THE PEOPLE v. DONALL DUNN

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Court of Appeal, Second District, California.

THE PEOPLE, Plaintiff and Respondent, v. DONALL DUNN, Defendant and Appellant.

B217408

Decided: December 17, 2010

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant. Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar, Joseph P. Lee, Ana R. Duarte and Colleen Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Donall Dunn appeals his conviction of one count of voluntary manslaughter, one count of first degree murder, and one count of attempted premeditated murder arising out of two separate incidents in which defendant shot and killed his friend;  beat, stabbed and shot to death his girlfriend;  and shot at and seriously injured another man.   Appellant contends the trial court erred in (1) denying his motion for acquittal on the murder and attempted murder counts;  (2) admitting hearsay testimony of the autopsy reports of the two murder victims;  (3) excluding evidence that one of the victims was a gang member;  and (4) instructing the jurors with CALJIC No. 2.90 on reasonable doubt.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In a three-count information, defendant was charged with two counts of murder (Pen.Code, § 187, subd. (a), counts 1 and 2) and attempted willful, deliberate, premeditated murder (Pen.Code, §§ 664, 187, subd. (a), count 3).   The information alleged on all three counts that defendant personally and intentionally discharged a firearm (Pen.Code, § 12022.53, subds.(c), (d)) and on count 3 that defendant personally inflicted great bodily injury (Pen.Code, § 12022.7, subd. (a)).  The information further alleged the special circumstance of multiple murder (Pen.Code, § 190.2, subd. (a)(3)), that defendant had suffered four serious or violent felony convictions (Pen.Code, §§ 667, subds.(b)-(i) and 1170.12, subds. (a)-(d)), and that he had served six prior prison terms (Pen.Code, § 667.5, subd. (b)) [1](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_1) .

Prosecution Case.

A. The Shooting of Michael Jones (“Kinfolk”) (Count 1).

In the early morning hours of May 2, 2006, defendant shot his friend Michael Jones (known as “Kinfolk”) in the laundry room of an apartment complex located at 716 East Vernon Avenue in Los Angeles.

Crystal Taylor was using crack cocaine every day at the time of the shooting.   She turned to prostitution to pay for her drug habit.   Taylor purchased drugs from a woman named Miyoshia who lived at 716 East Vernon.   She knew defendant as “Debo,” and sometimes smoked crack with him.   Sometimes she saw defendant with “Kinfolk.”   She never saw them threaten one another, and they appeared to be friends.

On May 2, 2006, she had smoked some crack.   She was in the laundry room with Kinfolk and defendant.   Kinfolk asked to use her pipe to smoke some of his own drugs, and she gave it to him.   Kinfolk started “tweaking,” (behaving in a jittery, nervous fashion) and defendant asked to “hit the back end” of the pipe, meaning that he wanted to smoke the drugs before they got cold.   Defendant smoked the pipe.   Kinfolk was holding the lapels of his own jacket and said, “you need to watch out for these people,” and stated that people were out to get him.   Kinfolk was standing near the wall.   Defendant told Kinfolk not to put his hand in his jacket, and Taylor saw that defendant was holding a gun.   She heard a shot, she heard Kinfolk choking, and she ran out of the room.

Taylor ran to Floyd Don's [2](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_2) apartment, and defendant followed her.   When Don would not give her a ride, Taylor left.   She did not believe smoking crack affected her perception or memory.

Miyoshia Nelson also knew defendant as “Debo,” and had known him and Kinfolk most of her life.   Defendant and Kinfolk were very good friends, and they did not fight or argue.   Nelson had seen Kinfolk carry a black automatic weapon with a clip on two or three occasions.   He was carrying an automatic weapon two or three days before the shooting, and showed it to her.   Defendant carried a revolver with a pearl handle on it every day.   Defendant would become paranoid when he used drugs.

The night of the shooting, Nelson was waiting to receive some drugs from Don. She was waiting with a man named Willie near the back of the apartment complex near the laundry room.   She saw Kinfolk sitting on the front porch in front of her mother's apartment, which was near the front of the apartment complex.   She walked past the laundry room, and saw Taylor and defendant.   She did not see Don because he was in his apartment getting her drugs.   About five or seven minutes later, she heard a “pop.”   She did not think anything of the sound, and someone told her to stop setting off firecrackers.   She went towards the laundry room and saw some feet lying on the ground sticking out of the doorway.   She looked into the laundry room and saw the feet belonged to Kinfolk.   She did not see defendant.

Nelson turned around and saw Don getting into his car.   Taylor was following him and banging on the window.   Don drove off.

