Filed 8/2/12 P. v. Webb CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KENNETH WILLIE WEBB, Defendant and Appellant.	B234641 (Los Angeles County Super. Ct. No. BA351123)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Kenneth Willie Webb guilty of first degree murder and willful, deliberate, and premeditated attempted murder. The jury also found true allegations that Webb personally and intentionally used and discharged a firearm, causing death. On appeal, Webb contends: (1) the trial court erred in allowing the prosecution to introduce gang evidence, and the court should have granted Webb's related motions for a mistrial; and (2) the trial court erred in instructing the jury on the right of self-defense by an initial aggressor. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the factual background in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) On January 12, 2008, Eron Mull and several friends went to a party in west Los Angeles. The party was thrown by a "party crew"; a group that sponsors and promotes parties for teenagers. While Mull and his friends were waiting to enter, a fight started at the front of the line. Security officers used pepper spray to break up the fight and shut the party down. The line dispersed. Mull's group went to a nearby restaurant to help one friend rinse pepper spray from his eyes. While in front of the restaurant, they saw people fighting in the street, and other people kicking and "stomping on" cars.

Webb also went to the January 12 party with a group of friends. He was a member of a party crew. A few weeks earlier, Webb had attended another party hosted by a party crew at the Fredo's Grill restaurant. Webb's friend, Kevin Bernard, had an altercation with a third person, and Webb intervened to support Bernard. Webb and others were detained by security. Webb later told another friend that at Fredo's Grill, "this big-ass nigger just banged on me. I'm going to fuck him up."

Before the January 12 party, Webb's friend Ellsworth Andrews told Webb "not to bring anything," by which he meant Webb should not bring any weapons to the party. Andrews had "heard of [Webb] before with a gun." Once at the party, Webb and his friends went in through a back entrance. At one point, Webb's girlfriend showed another friend a handgun she had in her purse. Webb's girlfriend was crying for reasons related to Webb. While Webb and his friends were at the party, security shut it down. There

were a lot of people in the street, and several fights. Webb and his friends got in a car to leave. Webb's girlfriend gave Webb the gun from her purse. As the group was driving away, Webb said he wanted to get out of the car. His friends got out with him. Webb took Andrews's bandana and ran off.

In the meantime, Mull and his friends had left the restaurant and were returning to their car. They passed two "guys" at the entrance of an alley, one of whom was Webb. To Kevin Burton, one of Mull's friends, Webb and the other person looked "suspicious," so he told Mull, "let's get in the car." Mull was walking with Napoleon Bridges, behind his other companions. Bridges was around six feet four inches tall, and weighed about 250 pounds. Mull said: "Hey, aren't you from . . ." and identified a place, or "Where do you know us from?" According to Bridges, Mull was usually quiet, but he spoke because of the way Webb was staring at them. Although Bridges was texting, he put his phone away, fearing they were about to be robbed. Bridges then said to Webb, "Yo, mother-fucker, do you know us from somewhere?" Webb was with "two girls and a guy." Webb moved towards Bridges and Mull and pulled at his pants in a gesture that indicated he wanted to fight. Bridges responded in kind. Webb pulled a gun from his back. Webb's companions ran away. Bridges said, "Oh, shit," and Webb fired the gun. Webb then ran away. Mull was fatally shot in the throat.

When Webb's friends heard the gunshot, they ran back to their car. Webb followed. He was no longer wearing the sweater he had on before he got out of the car. They drove to a nearby gas station. Webb's friends asked what had happened. Webb said he aimed and shot the wrong person. The group drove back to the alley to retrieve Webb's sweater and the gun. Webb grabbed his sweater but could not find the gun. Someone in the group subsequently threw the sweater away in a trash bin. They all agreed not to tell anyone about what happened. However, one member of the group, Lori Ross, later told a counselor at her high school, then police, about the shooting.

