**PEOPLE v. TOLEDO**

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*THE PEOPLE, Plaintiff and Respondent, v. JOE ANTHONY TOLEDO et al., Defendants and Appellants.*

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

Filed October 5, 2011.

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

CHANEY, J.

A jury convicted Joe ("Leon") Toledo, Jose ("Evil") Enciso and David ("Pelon") Guerrero of the first degree murder of Darryl White and found true the allegations that a principal used a firearm in committing the offense, causing death, Toledo personally used a firearm, causing death, and the crime was committed for the benefit of a criminal street gang. Appellants were sentenced to state prison for 50 years to life. On appeal, appellants contend (1) insufficient evidence established the murder was premeditated, (2) insufficient evidence established that appellants Guerrero and Enciso were guilty either as accomplices or conspirators, (3) the trial court made evidentiary and instructional errors, and (4) each defendant was inappropriately fined $50.

We reverse because the trial court abused its discretion by admitting extensive, detailed, inflammatory, and overwhelmingly irrelevant gang evidence.

**BACKGROUND**

Several street gangs claim overlapping territory in Compton, California, including the Compton Varrio 70 (CV70) and Leuders Park Piru (Leuders Park) gangs. Appellants are members of CV70. White and his cousin, Brandon Buckhalter, were members of Natural Born Players (NBP), a group associated with Leuders Park. The CV70 and Leuders Park gangs maintain a longstanding feud.

On the morning of November 27, 2002, White and Buckhalter spray painted "NBP" on some walls and a street sign at the intersection of San Vicente and Bradfield avenues in Compton. White also painted over a graffito referring to CV70.

Toledo saw or learned of White and Buckhalter defacing the CV70 graffiti and hurriedly obtained a revolver from Guerrero at Guerrero's home. Appellants then approached White and Buckhalter in a blue Chevy Tahoe driven by Enciso. When Enciso flourished a chrome semiautomatic handgun, White and Buckhalter fled on foot. Appellants pursued in the Tahoe but temporarily lost sight of the NBP members.

White and Buckhalter ran to a friend's house and went inside, for a time thinking they had eluded appellants. But when White left the house to reconnoiter he was seen by Toledo and Mario Contreras, also a CV70 member. White ran into the backyard of a neighboring house, closely pursued on foot by Toledo and Contreras. One of the pursuers shouted, "`Yeah mother fucker. You think you got away. But I got you now.'" Toledo and Contreras took different routes to the backyard, cornered White, and shot him five times with a revolver and a semiautomatic, twice through the heart. Then they ran back to the Tahoe and were driven away. White died at the scene.

The police investigation spanned several years.

Months after the shooting, Danny Guerrero, appellant Guerrero's brother, was stopped in a vehicle in which a number of CV70 members were passengers. Under a seat occupied by one of the gang members was a semiautomatic handgun that was later determined to have ejected the shell casings recovered at the scene of the White shooting.

Enciso and Guerrero were arrested on November 9, 2005. Toledo was arrested on January 31, 2006. On the day he was arrested, Toledo gave an extensive statement to police about CV70 criminal activities but not about the White murder.

In 2006, Melina Rodriguez, Guerrero's girlfriend, was arrested for drug possession. She told police that on an unspecified day an unidentified "Black guy got killed," she had been living with Guerrero near the intersection of San Vicente and Bradfield. She was in the house with Guerrero while Enciso, Toledo and Contreras were outside. Toledo rushed in and told Guerrero to give him a gun. Guerrero gave Toledo a chrome revolver, then ran outside with him. She could not otherwise identify the gun. Rodriguez heard shots five minutes later. She was later told by a neighbor that a Black man had been killed. In a later interview Rodriguez told police that Enciso drove a blue Tahoe owned by Danny Guerrero. Rodriguez recanted her statements at the preliminary hearing.

Also in 2006, police detained Danny Guerrero as he emerged from the house of Sabrina Lewis, his girlfriend, with duffle bags containing guns, clips, ammunition, and bulletproof vests. It was determined that three of the guns had been used in other crimes. A search of Lewis's residence recovered a bulletproof vest, armor-penetrating ammunition, a bag of inactive cell phones, and some preliminary hearing transcripts, one of which included Buckhalter's testimony in an unidentified case.

Buckhalter identified Toledo and Contreras as the shooters and Enciso and Guerrero as the Tahoe's driver and passenger, respectively.