Officer Joel Estrada of the Los Angeles police department responded to the shooting at 716 East Vernon Avenue at approximately 12:15 a.m. He found the victim in the laundry area with trauma to his face.   There was no one else in the room.   He did not see anyone running from the scene, or see any cars leave.

Detective Tommy Thompson also responded to the scene.   He did not find any weapons in the laundry room.   He testified at trial that a revolver will not leave casings when fired like an automatic weapon does.   A bullet was found underneath Kinfolk's body.   Detective Thompson found some cigarette butts on top of the washing machine.   He spoke to Crystal Taylor at the scene.   She appeared to be under the influence of rock cocaine and was behaving in a jittery, nervous fashion (“tweaking”).

Police dusted the laundry room for prints, including some beer bottles and cans.   One of defendant's prints was on a Budweiser beer bottle found outside the laundry room on the ground, one was on the top of a dryer in the laundry room near its coin slot, and one was on the top of the dryer near the front.   Police also recovered a glass pipe from Kinfolk's body, but no weapons.

Kinfolk died from a gunshot wound to the chest.   Kinfolk had alcohol and cocaine in his system.

B. Killing of Sheron Harrison and Shooting of Erik Garcia (Counts 2 and 3).

Several hours after shooting and killing Kinfolk, defendant shot and stabbed his girlfriend Sheron Harrison at the Little Cesar's Motel after finding her with Erik Garcia.   Defendant also shot and seriously wounded Garcia in the legs.

Erik Garcia was a friend of the victim Sheron Harrison.   Garcia was a member of the 41st Street gang.

Sometimes Garcia would use drugs at the Little Cesar's Motel, and would have sex with people there.   The early morning of May 2, 2006, he was at the motel in room 207 with Harrison having sex.   Garcia was getting dressed and about to leave when defendant came in the door.   Garcia was not wearing his shirt.   Harrison was dressed.   Garcia hid in the bathroom.

Garcia heard some noise, and as he left the bathroom, he saw Harrison was talking to defendant.   Defendant was telling Harrison that he needed to stay because he had done something.   Harrison told defendant to leave.   Garcia was paranoid because he had been doing drugs, and as he left the bathroom, defendant shot him.   Harrison left the room.   Garcia heard two shots in the room, and more outside.   Garcia closed the door and called 911.   Garcia had been shot twice in the legs, and required surgery.   He has scars on his right leg running from his ankle up his shin.[3](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_3)

Julian Hernandez, the clerk at the Little Cesar's Motel, was working in the office at the time of the shooting.   The motel has two stairways;  one in the front and one near an alley in the back.   Room 207 is in the back on the second floor.   He heard two or three shots and screams from the second floor.   He heard running and a woman's voice asking for help.   He saw defendant hitting a woman about the head.   The woman told the man that she loved him.   The man turned around towards the office and pointed the gun.   For his own safety, Hernandez dropped to the ground.

Detective Thompson responded to the scene at room 207 of the Little Cesar's Motel.   He found a bullet hole in the bathroom door.   He recovered a bullet in the bathroom.   He also found a bullet hole in the wall near the front door of the room.   The bullet was still in the wall.   The Little Cesar's Motel is about a 20 to 25 minute walk from the apartment complex at 716 South Vernon.   There were no shell casings at the scene, which would indicate that an automatic weapon was not used.

Sergeant Amber Morales responded to the Little Cesar's Motel.   As she approached the motel, she saw a man crossing the street going southbound.   She heard somebody scream, “that guy shot me, the guy walking away in the white.”   Sergeant Morales attempted to detain defendant.   She ordered him to stop, but he continued in a slow jog away from her.   After Sergeant Morales drew her gun, defendant stopped, walked toward her and told her that “that guy on the balcony shot me.”   However, defendant did not appear to be injured, but he was agitated and nervous and appeared to be under the influence.   Defendant said to her several times that people were out to get him and kill him.

Sergeant Morales saw a woman lying in the driveway of the motel and saw a knife.   She also observed a handgun in the middle of the street.

Sergeant Charles Springer responded to the scene and found the victim lying in the motel's driveway.   She was alive and moving at the time, and paramedics transported her to the hospital.

Officer James Vena responded to the scene and went to room 207.   He did not find any shell casings in the room or in the parking lot.   He recovered a handgun from the street which had blood, hair and flesh on it.   He also recovered a knife with bloodstains on it.   The handle was broken.   He found some cocaine inside a coffee tin in the room.

Rafael Vazquez was driving by the Little Cesar's Motel at about 12:30 or 1:00 a.m. the morning of May 2, 2006.   He heard screams.   He stopped, saw a man he later identified as defendant with his back to him hitting a body lying on the motel grounds.   Defendant was looking all around himself in a random and erratic way.   Vazquez, who had already called 911, saw defendant stand up and cross the street.