Bridges identified Webb from a photographic lineup. He also told law enforcement he recognized Webb from a party crew sponsored party at a "grill type of

place." Bridges told police Webb had "pulled a gun out on people" before security detained him.[1]

At trial, Ross admitted that at the preliminary hearing she testified Webb returned to the car after the shooting and said: "I thought it was a gun," in addition to saying he aimed and shot the wrong person. However, at trial she testified that, despite her previous testimony, she did not remember hearing Webb say, "I thought it was a gun." Webb did not testify at trial or offer any evidence. The defense argued Webb acted in self-defense.

A jury convicted Webb of one count of first degree murder as to Mull (Pen. Code, § 187, subd. (a); count 1), and one count of attempted murder as to Bridges (§§ 664, 187, subd. (a); count 2). As to both counts, the jury found true allegations that Webb personally and intentionally discharged a firearm which caused Mull's death (§ 12022.53, subd. (d)); personally and intentionally discharged a firearm (§ 12022.53, subd. (c)); and personally used a firearm (§ 12022.53, subd. (b)). As to count 2, the jury found true an allegation that the attempted murder was willful, deliberate, and premeditated. The trial court sentenced Webb to a total prison term of 50 years to life on count 1, and a concurrent sentence of 25 years to life on count 2.

DISCUSSION

I. Admission of Gang Evidence Was Not Reversible Error

Webb contends the trial court erred by admitting evidence that he was affiliated with a gang, and by denying his two mistrial motions. We find any error was harmless.

A. Background

In his opening statement, defense counsel told the jury they would hear that Webb was not involved with gangs and that "none of these witnesses were gang people from either side. [Webb's] friends and [Mull's] friends. They're not gang-bangers. They're kids from the neighborhood." While describing what he expected the evidence to show

---

[1] Bridges told police the Fredo's Grill party was after the January 12 shooting. At trial, Ross testified she witnessed part of the Fredo's Grill incident but also that she had never seen Webb with a gun before the January 12 party.

about the shooting, he suggested that Webb and his friends did not know who among the crowd were gang members because sometimes gang members showed up to cause trouble at party crew sponsored parties. Counsel indicated that by the time of the confrontation in the alley, tensions were heightened, and "people [were] frightened."

Prosecution witnesses testified that Mull was not involved in a gang, and no one in Mull's group was using gang signs or claiming a gang on the night of the shooting. Mull's friend Kevin Burton testified on cross-examination that while no one in their group was throwing gang signs, he did see others throwing gang signs that night. Defense counsel asked Burton whether Bridges issued a "gang-type challenge" to Webb. Burton said he did not perceive Bridges's question to be a gang challenge.

The prosecutor asked Ellsworth Andrews, one of the witnesses who was with Webb on the night of the shooting, if Webb ever claimed membership in a gang. Andrews responded: "Claiming, yes, but being a part of it, affiliated, personal knowledge, no." The prosecutor asked what gang Webb claimed. Defense counsel objected that there was no gang enhancement alleged, and the matter was irrelevant and inadmissible under Evidence Code section 352 (section 352). At sidebar, the prosecutor asserted the issue was relevant because defense counsel "made the argumentative point that nobody involved in this case was involved in any gangs. I think more importantly relevant to [Webb's] conduct on that night that he saw some friends fighting, according to this witness, that he jumped out of the car, and he ran off in the direction that those friends were running with a loaded gun. . . . I think that if he is a gang member -- and counsel made the point that there were a lot of gang members at this party, that his confrontation ultimately that led to the shooting, the jurors could reasonably find that he was acting more as aggressor in that situation than as somebody who just happened to be standing around and was . . . the victim which I think is going to be the defense's position." The prosecutor agreed with the court's assessment that the gang evidence would be offered to prove motive.

