Filed 3/9/15 P. v. McDaniels and Britt CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LAMARR MARQUIS McDANIELS and JOEL JAREA BRITT, Defendants and Appellants.	B250574 (Los Angeles County Super. Ct. No. GA076378)

APPEALS from judgments of the Superior Court of Los Angeles County. Candace J. Beason and Darrell S. Mavis, Judges. Affirmed in part and reversed in part with directions.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant McDaniels.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant Britt.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Ana R. Duarte, Deputy Attorney General, for Plaintiff and Respondent.

Defendants Lamarr McDaniels and Joel Britt appeal from the judgments entered following a jury trial in which they were convicted of first degree murder and attempted murder, with firearm and gang findings. McDaniels was also convicted of being a convicted felon in possession of a firearm. Each defendant raises several contentions and McDaniels joins in Britt's contentions. We reverse McDaniels's first degree murder conviction for instructional error, but otherwise affirm.

BACKGROUND

1. The death of Brandon Lee (possible motive for charged offenses)

On January 29, 2008, Brandon Lee was shot and killed. Lee was a member of the Duroc Crips gang. A member of the rival Monrovia Nuevo Varrio gang (MNV) was ultimately charged with Lee's murder. MNV members were also suspected of shooting at Lee six months before he was killed.

Lee was the father of Koteysha Cox's child and a good friend of defendant Britt, who grew up living next door to Lee. In March of 2008, Cox wrote to Larry Alderson, a Duroc Crips gang member who was then in jail, expressing frustration that people were not doing anything about Lee's death. Cox testified at trial she was referring to the police and to witnesses who had not told the police everything they knew.

2. Events in the days before the shooting

Someone broke into Nader's Market in Loma Linda about 2:00 a.m. on February 7, 2009,[1] and stole cartons of cigarettes and the store owner's Heckler & Koch (HK) semiautomatic handgun, along with its case and user's manual. A woman who lived across the street from Nader's Market observed three to four African-American men wearing hooded sweatshirts loading boxes of cigarettes into a white minivan parked in front of her house.

On the evening of February 7, a Monrovia police officer saw a white minivan parked in an alley and shone a light on it. A man who had been standing next to the passenger-side door ran away. The officer found two women in the van: Cox and

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[1] Undesignated date references pertain to 2009.

Aquaneesha Rawls. He also found a user's manual for an HK handgun, crowbars, several pairs of gloves, several hooded black sweatshirts, several mobile phones, including one in its original packaging, and a camera in its original packaging. About 15 feet from the van, the officer found a Glock nine-millimeter handgun in a planter next to the yard of a home.[2]

Cox and Rawls testified that defendant McDaniels had driven the van and parked it where the officer found it, and then left. One or two other men had been in the van and ran when the police officer approached. Cox and Rawls were along for the ride because McDaniels was supposed to be going to a liquor store.

In a recorded statement played at trial, Cox told detectives that she saw McDaniels hand Britt a "cute," expensive-looking gun with "a laser" on it. At trial, Cox denied that she had seen this and claimed she had simply told the detectives what Rawls had told her. Rawls denied seeing a gun transfer and denied telling anyone she had.

3. Events of February 9, prior to shooting

Cox lived on Goodall Avenue in Duarte and Rawls lived directly across the street. Throughout the day on February 9, a number of people hung out on Goodall in the vicinity of Cox's home, including Cox, Rawls, McDaniels, Britt, Alderson, and Joseph Barnes. Britt admitted at trial he was a member of the Duroc Crips gang. Britt was 21 years old, while McDaniels, Alderson, and Barnes were in their thirties. The prosecution's gang expert opined McDaniels and Alderson were members of the Duroc Crips gang and Barnes was an associate. They were drinking, smoking strong marijuana, and listening to music. Alderson and Cox were involved in a romantic relationship at the time. At some point, a blue Dodge Magnum arrived and parked on the driveway at Cox's house. "RIP Brandon Lee" was written in chalk on a wall next to Cox's house. She testified one of her younger sisters had written it.

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[2] McDaniels's girlfriend, Sabrina Jones, testified at trial she had previously lived in the house where the Glock was found.

Recordings from surveillance cameras at Al's Liquor store depicted McDaniels and Alderson entering the store approximately 5:20 p.m. According to the prosecution's gang expert, members of both the Duroc Crips gang and the rival MNV gang shopped at Duarte Liquor.

Around 6:00 p.m., Cox, Rawls, and Rawls's younger brother were driving to West Covina when the Magnum pulled up next to them at a stoplight. McDaniels was driving, Alderson was the front passenger, and Britt and Barnes were in the backseat. Cox spoke with the men in the Magnum, each asking where the other group was going. Rawls and Cox testified that McDaniels said they were going to the store. Rawls further testified that McDaniels said that they were going to "hit some corners." Cox testified that someone other than McDaniels said they were going to hit some corners. The Magnum turned right, which was toward Duarte Liquor store.

Recordings from surveillance cameras at Duarte Liquor store depicted McDaniels, Alderson, and Barnes entering the store approximately 6:08 p.m. Britt got out of the Magnum but remained outside the store. When the other three returned to the vehicle, McDaniels and Britt got in the driver's side, while Alderson and Barnes got in the passenger side. According to the prosecution's gang expert, members of both the Duroc Crips gang and the rival Duarte Eastsiders gang shopped at Duarte Liquor.

4. The shooting

Friends Miguel Sanchez and Salvador Velasquez were walking in the middle of Millbrae Avenue en route from Sanchez's house to a park. It was around sunset and getting dark. Neither belonged to a gang. Velasquez saw the Dodge Magnum make a sharp turn from the cross-street onto Millbrae and head toward them. He testified it seemed as if the car had almost passed the street before turning abruptly. Sanchez and Velasquez moved toward the curb and continued walking. As the Magnum approached them, it slowed to a "really slow" speed. Velasquez saw the driver's side, rear passenger window roll down, then he saw a gun protruding from that window. He began running and yelled to Sanchez to run. Almost immediately, the passenger began to shoot. Velasquez heard more than five shots, in rapid succession, and felt two shots fly past him.

Velasquez escaped injury, but Sanchez was killed. The fatal shot entered his back on the left side and traveled sharply upward. The coroner recovered a projectile from just below the base of Sanchez's skull. A second shot hit the back of Sanchez's leg.

The site of the shooting was about 1.8 miles from Duarte Liquor in an area claimed by the Duarte Eastsiders gang.

5. Discovery of vehicle and gun

The shooting was reported to 911 at 6:15 p.m. Velasquez provided responding sheriff's deputies with a description of the vehicle, which was then broadcast to other law enforcement officers. Ten to fifteen minutes after he heard the police broadcast about the shooting, Deputy Louis Serrano drove down Goodall Avenue in a marked patrol car to "check the area for suspects." Serrano saw the Dodge Magnum parked in the driveway at Cox's house. Five men and one woman stood near the vehicle. Serrano stopped and four of the men ran away. The fifth man, Barnes, and the woman, Katrina Cox (Koteysha's sister), remained. Serrano was unable to identify the defendants.

Deputies drove Velasquez to Goodall Avenue, where he identified the Magnum as similar to the vehicle from which shots had been fired. At trial, he was certain the Magnum was the vehicle.

Sheriff's personnel found an HK .45-caliber semiautomatic handgun under the driver's seat of the Magnum. They also found an empty vodka bottle and a full bottle of beer inside the vehicle. Three more empty vodka bottles were on the driveway and sidewalk near the vehicle.

6. Forensic evidence

Investigators found eight .45-caliber casings spread over a distance of 87 feet on Millbrae. They also found a bullet jacket and recovered a partial bullet from a hole on a parked vehicle. Ballistics testing revealed the HK gun recovered from the Magnum ejected all of the casings recovered at the scene of the crime and fired the bullet recovered from Sanchez's body.

