**PEOPLE v. BINNS**

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*THE PEOPLE, Plaintiff and Respondent, v. KHAALIQ BINNS, Defendant and Appellant.*

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

Filed June 30, 2010.

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

*Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.*

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

JOHNSON, J.

Appellant Khaaliq Binns (Binns) appeals his conviction of one count of first degree murder (Pen. Code, § 187, subd. (a)),[1](https://www.leagle.com/decision/incaco20100630043#fid1) with true findings that a principal personally and intentionally discharged a handgun (§ 12022.53, subds. (b), (c), (d), and (e)(1)) and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(A), (b)(4). On appeal, he argues the trial court erred (1) in excluding expert testimony on the effects on habitual marijuana use; (2) in admitting expert testimony on his gang affiliation and activities; (3) in instructing the jury pursuant to CALCRIM No. 370 that the prosecution need not prove motive applied to the gang enhancement allegations; and (4) he argues cumulative errors require reversal. We affirm.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Binns and codefendant Travon Willis (Willis) were charged with the June 9, 2005 murder of Darren Elliott (Elliott). The prosecution's theory of the case was that James Brown, aka Baby G., who was a leader of the 118th Street East Coast Crips, ordered the killing of Elliott, who was a known drug dealer, in order to take over Elliott's drug territory. Binns and Willis, who were tried together, contended one of them shot Elliott in self-defense.[2](https://www.leagle.com/decision/incaco20100630043#fid2)

***1. The Shooting***

Elliott rented two apartments (Nos. 4 and 7) in a building located near 48th and Crenshaw in Los Angeles. Number 7 was a studio and had a small bathroom, closet and a kitchen. On June 9, 2005, Marquis Addy, Ellliott, and a man named Dee met for breakfast and spent the day together driving around in Elliott's van and smoking marijuana. Elliott spoke on the phone to someone named "White Boy" and arranged to meet him at his apartment. The three men drove back to Elliott's apartment, where Addy and Dee waited in the van.

James Garrison worked in a recording studio across the street from Elliott's apartment. He knew Elliott, who was also known by the name of Dayday. According to Garrison, everyone in the area knew Dayday sold marijuana. On June 9, 2005, around 6:50 p.m., Garrison saw Dayday get out of his green van and go upstairs to his apartment building. Shortly before 7:00 p.m., Garrison noticed Dayday was on the walkway of the apartment building, talking to someone in the parking lot. Elliott beckoned to the person, and they went inside his apartment. Garrison was busy in his studio, and shortly thereafter he heard two gunshots and saw two black men running down the stairs of Elliott's apartment. Garrison did not recognize them. He saw someone else enter Elliott's apartment, leave, and drive off in a hurry in Elliott's green van. He identified defendant in court as one of the two men who left the apartment after the shooting. Garrison described the scene around the apartment building as "chaos" after the shooting. Garrison did not see the shooting.

Addy had waited in the van while Elliott went up to his apartment. He heard six or seven shots and went up to No. 7. Elliott was in the kitchen against the wall "shot up," and Addy tried to call 911. He did not touch anything in the apartment, but admitted taking a leather jacket. He and Dee left in Elliott's van.

Sylvia Smyles lived at Elliott's apartment building. She was home at about 6:50 p.m. on June 9, 2005, and saw two men go to No. 4. She heard Dayday say, "Come here, man. Over here," and the men went inside No. 7. They were there for about three or four minutes, and she then heard a "pow." The two men came out and flew down the front steps. When the two men left the apartment running, she did not see anything in their hands. She identified defendant at trial as one of the two men.

Robert Smith told police that he met Elliott at his apartment on June 9, 2005, and as he was leaving he saw two men as he was walking down the back stairway. He recognized defendant, who he knew belonged to the 118th Street East Coast Crips and who went by the name "Loc" or "Lof." Smith identified a photograph of defendant for police. At trial, Smith denied making these statements to police, although he admitted being at Elliott's apartment.

Los Angeles Police Detective Stanley Evans responded to the scene. Elliott was in the kitchen with a clear plastic baggie containing a plant like substance in his hands. He had a loaded semiautomatic 9-millimeter handgun in his waistband and $677 on him. Detective Evans did not believe Elliott was holding the gun at the time he was shot because he was right handed and was holding a baggie in his right hand.