Sheriff's Detective Hecht and Deputy Steinwand, the prosecution's gang experts, testified that a task force was created in 2005 or 2006 to solve crimes associated with CV70. Hecht testified that CV70's primary activities are robbery, illegal substance dealing, car theft and murder. He testified there was a longstanding feud between CV70 and Leuders Park, in furtherance of which numerous violent crimes were committed by CV70 members before and after the White murder. For example, in November 2001, Ricki Jimenez, the sister of a CV70 gang member, was murdered. It was suspected in the community that the murder was committed by members of the Ferguson family (of which White and Buckhalter were members), several of whom belonged to Leuders Park. Jimenez's brother retaliated by shooting Buckhalter in 2003. (Buckhalter testified in the instant case that he had been shot and subsequently testified in the criminal case against his attacker.) CV70 members killed or attempted to kill members of the Ferguson family over a period of years. In 2005, Contreras attempted to murder Corey Ferguson, White's cousin and a former member of NBP, after he testified in a case involving the murder of a relative and Piru gang member.

Hecht testified that gangs demand respect and announce their geographical authority with graffiti. In the gang culture, crossing out a rival gang's graffiti is a sign of disrespect and requires retaliation. A gang member loses respect by failing to retaliate when a gang's authority is challenged. One can be killed for cooperating with law enforcement. Some of these rules, Hecht testified, are enforced by the Mexican Mafia. Hecht opined that the White murder benefitted CV70 by increasing its reputation for violence and intimidating the community, thereby discouraging community members from assisting law enforcement in its investigations of CV70 activities.

Steinwand interpreted the evidence found in searches of the homes of Danny Guerrero's girlfriend and interpreted gang slang used in the jailhouse conversation. He testified that a gang member will sometimes use a "burn-out" cell phone.

Enciso's defense was alibi, his in-laws testifying he was with them in the San Diego area for a family Thanksgiving at the time of the murder. Toledo's defense was also alibi, Contreras testifying that he and Toledo were both in school at the time of the murder. Guerrero presented a statement made to police by Dejuan Ferguson, White's cousin, who said Guerrero was not present at the White shooting.

At closing argument, the prosecutor told the jury, "And I also want to make clear all these other murders, these guys are a well-oiled killing machine. But all those other murders have nothing to do with them, nothing. They are on trial for this murder and this murder alone. Don't speculate that they have something to do with those other murders or anything like that."

Appellants were convicted and sentenced to 50 years to life.

**DISCUSSION**

**1. Evidence Establishing Premeditation and Deliberation**

Murder that is perpetrated by a "willful, deliberate, and premeditated killing" is murder of the first degree. (Pen. Code, § 189.) Appellant Toledo, joined by Enciso and Guerrero, contends the evidence of premeditation and deliberation was insufficient to support a finding that the murder was willful, deliberate and premeditated. He argues the evidence that he chased White and shot him establishes at most that the murder was intentional, not that it was premeditated and deliberate. We disagree.

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. . . . `Deliberation' refers to careful weighing of considerations in forming a course of action; `premeditation' means thought over in advance. [Citations.] `The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." [Citations.]'" (*People v. Koontz* (2002) [27 Cal.4th 1041](https://www.leagle.com/cite/27%20Cal.4th%201041), 1080.)

Three types of evidence that typically support a finding of premeditation and deliberation are planning activity, motive, and a manner of killing from which a preconceived plan could be inferred. (*People v. Anderson* (1968) [70 Cal.2d 15](https://www.leagle.com/cite/70%20Cal.2d%2015), 26-27.) These categories are not prerequisites, but simply guidelines to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations, rather than an unconsidered or rash impulse. (*People v. Young* (2005) [34 Cal.4th 1149](https://www.leagle.com/cite/34%20Cal.4th%201149), 1183.) Planning consistent with a finding of premeditation and deliberation can be indicated by the acts of obtaining a weapon (*ibid.; People v. Koontz, supra,* 27 Cal.4th at pp. 1081-1082), searching for the victim (see *People v. Solomon* (2010) [49 Cal.4th 792](https://www.leagle.com/cite/49%20Cal.4th%20792), 817), and firing at vital body parts (*People v. Koontz* at pp. 1081-1082; *People v. Thomas* (1992) [2 Cal.4th 489](https://www.leagle.com/cite/2%20Cal.4th%20489), 517-518).

We review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the convictions, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) [4 Cal.4th 1134](https://www.leagle.com/cite/4%20Cal.4th%201134), 1138.) We presume the existence of every fact that the jury could reasonably deduce and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) [42 Cal.3d 284](https://www.leagle.com/cite/42%20Cal.3d%20284), 303; *People v. Catlin* (2001) [26 Cal.4th 81](https://www.leagle.com/cite/26%20Cal.4th%2081), 139.)