DNA was obtained from the HK gun, the Dodge Magnum, and the empty vodka bottle found in the Magnum. Testing and analysis indicated both defendants and

Alderson were possible contributors to a mixture of multiple individuals' DNA found on the vodka bottle. Both defendants were possible contributors to DNA mixtures from several locations on the gun. McDaniels was a possible contributor to a mixture of multiple individuals' DNA found on the steering wheel and gear shift of the Magnum, while Britt's profile matched DNA found on the inside of the driver's side, rear passenger door of the Magnum.

7. Statements by defendants

Britt and Alderson were arrested with a third person on April 2. Detectives arranged to have the three men placed together in a cell equipped with a hidden recording system and directed the jailer to tell them homicide detectives would come to speak to them. In the ensuing surreptitiously recorded conversation, which was played at trial, Alderson said they were wanted in connection with "that Mexican that got killed up on Millbrae." Britt asked, "Store?" Alderson said the stores had camera surveillance, but the police could not prove anything. Britt said, "They say that thing don't have prints on it. Anyway, I ain't worried though." Britt added, "I had gloves on anyway." Alderson later wondered aloud why he had been swabbed and recalled "he smelled it and he wanted me to smell it. Smell it. Passed it back, but I didn't have no gloves on." He lamented, "He's stupid for making me leave it there. That's just the dumbest move ever." Alderson referred to putting "it under the seat" and cautioned, "See, that's why, when you do your stuff, cuz, drinking ain't right cuz you make mistakes."

Britt's visits with his girlfriend, Kia, on April 17 and 19 were also surreptitiously recorded and the recordings were played at trial. On April 17 he told her, "I really need . . . somebody, like, really need to smash Aqua like. Come on, cuz. Smash, like (makes trumpet sound) that bitch." On April 19, Britt asked if anything had been said to Aqua yet, then told Kia, "Tell her don't come to court. She better not come to court." Detective Ken Perry testified Rawls was known as "Aqua."

Detectives interviewed McDaniels on April 28 and the recording of the interview was played at trial. He told them he had previously lived on Goodall Avenue across the street from Brandon Lee's family. McDaniels admitted he had belonged to the Duroc

Crips gang, but said he was no longer a member, although he had friends who were still members and he associated with them when he visited the area. The detectives said they could place McDaniels in the vehicle nine minutes before the murder. McDaniels responded, "From the liquor store?"

During a pretrial hearing in the case in February of 2010, Britt addressed the court in the presence of McDaniels, Alderson, and Barnes, saying, "I did this thing on my own without any of my co-defendants knowing anything."

Deputy Calvin Mah testified that in January of 2013, when he transported Britt back to the jail after a court appearance, Britt said he was sad because he would be spending the rest of his life in jail. Mah asked why, and Britt said he was going to take the stand and admit he was the shooter in his case. Britt also said he was "taking it for the team" and "'I hope it works.'" Mah commended Britt and said if Britt did that for "the team," then "the team" should support Britt's child. Britt said, "[T]hey are, they're sending him to private school."

8. Gang expert's testimony

Given a hypothetical question based upon the prosecution's evidence, Detective Timothy Brennan opined that the crimes were committed for the benefit of and in association with a criminal street gang, to promote and further the gang's "terrorism" of both their own neighborhood and the rival gang's neighborhood. Brennan opined that retaliation for an attack on a member of a gang served several gang purposes, notably revenge and maintaining the gang's respect in the neighborhood. He stated that the retaliation usually occurs soon after the event for which the gang is retaliating.

Brennan further testified that an older gang member may commit a burglary and then give a gun he had stolen during the burglary to a younger gang member trying to establish himself in the gang. An older gang member riding in a car with a younger gang member would know if the younger gang member had a weapon in a car, especially if they were going into the territory of a rival gang. Brennan elaborated that a younger member would be "disciplined" if he did not inform the older member of the presence of a weapon in the car. Brennan further testified that although not "the norm," on "several

occasions" he had seen a younger gang member claim responsibility for a crime committed by other gang members to enhance his status and respect within the gang. Brennan also testified that he had heard gang members use the phrase "hitting corners" to mean going into a rival gang's territory to look for an enemy to attack.

9. Defense case

Britt testified he spent the entire day of February 9 hanging out on Goodall Avenue near Cox's house, drinking beer and vodka and using methamphetamine, marijuana, PCP, Vicodin, and Xanax. He was not a heavy drinker, and tried PCP for the first time on February 9. In the days preceding February 9, he had smoked a lot of methamphetamine. Britt got into the Dodge Magnum with McDaniels, Alderson, and Britt because they said he should not be out on the street while he was under the influence because he might get arrested. Britt denied that anyone had discussed avenging Brandon Lee's murder. Britt did not know who killed Lee, but he told the detectives in a recorded interview played at trial that the rumor was that someone from the Duarte Eastsiders gang killed Lee. Britt also told the detectives he grew up with Lee and "still miss[ed] him."

Britt testified that none of his three companions in the Magnum knew that he was carrying a gun. McDaniels had given him the gun two or three days earlier and asked him to keep it for a few days until McDaniels was ready to return to Arizona. The gun was unloaded when McDaniels gave it to Britt, but Britt immediately acquired ammunition and loaded it "[j]ust to have the gun ready." Britt had previously testified he acquired the gun from "Hector" in exchange for drugs. At some point, Britt told McDaniels he had discarded the gun when he ran from the police.

Britt admitted he fired the gun toward two young Hispanic men, resulting in Sanchez's death. He explained he "snapped" after thinking he recognized one of the young men as "Justin." On New Year's Day, Kia had told Britt that Justin, not Britt, was the father of her newborn child. Britt testified, "I didn't exactly know who he was. But she kind of told me about him and showed me . . . a picture of him in her phone." She had also told Britt that Justin lived in "the flats part of Duarte."

Britt testified the other men in the car began yelling at him and asked why he would do such a stupid thing. Britt became angrier and pointed the gun at Alderson. When the car got back to Cox's house, Britt shoved the gun under the driver's seat and ran away.

Britt admitted he tried to mislead the detectives, initially by denying he was present, and later by telling them Barnes was the shooter and suggesting McDaniels and Barnes may have planned the shooting while they were at the liquor store. Britt had also told detectives he had been smoking marijuana, but not drinking, on February 9.

Barnes testified he had been charged in this case and jailed for four years, but was released after he was "not convicted."[3] He was a college graduate who had worked for the same company for 15 years, and was married and had children. He denied he had ever belonged to any gang.

Barnes testified he went to Goodall Avenue on the afternoon of February 9 to pick up his 11-year-old nephew. The nephew was not there, so Barnes waited. He saw people hanging out nearby, including some he knew. His childhood friend McDaniels arrived and Barnes socialized with him. Eventually, McDaniels asked Barnes if he wanted to ride with him to the liquor store or to get some marijuana and to see McDaniels's girlfriend. Barnes agreed to go along, and Britt and Alderson jumped into the vehicle, as well.

Barnes testified the group went to two liquor stores because the first did not have the brand of vodka McDaniels wanted. Then they went to visit McDaniels's girlfriend. Britt was talking to himself and acting paranoid and crazy. Some kids were in the middle of the street as the car drove on Millbrae, and McDaniels slowed down. Britt suddenly began shooting out the window. McDaniels and Alderson yelled at Britt, asking what was wrong with him and what he was doing. Britt threatened to shoot them unless they shut up. Britt kept the gun in his lap all the way back to Goodall Avenue. There had been no prior talk about shooting anyone, and Barnes was unaware Britt was armed.

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[3] Barnes was acquitted.

Barnes testified he looked for his nephew again after the group got back to Goodall Avenue. Barnes was about to leave when sheriff's deputies arrived. Barnes did not tell them what he knew about the shooting because he feared he would incur criminal liability for being present and he feared retaliation against himself or his family by Britt and Alderson, whom he knew were members of the Duroc Crips gang. Barnes was aware that "snitches" got killed. Eventually, he told law enforcement Britt was the shooter. He also told them Alderson had told McDaniels to turn onto Millbrae because Alderson wanted to purchase marijuana there.