Police recovered four spent bullet casings from inside the sink. Police also found another gun and a shotgun in the apartment, ammunition and a bulletproof vest. The four casings from the sink were fired from the same gun, but were not fired from any of the weapons found in the house. They found ecstasy and scales for weighing narcotics in the apartment.

They did not find the weapon used to shoot Elliott. Elliott died from four gunshot wounds, which were to the head, neck, arm, and leg. His toxological screen was positive for marijuana use.

There were four functioning surveillance cameras at the apartment complex. At trial, an edited tape showing the complex at the time of Elliott's shooting was played for the jury. Garrison described the video as depicting the two men he had seen entering the apartment; to Garrison it was evident Elliott knew the two men. From the tape, Detective Evans identified defendant and Willis entering apartment No. 7.

***2. Jailhouse Cell Tape***

On August 7, 2005, sheriff's deputies placed defendant and Willis in a jail cell with a hidden recording device. In a copy of the tape, which was played for the jury, defendant tells an unidentified man that he is from the 118th Street East Coast Crips. Willis tells the man that "Whatever I doing, I ain't hanging with no gang bangers no more. That's what got me into this mess—hanging with the wrong crowd," and that he belonged to 118th Street East Coast Crips.

On the tape, defendant and Willis accused each other of speaking to the police. Defendant accused Willis of telling police defendant shot Elliott. They read the police report together. After awhile defendant told Willis that they would have let him go if he had blamed it on Willis, to which Willis responded, "They wouldn't never gonna let you go `cause you were there, nigger. What I'm saying, `cuz. They just trying to have us both going at it with each other, so it's like we both mad at each other. . . ." Defendant and Willis discussed whether they had told the police the same story, which was that someone else had been in Elliott's apartment.

Willis told defendant he had spoken to "Twin," a member of the Q102 East Coast Crips. Twin had talked to Baby G. about Elliott's murder, and Twin told Willis that "Baby G. was just like, do what all you gonna do." Defendant responded, "I already told you Baby G. nigger gave the green light, nigger, that's on the real, homie. . . . What did [Twin] say Baby G. said, though?" Willis responded that he said, "Do what you all want to do to them niggers."[3](https://www.leagle.com/decision/incaco20100630043#fid3)

Defendant observed that the police had no evidence, but had seen them on the surveillance cameras. Defendant and Willis discussed the need to get their stories straight. He told Willis to claim Elliott was dead when they arrived at his apartment, but Willis pointed out that the police report stated Elliott let them into the apartment.

***3. Expert Gang Testimony at Trial***

At trial, Officer Roger Fontes of the Los Angeles Police Department (LAPD) testified as a gang expert. He specializes in the 89 East Coast Crips, the 897 East Coast Crips, the Q102 East Coast Crips, 118th Street East Coast Crips, and the Raymond Avenue Crips. He explained that a person can get into a gang in several ways—through a family member, "jumping," joining, or being forced in. Certain behavior is expected of gang members, such as selling narcotics, confronting rival gang members, wearing gang colors. Gang members seek respect in the community, and fear and intimidation are means of getting respect; fear permits gangs to commit more crimes and if the gang commits more crimes, the more they are feared.

In June 2005, the 118th Street East Coast Crips had about 160 members. The 118th Street East Coast Crips get along with other Crips gangs, including the Rolling 90s, 60s, etc. Rival gangs are all blood gangs. Officer Fontes has known Binns since 2004. Binns has a tattoo that says "`118 St,'" meaning the 118th Street East Coast Crips, and has admitted to him that he is a member of the 118 East Coast Crips. Defendant's monikers are Young Loff, Young Loffa, and Looney Corleon.

Elliott was a member of the Q102 East Coast Crips gang. The Q102 East Coast Crips and the 118th Street East Coast Crips were subsets of the same gang, and would interact with each other. In some circumstances, such as a "green light" situation, a gang member can commit a crime on a member of the same gang, yet the crime will still be for the benefit of the gang.

Both gangs had territory near Watts. The Rolling 40s and Rolling 60s claimed the territory where Elliott's murder took place. Watts was about 50 blocks away from the neighborhood of the shooting. Baby G. was a high-ranking member of the 118th Street East Coast Crips, and Elliott was a high-ranking member of the Q102 East Coast Crips.