Defense counsel argued Bridges would testify that the exchange had nothing to do with gangs, so the only purpose of the evidence would be to disparage Webb. The court

asked the prosecutor for an offer of proof as to relevance. The prosecutor indicated that, prior to the incident, Bridges and his friends were involved in an altercation with one of Webb's friends over a cap "referred to by witnesses as a bird in the hat which is a group that hangs out at the nest that's associated with a street gang." The prosecution theory was that Webb and Bridges recognized each other on January 12 and Webb had a motive to shoot Bridges. The prosecutor explained there was information that Bridges was associated with a "rival gang, which would provide motive for the shooting." The prosecutor also indicated that during a search of Webb's home, police found schoolbooks containing writings referring to the Rolling 40s gang. Defense counsel continued to argue the testimony was irrelevant and unduly prejudicial. The prosecutor responded: "It's not my intent to prove that Mr. Webb is a gang member, but if he and, on the other side, Napoleon Bridges and/or Eron Mull, by way of whatever allegiances had allied themselves with certain gang identities that are rival and hostile to each other, then that's relevant to show motive."

The trial court concluded the expected testimony was relevant to motive and the probative value outweighed any prejudicial effect. The court also offered to instruct the jury with CALCRIM No. 1403 at the end of the trial. When testimony resumed, the prosecutor again asked if Webb claimed membership in a gang. Andrews testified that sometimes Webb would call out different gang names as if he were a gang member, mainly when he was dancing.[2] Andrews said "sometimes it would be just a joke."

The next day, during a break in the testimony of Lori Ross, the prosecutor informed the court he wished to ask Ross whether Webb ever claimed membership in the Rolling 40s gang. Defense counsel objected that the case was not a gang case, the shooting was not gang-related, and the testimony would only serve to attack Webb's character. The court stated its ruling had not changed from the day before and it would allow the question and testimony. Defense counsel moved for a mistrial on the ground

---

[2] Andrews testified: "You would hear sometimes '40s.' Sometimes you'd hear '60s,' sometimes you'd hear 'seven-0,' sometimes you would hear 'Blood.' Just a variety of different things."

that the testimony was overly prejudicial and would unfairly bias the jury. The court noted the evidence had not yet come in and denied the motion.

However, the court subsequently asked the prosecutor for a good-faith basis for questions about Webb's reputation as a gang member. The prosecutor said he had information that during the confrontation a few weeks before the January 12 incident, "the confrontation was between the Rolling 40s, the defendant's friends, himself, versus Napoleon Bridges who witnesses have suggested or in their minds believed to be a 60s. And they have described them as rivals. . . . That witness knows the defendant as T.K. from the Rolling 40s." The trial court overruled the defense objection, but offered to give a limiting instruction either at the end of trial, or earlier at counsel's request. Defense counsel asked that the court give the limiting instruction immediately after the prosecutor asked the questions.[3]

Ross testified that Kevin Bernard was a Rolling 40s gang member and that he was involved in the Fredo's Grill confrontation. She testified she had no reason to believe Webb was a Rolling 40s gang member, but that she had seen him with Rolling 40s gang members. She believed Webb was "backing up another Rolling 40s" during the Fredo's Grill incident. The court then gave CALCRIM No. 1403: "Ladies and gentlemen, you may consider evidence of gang activity only for the limited purpose of deciding whether the defendant had a motive to commit the crimes charged. You may not consider this evidence for any other purpose. You may not conclude from the evidence that the defendant is a person of bad character or that he has disposition to commit crime."

---

[3] The prosecutor then asked Ross several questions outside the presence of the jury. Ross indicated she could not say Webb was a Rolling 40s gang member, but that he associated with the gang. She believed the incident at Fredo's Grill involved the Rolling 40s because Kevin Bernard was a Rolling 40s member. She did not know the gang affiliation, if any, of the people on the other side of the confrontation. Following this testimony, the court found the gang evidence relevant and stated it would give a limiting instruction that the testimony was only to be considered for motive. Defense counsel requested that the instruction be given immediately after the testimony and at the end of trial.