Defendants are CV70 members. When White, a CV70 rival, was seen crossing out CV70 graffiti, Guerrero furnished Toledo with a revolver and they and Enciso searched for White first in the Tahoe (Guerrero and Enciso) and then on foot (Toledo and Contreras). (See *People v. Francisco* (1994) [22 Cal.App.4th 1180](https://www.leagle.com/cite/22%20Cal.App.4th%201180), 1192 [gang member's retaliation motive supported finding of premeditation].) Toledo and Contreras ultimately cornered White and shot him five times, twice through the heart. (*People v. Manriquez* (2005) [37 Cal.4th 547](https://www.leagle.com/cite/37%20Cal.4th%20547), 578 [multiple gunshot wounds to the chest supported finding of premeditation].) Applying the *Anderson* guidelines, we easily conclude sufficient evidence existed to convince a rational trier of fact beyond a reasonable doubt that appellants murdered White willfully, deliberately and with premeditation.

**2. Evidence Establishing Guerrero and Enciso as Accomplices**

Guerrero, joined by Enciso, contends no evidence shows he aided or abetted the White murder.

A person aids and abets the commission of a crime when he, with knowledge of the unlawful purpose of the perpetrator, and with the intent or purpose of committing, facilitating, or encouraging 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](https://www.leagle.com/cite/14%20Cal.4th%20248), 259.) An aider and abettor is guilty not only of the offense he intended to facilitate or encourage but also of any other crime committed by the person he aids and abets that is a natural and probable consequence of the target offense. (*Id.* at p. 261.) A criminal act is a natural and probable consequence of the target offense if it is a reasonably foreseeable consequence of that offense. (*People v. Medina* (2009) [46 Cal.4th 913](https://www.leagle.com/cite/46%20Cal.4th%20913), 920.) "`[T]to be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . ."'" (*Ibid.*)

Guerrero and Enciso argue no evidence suggested they knew Toledo intended to shoot White. We disagree. Guerrero furnished the gun and accompanied Toledo in pursuit of White. Guerrero and Enciso were seen pursuing White in the Tahoe, and Toledo and Contreras on foot. After the shooting, Toledo and Contreras got into the vehicle and were driven away. A reasonable jury could infer from these facts that Guerrero and Enciso accompanied Toledo to locate White and facilitated his escape after the shooting. It could conclude they intended that Toledo shoot White and that White's death was foreseeable.

**3. Evidence of Conspiracy and Conspiracy Instructions**

The court instructed the jury in accordance with CALCRIM Nos. 416 through 420 that it could find Guerrero and Enciso guilty of the charged offense if it found they were members of a conspiracy to commit it. Among other things, the instructions stated that "[a] member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime."

Conspiracy instructions are proper even though the defendant is not charged with conspiracy. (*People v. Pike* (1962) [58 Cal.2d 70](https://www.leagle.com/cite/58%20Cal.2d%2070), 89 & fn. 10.)

Guerrero, joined by Enciso, contends no evidence established an uncharged conspiracy, and the court therefore improperly instructed the jury.

"`A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.' [Citations.]" (*People v. Jurado* (2006) [38 Cal.4th 72](https://www.leagle.com/cite/38%20Cal.4th%2072), 120.) "[A] conspirator is vicariously liable for the unintended acts by coconspirators if such acts are in furtherance of the object of the conspiracy, or are the reasonable and natural consequence of the object of the conspiracy." (*People v. Hardy* (1992) [2 Cal.4th 86](https://www.leagle.com/cite/2%20Cal.4th%2086), 188, fn. omitted.) Due to the secrecy usually involved in a conspiracy, the People need not provide direct evidence that the conspirators met and came to an express or formal agreement to commit the target crime. (*People v. Austin* (1994) [23 Cal.App.4th 1596](https://www.leagle.com/cite/23%20Cal.App.4th%201596), 1606, disapproved on another ground in *People v. Palmer* (2001) [24 Cal.4th 856](https://www.leagle.com/cite/24%20Cal.4th%20856), 861.) "The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Prevost* (1998) [60 Cal.App.4th 1382](https://www.leagle.com/cite/60%20Cal.App.4th%201382), 1399.)