The prosecution posed a hypothetical that assumed two men known to be 118 Street East Coast Crip members went to the residence of a Q102 East Coast Crips member who was also a drug dealer, and assumed the two gangs were on friendly terms. Further, the hypothetical asked Officer Fontes to assume that drugs were in plain view at the Q102 gang members house, there were numerous guns, the shooting occurred within seconds of the men's arrival at the house, the men did not take anything from the house after leaving, and later discussed the fact another 118 Street East Coast Crips member had given the "green light" on the killing. Over defense objection, Officer Fontes testified that lower-ranking gang members would not disobey such an order, and that such a killing would be committed with the specific intent to promote, further or assist the criminal conduct of the gang. However, Officer Fontes testified that he did not know Binn's or Willis's actual motivation, and admitted he did not interview Baby G. in connection with his investigation.

Officer Fontes did not know why there was no gang war between the two gangs as a result of the shooting. Officer Fontes testified individuals dealing in narcotics often have weapons because dealing narcotics is dangerous. They do not keep the fact secret in order to let people know they are armed.

The jury convicted defendant of one count of first degree murder, and found all special allegations true.

**DISCUSSION**

**I. EXCLUSION OF EXPERT TESTIMONY ON THE EFFECTS OF HABITUAL MARIJUANA USE**

Defendant contends the trial court erred in refusing to grant Willis's request to admit the testimony of Darryl Clardy (Clardy).[4](https://www.leagle.com/decision/incaco20100630043#fid4) He contends the testimony was relevant to his self-defense claim; because the prosecution argued a gang-related motive, its exclusion resulted in a "lopsided scenario unfairly stacked against the defense;" further, it was an abuse of discretion to exclude the evidence on the grounds of its late discovery. He argues the error was prejudicial because of the complicated facts of the case and the jury's difficulty in reaching a verdict.

**A. Factual Background**

Codefendant Willis moved for the admission of the expert testimony of Darryl Clardy, a toxicologist, on the effects of marijuana intoxication on behavior and perception. Willis argued that the defense should be permitted to theorize on what happened in the apartment before Elliott was shot and that there was enough evidence to permit the jury the evaluate it. The prosecution objected on the basis that they had no notice. Further, there was no basis for Clardy's opinion, and it was not relevant unless Willis were to testify. Defendant responded that he should be able to argue to the jury that victim was intoxicated and not behaving like a sober person, and that there was some sort of confrontation. The trial court denied the motion, finding there was insufficient nexus between testimony and defendant's proposed argument. The court also excluded the evidence based on defendant's late notice to the prosecution that he intended to introduce it.

**B. Discussion**

Generally, all relevant evidence is admissible. (Evid. Code, § 351.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Pursuant to Evidence Code section 352, trial courts have discretion to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court's exercise of discretion under Evidence Code section 352 will be disturbed only "`when the prejudicial effect of the evidence clearly outweighed its probative value.' [Citation.]" (*People v. Hollie* (2010) [180 Cal.App.4th 1262](https://www.leagle.com/cite/180%20Cal.App.4th%201262), 1274.)

In *People v. Stitely* (2005) [35 Cal.4th 514](https://www.leagle.com/cite/35%20Cal.4th%20514), the defendant sought to introduce evidence of the victim's alcohol intoxication to establish her inhibitions had been lowered such that she consented to intercourse. (*Id.* at p. 549.) The Supreme Court rejected the evidence on both Evidence Code sections 210 and 352 grounds. "Nothing in the offer of proof showed how [the victim's] blood-alcohol content and intoxication affected her judgment and behavior the night she was killed, or increased the chance that she did, in fact, consent to vaginal and anal intercourse. Defendant essentially wanted jurors to speculate on intoxication, inhibition, and impulse. Speculative inferences are, of course, irrelevant." (*Id.* at pp. 549-550.) Further, the Supreme Court found the evidence properly excluded under Evidence Code section 352 because the effects of alcohol intoxication were in the province of lay jurors. (*Id.* at p. 550.)