Detective Dennis James Fanning booked a .357 revolver into evidence.   He recovered it from the street outside the motel, where it had been run over by a car.   The gun had six expended shell casings in the cylinder.   He recovered a bloody knife from the motel's driveway, a bullet from the bathroom floor of room 207, and a bullet from behind the mirror in the bathroom of room 208 next door (the bullet had gone through the wall).

Police were unable to determine whether the bullets found in the laundry room and at the Little Cesar's Motel were fired from the gun found in the street outside Little Cesar's motel.   The gun was heavily damaged from being run over.   The bullets were all of the same type, were made of lead, and were consistent with a 9 millimeter, .38 special, or a .357 magnum.   However, police were not able to determine the specific caliber of the bullets.

Defendant tested positive for gunshot residue.   Additional forensic testing determined that the beer can and cigarette found in the laundry room contained defendant's saliva, and that Sheron Harrison's blood was on the gun and knife found at the Little Cesar's Motel as well as defendant's clothing worn at the time of the shooting of Harrison.

Harrison had a gunshot wound in the abdomen and blunt force head trauma consistent with being struck by a gun.   Harrison also had nine stab wounds on her face, neck and back.   She died from the gunshot wound, although the blunt force trauma and stab wounds contributed to her death.   Harrison had cocaine in her system.

Defense Case.

Annette Razo of the Los Angeles Police Department surveillance squad executed a search at Floyd Don's apartment on August 24, 2006.   Don was observed the day of the warrant execution removing a bag containing green leafy material from his car.   Police also found rock cocaine in his apartment.   Don had in his possession materials indicating he possessed the cocaine for sale.   Police recovered two firearms from Don, a .22 caliber and 9 millimeter handgun.

Leticia Macias, defense investigator, interviewed Nelson.   After the shooting of Kinfolk, Nelson told Macias she saw three people (defendant, Taylor, and Don) running out of the laundry room.   Nelson told Macias that she saw Don come out, and Taylor tried to get into his car.

Prosecution Rebuttal.

Genardo Arredondo a police firearms expert, testified that a layperson could confuse the various types of semiautomatic weapons.   The bullets recovered in the laundry room and the motel could not have been fired from the gun recovered from Don's apartment.

Nelson denied telling defendant's investigator that she saw Don running from the laundry room.   Don was already gone, and she did not see him running.

Verdict and Sentencing.

The jury found defendant guilty of voluntary manslaughter, as lesser included, on count 1 (Michael Jones), guilty of first degree murder on count 2 (Sheron Harrison), and guilty of attempted premeditated murder on count 3 (Erik Garcia).   The jury found true the firearm use and great bodily injury allegations, and found not true the special circumstance allegation.   The court sentenced defendant to an aggregate term of 191 years to life.

DISCUSSION

I. MOTION FOR ACQUITTAL.

Defendant argues the trial court erred in denying his motion pursuant to section 1118.1 for acquittal.   He argues that he was distraught because he had killed his best friend and returned to the hotel room he shared with Sheron Harrison to hide, but discovered her having sex while he had been gone.   His relationship with Harrison was good, and there was no evidence he harbored any malice towards her.   Further, his shooting of Garcia was at most an impulsive and rash act, arguing that if he had wanted to kill Garcia, he easily could have done so given the close range.   These facts he contends do not show planning, motive, or a manner of killing consistent with pre-existing reflection pursuant to People v. Anderson (1968) 70 Cal.2d 15.   Therefore, he requests us to reduce his conviction for the murder of Sheron Harrison to second degree murder, and to reduce his conviction for the attempted premeditated murder of Garcia to attempted murder without premeditation.

A. Factual Background.

At the close of the prosecution's case, defendant moved for acquittal as to first degree murder pursuant to section 1118.1 on counts 1 and 2, contending the evidence did not show premeditation.   After the prosecution conceded the issue on count 1, the court granted the motion on count 1 as to first degree murder, but stated there was a reasonable basis for a finding of second degree murder.   On count 2, the prosecution argued the position of the stab wounds on the victim's back indicated defendant did not act in a random, haphazard manner;  furthermore, defendant chased the victim down the hallway, and after shooting her, defendant used the gun to beat the victim, ultimately using a knife to stab her, all of which showed he acted in a deliberate manner.   Defendant countered that the Erik Garcia's testimony indicated everything happened “really fast,” and that Garcia was shot “almost immediately.”   There were no threats made or arguments indicating that defendant was forming the intent to kill.   Rather, the defendant encountered a half-dressed man in his girlfriend's room and acted rashly.   Further, because the cause of death was the gunshot wound, the focus should be on defendant's state of mind at the moment he pulled the trigger in the motel room.   The court denied the motion on count 2.