Here, the evidence was sufficient to establish that defendants expressly or tacitly reached an agreement to murder White in retaliation for his defacing CV70 graffiti. Defendants had a common membership in a gang of which White was a rival. (See *People v. Vu* (2006) [143 Cal.App.4th 1009](https://www.leagle.com/cite/143%20Cal.App.4th%201009), 1025-1026 [gang retaliation supports conspiracy finding].) Guerrero furnished Toledo with a gun and it can reasonably be inferred that he and Enciso drove Toledo to White's location and picked him up after the shooting. It is reasonably inferable from this evidence that Toledo told Guerrero and Enciso that White was defacing CV70 graffiti and obtained a gun and transportation from them so that he could shoot White. The evidence thus supports an inference that all three CV70 members "positively or tacitly came to a mutual understanding" (*People v. Prevost, supra,* 60 Cal.App.4th at p. 1399) that Toledo and Contreras would shoot White. Substantial evidence therefore supports a conspiracy finding. (*Ibid.*)

"Once there is proof of the existence of the conspiracy there is no error in instructing the jury on the law of conspiracy." (*People v. Rodrigues* (1994) [8 Cal.4th 1060](https://www.leagle.com/cite/8%20Cal.4th%201060), 1134.)

**4. Danny Guerrero's Jail Conversation**

Guerrero and Enciso, joined by Toledo, contend the trial court erred in admitting an audio and video recording of a jailhouse statement made by Danny Guerrero. After they were arrested, appellants were placed in a cell area and their conversation surreptitiously recorded. Also in the cell area were Danny, Marcos Contreras, and some unidentified Black men. Appellant Guerrero and Enciso had been told that Toledo had made a statement to police. Contreras and appellant Guerrero had a brief discussion about Buckhalter also making statements to police. When Danny said Buckhalter did not know anything, appellant Guerrero responded, "Man, I know the mother fucker's still coming to court." Enciso then punched Danny in the face. Appellant Guerrero told his brother, "You left us fucking hanging. You left us hanging." "You know everyone who's snitching on us." "You weren't handling the business out there." One of the Black inmates told Danny he got "hit like a bitch," he "fired on you." Danny responded, "You know wh[y] I got fired on? For not droppin' enough mother fuckers like you." Enciso said nothing.

The trial court admitted the evidence over trial counsel's objections, ruling Enciso's silence constituted an adoptive admission of Danny's statement that Enciso punched him because he did not protect the gang by "handling" or "dropping" police informants. It instructed the jury that it could consider Danny's statement to establish Enciso's guilt.

Defendants argue Danny's statement constituted inadmissible hearsay and was irrelevant and unduly prejudicial.

We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) [37 Cal.4th 1067](https://www.leagle.com/cite/37%20Cal.4th%201067), 1113.) This standard of review applies to a trial court's determination of the admissibility of an adoptive admission (*People v. Edwards* (1991) [54 Cal.3d 787](https://www.leagle.com/cite/54%20Cal.3d%20787), 820), its relevance, and whether the evidence is unduly prejudicial within the meaning of Evidence Code section 352 (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1124).

Danny's statement about Enciso's motive for striking him is inadmissible hearsay (Evid. Code, § 1200, subd. (b)) unless it qualifies for admissibility under some exception to the hearsay rule.

Evidence Code section 1221 provides a hearsay exception for adoptive admissions: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) "When a defendant remains silent after a statement alleging the defendant's participation in a crime, under circumstances that fairly afford the defendant an opportunity to hear, understand, and reply, the statement is admissible as an adoptive admission, unless the circumstances support an inference that the defendant was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution." (*People v. Jurado* (2006) [38 Cal.4th 72](https://www.leagle.com/cite/38%20Cal.4th%2072), 116.) The statement need not be a direct accusation, just a statement that would normally call for a response if it were untrue. (*People v. Riel* (2000) [22 Cal.4th 1153](https://www.leagle.com/cite/22%20Cal.4th%201153), 1189.) Evasive or equivocal replies, as well as silence, may constitute adoptive admissions. (*Ibid.*) "To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*People v. Edelbacher* (1989) [47 Cal.3d 983](https://www.leagle.com/cite/47%20Cal.3d%20983), 1011.)

Danny's statement implied Enciso was engaged in a conspiracy to kill witnesses. Such a statement, if untrue, would normally call for a response. Enciso had a fair opportunity to respond—the statement was made in his presence and within his hearing. Enciso's silence supports a reasonable inference that he endorsed the statement, and thus constitutes an adoptive admission.

Defendants argue the tenor of the conversation was lighthearted and playful, and Enciso did not remain silent but made a response that was unintelligible. But it was up to the jury to decide whether or not to accept the guilty interpretation. (See *People v. Silva* (1988) [45 Cal.3d 604](https://www.leagle.com/cite/45%20Cal.3d%20604), 623-624 [possible implied adoption through silence was sufficiently relevant to be submitted to the jury under appropriate instructions]; *People v. Castille* (2005) [129 Cal.App.4th 863](https://www.leagle.com/cite/129%20Cal.App.4th%20863), 881 [jury is uniquely qualified to determine whether an ambiguous response qualifies as an adoptive admission].) Enciso did not clearly and affirmatively distance himself from Danny's comment about eliminating witnesses. His response could reasonably be interpreted to mean that he endorsed Danny's suggestion that CV70 members should eliminate witnesses who might testify against other members.