Sabrina Jones testified she had been McDaniels's girlfriend for about 10 months in 2008 and 2009. McDaniels's three-year-old daughter had been staying with them in Phoenix, and in February of 2009, McDaniels and Jones drove to California in Jones's white minivan to return the girl to her aunt. Jones and McDaniels's daughter stayed in her grandmother's house on Millbrae Avenue, where Jones had grown up and her two teenage brothers resided. Jones's grandmother did not allow McDaniels to stay there.

Jones testified that while they were visiting California, McDaniels told her that her white minivan had been impounded. She did not ask why or attempt to reclaim it because it "was under a repossession status." She did not have a gun manual, gloves, hats, or crowbars in her van. After Jones's van was impounded, McDaniels drove the Dodge Magnum.

McDaniels was supposed to meet Jones at her grandmother's house on the evening of February 9 to get his daughter to take her to her aunt's home. Jones was away from the house and was running late. When Jones arrived in the neighborhood, law enforcement had blocked off the street.

10. Verdicts and sentencing

At the first trial of the charges, a jury acquitted Barnes entirely and Alderson of all but one charge, and convicted McDaniels of possession of a firearm by a felon. The jury, however, could not reach verdicts on the murder and attempted murder charges against McDaniels and Britt. The court declared a mistrial as to those charges.

Britt and McDaniels were retried, and the jury convicted each of first degree murder and attempted murder, which the jury found to be willful, deliberate, and premeditated. The jury found each crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. It further found, with respect to each count, that Britt personally fired a gun, causing death (Pen. Code, § 12022.53, subd. (d)),[4] and a principal personally fired a gun, causing death (§ 12022.53, subds. (d), (e)). The court sentenced each defendant to 90 years to life in prison, calculated as 25 years to life for murder, plus 15 years to life for attempted murder, plus enhancements to each count of 25 years to life for the section 12022.53 firearm enhancement. The court imposed a two-year concurrent term for McDaniels's felon in possession conviction.

DISCUSSION

1. Prosecutor's peremptory challenge to original trial judge for retrial

Judge Stanley Blumenfeld presided over the trial that ended in a mistrial with respect to McDaniels and Britt. Thereafter, the case was called in the master calendar courtroom on several occasions, and then assigned to Judge Blumenfeld for retrial. On the same day, the prosecutor filed a Code of Civil Procedure section 170.6 peremptory challenge against Judge Blumenfeld in the master calendar court. Judge Darrell Mavis reviewed the challenge, found it timely, and assigned the case to Judge Candace Beason for trial. Defendants contend that Judge Mavis erred by accepting the prosecutor's Code of Civil Procedure section 170.6 peremptory challenge against Judge Blumenfeld when the case was assigned to Judge Blumenfeld for retrial.

A ruling on a Code of Civil Procedure section 170.6 peremptory challenge is not appealable; it is reviewable only by filing a petition for a writ of prohibition or mandamus. (*People v. Webb* (1993) 6 Cal.4th 494, 522–523; Code Civ. Proc., § 170.3,

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[4] Undesignated statutory references pertain to the Penal Code.

subd. (d).) Defendants failed to file such a writ petition. We thus do not address defendants' claims that the peremptory challenge was improvidently accepted.

2. Refusal to instruct on heat of passion, voluntary manslaughter, and attempted voluntary manslaughter

a. Proceedings in the trial court

Britt asked the court to instruct the jury on voluntary manslaughter, attempted voluntary manslaughter, and heat of passion. The trial court refused on the ground that insufficient evidence supported the heat of passion theory. Defendants contend the trial court erred and that the error violated their constitutional rights to a jury trial and to present a defense.

b. Relevant principles of law

"A trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration." (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) A trial court must instruct on lesser included offenses whenever substantial evidence raises a question as to whether all of the elements of the charged offense are present. (*People v. Avila* (2009) 46 Cal.4th 680, 705.) In this context, substantial evidence means evidence from which a reasonable jury "'could conclude that the lesser offense, but not the greater, was committed.'" (*Ibid.*) The "substantial evidence requirement is not satisfied by '"any evidence . . . no matter how weak."'" (*Ibid.*)

"Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter—a lesser included offense of murder." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) Similarly, an attempted killing upon sudden quarrel or heat of passion reduces the offense of attempted murder to attempted voluntary manslaughter. (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.)

"A heat of passion theory . . . has both objective and subjective components." (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) To satisfy the objective component, the claimed provocation must be sufficient to "cause an ordinary person of

average disposition to act rashly or without due deliberation and reflection," from passion rather than from judgment. (*Id.* at p. 550; *People v. Beltran* (2013) 56 Cal.4th 935, 942 (*Beltran*).) "[T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene." (*Beltran*, at p. 949.) "'The provocation . . . must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.'" (*Moye*, at pp. 549–550.) A defendant may not "'"set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused . . . ."'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215–1216, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1252 (*Steele*).)

"To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Moye*, *supra*, 47 Cal.4th at p. 550.) "[T]he passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion'"' [citation] other than revenge." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

"'[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter—"the assailant must act under the smart of that sudden quarrel or heat of passion."'" (*Beltran*, *supra*, 56 Cal.4th at p. 951.)

c. Substantial evidence did not support instruction upon heat of passion

Assuming, for the sake of argument, that fathering Kia's baby constituted adequate provocation, neither Sanchez nor Velasquez, let alone both, engaged in the conduct constituting the provocation. Nor was it *reasonable* for Britt to believe either—and certainly not both—of the victims engaged in the provocative conduct because, by his own admission at trial, he "didn't exactly know who [Justin] was." Britt had not met Justin, had only seen a photograph of him once, and knew only the general part of town he lived in, not, for example, that he lived on Millbrae Avenue near the cross street from which McDaniels abruptly turned. Britt viewed the victims at a distance from a moving

car in low light. Britt's leap to the conclusion that one of the men was Justin was not a reasonable belief sufficient to satisfy the objective component of heat of passion. Britt's purported consumption of drugs and alcohol may have been relevant to the subjective element of heat of passion, but he could not set up his own diminished capacity to support the objective element of heat of passion. (*Steele, supra*, 27 Cal.4th at p. 1253 [objective element of heat of passion must be due to provocation by victim; diminished capacity is irrelevant to this inquiry].) Moreover, Britt told detectives Kia had told him Justin was the father of the baby on New Year's Day, more than one month before the shootings on February 9. This was more than sufficient time for passion to subside and reason to return.

For all of these reasons, substantial evidence did not support instruction on heat of passion with respect to either murder or attempted murder, and the trial court did not err by refusing these instructions. The trial court's refusal to give the unsupported instructions did not violate Britt's federal constitutional rights. (*People v. Snow* (2003) 30 Cal.4th 43, 88.)

No evidence was introduced suggesting McDaniels acted in the heat of passion. To the extent he claims some vicarious use of Britt's purported heat of passion, his claim has no greater merit than Britt's claim does.

3. Admission of evidence of texted threats to Rawls

a. Proceedings in the trial court

Just before the prosecutor called Rawls, she informed the court she had just learned Rawls had received two threatening text messages "since" her testimony in the first trial. The first such message said that Rawls had received "a pass," but there would be no other passes and she should not return to California. The second said that the sender knew where Rawls stayed and everywhere she went. The prosecutor asked the court to allow her to introduce them during Rawls's testimony with respect to her credibility. The prosecutor said, "I believe her credibility will be challenged by the defense in this case. It was in the last trial regarding her level of intoxication and, you know, motives to fabricate."

Counsel for Britt objected to the text messages as "hearsay upon hearsay" and because the identity of the sender was unknown and the texts were "overly prejudicial." Counsel for McDaniels joined in these objections. After noting "that normally the appropriate thing to do would be to say that we don't know, that there isn't anything to suggest that [defendants] originated this text," the court overruled their objections.

Rawls testified on direct examination that she did not want to be involved in the case and she was present at trial pursuant to a subpoena. She also testified she had not contacted the police to tell them what she knew after she heard about the shooting because it was not her business and she did not want to be involved. Rawls had moved out of California in 2009.