In *People v. Daniels* (2009) [176 Cal.App.4th 304](https://www.leagle.com/cite/176%20Cal.App.4th%20304), defendant was charged with kidnapping for purposes of rape. His expert offered lengthy testimony on alcoholic blackouts to establish that the victim, who was intoxicated, consented to accompany him to a motel room. (*Id.* at p. 319.) *Daniels* found the evidence properly excluded on relevance grounds and under Evidence Code section 352 because it was too speculative. While there was evidence the victim was intoxicated, there was little evidence the victim was actually experiencing an alcoholic blackout such that she might have agreed to accompany defendant. On the other hand, the victim was unequivocal that she had done nothing to indicate her consent to defendant, and because defendant did not testify, there was no other evidence regarding her conduct or condition. Further, admission of the lengthy evidence would be unduly time consuming and confusing to the jury. (*Id.* at p. 321.)

Here, Clardy's testimony of the effects of marijuana on the victim were also irrelevant to establish a defense. Although the toxicology report indicated Elliott had consumed marijuana, no evidence was offered on when he did so or how much he might have consumed. Thus, in the absence of testimony from the two percipient witnesses, defendant and Willis, Elliott's reaction to the marijuana was pure speculation.

Further, evidence that other persons visited the crime scene before the police and might have moved the gun into Elliott's waistband, or it was not likely a gun would fit into the waistband of the pants Elliott wore, does not change the speculative basis of defendant's self-defense argument. Such evidence contradicts defendant's theory because Elliott greeted defendant and Willis in a friendly manner when they arrived at his apartment; seconds later, shots rang out and the two men ran out of the apartment. In addition, Elliott had a gun in his waistband, which he had not drawn, supporting an inference he had not made any threatening gestures to defendant or Willis. Furthermore, even if the evidence were improperly excluded, there was no prejudice to defendant. The evidence does not support his theory of self-defense, and it is not reasonably likely the result would have been different if the court had admitted Clardy's testimony. (*People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818), 836*.*)

Given the complete lack of facts to support defendant's theory of self-defense, we reject his contention that the court treated the parties' theories of the case in a "lopsided" fashion by giving more credence to the prosecution's gang theory than defendant's self-defense theory. The record contained substantial evidence of defendant and Willis's gang membership and gang-related activities, and supported the prosecution's theory of a gang-motivated shooting.

**II. ADMISSION OF GANG EXPERT'S HYPOTHETICAL CONCLUSION THAT "BABY G." ORDERED THE KILLING OF ELLIOT IN ORDER TO TAKE ELLIOT'S DRUG TERRITORY**

Defendant argues the trial court erred in admitting Officer Fontes's testimony about the motive for Elliott's murder because it lacked foundation and was nothing more than speculation. He contends (1) Officer Fontes relied entirely on LAPD Officer Tom Eiman's input for information about Baby G., and did not investigate whether Baby G. was dealing drugs in the Rolling 40s territory, never spoke to anyone in the LAPD division that covered the area, and never spoke to Baby G.; (2) Officer Fontes based his opinion on evidence that was adduced at the voir dire concerning Baby G.'s drug activities in the Rolling 40s gang area; and (3) Officer Fontes misinterpreted defendant and Willis's jailhouse conversation as confirmation of Baby G.'s green light order, when in fact the conversation with Twin took place after the killing and therefore cannot form evidence of a conspiracy between Baby G., defendant and Willis to kill Elliott. Defendant also argues the evidence violates his confrontation clause rights because he was unable to cross-examine Officer Eiman regarding gang activity in the area, and any error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) [386 U.S. 18](https://www.leagle.com/cite/386%20U.S.%2018), 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

**A. Factual Background**

***1. The Preliminary Hearing***

At the preliminary hearing, Officer Fontes testified that James Brown, also known as "Baby G.," was a member of and held a leadership position in the 118 Street East Coast Crips. Baby G. could "green light" the killing of another person who was a threat to the gang. Generally, the 18th Street East Coast Crips got along well with the Q102 East Coast Crips. In response to a hypothetical, Officer Fontes testified that if Baby G. had given the order to have someone killed, subordinate gang members would follow that order.

During his testimony, Officer Fontes invoked the privilege against disclosing information relating to an ongoing investigation, and refused to answer key questions posed by the defense: (1) the geographic areas that Baby G. had an interest in; (2) the affiliation of the 118th Street East Coast Crips with the gang that controlled narcotics in the area where Elliott was killed; and (3) whether the gang-controlled narcotics trade in the area changed or decreased after Elliott's murder.