Defendants argue Danny's statement was irrelevant and unduly prejudicial. We disagree.

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) Nevertheless, relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (Evid. Code, § 352.) In this context, unduly prejudicial evidence is evidence that would cause the jury to "prejudge" a person on the basis of extraneous factors. (*People v. Zapien* (1993) [4 Cal.4th 929](https://www.leagle.com/cite/4%20Cal.4th%20929), 958.)

The gist of Danny's statement was that Enciso punched him because he failed to intimidate or remove a witness. The statement is relevant because evidence that a defendant sought to suppress evidence tends to demonstrate the defendant's consciousness of guilt, which is circumstantial evidence of guilt. (See Evid. Code, § 413 [willful suppression of evidence]; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1007.)

The statement was not unduly prejudicial. It did not contain a racial slur, did not directly implicate any defendant in the White murder, and asserted a fact that in context was unsurprising: Members of CV70, who are Hispanic, target rival gang members who are Black. And it was established on multiple fronts that Danny actively served the gang's interests. One of the murder weapons was found in his vehicle; he kept the gang's guns, ammunition, bulletproof vests and cell phones at his girlfriend's residence; and he possessed a preliminary hearing transcript containing Buckhalter's testimony in another case. That the gang would also expect him to intimidate witnesses was unremarkable.

**5. Dejuan Ferguson's Complete Police Interview**

Dejuan Ferguson, White's cousin, participated in a police interview in 2006 and testified at the instant trial in 2009. The interview was tape-recorded and transcribed and involved about 45 minutes of dialogue occupying a 30-page transcript.

On direct examination of Ferguson, Guerrero's counsel tried to elicit an admission that Ferguson was present at the White shooting. Ferguson steadfastly denied he was. Defense counsel then offered into evidence a portion of the 2006 interview in which Ferguson told police he was present when White was shot, and Guerrero was not involved. The prosecutor objected on hearsay grounds and argued that if the defense introduced part of the interview, the prosecution was allowed to introduce the rest to show that Ferguson had lied to police, and why.

The matter was discussed outside the presence of the jury at a hearing pursuant to Evidence Code section 402 and again at a bench conference. Guerrero and Toledo argued a limited portion of the 2006 interview was admissible to impeach Ferguson's testimony about not being present when White was shot. The prosecution countered that if defendant introduced this evidence to impeach Ferguson's testimony, the prosecution should be allowed to introduce the entire interview to rehabilitate the testimony, i.e., to show that Ferguson lied to police in 2006. The prosecution argued the full interview showed Ferguson had a strong motive to lie about the White shooting: He wanted to frame Enciso for it.

The trial court agreed with the prosecution, observing: "There's no such thing as it only happened to one side and not the other. . . . So if you are going to talk about what happened, then bring it all out." "[I]f he testifies a certain way and it opens the door, then the door is going to be open. If it doesn't, it doesn't." The court told defense counsel, "It would be my suggestion if you [go and] play [the recorded interview], play everything. Let it all go."

Over defendants' objection, the recording of the entire 2006 interview was played to the jury. In addition to his statement about Guerrero not being present when Enciso killed White, Ferguson told police the following:

—To retaliate for the fatal shooting of Enciso's cousin, Enciso and his gang wanted to kill a girl, a baby, and the shooter;—Enciso hunted and killed Ferguson family members one by one;—A number of other Ferguson family members had been murdered, including a little boy;—On the day of the White shooting, Ferguson, White and Buckhalter had been approached by Enciso and Toledo in a black SUV driven by Enciso. Enciso got out of the vehicle and fought with White, then got back in and drove away. Later, Enciso and Toledo returned, Enciso carrying a gun. Enciso chased White and killed him, then fled in the vehicle. Guerrero was not present;—Ferguson was placed in protective custody in prison because Enciso and his gang threatened to have him killed there;—Guerrero, Enciso and Contreras were the three that did all that killing around there. Everybody, even if, like, people didn't see it, them dudes going around and bragging about it;—Guerrero, Enciso and Contreras were the three shooters that was doing all that killing around there.