Near the end of Rawls's testimony on direct examination, she testified she had testified at a "separate trial in this case" in January of 2013 and had been threatened since then. She explained, "I received a text message saying I got a pass and I better not come back to California. They knew where I was at, which is my sister's, I went to my mom's." She understood having a pass to mean she "got lucky" and "they're not going to do anything" about "the last time." The texts were from an e-mail address, and Rawls did not know who sent them.

The court interjected, "Ladies and gentlemen, there is—we don't have any information that the e-mail to text had—arose from Mr. McDaniels or Mr. Britt or at their direction. We don't have any information to that effect. [¶] So you shouldn't consider it as to their guilt or innocence in this case. It only is being allowed as it explains Ms. Rawl's [*sic*] demeanor and hesitation and credibility."

The prosecutor then read the first text into the record: "'I hope you had fun out here. We give you pass. This no more passes. You don't come back to Cali.'" The date of the message was February 9, 2013. The prosecutor did not read or otherwise ask about the content of the second text message.

On cross-examination, Rawls testified she had consumed beer and strong marijuana throughout the day on February 9, commencing about 10:00 a.m., soon after she awakened. She did not stop until she went to bed that night. Further, she drank and

smoked "like that every day." She could not recall, but "there's a good chance probably" she started drinking vodka later in the day. When asked what time it was when she saw defendants, Alderson, and Barnes in the Dodge Magnum at the stoplight, Rawls estimated it was "a little bit after 12 noon" or "sometime in the afternoon." Rawls agreed that there was no evidence or indication that McDaniels or Britt sent the threatening text.

Defendants contend the trial court erred by allowing the prosecutor to introduce evidence of the threats because the threats were highly prejudicial, yet irrelevant to Rawls's credibility because she did not testify that she feared testifying or was reluctant to testify. Defendants further argue that the admission of the evidence violated due process.

b. Relevant principles of law

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of an action." (Evid. Code, § 210.) Evidence Code section 780 enumerates factors bearing on the credibility of a witness, including "(a) His demeanor while testifying and the manner in which he testifies," "(f) The existence or nonexistence of a bias, interest, or other motive," and "(j) His attitude toward the action in which he testifies or toward the giving of testimony." "[A] trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1085 (*Mendoza*).)

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony. . . . For this purpose, it matters not the source of the threat." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368–1369.)

Evidence Code section 352 provides that the court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will either be unduly time consuming or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury.

We review a ruling on the admissibility of evidence for abuse of discretion. (*People v. Elliott* (2012) 53 Cal.4th 535, 577.) "A trial court's ruling on admissibility implies whatever finding of fact is prerequisite thereto." (*People v. Williams* (1997) 16 Cal.4th 153, 196.)

Generally, the erroneous admission of evidence requires reversal only if it is reasonably probable defendant would have obtained a more favorable outcome had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The admission of evidence may violate due process, however, if there is no permissible inference a jury may draw from the evidence. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*).)

c. Admission of the threats was not an abuse of discretion

Defendants' argument hinges upon their contention that whether Rawls feared testifying was an essential foundational fact for admission of the threats. They have not cited any authority supporting this principle, and we have found no statutory or decisional support for it. We conclude that the admissibility issue instead must be evaluated according to ordinary principles of relevance and discretionary exclusion pursuant to Evidence Code section 352.

Defendants rely upon two federal appellate cases from the same circuit, neither of which supports their contention that "admission of third party threats may violate a defendant's right to a fair trial where no evidence indicates that the threats cause the witness to fear for her safety." In addition, both cases are distinguishable and neither is binding upon this court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

In *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, cited by defendants, as soon as a testifying former codefendant had stated his name, age, and location of residence, the prosecutor asked him why he was nervous. The witness then testified about receiving phone calls the night before that made him fear the caller would harm the witness's girlfriend and family members if he testified. (*Id.* at pp. 969, 973.) The federal appellate court considering Dudley's federal habeas corpus petition noted that in affirming Dudley's conviction, the Indiana Supreme Court had not addressed established Indiana law premising admissibility of threats evidence upon a showing the threats were made by the defendant or with his knowledge or authorization. (*Id.* at p. 970.) The federal appellate court concluded that because the record did not reflect the witness's "'extreme nervousness,'" "the prosecutor intended to get the threat testimony before the jury under a pretext" "more to prejudice the defendants, including petitioner, than to explain away any nervousness of the witness." (*Id*. at pp. 971–972.) Notably, the court did not hold, as defendants argue, that evidence of threats is inadmissible absent proof that the witness feared testifying. Indeed, the witness whose testimony was in issue actually stated that he feared testifying. We further note that it does not appear that the jury in *Dudley* was given a limiting instruction regarding the threat evidence.

In contrast, the threat evidence in defendants' trial was introduced only at the end of the prosecutor's direct examination of Rawls. As noted, she had already testified she did not want to be involved in the case, had not contacted the police to tell them what she knew about the shooting, and was testifying pursuant to a subpoena. The court's ensuing remarks regarding Rawls's demeanor and hesitation indicate that Rawls hesitated in responding to questions and that the court viewed Rawls's demeanor as potentially raising doubts regarding her credibility. Nothing suggests that the prosecutor's basis for introducing the evidence was pretextual. In addition, California law does not condition the admissibility of threats evidence upon either the defendant's connection to the threat or particular behavior by a witness during testimony. (*People v. Merriman* (2014) 60 Cal.4th 1, 86 [rejecting contention that evidence witness feared retaliation was admissible only if witness hesitated or displayed nervousness or fear].) Finally, the trial

court instructed the jury in defendants' case that it could consider the threat evidence only with respect to Rawls's demeanor, hesitation, and credibility, and not with respect to defendants' guilt. We presume jurors follow limiting instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

The other case cited by defendants, *United States v. Thomas* (7th Cir. 1996) 86 F.3d 647, also did not hold that the admissibility of evidence of threats against a witness requires a showing that the threats caused a witness fear. Instead, the federal appellate court concluded that the district court in a federal drug prosecution had abused its discretion under the Federal Rules of Evidence by admitting evidence of third party and anonymous threats to witnesses to "'boost'" their credibility, not to explain specific behavior relevant to their credibility. (*Id.* at p. 654.) The appellate court stated the following principle: "[T]hreat evidence has extremely limited probative value towards credibility, unless the evidence bears directly on a specific credibility issue regarding the threatened witness. For example, . . . to explain a witness' inconsistent statements, delays in testifying, or even courtroom demeanor indicating intimidation." (*Ibid.*) The opinion does not indicate whether the trial court gave a limiting instruction regarding the threats evidence. The appellate court ultimately concluded that the admission of the challenged threats evidence was harmless in light of the strength of the evidence against the defendants and evidence of threats against witnesses made directly by one of the defendants. (*Id.* at p. 655.)

Defendants' case was not governed by the Federal Rules of Evidence or federal appellate decisions regarding those rules. Instead, the trial court had "discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination" (*Mendoza, supra,* 52 Cal.4th at p. 1085) because the prosecutor reasonably anticipated the defendants again would attack Rawls's credibility as they had at the first trial. Moreover, the trial court instructed the jury in defendants' case that it could consider the threat evidence only with respect to Rawls's demeanor, hesitation, and credibility, and not with respect to defendants' guilt,

and the court's references to Rawls's demeanor and hesitation indicate that her hesitancy in responding to questions and her demeanor cast doubt upon her credibility.

We conclude that the trial court did not abuse its discretion in concluding that the threats evidence was relevant and that its probative value was not substantially outweighed by a risk of undue prejudice, when the evidence was admitted for the limited purpose of evaluating Rawls's credibility. Because permissible inferences could be drawn from the evidence, its admission did not violate due process.

4. Gang expert's testimony

a. Proceedings in the trial court

McDaniels challenges three instances of gang expert Brennan's testimony. One challenge is to Brennan's knowledge of the meaning of gang slang. The other two challenged segments were based upon particular details set forth in the prosecution's hypothetical question, namely, whether older gang members would know a younger gang member was in possession of a gun and the reason a younger gang member would remain outside a store while older members went inside.