At the conclusion of trial, defendant renewed his motion on count 2. The prosecution argued the evidence supported premeditation, based upon the manner of killing coupled with three possible motives:  (1) defendant was upset with Harrison because she would not let him stay in her room;  (2) she had witnessed his shooting of Garcia, and he wished to silence her;  and (3) her tryst with Garcia did not amount to provocation but was motive for her killing.   Defendant argued there was no strong evidence of planning;  rather, Garcia overheard the conversion between the victim and defendant, which did not contain threats or shouting, and Garcia stepped out the bathroom only partially clothed.   The prosecution countered that defendant's choice of weapon changed over the course of the attack on Harrison, evidencing his intent and plan to kill her.   The court denied defendant's motion.

At sentencing, defendant stated he was renewing the motion on counts 2 and 3. The court again denied the motion.

B. Discussion.

We review the jury's finding of premeditation and deliberation for substantial evidence.  (See People v. Burney (2009) 47 Cal.4th 203, 235.)   We review a challenge to a judgment based upon insufficiency of the evidence by considering all of the evidence in the light most favorable to the prosecution to determine whether a reasonable jury could have found the elements of the crime beyond a reasonable doubt.  (People v. Jackson (1989) 49 Cal.3d 1170, 1199-1200.)   Attempted murder requires express malice and, on appeal, we do not distinguish between attempted murder and completed first degree murder to determine whether there is sufficient evidence to support the finding of premeditation and deliberation.  (People v. Herrera (1999) 70 Cal.App.4th 1456, 1462, fn. 8.)

A willful, deliberate and premeditated killing is murder of the first degree. (§ 189.)   A verdict of deliberate and premeditated murder requires more than a showing of intent to kill.  “Deliberation” refers to a careful weighing of considerations in forming a course of action, and “premeditation” refers to the act of thinking something over in advance.   However, the process of deliberation and premeditation does not require any particular amount 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. Young (2005) 34 Cal.4th 1149, 1182.)

In People v. Anderson, supra, 70 Cal.2d 15, the court set forth three categories of facts that would support a finding of premeditation and deliberation.  (Id. at pp.   26- 27.)   These categories may support an inference of premeditation where direct evidence of defendant's state of mind is not available:  (1) facts constituting “planning” activity, such as acts by the defendant prior to the killing that show the defendant was engaged in activity directed toward and intended to result in the killing;  (2) facts about the defendant's prior relationship with the victim from which the jury could reasonably infer a motive to kill;  (3) facts about the nature of the killing from which the jury could infer the manner of killing was the result of preexisting reflection and careful thought rather than unconsidered, rash impulses hastily executed.   Strong evidence of all three factors will support a verdict of first degree murder, as will strong evidence of planning or evidence of motive in conjunction with planning and method evidence.  (Anderson, supra, at pp.   26-27;  People v. Procter (1992) 4 Cal.4th 499, 529.)

The Anderson criteria of planning, motive and method are meant to guide reviewing courts in assessing whether the evidence supports an inference the killing resulted from preexisting reflection, rather than an unconsidered or rash impulse.   Therefore, no particular Anderson factor need be accorded a particular weight, the factors need not be used in any particular combination, and they are not exhaustive.  (Proctor, supra, 4 Cal.4th at p. 529.)   The circumstances need only show appellant formed the intent to kill through planning motive and the manner of killing.  (People v. Sanchez (1995) 12 Cal.4th 1, 34 [test of premeditation is not duration, but depth of reflection and deliberation].)   Thus, although facts may be consistent with a “rash impulse,” they may be equally consistent with a deliberated, premeditated decision to kill.  (People v. Thomas (1992) 2 Cal.4th 489, 514 [if evidence reasonably justifies the jury's findings, the fact that the circumstances might be reconciled with a different conclusion does not warrant reversal of the judgment].)

The fact that the planning activity in this case was not elaborate does not foreclose a finding of sufficient evidence of premeditation.  (People v. Millwee (1998) 18 Cal.4th 96, 134.)   Premeditation and deliberation are not measured by the length of time a person spends considering whether to kill.   (See People v. Bolin (1998) 18 Cal.4th 297, 332.)