The defense argued the privilege should not apply because there was no evidence Elliott was a member of a gang at the time and the only way to show the crime was committed for the benefit of a street gang was to show that the 118th Street East Coast Crips were trying to move into the area, but Officer Fontes was refusing to testify on the issue. The court conducted an in camera hearing, and advised the defense that independent of any Evidence Code section 1040 issue, it found the evidence sought not relevant under Evidence Code section 352.

***2 Trial Voir Dire of Officer Fontes***

At trial, prior to Officer Fontes's proposed testimony, defendant argued evidence that Baby G. was a narcotics seller who ordered the murder of Elliott was beyond the scope of Officer Fontes's expertise, and gang experts could not testify to the motivation for the crime. The prosecution argued Officer Fontes's testimony would establish the killing was for the benefit of a criminal street gang.

At voir dire, Officer Fontes testified that he had received his information from another narcotics officer in his division, Officer Eiman, who had told him that Baby G. was heavily involved in narcotics with the Rolling 40s. Officer Fontes did not know if Baby G. had ever been arrested for dealing drugs, and Officer Fontes did not investigate the specifics of Baby G.'s drug trade, nor did he attempt to contact Baby G.

Defendant moved to exclude the evidence, arguing there was little foundation for the evidence, which consisted of an off-the-record conversation with another police officer. The prosecution stated it would not be questioning Officer Fontes about Baby G.'s drug dealing activities within a specific area. Defendant advised the court this dealt with his concerns over admission of Officer Fontes's testimony.

***3. Officer Fontes's Trial Testimony***

At trial, when Officer Fontes was asked in a hypothetical whether Baby G. ordered the killing of Elliott in order to take over his drug territory, before Officer Fontes could answer defendant objected and moved for a mistrial, contending there was no evidence in the record that any gang members outside the area were concerned with Elliott's drug trade. The court excluded Officer Fontes's response, finding there was not enough evidence in the record to support the conclusion Baby G. wanted to move in on Elliott's drug territory, and denied the motion for a mistrial. Defense counsel declined the court's offer for an admonishment.[5](https://www.leagle.com/decision/incaco20100630043#fid5)

**B. Discussion**

A gang expert may testify to the culture and habits of criminal street gangs. "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) [33 Cal.4th 1040](https://www.leagle.com/cite/33%20Cal.4th%201040), 1049.) The gang expert may testify to an opinion based on hypothetical questions if such questions are based on facts in the evidence. (*People v. Gardeley* (1996) [14 Cal.4th 605](https://www.leagle.com/cite/14%20Cal.4th%20605), 618.)

A gang expert's opinion has an adequate foundation if it is based on personal observations, discussions with gang members, and is combined with information from other sources, including rival gang members. (*People v. Olguin* (1994) [31 Cal.App.4th 1355](https://www.leagle.com/cite/31%20Cal.App.4th%201355), 1385.) In *People v. Gardeley, supra,* [14 Cal.4th 605](https://www.leagle.com/cite/14%20Cal.4th%20605), foundation was sufficient where a police detective testified that the gang of which the defendant had been a member engaged in the sales of narcotics and witness intimidation. The detective had personally investigated "hundreds of crimes" committed by gang members, gathered information from conversations with gang members as well as police department employees and other law enforcement agencies. (*Id.* at p. 620; see also *People v. Sengpadychith* (2001) [26 Cal.4th 316](https://www.leagle.com/cite/26%20Cal.4th%20316), 324.)

Furthermore, the prosecution can show that a crime is committed for the benefit of a criminal street gang by producing evidence that establishes the defendant has the specific intent "`to promote, further, or assist in any criminal conduct by gang members.'" (*People v. Morales* (2003) [112 Cal.App.4th 1176](https://www.leagle.com/cite/112%20Cal.App.4th%201176), 1179 (*Morales*).) In *Morales,* the defendant and two other members of a gang robbed three occupants of a house, and during the robbery, one of the other gang members murdered one of the occupants. (*Id.* at pp. 1179-1183.) The defendant argued that insufficient evidence supported the enhancement because the evidence only established that he and his accomplices in the robbery belonged to the same gang. (*Morales, supra,* at p. 1197.) Morales rejected this contention, reasoning that there was adequate evidence that the defendant had engaged in the robbery in association with other gang members and it was therefore "fairly inferable that he intended to assist in criminal conduct by his fellow gang members." Further, nothing indicated that the offenses were merely "a frolic and detour unrelated to the gang." (*Id.* at p. 1198.)