In framing her hypothetical, the prosecutor tracked evidence in this case. Thus, her hypothetical described, among other assumptions, four men in a vehicle from which shots were fired at two Hispanic men, killing one of them. The men included active gang members aged 35, 32, and 21, and a 34-year-old associate of the gang, who had all hung out together previously that day at a well-known gang meeting place. Her hypothetical asked Brennan to assume that earlier, a fellow gang member had been killed in a drive-by shooting and that the previously mentioned hang-out had a surface on which that fellow gang member's name was written in chalk. The prosecutor further asked Brennan to assume that the 35-year-old gang member was driving and the 21-year-old gang member was seated behind the driver and armed with a semiautomatic handgun. She asked the witness to assume that the car made a sharp turn when it approached the direction of the two Hispanics, that the window next to the 21-year-old descended as the car pulled alongside the Hispanics, and that the driver slowed the car at the same time. The prosecutor included in her hypothetical that before the shooting, the men in the car went

to a liquor store and the three older men went into the store**,** while the 21-year-old gang member remained outside.

(1) Testimony about other gang members' knowledge of gun in car

After Brennan opined that the crimes would have been committed for the benefit of and in association with a criminal street gang, to promote and further the gang's "terrorism of the rival neighborhood," the prosecutor asked him, "[A]ssuming that the 21-year-old, again, is armed with the semi-automatic handgun and he's in the car with his own older gang members, would you expect the older gang members to know that the 21-year-old has the gun?" Brennan replied, "Yes." Counsel for McDaniels objected: "That's outside the scope of the expertise. Not a proper hypothetical." The trial court sustained the objection to the question "as phrased." The prosecutor rephrased the question: "Based on the hypothetical that I read to you, would you expect that . . . the 35-year-old and 32-year-old who I indicated were the active gang members in 2009 would be aware that the 21-year-old was—had the gun?" Neither defendant objected. Brennan replied, "Yes," and explained, "It's just based on the level of membership within a gang. Usually the older members have been much more established and are looked up to. And they would—it wouldn't be a younger guy getting into the car with some illegal drugs, guns, whatever, without saying, hey, man, I got this in case the cops stop us or whatever."

Brennan added, "And that's based on thousands of interviews over the years that I've conducted of gang members after drive-by shootings and gang members within the neighborhood. [¶] That nobody gets in a car without knowing that there's a weapon, especially if they're going to a rival neighborhood, or even a possible rival liquor store or a rival neighborhood or especially if they're going on a mission, they're going to know who has the gun, who has what." He explained that a younger member would be "disciplined" if he did not inform the older members that he was armed.

(2) Testimony about reason youngest gang member remained outside store

The prosecutor asked whether Brennan had an opinion as to why the armed 21-year-old gang member would remain outside while the older men went inside the liquor store, as stated in her hypothetical. Counsel for McDaniels objected: "It's an improper

hypothetical." The trial court overruled the objection, and Brennan testified, "[T]hrough my experience over the years, I have seen gang members standing outside the door, run in the liquor store, would drive up—they call it 'post it up.' [¶] If there's some guys going in the liquor store and they're in a neighborhood that could be rivals going within the same liquor store, or just watching for the police. Then, oftentimes, they'll leave somebody with a weapon posted up outside."

(3) Testimony on the meaning of "hitting corners"

Outside the presence of the jury before Brennan testified, counsel for McDaniels asked the prosecutor if she intended to ask Brennan "what 'hit the corners' mean[s]." The prosecutor said she did, and defense counsel objected, saying, "I would object to what he believed. He will offer an opinion as to what that means." The trial court responded, "And then the foundation as a gang expert, if he is familiar with certain sayings. And, if so, would he be familiar with that saying and if he has an opinion. [¶] And I would allow it over the defense objection." The prosecutor subsequently asked Brennan if, based upon his training and experience before working on the present case, he was "familiar with the term 'hitting corners' or 'going to hit some corners.'" Brennan said he was and explained, "I'm familiar with that term 'hitting corners' from interviewing several gang members . . . either gang member suspects or witnesses that have been involved in gang-related shootings. [¶] And that term has come up as, you know, we were hitting corners, then we saw them over there and we blasted on them. [¶] And it was—kind of like went along with they were on a mission or they're putting in work. 'Hitting corners,' that's another word for going through the neighborhood till you find the enemy and assaulting them." Neither defendant objected.

On cross-examination, counsel for Britt asked Brennan if he had asked gang members to research the meaning of "'hitting the corners.'" Brennan replied, "I didn't ask for research. I've heard it several times when I've interviewed guys about shootings." Counsel asked if Brennan had heard the term "[i]n rap songs or amongst young people?" Brennan said he did not listen to much rap and explained, without objection, "Just in my job, talking with gang members and their interpretation that I got

from them, what they told me they're hitting corners or going on a mission, they're doing a drive-by."

b. Relevant principles of law

"[A] trial court has wide discretion to admit or exclude expert testimony." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Where, as here, a gang enhancement is alleged, "expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*Ibid.*, quoting Evid. Code, § 801, subd. (a).)

A gang expert may testify in response to a hypothetical question as long as the question is "'rooted'" in the evidence. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*); *People v. Gonzalez* (2006) 38 Cal.4th 932, 946 (*Gonzalez*).) An expert generally may not testify to an opinion that a specific defendant had particular knowledge or a particular specific intent. (*Vang*, at p. 1048 & fn. 4; *Gonzalez*, at p. 946; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*).)

Defendants assert that the prosecutor's hypothetical impermissibly asked the expert his opinion as to the defendants' intent or knowledge, which is a determination within the province of the jury. In *Killebrew*, the appellate court held an expert's opinion testimony was improper: "Through the use of hypothetical questions, [the expert] testified that each of the individuals in the three cars (1) knew there was a gun in the Chevrolet and a gun in the Mazda, and (2) jointly possessed the gun with every other person in all three cars for their mutual protection. In other words, [the expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action. [¶] [The expert]'s testimony was the only evidence offered by the People to establish the elements of the crime. 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."

(*Killebrew, supra,* 103 Cal.App.4th at p. 658.) The *Killebrew* opinion does not quote or paraphrase the objectionable testimony and "never specifically states whether or how the expert referred to specific persons, rather than hypothetical persons." (*Gonzalez, supra,* 38 Cal.4th at p. 946, fn. 3.)

The California Supreme Court has limited the scope of *Killebrew*. In *Gonzalez,* the Supreme Court commented that it "read *Killebrew* as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" (*Gonzalez, supra,* 38 Cal.4th at p. 946.) The court explained, "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*Gonzalez,* at p. 946, fn. 3.)

In *Vang, supra,* 52 Cal.4th 1038, the Supreme Court further explained, "To the extent that *Killebrew* [citation] was correct in prohibiting expert testimony regarding whether the *specific* defendants acted for a gang reason, the reason for this rule is *not* that such testimony might embrace the ultimate issue in the case," which the Supreme Court observed is permissible under Evidence Code section 805, but because such testimony was effectively an opinion on guilt or innocence, which would be of "'"no assistance to the trier of fact."'" (*Vang,* at p. 1048, fn. omitted.) "Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence." (*Vang,* at p. 1051.)

"[T]he trial court [has] no sua sponte duty to exclude evidence." (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) The burden is upon the party seeking to exclude evidence to make a timely objection that clearly and specifically states the grounds for the objection. (*Partida, supra,* 37 Cal.4th at pp. 433–434.) "What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*Id.* at p. 435.) Absent a timely and specific objection on the

particular ground now asserted on appeal, the objection is deemed forfeited. (*Id.* at pp. 433–434.)

c. McDaniels forfeited his claims of error

We address each of the three challenged portions of testimony in turn.

