewitness, testified that she saw five young men within a surrounding group of 15 to 20 bystanders hitting Jimmy C. as he lay on the ground. She specifically saw appellant, his hands with something red on them, being pulled away from the victim as he made hitting motions and urged the others, “Hit him. Go.”

Appellant argues that the court’s aggravated circumstance finding for count 1 “was not clearly resolved beyond a reasonable doubt since there was no evidence appellant actually touched [Jimmy C.] who needed no stitches,” and who had no broken bones. This argument borders on the frivolous in light of the undisputed evidence that appellant was seen being pulled away from the fallen victim with red-stained hands, making hitting motions, and urging others to continue their attacks, in an assault that resulted in the victim’s hospitalization and lingering injuries.

We have no doubt, in light of the undisputed evidence, that any rational jury would conclude beyond a reasonable doubt that appellant assaulted Jimmy C. with a high degree of cruelty, viciousness and callousness. Therefore, the trial court’s sentencing error was harmless under *Chapman, supra*, 386 U.S. at page 26.

b. *The Upper Terms Imposed for the Enhancements*

The court based its upper term sentence for the count 1 gang enhancement on the aggravated circumstance that “defendant induced and led others to participate in what amounted to a cowardly pack attack on the victim.” We find nothing in the record that can lead us to a definitive conclusion that this was the case regarding the assault on Jimmy C. The evidence indicates that appellant joined in the attack, and that he encouraged others to continue it as he was pulled away. There is no other evidence of his actions towards Jimmy C. Regarding the assault on Jose M., the only evidence that

appellant played a leadership role was C.S.'s eyewitness testimony that he was in the front of the group that pursued the victim. Based on this evidence, we cannot conclude beyond a reasonable doubt, pursuant to *Chapman, supra*, 386 U.S. at page 26, that a rational juror would find, also beyond a reasonable doubt, that appellant "induced and led" others to participate in either assault. Accordingly, we conclude the evidence is not sufficient to support the conclusion that the court's sentencing error regarding count 1's gang enhancement was harmless.

As we have already discussed, the trial court based the upper term for the count 3 gang enhancement on the aggravated circumstance that appellant "has engaged in violent conduct which indicates that he is a serious danger to society." The evidence of the assault on Jose M., in the form of C.S.'s eyewitness testimony, indicates appellant chased Jose M. and participated in kicking and punching him as he lay on the ground. We cannot conclude under the "reasonable doubt" standard of *Chapman, supra*, 386 U.S. at page 26, that a rational jury would find beyond a reasonable doubt that appellant's actions indicate he poses "a serious danger to society," however. A police officer who was contacted by Maria G. on the day of the assaults in the area where they occurred testified that she stated Jose M. had informed her that appellant "had been involved in an argument with the victim prior to the assault." Furthermore, Jose M. himself testified that he was confronted by another person, a thin man holding a knife, prior to the assault. A rational juror's view of appellant's potential danger to society could be affected by these facts, which could rationally be a basis for questions as to whether appellant was somehow angered by Jose M., or thought he was joining in an ongoing confrontation, rather than an unprovoked attack.¹³ In addition, both assaults occurred on the day appellant and others gathered by a mortuary where proceedings of some sort regarding a recently killed gang member were occurring. A rational juror's judgment regarding

¹³ The record also indicates appellant engaged in one other act of violence. When he was 14 years old, he attacked his older brother with a knife, but this attack occurred in 1996, approximately seven years before the assaults on Jimmy C. and Jose M.

appellant's potential danger to society reasonably could be affected by this circumstance as well. Therefore, the evidence is insufficient to conclude under the "reasonable doubt" standard of *Chapman, supra*, 386 U.S. at page 24, that the trial court's sentencing error regarding the count 3 enhancement was harmless.

c. *The Upper Term Imposed for Count 2*

As we have already indicated, the trial court imposed a stayed upper term for count 2 based on appellant's unsatisfactory prior probation performance. The presentence report indicates a number of previous grants of juvenile probation. In fact, despite the sustaining of a number of juvenile petitions involving petty theft, commercial burglary, possession of marijuana for sale, or assault with a deadly weapon, appellant continued to be placed on probation. While the report indicates appellant violated probation in the past, and was on probation at the time of the charged offenses in the present case, the report also indicates that he improved his behavior after a prior probation violation. We agree with appellant that under the "reasonable doubt" standard of *Chapman, supra*, 386 U.S. at page 24, this evidence is insufficient to conclude the trial court's sentencing error was harmless.¹⁴

d. *The Attorney General's "Reasonable Probability" Argument*

The Attorney General also argues in his initial reply brief, filed with this court in 2005, that the trial court's sentencing was harmless error because a California appellate court has held that it should set aside an upper term sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. However, the Attorney General can no longer rely on this case, *People v. Stankewitz* (2005) 126 Cal.App.4th 796, because the Supreme Court

¹⁴ Appellant also argues that "there is no mechanism under California law which would permit a jury to make findings of fact relating to recidivism." We need not address this issue in light of our holding.

subsequently granted review on May 18, 2005, thereby depublishing it.¹⁵ While this depublished case relied on a previous holding in *People v. Price* (1991) 1 Cal.4th 324, 492, that case did not involve sentencing errors of a federal constitutional nature. Accordingly, it relied on the state law harmless error analysis articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*ibid.*, citing *People v. Avalos*, (1984) 37 Cal.3d 216, 233 [which refers to the *Watson* test]), rather than the federal Constitution harmless error analysis articulated in *Chapman, supra*, 386 U.S. at page 26.

In his supplemental brief, filed with this court in 2007, the Attorney General again asserts that the trial court committed error because its comments at the sentencing hearing indicate it “clearly would not have imposed the middle term given appellant’s numerous and increasingly serious record of prior convictions and commitments.” The Attorney General relies once more on cases which involve state law challenges, *People v. Avalos, supra*, 37 Cal.3d at page 233, and *People v. Kelley* (1997) 52 Cal.App.4th 568, 581, footnote 18. The analysis in these cases is not applicable here.

Accordingly, we reject the Attorney General’s argument.

DISPOSITION

Appellant’s convictions and his upper term sentence for count 1 are affirmed. The upper term sentences imposed for the gang enhancements relating to counts 1 and 3, and for count 2, are vacated, and the matter remanded to the trial court for resentencing consistent with this opinion, and with *Sandoval, supra*, 41 Cal.4th 825.

¹⁵ Our Supreme Court later dismissed review and remanded the matter to be considered in light of *Black I, supra*, 35 Cal.4th 1238, but the case remained unpublished. (*People v. Stankewitz* (2005) 119 P.3d 962; Cal. Rules of Court, rule 29.3(b)(3).)

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.