Whether expert testimony has sufficient foundation rests within the sound discretion of the trial court, and absent a manifest abuse of discretion, the court's determination will not be disturbed on appeal. (*People v. Ramos* (1997) [15 Cal.4th 1133](https://www.leagle.com/cite/15%20Cal.4th%201133), 1175.) We review evidentiary error for abuse of discretion, and will not reverse unless it is reasonably probable the result would have been different if the evidence had not been admitted. (*People v. Watson, supra,* 46 Cal.2d at p. 836*.*)

Here, defendant complains of the hearsay basis for Officer Fontes's testimony, namely, that Officer Fontes relied on hearsay information he received from Officer Eiman; further, his attempts to find a foundation were thwarted at the preliminary hearing by Officer Fontes's claim of privilege. However, an expert may base his opinion on any reliable material, including hearsay. (Evid. Code, § 801, subd. (b).) The hearsay evidence an expert relies on may not be testified to in detail on direct examination. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) [216 Cal.App.3d 388](https://www.leagle.com/cite/216%20Cal.App.3d%20388), 414-415.) Experts may be cross-examined concerning the contents of any hearsay materials they relied on. (See Evid. Code, § 721, subd. (a).) Officer Fontes did not testify to any of the material he received from Officer Eiman regarding Baby G.'s proposed expansion of his drug trade into Elliott's territory. Instead, the record discloses he testified that he had discussed with Eiman where Baby G. was selling drugs, and did not reveal the substance of the discussion.[6](https://www.leagle.com/decision/incaco20100630043#fid6)

Further, we reject defendant's arguments that Officer Fontes's opinion should have been excluded because he failed to conduct any investigation of his own, including questioning Baby G. about the shooting, and did not explain why the two gangs continued to get along after the shooting. Defendant's argument goes to the weight, not admissibility, of the evidence. Any infirmities in the factual basis for Officer Fontes's opinion could be explored on cross-examination. (*People v. Fulcher* (2006) [136 Cal.App.4th 41](https://www.leagle.com/cite/136%20Cal.App.4th%2041), 54.) "Any erroneous factual assumptions by the experts could be addressed through cross-examination of the experts and by showing there was no evidence to support their conclusions." (*Ibid.;* see also *People v. Wright* (1988) [45 Cal.3d 1126](https://www.leagle.com/cite/45%20Cal.3d%201126), 1142 [cross-examination of experts can reveal weaknesses in their testimony and theories, as well as underlying assumptions on which conclusions are based].)

Lastly, defendant complains of Officer Fontes's interpretation of defendant and Willis's jailhouse conversation about Baby G.'s "green light." Simply because defendant interprets the conversation as being a discussion of a future green light on defendant and Willis, rather than a past green light on Elliott, does not mean the evidence was admitted in error. Nothing prevented defendant from cross-examining Officer Fontes in order to present defendant's own interpretation of the conversation.

We conclude that even if Officer Fontes's testimony was erroneously admitted, we find no prejudice. There was other evidence of defendant's guilt: the eyewitness testimony that they were the men who entered Elliott's apartment right before the shooting; their jailhouse conversation in which they discussed getting their stories together; the lack of evidence of self-defense. Further, there was other evidence that the shooting was committed to benefit defendant's gang, the 118th Street East Coast Crips: defendant belonged to the gang; Elliott belonged to a different, but friendly gang; Elliott was a known narcotics dealer; the shooting was not a robbery (no drugs or weapons were taken from Elliott) or self defense; and defendant's jailhouse conversation with Willis could be construed either as a discussion on how another gang member, Baby G., ordered the shooting of Elliott, or wanted to tie up loose ends by authorizing the murder of the members of his own gang.