The trial court later heard argument on the proposed introduction of gang-related graffiti in school notebooks found at Webb's house. The books included writing such as "Baby Tramp Killa," "R40," and "R20."[4] Defense counsel objected that the evidence was inadmissible under section 352, lacked foundation, and added nothing to the case. The prosecutor argued the gang writing showed an allegiance or identification with the Rolling 40s gang and was "relevant to his association with that organization. That in and of itself corroborates the witness's testimony that he came to the back-up of [a Rolling 40s member at Fredo's Grill]." The prosecutor further argued that the Fredo's Grill incident was relevant because there was evidence Webb left Fredo's Grill angry at someone and he indicated he would retaliate against that person, whom the prosecutor believed was Bridges. Defense counsel objected that evidence of a gang allegiance was highly prejudicial and irrelevant because it was not a gang case. Defense counsel again pointed out that Bridges told police the shooting was not gang-related.

The trial court overruled the defense objections. Defense counsel again moved for a mistrial. Counsel explained he had defended other cases in which the court did not realize until the end of trial that gang-related evidence was prejudicial, but at that point there was nothing to be done. Counsel further stated his "sense is even a limiting instruction doesn't cure that because of the paranoia that surrounds gangs in this community, so I would move for a mistrial at this point." The court denied the mistrial motion, stating: "I ruled earlier on this very issue, although this is a different manner of presenting the evidence. I ruled that it was admissible, and gang evidence in general in the case, and I already gave a limiting instruction. And the court reconsidered this new evidence, this additional evidence. I've considered all the various issues presented by counsel, and my ruling remains the same. It is admissible, so the motion for a mistrial is

---

[4] The investigating police officer on the case testified he was told that Webb went by the moniker Baby T.K. or T.K. Ross testified that the name "Tramp Killer" was a "dis" for another gang. When asked what gang uses the term "Tramp Killa" to "dis" other people, Ross answered: "Rolling 40s, 60s."

denied." Defense counsel requested that the court give a limiting instruction at the end of trial.

The investigating police officer in the case testified Bridges told him that as far as he (Bridges) knew, the shooting was not gang-related. Bridges did not think Webb was wearing "gang colors" during the incident. Bridges said he did not belong to a gang and was not affiliated with a gang. Law enforcement had no indication that either Mull or Webb were active gang members. The officer also testified that Bridges said he did not "bang." The officer explained "banging" meant "he did not identify himself or portray himself to be a gang member or affiliated with any gang." On cross-examination, defense counsel asked, regarding "banging," "And that's when a person would identify himself as being affiliated with a gang; right?" The officer answered: "Yes. And there was additional - - or portray themselves to be." The colloquy continued:

"[Defense counsel]: Or portray themselves to be. And one way of banging would be, 'where you from,' right, as a challenge?

"[Officer]: Yes, given the context of the situation, yes.

"[Defense counsel]: Okay. One gang member sees another gang member or person that looks like a gang member, where you from, that would be banging; right?

"[Officer]: Yes."

The prosecution did not offer any evidence establishing that Bridges was affiliated with a gang, or that anyone perceived Bridges to be associated with a gang that is a rival of the Rolling 40s. In the final instructions to the jury, the trial court repeated CALCRIM No. 1403.

In his closing statement, the prosecutor argued: "Defendant lived in two worlds, so it appears from the evidence. He had these friends who were somewhat enterprising, somewhat positive, it appears, and then had his friends like Kevin Bernard who were Rolling 40s, gang members, troublemakers, and he was straddling both sets of friends." When describing the Ross testimony, the prosecutor stated: "[S]he caught what looked like the tail end of something where the defendant was coming to the back-up of Kevin Bernard. By her testimony and her demeanor on the stand, he is somebody that she

wanted nothing to do with, he's a Rolling 40s gang member, the defendant was backing him up that night at that party, and although she didn't see the defendant with a gun that night, that is the same party that [Bridges] referenced where he said the defendant pulled out a gun." The prosecutor later argued: "Before the crime we know that [Webb] associates with Rolling 40s gang members. Is he a Rolling 40s? I don't know. Is he formally a member of the gang? I don't know. I haven't alleged that he is. I'm not going to ask you to find that he is. But you know he associates with them. He backs them up, he has Rolling 40s related graffiti in his books. He is – at least loyal to and sympathizes with that gang. That's part of his state of mind. That's part of who he is. His own friend . . . talked about the fact that he's friends with those people. He's also known to carry a gun. He backs people up. He got involved in that party at Fredo's that apparently had nothing to do with him in the first place . . . . The prosecution is telling you that [Webb] was up there with a purpose, and when [Bridges] walked out of the Norm's lot, he started to mad-dog him. Don't underestimate what staring at someone means to these young people, especially the ones who are gang-related. A term for it, they call it mad-dogging. It is a sign of disrespect. They respond to that."