Here, the trial court did not err in denying defendant's motion for acquittal because there is sufficient evidence of premeditation on count 2 (Harrison) and count 3 (Garcia).   With respect to Harrison, at the time he shot her, defendant had already shot Kinfolk, fled from the scene of that crime, and shot Garcia twice as Garcia emerged from the bathroom.   When Harrison refused to let him stay in the room, he shot her in the abdomen.   When she ran from the room, he followed her, beat her about the head, and stabbed her nine times.   Considered in the light most favorable to the prosecution, this conduct occurring over a course of time shows that defendant had time to reflect on his actions and had no intention of stopping until Harrison was dead.

With respect to Garcia, it was reasonable for defendant to infer that Harrison was a prostitute and that she would use their room for business.   Garcia emerged from the bathroom half-clothed, and presented no threat to defendant;  he was not armed;  and he said nothing to defendant to provoke him.   Instead, defendant shot Garcia twice.   This evidence establishes that defendant reflected on his actions and shot Garcia as a result of preexisting reflection, not a rash or hurried impulse.

II. DEPUTY MEDICAL EXAMINER'S TESTIMONY.

Defendant argues that the admission of Dr. Ajay Panchal's testimony concerning Dr. Changsri's autopsy report of Harrison prejudicially violated his Sixth Amendment confrontation clause rights pursuant to Melendez-Diaz v. Massachusetts (2009) 557 U.S. \_ [129 S.Ct. 2527, 2531] (Melendez-Diaz ).   He contends the error was prejudicial because Dr. Panchal testified that the stab wounds contributed to Harrison's death, and these injuries inflicted over a period of several minutes were the basis of the trial court's decision to deny his motion for acquittal based on the prosecution's failure to prove premeditation.

A. Factual Background.

Dr. Ajay Panchal, a deputy medical examiner with the County of Los Angeles, testified that as a forensic pathologist, he examined decedents to determine the manner and cause of death.   His examinations consist of a review of photographs or notes containing background information, medical records of the decedent, and external and internal examination of the decedent's body.   Depending upon the case, he would send tissues or organs for toxicological examination.

Dr. Panchal did not perform the autopsies of the two victims.   Michael Jones's autopsy was performed by Dr. Riley, and Sheron Harrison's autopsy was performed by Dr. Changsri.[4](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_4)  Dr. Panchal testified he knew Dr. Changsri, she was a board certified pathologist, licensed to practice medicine in California, and that he had observed her perform autopsies.   Dr. Panchal had worked with her for two years.   He testified to the manner in which an autopsy is conducted and how the findings are recorded.   The medical examiner makes diagrams, takes photographs, and dictates or handwrites a report during the autopsy.   In this case, Dr. Panchal reviewed the autopsy reports and formed his conclusion as to the cause of death of the victims.   He agreed with Dr. Changsri that Harrison died from the gunshot wound to her abdomen, and that the blunt force trauma and stab wounds contributed to her death.   Defendant had an opportunity to cross-examine Dr. Panchal at trial.

In Crawford v. Washington (2004) 541 U.S. 36 [124 S.Ct. 1354], the Supreme Court held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination.  (Id. at p. 59.)  “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.   They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”  (Davis v. Washington (2006) 547 U.S. 813, 822 [126 S.Ct. 2266] (Davis ).)

Under Crawford, the crucial determination for confrontation clause purposes is whether the out-of-court statement is testimonial or non-testimonial.   Thus, in People v. Geier (2007) 41 Cal.4th 555 (Geier ), our Supreme Court held that admission of laboratory reports of DNA analysis did not violate the confrontation clause even where the analyst who prepared the reports did not testify in court.  (Id. at pp.   596-605.)   In Geier, the analyst's supervisor testified concerning the tests, the manner in which the reports were prepared, the reliability of the tests, and the results reflected in the reports.  (Id. at pp.   594-596.)  Geier held that the testimony of a lab director who cosigned the analyst's report was nontestimonial, based on its interpretation of Crawford and Davis.  (Id at pp. 605, 607.)  Geier reasoned that because the reports constituted “contemporaneous recordation of observable events rather than the documentation of past events,” they were not testimonial and therefore did not implicate the confrontation clause.  (Id. at p. 605.)   In addition, the reports in Geier were generated as part of the analyst's job rather than in order to incriminate defendant and were not themselves accusatory because DNA analysis can lead to either incriminating or exculpatory results.  (Id. at pp.   605-607.)