**III. USE OF CALCRIM NO. 370**

Defendant argues the trial court erred in giving CALCRIM No. 370, which instructs the jury that the prosecution is not required to prove motive, without specifying this instruction did not apply to the gang enhancements under section 186.22, subdivision (b)(1), and conflicted with CALCRIM No. 1403 regarding gang activity. He contends this error requires reversal of the gang enhancement, and that he did not forfeit the issue by failing to raise it below because the contradiction between CALCRIM Nos. 370 and 1403 is a pure issue of law. Respondent contends defendant forfeited the issue by failing to raise it in the trial court.

**A. Factual Background**

The trial court instructed the jury with CALCRIM No. 370, "Motive" and CALCRIM No. 1403, "Limited Purpose of Evidence of Gang Activity."

CALCRIM No. 370 provided: "The People are not required to prove that a defendant had a motive to commit the crimes charged. In reaching your verdict you may, however, consider whether that defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

CALCRIM No. 1403 provided in relevant part: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancement. [¶] OR [¶] A defendant had a motive to commit the crime charged. [¶] . . . [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that a defendant is a person of bad character or that he has a disposition to commit crime."

**B. Discussion**

"`[T]he correctness of the jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Castillo* (1997) [16 Cal.4th 1009](https://www.leagle.com/cite/16%20Cal.4th%201009), 1016.) We examine the jury instructions as a whole, along with the attorneys' closing arguments to the jury, to determine if the instructions sufficiently conveyed the correct legal principles. (See *People v. Kelly* (1992) [1 Cal.4th 495](https://www.leagle.com/cite/1%20Cal.4th%20495), 525-526.)

Motive "describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent . . . ." (*People v. Hillhouse* (2002) [27 Cal.4th 469](https://www.leagle.com/cite/27%20Cal.4th%20469), 504.) Evidence of gang activity and affiliation is admissible where it is relevant to issues of motive and intent. (*People v. Olguin, supra,* 31 Cal.App.4th at p. 1369.) Accordingly, "[g]ang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) [172 Cal.App.4th 1148](https://www.leagle.com/cite/172%20Cal.App.4th%201148), 1167.) Here, CALCRIM No. 1403 thus properly directed the jury to consider whether the murder was motivated by gang-related goals. (*Ibid.*)

In *People v. Fuentes* (2009) [171 Cal.App.4th 1133](https://www.leagle.com/cite/171%20Cal.App.4th%201133) (*Fuentes*), the court considered the interaction of CALCRIM No. 370 on motive and gang enhancements under section 186.22, subdivision (b)(1), and rejected a similar claim. In *Fuentes,* the court observed the "superficial attractiveness" of the argument that the motive instruction undercut the gang and special enhancement instructions given in the case. "Any reason for doing something can rightly be called a motive" and there are "reasons that stand behind other reasons." (*Fuentes,* at p. 1140.) However, "intent to further criminal gang activity is no more a `motive' in legal terms than is any other specific intent. We do not call a premeditated murderer's intent to kill a `motive,' though his action is motivated by a desire to cause the victim's death. Combined, the instructions here told the jury the prosecution must prove that Fuentes intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it." (*Id.* at pp. 1139-1140.)

In so holding, Fuentes distinguished *People v. Maurer* (1995) [32 Cal.App.4th 1121](https://www.leagle.com/cite/32%20Cal.App.4th%201121), on which defendant also relies. *Maurer* held that the standard motive instruction was erroneous when given in conjunction with an instruction on section 647.6, subdivision (a)(2), which prescribes punishment for "[e]very person who, motivated by an unnatural or abnormal sexual interest in children, engages in conduct with an adult whom he or she believes to be a child" where the conduct would be an offense if the other person really were a child. According to *Fuentes,* the offense included a "motivation" as one of its elements, and therefore a jury naturally would be confused by an instruction saying the prosecution need not prove the defendant's motive. (*Fuentes, supra,* 171 Cal.App.4th at p. 1140.) Due to this peculiarity in the definition of the offense charged in *Maurer,* the combination of instructions could not successfully guide the jury as to where to cut off the chain of reasons for the defendant's action which the prosecution had to prove. (*Id.* at p. 1140.)