Defense counsel argued gangs were peripheral to the case. Counsel asserted: "They try to paint [Webb] as some quasi-gang member, that he would have motive to kill because he jumped to the defense of his friend who was in a gang. Well, he must be loyal to the Rolling 40s gang because he jumped to the defense of this five-foot-five-and-a-half inch guy. [Loyal] to the gang or loyal to a friend? These kids go together to school from kindergarten. Just because a person, one becomes a gang member, and one doesn't, does not necessarily mean that you stop friendships. That's real life."

B. The Trial Court Error in Admitting the Gang Evidence Was Harmless

On appeal, Webb contends the trial court abused its discretion in admitting gang-related evidence and denying his related mistrial motions. Webb asserts the error was prejudicial and violated his constitutional right to due process.

The trial court admitted gang-related evidence based on the prosecutor's offers of proof, which indicated the People would show the shooting was related to a rivalry

between the gangs with which Webb and Bridges were affiliated. While the trial court's admission of gang-related evidence may have been appropriate based on the initial offers of proof, the People did not, in fact, introduce evidence of a gang rivalry, or that Bridges was connected to a rival gang of the Rolling 40s. Without evidence that Bridges was affiliated with a gang, or of a relevant gang rivalry, the People's gang-related evidence was not probative of Webb's motive. Admission of the gang-related evidence thus became erroneous. However, we conclude that the error was harmless and did not deprive Webb of his right to due process. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581.)

"Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts—such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect." (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) " 'Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.]' [Citation.]" (*People v. Memory* (2010) 182 Cal.App.4th 835, 858 (*Memory*).) However, " '[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.' [Citation.] [¶] . . . [¶] . . . 'In cases *not* involving the gang enhancement . . . evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]' [Citation.]" (*Id.* at pp. 859-860.) "[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225 (*Albarran*).)

But even if gang evidence is improperly admitted, the error does not necessarily deprive the defendant of the right to due process, or constitute prejudicial error. " 'Ordinarily, even erroneous admission of evidence does not offend due process unless it is so prejudicial as to render the proceeding fundamentally unfair.' [Citations.] . . . . 'To

prove a deprivation of federal due process rights, [a defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial.' [Citation.] ' "The dispositive issue is . . . whether the trial court committed an error which rendered the trial 'so "arbitrary and fundamentally unfair" that it violated federal due process.' [Citations.]" [Citation.]' [Citation.]" (*People v. Covarrubias* (2011) 202 Cal.App.4th 1, 20 (*Covarrubias*); see also *People v. Partida* (2005) 37 Cal.4th 428 (*Partida*).) " 'Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.]" (*People v. Hunt* (2011) 196 Cal.App.4th 811, 817.)

Here, the gang-related evidence was limited. It consisted of testimony that Webb had friends who were Rolling 40s gang members, he sometimes called out the names of various gangs while dancing, he had a nickname that had gang connotations, and he wrote gang names and his "moniker" in school notebooks. The investigating officer testified that Webb was not identified as an active gang member in law enforcement records, and Webb's friends testified they had no reason to believe he was actually a gang member. There was no general evidence about gangs, and no evidence about the Rolling 40s gang in particular.