In Melendez-Diaz, the Supreme Court held that notarized affidavits of laboratory analysis at issue, prepared a week after the actual tests, were testimonial within the meaning of Crawford because they constituted “ ‘near-contemporaneous' ” observations.  (Melendez-Diaz, supra, 557 U.S. at p. \_, [129 S.Ct. at p. 2535].)   We believe that Geier remains good law after Melendez-Diaz because Geier can be distinguished on the basis the laboratory reports in Geier were prepared at the time of the actual testing, rather than later, and therefore are not testimonial.[5](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_5)

Here, defendant argues that the autopsy reports are testimonial hearsay because the purpose of the autopsy was to determine the circumstances, manner, and cause of death and were designed to be used to establish defendant's liability for the homicides.   He argues any error was not cured by Dr. Panchal's own expert opinion based upon Dr. Changsri's autopsy reports.[6](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_6)  However, as in Geier, Dr. Panchal was an associate of the percipient medical examiner;  Dr. Panchal testified at trial and was subject to cross-examination by the defense.   Further, Dr. Panchal described the autopsy reflected in Dr. Changsri's report and described the procedures used.   Finally, as in Geier, Dr. Panchal testified the report was prepared at the time the autopsy was conducted, not a week after the tests were performed, as in Melendez-Diaz.   (Melendez-Diaz, supra, 557 U.S. at p. \_ [129 S.Ct. at p. 2535].)   Thus, the report was not testimonial under Geier.

Even if admission of Dr. Panchal's testimony was error, the error was harmless beyond a reasonable doubt.   The purpose of Dr. Panchal's testimony was to establish the cause of Harrison's death.   Defendant nonetheless argues the cause of death was relevant to his state of mind and the question of whether he premeditated Harrison's murder, and was used by the trial court to deny his motion for acquittal on the basis the shooting and subsequent beating and stabbing of Harrison established premeditation.   We disagree with defendant's prejudice analysis.   Whether the cause of Harrison's death was the shooting, the stabbing, or the beating, it was defendant who committed the act of killing.   The mental state he possessed during either of those there activities (shooting, stabbing, beating), does not bear on the issue of premeditation because at the time he continued his attack on Harrison, as the witness testified at trial, Harrison was still alive.

III. EXCLUSION OF EVIDENCE THAT VICTIM OF ATTEMPTED MURDER WAS A GANG MEMBER.

Defendant argues the trial court erred in excluding expert gang evidence that Garcia belonged to the 41st Street gang, which was active in the area around the Little Cesar's Motel, had a gang tattoo on his shoulder which would have been visible when his shirt was off, and that he was a suspect in a homicide committed January 2, 2007.   The trial court excluded the evidence on the basis of relevance, finding there was no evidence Garcia's shooting was gang related.   He argues the error is prejudicial because the exclusion of the gang evidence eliminated crucial evidence that was relevant to explain defendant's actions in shooting him, and because the error was of constitutional magnitude, it must be shown that it was harmless beyond a reasonable doubt.   We disagree.

A defendant is entitled to present relevant evidence in support of his defense.  (California v. Trombetta (1984) 467 U.S. 479, 485 [104 S.Ct. 2528];  Chambers v. Mississippi (1973) 410 U.S. 284, 302 [93 S.Ct. 1038].)   However, that right is not unlimited.  (People v. Ayala (2000) 23 Cal.4th 225, 282.)  “ ‘As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense.   Courts retain ․ a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.  [Citations.]․’ ”  (People v. Cudjo (1993) 6 Cal.4th 585, 611, quoting People v. Hall (1986) 41 Cal.3d 826, 834-835;  People v. Ybarra (2008) 166 Cal.App.4th 1069, 1081.)

Evidence Code section 210 defines relevant evidence as, “evidence ․ having any tendency in reason to prove or disprove any disputed fact that is of consequence” to the litigation.  (See also People v. Leahy (1994) 8 Cal.4th 587, 597.)   The test of whether evidence is relevant is whether it logically, naturally, and by reasonable inference establishes material facts.  (People v. Williams (2008) 43 Cal.4th 584, 633-634) “The trial court has considerable discretion in determining the relevance of evidence.  [Citations.]”  (Id. at p. 634.)   We examine the admissibility of the proffered evidence utilizing the deferential abuse of discretion standard of review.  (People v. Cox (2003) 30 Cal.4th 916, 955.)

Defendant argues that evidence of Garcia's gang affiliation was relevant to explain defendant's conduct in shooting Garcia almost immediately after Garcia came out of the bathroom in Room 207.   Garcia had tattoos on his torso and the back of his head and the Little Cesar's Motel was in Garcia's gang territory;  he was half-dressed and defendant could have believed he possessed a gun in his waistband;  thus, the evidence was probative on the issue of whether defendant acted with premeditation or shot Garcia in reasonable or unreasonable self-defense.   Further, the evidence was relevant to Garcia's credibility as a witness because Garcia had changed his testimony from the preliminary hearing concerning where he met Harrison and Garcia was a suspect in a homicide.