Here, relying on the analysis of *Fuentes,* we therefore find no error in instructing the jury that the prosecution did not need to prove motive and while also instructing the jury that gang activity could be considered for the limited purpose of deciding whether defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancement, or that defendant had a motive to commit the crime charged. As stated in *Fuentes,* "intent to further criminal gang activity is no more a `motive' in legal terms than is any other specific intent." (*Fuentes, supra,* 171 Cal.App.4th at p. 1139.)

**IV. CUMULATIVE ERROR**

Defendant argues that the cumulative effect of the errors at his trial deprived him of his due process rights. We disagree. In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. (*People v. Cain* (1995) [10 Cal.4th 1](https://www.leagle.com/cite/10%20Cal.4th%201), 82.) A predicate to a claim of cumulative error is a finding of error. There can be no cumulative error if the challenged rulings were not erroneous. (*People v. Bradford* (1997) [15 Cal.4th 1229](https://www.leagle.com/cite/15%20Cal.4th%201229), 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].) Our review of the record assures us that defendant received due process and a fair trial. (See *People v. Ashmus* (1991) [54 Cal.3d 932](https://www.leagle.com/cite/54%20Cal.3d%20932), 1006.)

**DISPOSITION**

The judgment is affirmed.

We concur.

MALLANO, P. J.

ROTHSCHILD, J.

**FootNotes**

1. All further statutory references are to the Penal Code unless otherwise indicated.

2. Willis was convicted of first degree murder, with true findings on firearm use (§ 12022.53, subd. (b)-(e)) and gang enhancements (§ 186.22, subd. (b)(1)(A)). The trial court sentenced Willis to 50 years to life in prison. On May 27, 2009, we affirmed his conviction. (*People v. Willis* (May 27, 2009, B200915) [nonpub. opn.].)

3. At trial, the prosecution's gang expert was asked a hypothetical which interpreted this conversation to be a discussion of Baby G.'s "green light" of the hit on Elliott. Defendant contends it was in fact a discussion about Q102 East Coast Crips anger with defendant and Willis for shooting Elliott, and that they were concerned whether Baby G. had ordered their own killings.

4. Conceding that he did not join in Willis's request to admit the testimony, defendant nonetheless argues that the issue is preserved for appeal. First, the record demonstrates Willis was speaking for both defendants; even if he was not, because the issue concerns the deprivation of a fundamental constitutional right, it need not have been raised below; and finally, if we find the issue should have been raised below, then counsel was ineffective for not doing so and no reasonable tactical basis exists his failure to do so. We conclude that we need not reach these contentions because in any event, even if defendant had raised the issue, the trial court did not abuse its discretion in excluding the evidence.

5. Defendant contends counsel was ineffective for failing to obtain an admonishment to the jury to clarify that they were not to consider Baby G.'s purported motive of moving into Elliott's area. We reject this claim. "A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. `If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*People v. Cunningham* (2001) [25 Cal.4th 926](https://www.leagle.com/cite/25%20Cal.4th%20926), 1003.) Given the presumption of reasonableness proper to direct appellate review, our Supreme Court has "repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. [Citations.] The defendant must show that counsel's action or inaction was not a reasonable tactical choice, and in most cases `"`the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged . . . .'"' [Citations.]" (*People v. Michaels* (2002) [28 Cal.4th 486](https://www.leagle.com/cite/28%20Cal.4th%20486), 526.) Such is the case here.

6. In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. \_\_\_ [[129 S.Ct. 2527](https://www.leagle.com/cite/129%20S.Ct.%202527), 174 L.Ed.2d 314], the court held that a criminalist's affidavit certifying that a tested substance was cocaine constituted "testimony" for purposes of the confrontation clause because it contained the same statements the analyst would provide if called as witness at trial. (*Id.* at p. 2532.) Prior to *Melendez-Diaz,* experts were permitted to rely on hearsay in forming their opinions, but the confrontation clause analysis did not consider whether the hearsay was testimonial. (See, e.g., *People v. Ramirez* (2007) [153 Cal.App.4th 1422](https://www.leagle.com/cite/153%20Cal.App.4th%201422), 1427.) Here, under *Melendez-Diaz,* admission of Officer Eiman's testimony did not violate defendant's confrontation clause rights because Eiman's conversations with Officer Fontes were not testimonial hearsay; rather, they were informal exchanges of information.