Moreover, the case against Webb was based primarily on other evidence. (*Covarrubias*, *supra*, 202 Cal.App.4th at pp. 20-21.) That Webb shot Mull was not disputed. Webb did not testify or offer any evidence. According to prosecution witnesses, several of whom were Webb's friends or associates, Webb was involved in an altercation with someone weeks before the January 12 party. Webb told a friend someone had "banged" on him and Webb planned to "fuck him up." Before the January 12 party, one of Webb's friends made a point of telling Webb not to bring any weapons because he was known to carry a gun. Despite this request, Webb's girlfriend had a gun in her purse on the night of the party. She showed the gun to Lori Ross. The girlfriend was distraught for reasons related to Webb, and, the jury could infer, Webb in

relation to the gun. After Webb and his friends left the party, Webb's girlfriend gave the gun to Webb. The scene outside the party was chaotic, with fights breaking out. While there was conflicting testimony about why Webb and his friends drove away, only to stop and return to the fray, it was undisputed that Webb walked or ran off ahead of the group once they got out of the car.[5] Defense counsel argued Bridges initiated the confrontation, but the only available evidence indicated it was Webb's "challenging" stare that led Bridges to notice him. Despite Bridges's provocative statement, Webb did not speak except to gesture that he wanted to fight. He said nothing before he fired the gun. When Webb joined his friends after the shooting, he described aiming before he shot. The evidence was overwhelming that Webb committed a deliberate, premeditated killing, erring only in that he shot Mull instead of Bridges.

In contrast, Webb's theory that he thought Bridges had a gun was nearly devoid of evidentiary support. Webb did not testify. Bridges testified but claimed to remember nothing about the incident. The only evidence regarding the timing of the events immediately before the shooting came from Bridges's prior statements to the investigating officer. In those statements, Bridges said Mull asked Webb if he knew them. Bridges had been texting, but once he heard Mull speaking, he put his phone away. Bridges then posed Mull's question in a more provocative way. Webb pulled at his pants indicating he wanted to fight. Bridges also pulled at his pants, at which point Webb fired the gun. Thus, although defense counsel argued Webb may have thought the phone was a gun, this was in tension with the evidence, which indicated Bridges put his phone away at the very beginning of the confrontation, and when he reached for his pants he was mimicking Webb's gesture. Indeed, the only indication that Webb thought Bridges had a gun came from Ross's preliminary hearing testimony, which she recanted at trial. And, at *both* the preliminary hearing and trial, Ross testified Webb said: "I aimed and shot the wrong person."

---

[5] Ross testified the group was leaving but they collectively decided to stop and look for other friends. Ellsworth Andrews testified the group was leaving and Webb asked that they stop the car because he saw some of his friends.

Further, the trial court twice instructed the jury it could not consider the gang-related evidence to conclude that Webb was a bad person or was disposed to commit crime, and that it could *only* consider the evidence to decide whether Webb had a motive to commit the crime. We presume the jury followed the court's instruction. (*People v. Thomas* (2011) 51 Cal.4th 449, 489.) The gang-related evidence was not "uniquely inflammatory." (*Albarran, supra,* 149 Cal.App.4th at p. 230.) There was no evidence that Webb was an actual gang member. There was no evidence that on the night of the shooting he was in the company of gang members. There was no general evidence offered about gangs, the culture or activities of the Rolling 40s gang, or any inference that Webb had been involved in gang-related activities prior to the Fredo's Grill incident. Even if the trial court erred in admitting the evidence, the error did not rise to the level of a constitutional due process violation. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 434 [assessing alleged due process violation as concerning whether trial resulted in a verdict "worthy of confidence"].)

" 'Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict[s] would have been more favorable to the defendant absent the error. [Citations.]' [Citation.]" (*Covarrubias, supra,* 202 Cal.App.4th at p. 21, fn. omitted, quoting *Partida, supra,* 37 Cal.4th at p. 439.) Two cases involving gang-type evidence are instructive in considering this question.