There was no evidence in the record defendant knew Garcia was a gang member, recognized his tattoos or believed he had a gun in his waistband, or that the shooting was gang-related.   Thus, the evidence was irrelevant and the trial court did not abuse its discretion in excluding it.   In any event, Garcia testified he had been a member of the 41st Street gang, and the jury had evidence of gang membership before it in assessing his credibility.

IV. INSTRUCTION WITH CALJIC 2.90.

Defendant argues that CALJIC No. 2.90 [7](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_7) is constitutionally deficient because, although it instructed the jury that it must find him guilty beyond a reasonable doubt and the trial court instructed the jury that it must find every element of the offenses charged, the jury was not instructed that proof beyond a reasonable doubt required proof beyond a reasonable doubt of every element of the offenses charged.  (See United States v. Gaudin (1995) 515 U.S. 506, 522-523 [115 S.Ct. 2310] (Gaudin ).)   He contends People v. Osband (1996) 13 Cal.4th 622, 678-679, which held that CALJIC No. 2.90 was not constitutionally deficient even though it did not inform the jury that the prosecution must prove each element of the charged offense beyond a reasonable doubt, did not discuss Gaudin and instead relied on CALJIC.   No. 2.01, which informs the jury that “each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.”   He argues CALJIC No. 2.01 [8](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_8) did not cure the error in CALJIC No. 2.90's “gestalt” approach because the jury could have used the instruction to determine that a set of circumstances taken together proved guilt beyond a reasonable doubt as to the entire offense, but the prosecution did not prove beyond a reasonable doubt each element of the offense.   For the same reasons, he argues CALJIC No. 8.67,[9](https://caselaw.findlaw.com/ca-court-of-appeal/1549105.html%22%20%5Cl%20%22footnote_9) given here, exacerbated the problem.   He argues the error is structural and requires reversal per se.   We disagree.

The Fifth and Sixth Amendments to the United States Constitution require that every criminal conviction rest upon a jury determination that the defendant is guilty beyond a reasonable doubt of every element of the charged crime.   (Gaudin, supra, 515 U.S. at pp.   509-510.)   This principle requires jury instructions informing the jury of the elements of the charged felony.   (People v. Magee (2003) 107 Cal.App.4th 188, 193.)   Without the instructions, a jury would not possess the necessary information to find that every element of the charged offense had been established beyond a reasonable doubt.  (Ibid.) Accordingly, the trial court has a sua sponte duty to instruct on all of the elements of the offense.  (People v. Cummings (1993) 4 Cal.4th 1233, 1311.)

Defendant contends that the instruction is constitutionally deficient because it fails to tell the jury that to find defendant guilty it must find that he committed each of the elements of the offenses charged beyond a reasonable doubt.   Our California Supreme Court rejected this contention in People v. Osband, supra, 13 Cal.4th 622, 679 (Osband ).   In Osband, the jury was instructed with, among other instructions, CALJIC Nos. 2.90 and 2.01.   After considering the instructions as a whole, the court held “we find no reasonable likelihood that the jury was misled with regard to its obligation to find each element of each charged crime proven beyond a reasonable doubt.”   (Ibid.;  see also People v. Ochoa (2001) 26 Cal.4th 398, 444, fn.   13 [“It would be correct to instruct that the People must prove every element of the offense beyond a reasonable doubt, but a defendant is not entitled to that instruction”], disapproved on other grounds in People v. Prieto (2003) 30 Cal.4th 226, 263, fn. 14.)   We are bound by Osband.  (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Defendant nonetheless argues that Osband is in tension with Gaudin, supra, 515 U.S. 506.   Nothing in Gaudin, however, calls into question Osband 's conclusion.  Gaudin recognized a defendant's right to have a jury determine guilt on every element of a charged crime beyond a reasonable doubt, but it did not require any specific language in jury instructions.   Equally unpersuasive is defendant's argument that giving CALJIC No. 2.01 regarding sufficiency of circumstantial evidence compounded the alleged error in giving CALJIC No. 2.90 by “reinforcing the gestalt approach to reasonable doubt” in CALJIC No. 2.90.   Our California Supreme Court has rejected similar arguments that the circumstantial evidence instructions (including CALJIC Nos. 2.20 and 8.83.1), which refer to an interpretation of the evidence that “appears to you to be reasonable” dilute the prosecution's burden of proof to a standard lesser than beyond a reasonable doubt.  (See People v. Maury (2003) 30 Cal.4th 342, 428.)