(1) Other gang members' knowledge of gun in car

McDaniels contends that Brennan rendered an improper opinion about McDaniels's subjective knowledge and intent regarding the gun in the car in violation of *Killebrew*. Although McDaniels objected to the prosecutor's initial question as an improper hypothetical, neither he nor Britt objected when the prosecutor slightly rephrased the question to repeat details from her original hypothetical question. Because the first objection was sustained, McDaniels cannot reasonably contend that further objection would have been futile. Accordingly, McDaniels forfeited his appellate claim by failing to object to the rephrased question on any ground.

Even if McDaniels had preserved the *Killebrew* claim, we conclude the question and testimony were permissible. Brennan was asked and testified about the expectations of hypothetical persons, not of McDaniels. In addition, Brennan explained that his answer was based on what he had been told in "thousands of interviews" with gang members "over the years" regarding gang practices that stemmed from both the relative rank and respect of persons within a gang and the importance of knowing about the presence of a gun in a car. Brennan's testimony in this regard addressed gang practices and expectations, and was not an opinion regarding McDaniels's guilt.

(2) Reason youngest gang member remained outside store

McDaniels contends that Brennan's testimony about why the 21-year-old gang member in the prosecutor's hypothetical would remain outside the liquor store addressed a matter that was not beyond the common knowledge and experience of jurors and was improper profile evidence. His "improper hypothetical" objection in the trial court did not fairly inform the court or prosecutor of either ground asserted on appeal. Accordingly, McDaniels forfeited these claims of error.

Even if McDaniels had not forfeited his argument, we conclude that the argument is not well founded. The question addressed gang strategy in leaving someone outside as a lookout to protect gang members in a store where they might meet members of a rival gang. This was a matter outside the scope of the common knowledge and experience of jurors. McDaniels also misconstrues Brennan's testimony in arguing that Brennan improperly opined "as to the significance of equivocal conduct by the defendant prior to his arrest." In fact, Brennan was asked about the conduct of the 21-year-old gang member described in the prosecutor's hypothetical, not about the conduct of McDaniels or Britt.

McDaniels's claim that the opinion testimony was profile evidence is factually erroneous and legally inaccurate. "A profile ordinarily constitutes a set of circumstances—some innocuous—characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile." (*People v. Prince* (2007) 40 Cal.4th 1179, 1226.) Brennan's testimony about a strategic reason for one hypothetical gang member staying outside a store while others went inside did not describe a set of circumstances characteristic of certain crimes or criminals and compare either defendant's conduct to that profile. Moreover, "'[p]rofile evidence' . . . is not a separate ground for excluding evidence; such evidence is inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (*People v. Smith* (2005) 35 Cal.4th 334, 357.)

Finally, the strategic significance of a younger gang member standing guard outside the store—described by Brennan as essentially a defensive move—was a minor component of the events of the subsequent shooting at another location and of the issue of whether the driver knew of the shooter's intent. Thus, even if defendants' argument had been preserved, and even if the trial court erred in allowing the questioning, any such error would be harmless beyond a reasonable doubt.

(3) Meaning of "hitting corners"

McDaniels contends that under *Killebrew*, Brennan was not qualified to testify as to the meaning of "hitting corners" and that his testimony was not proper expert testimony. He did not raise either objection in the trial court. Instead, by saying, "I would object to what he believed. He will offer an opinion as to what that means," McDaniels objection merely states what testimony he would object to, not the reason he believed the evidence was inadmissible. His objection was insufficient to put the trial court on notice that he was objecting on either ground raised on appeal. Accordingly, he forfeited his appellate claims to this evidence.

Even if McDaniels had preserved these claims, they are not meritorious. Brennan testified he had been a police officer for more than 31 years at the time of trial and a gang homicide detective since 1993. He had received formal training on gangs and had extensive practical experience monitoring gangs in various parts of Los Angeles County, speaking to gang members on a daily basis, serving on gang-related task forces since 1992, and investigating gang crimes. He was assigned to investigate the Duroc Crips gang and had reviewed or investigated over 90 gang-related shootings involving the gang and its rivals. He had taught at state and national seminars pertaining to gangs, gang-related crimes, and gang trends and provided assistance to law enforcement and prosecutors around the nation and in Europe. He had testified as a gang expert more than 100 times and an expert about the Duroc Crips gang roughly 15 to 20 times prior to defendants' trial.

With specific reference to the meaning of "hitting corners," Brennan testified he had heard the term from gang members. On cross-examination, he explained gang members had given him an "interpretation," that it meant "going on a mission" or "doing a drive-by." Given Brennan's gang expertise, his extensive contacts with gang members, and his explanation for how he learned the phrase, we conclude defining the term as he had heard it was not beyond the scope of Brennan's expertise.

McDaniels's *Killebrew* claim seems to be based upon a misreading of Brennan's testimony. He did not testify on McDaniels's "subjective knowledge and intent," but merely on the meaning of slang that he had heard other gang members use.

Finally, we note that during a recorded interview that was played at trial without objection, Detective McElderry asked Britt, "If somebody says we're gonna go hit the corner? Go hit this corner? What does that mean to you?" Britt responded, "Then it's on. Like gonna dip this way." Detective Perry asked what it meant "in a gangster kind of term." Britt replied, "Well, probably been gonna go look for something or—you know what I mean?" Perry asked, "Doesn't it mean going out looking for somebody to shoot?" Britt conceded, "It could be." An admitted gang member thus corroborated Brennan's definition of the term. Had Brennan's testimony on the meaning been excluded upon proper objection, the jury nonetheless would have received essentially the same definition from Britt's recorded interview. Thus, any purported error in admitting Brennan's testimony was harmless beyond a reasonable doubt.

d. Ineffective assistance of counsel

In his reply brief, McDaniels argues that his attorney rendered ineffective assistance by failing to object at all, or failing to object on the grounds asserted on appeal. We decline to consider this argument because McDaniels raises it for the first time in his reply brief. (*People v. Grimes* (2015) 60 Cal.4th 729, 757; *People v. Harris* (1985) 165 Cal.App.3d 1246, 1256, fn 8.)

5. Instructional error regarding natural and probable consequences doctrine

McDaniels contends that the trial court erred in instructing the jury on his liability for aiding and abetting first degree premeditated murder pursuant to the natural and probable consequences doctrine. After he filed his opening brief, in which he argued particular omissions from the jury instructions, the California Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). *Chiu* bars conviction of first degree premeditated murder based on the natural and probable consequences doctrine. The Attorney General concedes the instructions in this case violated *Chiu*, but argues that the error was harmless. In his reply brief, McDaniels adopted *Chiu* as the basis for his claim

of error, but disagreed that the error was not prejudicial. Accordingly, we address the *Chiu* error, which, for the reasons set forth below, obviates our having to address McDaniels's other contentions regarding instructional error.

a. Applicable law

A trial court in a criminal case is required—with or without a request—to give correct jury instructions "on '"'the general principles of law relevant to the issues raised by the evidence'"' [citation], including the elements of an offense [citation]." (*People v. Acosta* (2014) 226 Cal.App.4th 108, 118.)

One who aids and abets the commission of a crime is a principal in the crime, and thus shares the guilt of the actual perpetrator. (§ 31.) A person aids and abets the commission of a crime when he or she, with "'knowledge of the unlawful purpose of the perpetrator,'" and with "'the intent or purpose of committing, encouraging or facilitating the commission of the crime . . . by act or advice, aids, promotes, encourages or instigates, the commission of the crime.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*).)

Generally, an aider and abettor is guilty not only of the offense he or she intended to facilitate or encourage (the target crime), but also of any other crime committed by the person he or she aids and abets that is the natural and probable consequence of the target crime. (*Prettyman, supra,* 14 Cal.4th at p. 261.) An aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed, and generally need not have any specific intent that is an element of the offense committed. (*Ibid.*)

In *Chiu*, however, the California Supreme Court eliminated the availability of the doctrine of natural and probable consequences as a basis for aider and abettor liability for premeditated murder. (59 Cal.4th at p. 166.) The court declared, "[P]unishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder." (*Ibid.*) An aider and abettor can be convicted of first degree premeditated murder only if the prosecution establishes "the defendant aided or encouraged the

commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*Id.* at p. 167.) The court explained, "An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder."[5] (*Ibid.*) The *Chiu* court also observed that its ruling did not limit aider and abettor's liability for first degree felony murder. (*Id.* at p. 166.)