In *People v. Memory, supra,* 182 Cal.App.4th 835, the Court of Appeal concluded the admission of gang-related evidence was prejudicial error. The defendants were convicted on charges of second degree murder, attempted voluntary manslaughter, and assault with a deadly weapon, arising out of a fight in the parking lot of a bar. (*Id.* at p. 837.) The defendants were members of a motorcycle club. There were conflicts within the prosecution's evidence as to the relevant incidents and defendants' role in the fight. The defendants contended they acted in self-defense. The trial court allowed the prosecutor to introduce evidence portraying the motorcycle club as an "outlaw" organization, even though it did not rise to the level of a criminal group like the Hell's

Angels. (*Id.* at pp. 852, 860.) The prosecutor elicited testimony about the criminal activities of other members of the club even though they were not involved in the charged crimes. (*Id.* at p. 854.) The prosecutor also "sarcastically referred to defendants just happening to have deadly weapons with them," while suggesting their membership in the club made this behavior predictable, and that "that's the kind of people they are." (*Id.* at pp. 855-856.) The trial court instructed the jury that evidence regarding the activities of other members of the club could not be considered for proving the likelihood the defendants committed the crimes charged. (*Id.* at p. 856.)

The Court of Appeal found the trial court abused its discretion in admitting the evidence because it was offered only to show the defendants had a criminal disposition to fight with deadly force when confronted, even though there was no evidence of that disposition. (*Memory, supra,* 182 Cal.App.4th at p. 859.) The court noted the "prosecutor sought through its opening statement, structure of its case in chief, examination of witnesses, and in closing arguments, to continually portray defendants as members of a violent . . . outlaw motorcycle club akin to the Hell's Angels. The Attorney General argues that since there was no evidence about the Hell's Angels, any connection between the [defendants' motorcycle club] and the Hell's Angels was benign. Again, we disagree. The lack of specific evidence about the Hell's Angels allowed free rein to the jury's bias and prejudice." (*Id.* at p. 861.) The court further concluded the error was prejudicial because it damaged the defendants' credibility and "[tainted the jurors'] view of events with the inference of defendants' criminal disposition." (*Id.* at p. 862, fn. omitted.) This was important because the outcome of the case "depended heavily on questions of defendants' mental state," and it "was not a case where the jury had only to choose between the People's and the defense's version of events and the evidence was overwhelming in favor of the prosecution." (*Id.* at p. 863.) "The prosecutor relied heavily on the [motorcycle club] evidence to show defendants were guilty and in arguing 'this case is strong for intent.' " (*Ibid.*)

In *Covarrubias*, the Court of Appeal reached the opposite result. The defendant in the case was found guilty of possession of marijuana for sale and transporting more than

28.5 grams of marijuana into California. (*Covarrubias, supra,* 202 Cal.App.4th at p. 3.) The trial court admitted expert testimony from a law enforcement agent who testified about the structure and practices of drug trafficking organizations. The Court of Appeal determined admission of the evidence was error because the prosecution presented no evidence associating the defendant with a drug trafficking organization. (*Id.* at pp. 16, 18-19.) However, the court determined the error did not constitute a due process violation and was harmless. Although the testimony was a significant portion of the prosecution case, "it was far from the primary evidence" of the defendant's guilt. (*Id.* at p. 20.) The court also noted the jury could have inferred the defendant was part of a drug trafficking organization from the fact that the defendant had a large quantity of marijuana in his possession and because of statements he made to law enforcement agents. The expert testimony "merely corroborated a reasonable inference that the jurors likely would have drawn without such testimony." (*Id.* at pp. 20-21, fn. omitted.)

The court additionally concluded that because the expert's testimony presented drug trafficking organizations as operating a business rather than as criminal organizations committing violent acts, the testimony was "not so 'uniquely inflammatory' as to render the trial fundamentally unfair." (*Covarrubias, supra,* 202 Cal.App.4th at p. 21.) The jury was not faced with a "close case" and the defendant's arguments were implausible. (*Id.* at p. 22.) Thus, the court concluded it was not reasonably probable the verdicts would have been more favorable to the defendant had the trial court excluded the challenged testimony.