During closing argument, the prosecution argued: "Now, [Dejuan] Ferguson told you, Mr. Guerrero is the one who killed his cousin . . . . That is to explain why [Dejuan] Ferguson would lie. Why he would lie and say that I was there, I saw them kill Darryl White. Because in his mind, he has seen, particularly David Guerrero, do another crime. And in his mind, he felt that all three of them were responsible for [Ferguson's cousin's] murder. That's the only reason that comes in."

Guerrero, joined by Enciso and Toledo, contends the trial court erred in admitting the full 2006 interview into evidence. We agree.

A trial court has broad discretion to exclude evidence it deems irrelevant, cumulative, or unduly prejudicial or time consuming. (Evid. Code, § 352.) Relying on Evidence Code section 356 (section 356), the People argue defendants forfeited the right to challenge admission of Ferguson's full interview by introducing into evidence other statements made by Ferguson during the same interview. The argument is without merit.

"[W]here one party has introduced part of a conversation, the opposing party may admit any other part necessary to place the original excerpts in context." (*People v. Pride* (1992) [3 Cal.4th 195](https://www.leagle.com/cite/3%20Cal.4th%20195), 235.) Section 356 provides in part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing *which is necessary to make it understood* may also be given in evidence." (Italics added.)

The purpose of section 356 "is to prevent the use of selected aspects of a conversation . . . so as to create a misleading impression on the subjects addressed." (*People v. Arias* (1996) [13 Cal.4th 92](https://www.leagle.com/cite/13%20Cal.4th%2092), 156.) "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. `In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with,* the admission or declaration in evidence. . . .' [Citations.]" (*People v. Hamilton* (1989) [48 Cal.3d 1142](https://www.leagle.com/cite/48%20Cal.3d%201142), 1174.) When one part of a conversation is admitted in evidence, other parts may not be admitted if they have no bearing on or connection with the admitted part. (*People v. Zapien, supra,* 4 Cal.4th at p. 959; cf. *People v. Pride, supra,* 3 Cal.4th at p. 235 [court may admit any portion of an interview "necessary to place the original excerpts in context"]; *People v. Williams* (1975) [13 Cal.3d 559](https://www.leagle.com/cite/13%20Cal.3d%20559), 565 [the court may exclude any portions of a conversation that are irrelevant to the previously admitted portions].)

A trial court's determination of whether evidence is admissible under section 356 is reviewed for abuse of discretion. (See *People v. Pride, supra,* 3 Cal.4th at p. 235.)

In the portion of the 2006 interview offered by Guerrero, Ferguson stated he was present at the White shooting but Guerrero was not. The statement was admissible to impeach Ferguson's trial testimony, in which he denied being present at the shooting. The other statements Ferguson made in the interview were inadmissible unless for the purpose of putting in context the statement introduced by Guerrero. (§ 356.)

Ferguson's statements to the effect that Enciso killed his family members were admissible because they demonstrated a basis for hostility against Enciso and a motive to create a narrative to implicate him in the White murder and inject himself into the narrative to give it credibility. But his statement that he believed *Guerrero* was responsible for the murder of his family members was not relevant because he evinced no desire to implicate Guerrero in the murder; on the contrary, he exonerated Guerrero.

Therefore, the challenged hearsay statements, *insofar as they mentioned Guerrero,* had no bearing upon the portion presented by Guerrero's counsel, and their admission was improper. Neither were the statements admissible against Enciso or Toledo, because these defendants had offered no portion of Ferguson's 2006 statement in the first instance.

Moreover, even if some of Ferguson's 2006 statement was relevant to the part offered by Guerrero, not all of it was. For example, Ferguson stated Enciso owned a black SUV "like a Tahoe," which Guerrero and "they all" drove. He also discussed the White murder at length and in detail, describing the initial altercation between Enciso and White and how Toledo and Enciso later returned with a gun, Enciso then chasing down White and killing him. None of this tended to make the prosecution's point that Ferguson was not present at the murder.

The trial court's admission of Ferguson's entire interview was a clear abuse of discretion.

The error was compounded during closing argument, where the prosecutor argued that Ferguson lied to police about the White murder because Guerrero had killed his cousin. He lied, the prosecutor argued, "[b]ecause in his mind, he has seen, particularly David Guerrero, do another crime. And in his mind, he felt that all three of them were responsible for [Ferguson's cousin's] murder." But Ferguson's enmity toward *Guerrero* had no bearing on his motive to lie about the White murder because in the purported lie, Ferguson exonerated Guerrero.

**6. Admission of Gang Evidence**

**a. CV70's Activities**

Detective Hecht and Deputy Steinwand testified they were assigned to a task force to investigate an "explosion of crimes" associated with CV70 from 2002 to 2005. Guerrero objected that a gang war occurring after 2002 was not material to the 2002 White murder. The objection was overruled.