The next issue before the *Chiu* court was what were the consequences of its ruling where the trial court instructed on the valid theory of direct aider and abettor liability for premeditated murder and the invalid theory based on the natural and probable consequences doctrine. Where, as in *Chiu*, a prosecutor tried the case on both theories, "[d]efendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu, supra*, 59 Cal.4th at p. 167.) In *Chiu*, because a holdout juror had been excused when she stated that she "was bothered by the principle of aiding and abetting and putting an aider and abettor in the shoes of a perpetrator," and it seemed as if the jury had focused on the natural and probable consequences theory of aiding and abetting premeditated murder, "we cannot conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on a . . . legally valid theory." (*Id*. at p. 168.)

b. Proceedings in the trial court

McDaniels's guilt of the charged offenses depended on his status as an aider and abettor. The prosecutor relied upon alternative theories: (1) McDaniels directly aided

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[5] "[T]he connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above stated public policy concern of deterrence." (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

and abetted Britt's commission of the murder, that is, with knowledge Britt intended to commit murder and an intent to commit, facilitate, or encourage Britt to commit murder, or (2) McDaniels aided and abetted Britt's commission of either assault with a semiautomatic firearm or carrying a concealed firearm, and murder was a natural and probable consequence of those offenses.

Accordingly, the court instructed the jury upon aiding and abetting with CALCRIM No. 401 and upon the natural and probable consequences doctrine with CALCRIM No. 403, which stated, in pertinent part, "To prove that the defendant is guilty of Murder and/or Attempted Murder, the People must prove that: [¶] 1. The defendant is guilty of Assault with a Semi-automatic firearm, or Carrying a concealed firearm; [¶] 2. During the commission of Assault with a Semi-automatic firearm or Carrying a concealed firearm, a coparticipant in that Assault with a Semi-automatic firearm or Carrying a concealed firearm committed the crime of Murder and Attempted Murder; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the Murder and/or Attempted Murder was a natural and probable consequence of the commission of the Assault with a Semi-automatic firearm or Carrying a concealed firearm. [¶] . . . [¶] If you decide that the defendant, Lamar McDaniels, aided and abetted one of these crimes and that Murder and or Attempted Murder was a natural and probable consequence of that crime, the defendant is guilty of Murder and/or Attempted Murder. You do not need to agree about which of these crimes the defendant aided and abetted."

The court also instructed the jury on two alternative theories of first degree murder: willful, deliberate, and premeditated murder, and murder committed by intentionally shooting from a motor vehicle at a person outside the vehicle with intent to kill. (CALCRIM No. 521.)

One hour and 15 minutes after the jury began deliberating, it asked that Sabrina Jones's testimony be read back. The testimony was read to the jury within the hour, and at the conclusion of the reading, trial adjourned for the day. The jury resumed deliberations the next morning and, just before leaving for lunch, sent the court a note

asking for "[t]he definition of implied—vs—express intent." The court conferred with counsel, who stipulated to the following response by the court: "Please see Calcrim 520[**6**] on p. 13 of the instructions." CALCRIM No. 520 describes the difference between express and implied malice and references the term "natural and probable consequences." The jury received the court's written response when it returned from lunch at 1:35 p.m., and at 3:20 p.m. it informed the court it had reached verdicts.

c. Reliance and instruction upon the natural and probable consequences doctrine as a theory of liability for first degree murder constituted prejudicial error

Instructing the jury that it could convict McDaniels of first degree murder by applying the natural and probable consequences doctrine was error under *Chiu*, as the parties agree. The Attorney General argues the instructional error was harmless because, "[u]nlike in Chiu, the jury's inquiries here did not indicate that it was focusing on the natural and probable consequences doctrine. [Citation.] And the evidence that appellant McDaniels directly aided and abetted appellant Britt in the murder of Sanchez is strong." Neither argument is sufficient for us to conclude *beyond a reasonable doubt* that the jury based its verdict on a legally valid theory.

Indeed, the jury's request for a reading of Jones's testimony suggests the jury may not have dismissed as false her innocuous explanation for McDaniels's presence at the crime scene at the time of the shooting. The testimony of Jones, Britt, and Barnes

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6 CALCRIM No. 520 provided: "The defendants are charged in Count 1 with murder in violation of Penal Code section 187. [¶] To prove that the defendants are guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. he deliberately acted with conscious disregard for human life. [¶] . . . [¶] If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521."

provided an alternative explanation for events that, if believed, would have exonerated McDaniels of murder unless the jury applied the natural and probable consequences doctrine. Notably, evidence that McDaniels gave Britt the gun was uncontradicted, and the jury instructions permitted the jury to convict McDaniels of first degree premeditated murder by concluding he aided and abetted the crime of carrying a concealed firearm. This provided a simple conceptual path for the jury to follow to reach its verdict. Nothing in the record permits us to conclude beyond a reasonable doubt that the jury did not, in fact, adopt that analysis and base its verdict on a legally invalid theory. Although, as explained in the next section, the prosecution presented evidence sufficient to support McDaniels's conviction of first degree murder on a legally valid theory, crucial aspects of that evidence were contradicted by defense evidence.

Because we cannot conclude beyond a reasonable doubt that the jury relied on a legally valid theory to convict McDaniels of first degree murder, we reverse his murder conviction and allow the People to choose between accepting a reduction of that conviction to second degree murder, followed by resentencing, or retrying McDaniels on the murder charge.

We note that McDaniels does not contend that the natural and probable consequences instruction was erroneous with respect to his attempted murder conviction. The Supreme Court expressly limited its ruling in *Chiu* to first degree premeditated murder. (*Chiu, supra,* 59 Cal.4th at pp. 158–159, 166–167.) Indeed, the Supreme Court contrasted its ruling with its ruling in *People v. Favor* (2012) 54 Cal.4th 868, in which the Supreme Court held that an aider and abettor may be found to have committed an attempted murder with premeditation and deliberation on the basis of the natural and probable consequences doctrine. (*Favor*, at p. 872; *Chiu*, at pp. 162–163.)

6. Sufficiency of evidence

McDaniels contends that insufficient evidence supports his murder conviction and the gang enhancement findings. He does not challenge the sufficiency of evidence supporting his attempted murder conviction. Because a finding of insufficiency of evidence precludes retrial of a charge, we address McDaniels's contention regarding the

murder charge notwithstanding our reversal of that conviction due to *Chiu* error, as addressed in the prior section of this opinion. Our disposition of the *Chiu* error renders it unnecessary to address McDaniels's sufficiency arguments regarding application of the natural and probable consequences theory.

a. Applicable law

To determine the sufficiency of evidence, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) The same standard applies to the sufficiency of evidence to support a true finding on an enhancement allegation. Substantial evidence is "'"evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."'" (*Ibid*.) We presume the existence of every fact supporting the judgment that the jury could reasonably have deduced from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) We may not set aside a judgment for insufficiency of evidence unless it clearly appears that under no hypothesis whatever is there sufficient evidence to support it. (*People v. Johnson* (1992) 5 Cal.App.4th 552, 561.) Accordingly, where substantial evidence supports the verdict, we must affirm, even though the evidence would also reasonably support acquittal. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

"'"Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment"'" for insufficiency of evidence; it is the exclusive province of the trier of fact to determine credibility and the truth or falsity of the facts upon which credibility depends. (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) A jury is entitled to reject portions of a witness's testimony and accept other portions. (*Ibid*.)

b. Sufficient evidence supports McDaniels's murder conviction

McDaniels argues the evidence was insufficient to support his murder conviction because "[a]ny inculpatory significance of appellant's role as the driver and of his

presence at the crime scene was dissipated by the testimony of Sabrina Jones," "[McDaniels's] sudden turn onto Millbrae Avenue and slowing down for pedestrians may be explained by his search for her grandmother's house in an unfamiliar neighborhood," and "there was uncontroverted evidence that [McDaniels] did not know that Joel Britt was armed with a gun in the car" and that Britt intended to shoot at anyone from the car. These contentions amount to a request that this court reweigh the evidence, crediting the defense evidence and rejecting contradictory prosecution evidence. Under the authorities set forth above, review for substantial evidence does not permit appellate courts to second-guess the jury in these evidentiary assessments.