The court's reasoning in *Covarrubias* is applicable here, while that of *Memory* provides a helpful contrast. Unlike the evidence in *Memory*, the prosecution evidence here had few conflicts. Although, as was true in *Memory*, Webb's state of mind was a crucial aspect of the case, here there was minimal evidence to support Webb's interpretation of the evidence, while in *Memory* the testimony of several witnesses supported the defense version of the facts. While in *Memory*, the prosecution case centered on the defendants' membership in the motorcycle club and impermissible inferences the jury might draw from that membership, here the gang-related evidence was

limited, was only minimally referred to in the prosecution's closing argument and not in his opening statement, and represented only a small portion of the evidence at trial.

As in *Covarrubias*, this was not a close case and the evidence was not uniquely inflammatory. And, as was the case in *Covarrubias*, the gang-related testimony was "far from the primary evidence" of Webb's guilt. Even without the challenged evidence, the jury would likely have inferred Webb planned to commit a violent act because he brought a loaded gun to a party, and stated he would respond to Bridges's "banging" by "fuck[ing] him up." The challenged evidence was subject to a twice-repeated limiting instruction. The jury deliberated for less than three hours and concluded that Webb's actions were willful, deliberate, and premeditated. (Cf. *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [admission of cumulative, minimally probative gang evidence was prejudicial error where prosecution case was "not overwhelming" and jury deliberated for 12 hours].) As in *Covarrubias*, we find the trial court's admission of the evidence and denial of Webb's related mistrial motions do not warrant reversal.[6]

II. The Trial Court's Instruction of the Jury with CALCRIM No. 3471 Was Not Prejudicial

Webb further contends the trial court prejudicially erred in instructing the jury with CALCRIM No. 3471. We need not determine whether giving the instruction was error because any error was harmless.

CALCRIM No. 3471, as given at trial, states: "A person who is the initial aggressor has a right to self-defense only if: 1. He actually and in good faith tries to stop fighting; and 2. He indicates by word or by conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting, and that he has stopped fighting. If a person meets these requirements, he then has a right to self-defense

---

[6] Webb also contends on appeal that in the event this court determines the mistrial motions were properly denied because they were premature, his counsel was prejudicially ineffective in failing to renew the motions after the gang evidence was admitted. In light of our conclusion that no prejudice resulted from the admission of the evidence, we find no ineffective assistance of counsel either. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696.)

if the opponent continues to fight. If you decide the defendant started the fight using nondeadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and is not required to try to stop fighting. The person does not have the right to self-defense if he or she provoked the fight or quarrel with the intent to create an excuse to use force."

Webb contends no substantial evidence supported the theory addressed by CALCRIM No. 3471, and even if there were substantial evidence to support giving the instruction, the court erred because the instruction was inconsistent with Webb's theory of the case and the defense opposed it. However, we can only conclude that any error was harmless. We find no " 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

We agree that CALCRIM No. 3471 did not apply to the facts of this case. But the court instructed the jury: "Some of these instructions may not apply, depending on your findings about the facts of this case. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." CALCRIM No. 3471 instructs the jury that a person who starts a fight only has a right to self-defense if he first tries to stop fighting. It is not reasonably probable that the jury construed the exchange between Webb and Bridges as a "fight," or that the jury would have concluded Webb could have "stopped fighting." There was no evidence that Webb and Bridges exchanged anything other than words and a gesture before Webb fired a gun. Defense counsel argued the instruction was inapplicable because Webb was not the aggressor since he only stared at Bridges, and there was no "fight." The prosecutor did not specifically refer to the instruction, but also argued there was no physical fighting, stating: "We don't even know if a fight would have happened at all," had Webb not pulled out a gun. In rebuttal, the prosecutor noted: "We didn't get beyond -- we didn't even get to an argument here, and the defendant pulled out a gun and killed."

Without a fight, or in other words, some form of actual combat or use of force, the instruction cannot be meaningfully applied. Under the circumstances, Webb's "assertion that no substantial evidence supported the instruction does not warrant our finding reversible error because the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278.)

Thus, we find no basis for reversal.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.