Hecht testified there was a feud between CV70 and a Piru gang and reviewed, over defendants' objections, exhibits reflecting several incidents of CV70 gang violence occurring before and after the White shooting: (1) In 1988, CV70 member Manuel Castillo shot Piru gang member Paul Specter, and was in turn shot in the face. (2) A few weeks later, Castillo shot and killed the Piru member who shot him. (3) The next day, Leuders Park gang members broke into Castillo's house and killed his father. (4) In 2001, Ricki Jimenez was killed by two Black males. (5) Ricki's brother, Antonio Jimenez, a CV70 member, retaliated by shooting Buckhalter in 2003. He was later convicted of that crime. The prosecution, over defendants' objections, admitted a chart entitled "CV 70 shooting on Piru/Fergusons," which detailed more incidents: (6) In August 2002, Gerald Bennett was killed at a house at 14524 South Harris (the Harris house), where members of the Ferguson family lived. (7) On November 27, 2002, the instant murder occurred. (8) On January 2, 2003, White's brother was killed. (9) On January 20, 2003, Horace Ferguson was killed at the Harris house and CV70 gang members were convicted of the crime. (10) On October 23, 2004, Keshawn Erving was killed. (11) On October 5, 2005, Melvin Walker was killed, and a CV70 gang member was convicted of the crime.

The trial court instructed the jury in accordance with CALCRIM Nos. 360 and 1403. CALCRIM No. 360 enjoins the jury to consider an expert's statements "only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true." CALCRIM No. 1403 instructs the jury that it "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 enhancements charged; [and] [t]he defendant had a motive to commit the crimes charged. . . . You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

Defendants contend the court should have excluded certain parts of Hecht's and Steinwand's testimony about gang activity, the task force, and the relationship between and events surrounding several specified individuals on both sides of the CV70/Leuders Park feud on the ground that the matter did not require expert testimony, Hecht and Steinwand did not qualify as experts, and the probative value of the testimony was substantially outweighed by its undue prejudicial effect. We conclude that crimes occurring after the 2002 White murder had no relevance to the charged crime and should not have been admitted.

Given its inflammatory impact, "[g]ang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) [58 Cal.App.4th 1435](https://www.leagle.com/cite/58%20Cal.App.4th%201435), 1449.) "Thus, as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*People v. Albarran* (2007) [149 Cal.App.4th 214](https://www.leagle.com/cite/149%20Cal.App.4th%20214), 223.) "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.) But the trial court "must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran, supra,* at p. 224.)

We review the trial court's decision on whether evidence, including gang evidence, is relevant and not unduly prejudicial for abuse of discretion. (*People v. Avitia* (2005) [127 Cal.App.4th 185](https://www.leagle.com/cite/127%20Cal.App.4th%20185), 193.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion `must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125.)

Defendants' argument that Hecht did not qualify as an expert because gang culture does not require particular expertise is rejected. (*People v. Hernandez, supra,* 33 Cal.4th at pp. 1047-1048 [the elements of gang allegations may be proven by expert testimony].)

Hecht and Steinwand testified as experts on gang culture and activities. To testify as an expert, the witness must establish his or her expertise. (Evid. Code, § 720.) Hecht's and Steinwand's membership on a Sheriff's task force devoted to investigating CV70's activities and their statements regarding the CV70/Leuders Park history established a foundation for their opinions. (*People v. Hill* (2011) [191 Cal.App.4th 1104](https://www.leagle.com/cite/191%20Cal.App.4th%201104), 1122, fn. 9.) Their testimony about the culture of CV70 and its historical activities was directly relevant not only to ground their opinions but also assisted the jury in understanding statements made by percipient witnesses, several of whom gave different reports to police and at trial.

But many of the crimes discussed by Hecht were unsolved, were not shown to involve gang activity, and had occurred after the White murder. Discussion of these crimes was unnecessary either to establish Hecht's expertise or to illuminate CV70 culture. Its sole relevance was, in effect, to put the CV70 gang on trial. Admission of the innuendo regarding CV70 and the post-2002 murders was error.

**b. The Mexican Mafia**

Defendants argue Hecht should not have been permitted to testify that the Mexican Mafia enforces gang rules. We agree.

At trial, Corey Ferguson testified that because he had testified against other gang members, any of a number of gangs, including "South Side" [i.e., Hispanic] gangs, would try to "get" him. During the jailhouse conversation, appellant Guerrero told Danny Guerrero, "You left us fucking hanging. You left us hanging." "You know everyone who's snitching on us." "You weren't handling the business out there." The implication of Ferguson's testimony and Guerrero's statement is that it is against gang rules to cooperate with law enforcement.