Viewing the whole record in the light most favorable to the judgment, we conclude substantial evidence supported McDaniels's murder conviction as a direct aider and abettor. The record supports an inference that McDaniels either stole the gun used in the murder or acquired it within no more than a day after it was stolen from Nader's Market. The day before the murder, he gave that gun to Britt. On the day of the murder McDaniels spent time socializing with his fellow Duroc Crips gang members Britt and Alderson, possible gang associate Barnes, and Koteysha Cox, who was romantically involved with Alderson and had had a child with Duroc Crips gang member Brandon Lee. Apparently Lee had been killed earlier by members of a rival gang, either MNV or Duarte Eastsiders, both of which were Latino gangs. The group socialized on February 9 at Cox's home, where a wall bore a memorial to Lee. Cox had previously expressed frustration to Alderson that no one had done anything about Lee's murder. Late in the afternoon, Cox and Rawls saw McDaniels driving the vehicle from which fatal shots were later fired, with Britt, Alderson, and Barnes as passengers. McDaniels said the group was going to the store, then they were going to "hit some corners," an expression used by gang members to mean going out looking for rivals to attack.

After visiting first a liquor store at which members of the MNV gang were known to shop, then a liquor store at which members of the Duarte Eastsiders gang were known to shop, McDaniels drove into the territory claimed by the Duarte Eastsiders gang. He made a sudden sharp turn onto Millbrae Avenue, drove toward Sanchez and Velasquez,

who were two young[7] Latino men. McDaniels slowed the vehicle as it neared them, allowing Britt, who was armed with the gun that McDaniels had provided him, to shoot at the victims. Evidence of the distribution of the casings and Velasquez's testimony that he perceived bullets flying past him as he ran supported an inference that McDaniels drove the vehicle in a manner that assisted Britt in continuing to fire at both men as at least one of them fled. McDaniels then drove away from the crime scene, abandoned the vehicle (which had been his means of transportation) at Cox's home, and fled. These two instances of flight and abandonment of the vehicle used in the commission of the crimes supported strong inferences of consciousness of guilt, and the jury was so instructed.

In sum, this evidence constituted substantial evidence supporting McDaniels's conviction of murder as a direct aider and abettor, and its sufficiency was not "dissipated" or otherwise affected by either the conflicting defense evidence or any discrepancies or inconsistencies in the prosecution's case. Accordingly, if the prosecutor chooses to do so, McDaniels may be retried for first degree murder on a legally valid theory.

c. Sufficient evidence supports the gang enhancement finding

Section 186.22, subdivision (b)(1) provides a sentence enhancement for anyone convicted of a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The "for the benefit of . . ." element essentially means that the crime must be "'"gang related."'" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) "Not every crime committed by gang members is related to a gang." (*Ibid*.)

McDaniels challenges the sufficiency of the evidence to support findings that the murder and attempted murder were "committed for the benefit of, at the direction of, or

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[7] In the first trial, Velasquez testified that in February 2009 he was 17 and Sanchez was 19. Although this testimony was not repeated at the retrial, Sanchez's youth would have been apparent from autopsy photos and the autopsy report admitted in evidence. Velasquez's youth would have been apparent from his appearance at trial, albeit more than four years after the shooting.

in association with any criminal street gang" and that they were committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." He cites Jones's testimony presenting an alternative explanation for his presence on Millbrae Avenue and the testimony that no one knew Britt was armed and that Britt fired unexpectedly. McDaniels further argues the evidence did not show the crimes were gang-related because more than a year had elapsed since Brandon Lee's death, an MNV gang member had been prosecuted for the crime but this shooting occurred in territory claimed by the Duarte Eastsiders gang, Britt did not shout the name of his gang or make gang hand signs at the time of the shooting, and there was no evidence of bragging by any gang members about the killing.

Viewing the whole record in the light most favorable to the judgment, not in the light most favorable to the defense, we conclude that substantial evidence supported the jury's findings on the gang enhancement allegations against McDaniels for essentially the same reasons set forth in the preceding part of this opinion. At the risk of being repetitive, however, we summarize here the evidence in support of the gang enhancement allegations to respond to defendants' arguments fully.

On the day of the murder McDaniels spent time socializing with his fellow Duroc Crips gang members Britt and Alderson, possible gang associate Barnes, and Koteysha Cox, who had romantic ties to two members of the Duroc Crips gang: Alderson and Brandon Lee, who apparently had been killed by members of one of the Duroc Crips gang's rivals, either MNV or Duarte Eastsiders, both of which were Latino gangs. They socialized that day near a memorial to Lee. McDaniels had previously lived on Goodall Avenue across the street from Brandon Lee's family. Britt had grown up with Lee and told detectives he still missed him. Cox had previously expressed frustration to Alderson that no one had done anything about Lee's murder. Later that day, McDaniels, Britt, Alderson, and Barnes got in the Dodge Magnum with McDaniels driving and Britt armed with a stolen handgun McDaniels had given him just the day before. McDaniels told Cox and Rawls that his group was going to the store, then they were going to "hit some

corners," an expression used by gang members to mean going out looking for rivals to attack.

McDaniels then drove his group to two liquor stores at which members of the rival gangs were known to shop. Although this may have been a mere quest for liquor, the jury could have inferred that it may have been a search for members of the rival gangs. McDaniels then drove into a residential neighborhood the Duarte Eastsiders gang claimed as part of their territory, made a sudden sharp turn onto Millbrae Avenue, drove toward two young Latino men (Sanchez and Velasquez), and slowed the vehicle as it neared them, allowing Britt, who was armed with the gun McDaniels had provided him, to shoot at the victims.

As far as the record reveals, the victims did nothing to arouse the group's ire. Although Sanchez and Velasquez were not gang members, McDaniels and his companions may have believed they were. Alternatively, they may have been satisfied with shooting at anyone in the neighborhood of the rival gang. The motive may have been revenge for Brandon Lee or may have been to terrorize the rival gang's neighborhood, thereby burnishing the fearsome reputation of the Duroc Crips gang. Notwithstanding the absence of gang hand signs and proclamation of gang names, the evidence was sufficient for the jury to find that the crimes were gang-related, that is, "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." That McDaniels's group attacked in the territory of the Duarte Eastsiders gang, not the MNV gang, does not alter the sufficiency of the evidence. The record does not indicate whether the MNV gang member prosecuted for Lee's murder was convicted, and Britt told the detectives in a recorded conversation played at trial that the rumor was that someone from the Duarte Eastsiders gang killed Lee.

Accordingly, we reject McDaniels's sufficiency of evidence claim.

7. Errors on abstracts of judgment

McDaniels correctly contends the trial court erred by failing to include his presentence credits on the abstract of judgment.

In reviewing the abstracts of judgment, we note that the trial court failed to list either defendant's attempted murder conviction as a felony of which he was convicted in these proceedings.

We direct the trial court to issue an amended abstract of judgment for Britt that includes count 2, attempted murder, in the list of felonies of which Britt was convicted. Given our reversal of McDaniels's murder conviction, he will be either resentenced for second degree murder or retried on the first degree murder charge. When that issue is resolved, we trust the trial court will issue a new abstract of judgment that includes both presentence credits and count 2 in the list of felonies of which McDaniels was convicted.

DISPOSITION

McDaniels's first degree murder conviction is reversed, and the trial court is directed to give the People the option of either accepting a reduction of the conviction to second degree murder or retrying the charge against McDaniels. The trial court is further directed to issue an amended abstract of judgment for Britt, if it has not already done so, adding count 2, attempted murder, to the list of felonies of which Britt was convicted. The judgments are otherwise affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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