Over defendants' objection, Hecht testified there is indeed a gang rule against cooperating with law enforcement, and that the Mexican Mafia oversaw "South Side" gangs (i.e., any Hispanic gang located south of Delano Avenue), set gang rules, and gave its blessing on the killing of any gang member who did not follow the rules.

The People argue Hecht's testimony helped the jury evaluate the behavior and credibility of witnesses, several of whom made statements to police that they later recanted. We disagree. The prosecutor stipulated that defendants were not in the Mexican Mafia and during closing argument told the jury "this case ha[d] nothing to do with Mexican Mafia." The prosecutor was correct: Hecht's discussion of the Mexican Mafia was irrelevant to this case. Its admission was error.

**7. Prejudice**

The errors discussed above require reversal only if prejudicial, that is, if there is a reasonable probability that, absent the errors, defendants would have obtained a more favorable verdict. (*People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818), 836.)

The primary issue in this case was identity. The only substantial evidence relevant to identity was provided by Buckhalter and Rodriguez. Buckhalter, an admitted gang rival (and gang shooting victim), testified Guerrero and Enciso were in the Tahoe that initially pursued Buckhalter and White, and Toledo pursued White on foot with a gun shortly before the murder. Rodriguez told police that on an unspecified date shortly before an unidentified Black man was shot in the neighborhood, Guerrero furnished Toledo with a gun and then ran out of the house with him, presumably to use the gun.

While it is possible that Guerrero furnished Toledo with the murder weapon and he and Enciso drove with him to find White, it is equally possible these events did not occur. Buckhalter did not see Guerrero or Enciso at the time of the shooting or afterward, and he never saw Toledo with them. Rodriguez could not identify the date Guerrero gave Toledo a gun, could not identify the gun, and did not know whether White was the person killed on the day the gun was provided. Enciso's in-laws testified he was with them in San Diego at the time of the murder; Contreras testified Toledo was in school with him at the time; and Dejuan Ferguson told police Guerrero was not present at the White shooting.

Given the extensive, detailed testimony about defendants' gang membership, gang culture, gang territories, gang relations (including the highly inflammatory gang war testimony by Hecht), gang activities, gangs' practices of disposing of guns used in crimes, the way in which defendants' and their associates' conduct and alleged conduct conformed to the expectations of the gang and the Mexican Mafia, plus detective Hecht's testimony regarding the behavior of a gang member, plus the prosecutor's extensive reliance upon the gang testimony in argument, including his argument that "these guys are a well-oiled killing machine," it would have been remarkable if the jury had not been influenced by the improperly admitted and utilized gang evidence.

This is so even if the jury followed the court's usual limiting instruction and did not draw any propensity inference. The limiting instruction expressly permitted the jury to consider the gang evidence to decide whether "defendant had a motive to commit the crimes charged." The jury, under the limiting instruction, was not precluded from considering the gang evidence as showing that defendants had a gang-related motive to commit a murder. Thus, the instruction failed to cure the admission of extensive, detailed, and inflammatory gang evidence.

Where there is "`at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result,'" the error is prejudicial. (*People v. Mower* (2002) [28 Cal.4th 457](https://www.leagle.com/cite/28%20Cal.4th%20457), 484, quoting *People v. Watson, supra,* 46 Cal.2d at p. 837.) Here, comparing the extensive, detailed, and inflammatory gang evidence that the trial court improperly admitted against the plausible, but flawed and by no means conclusive identification evidence, and the prosecutor's use of the gang evidence in argument, we conclude there is such an equal balance of reasonable probabilities to create serious doubt about whether the error affected defendants' convictions. Accordingly, we reverse.

We briefly address two issues that may recur on retrial.

**8. The Judgment Should be Amended to Reflect a $30 Fee**

The trial court imposed an "education fee" of $50 on Guerrero and Enciso and $30 on Toledo. The minute orders do not reflect these fees, but indicate each defendant was fined $50 pursuant to Government Code section 70373. Under subdivision (a) of that section, the court is directed to impose a $30 court construction fee. The trial court's reference to an "education fee" was apparently a misstatement.

**9. Toledo's Presentence Custody Credits**

Toledo contends he was in custody 1,348 days before sentencing, from January 31, 2006 to October 9, 2009, but was awarded credit for only 1,346 days. He is correct. He should have received 1,348 days credit for this period.

**DISPOSITION**

The judgment is reversed.

MALLANO, P. J. and JOHNSON, J., concurs.