Finally, for the same reason we reject his argument that CALJIC No. 8.67 similarly compounded the alleged error and permitted the jury to convict even if it only found some of the elements of the crime beyond a reasonable doubt.   Although defendant may be entitled to a reasonable doubt instruction on every element of the crime, it is not constitutionally required.  (See People v. Ochoa, supra, 26 Cal.4th at p. 444, fn. 13.)   In addition, the presence of “reasonable doubt” language in CALJIC No. 8.67 did not dilute the prosecution's burden of proof.  (See People v. Maury, supra, 30 Cal.4th at p. 428.)

DISPOSITION

The judgment of the superior court is affirmed.

NOT TO BE PUBLISHED.

We concur:

FOOTNOTES

FN1. All statutory references herein are to the Penal Code unless otherwise noted..  FN1. All statutory references herein are to the Penal Code unless otherwise noted.

FN2. Floyd Don was also known as “Jewel.”.  FN2. Floyd Don was also known as “Jewel.”

FN3. Garcia admitted at trial he lied at the preliminary hearing when he testified he had run into Harrison on the street and went to her room buy baby clothes.   Instead, he called her on the phone.   He lied because he was married and embarrassed and did not want his daughters to find out what he had done..  FN3. Garcia admitted at trial he lied at the preliminary hearing when he testified he had run into Harrison on the street and went to her room buy baby clothes.   Instead, he called her on the phone.   He lied because he was married and embarrassed and did not want his daughters to find out what he had done.

FN4. Defendant argues the admission of Dr. Riley's hearsay autopsy report through the testimony of Dr. Panchal was error, but concedes that the error was harmless because he does not contest the cause of death..  FN4. Defendant argues the admission of Dr. Riley's hearsay autopsy report through the testimony of Dr. Panchal was error, but concedes that the error was harmless because he does not contest the cause of death.

FN5. The question whether Geier is still controlling law after Melendez-Diaz is an issue currently before our Supreme Court.  (People v. Rutterschmidt, review granted Dec. 2, 2009, S176213 [2009 Cal.Lexis 12460] [opn. granting review and limiting issues:  “The issues to be briefed and argued are limited to the following:  (1) Was defendant denied her right of confrontation under the Sixth Amendment when a supervising criminalist testified to the result of drug tests and the report prepared by another criminalist?  (2) How does the decision of the United States Supreme Court in [Melendez-Diaz ] affect this court's decision in [Geier ]?”];   People v. Gutierrez, review granted Dec. 2, 2009, S176620 [same];  People v. Lopez, review granted Dec. 2, 2009, S177046 [same].).  FN5. The question whether Geier is still controlling law after Melendez-Diaz is an issue currently before our Supreme Court.  (People v. Rutterschmidt, review granted Dec. 2, 2009, S176213 [2009 Cal.Lexis 12460] [opn. granting review and limiting issues:  “The issues to be briefed and argued are limited to the following:  (1) Was defendant denied her right of confrontation under the Sixth Amendment when a supervising criminalist testified to the result of drug tests and the report prepared by another criminalist?  (2) How does the decision of the United States Supreme Court in [Melendez-Diaz ] affect this court's decision in [Geier ]?”];   People v. Gutierrez, review granted Dec. 2, 2009, S176620 [same];  People v. Lopez, review granted Dec. 2, 2009, S177046 [same].)

FN6. Although he did not object in the trial court to the admission of Dr. Panchal's testimony, defendant contends the issue was not forfeited because Melendez-Diaz was not issued until June 25, 2009, a week after the jury reached a verdict in his case on June 18, 2009.   We agree defendant did not waive the issue because at the time, Melendez-Diaz had yet to be decided and its impact on Geier was not yet clear.  (See People v. French (2008) 43 Cal.4th 36, 48.).  FN6. Although he did not object in the trial court to the admission of Dr. Panchal's testimony, defendant contends the issue was not forfeited because Melendez-Diaz was not issued until June 25, 2009, a week after the jury reached a verdict in his case on June 18, 2009.   We agree defendant did not waive the issue because at the time, Melendez-Diaz had yet to be decided and its impact on Geier was not yet clear.  (See People v. French (2008) 43 Cal.4th 36, 48.)

FN7. The trial court instructed the jury with CALJIC No. 2.90 as follows:  “A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty.   This presumption places upon the People the burden of proving him guilty, beyond a reasonable doubt.  [¶] Reasonable doubt is defined as follows:  It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt.   It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.”.  FN7. The trial court instructed the jury with CALJIC No. 2.90 as follows:  “A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty.   This presumption places upon the People the burden of proving him guilty, beyond a reasonable doubt.  [¶] Reasonable doubt is defined as follows:  It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt.   It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.”

FN8. The jury here was instructed with CALJIC No. 2.01, which provides in relevant part that:  “However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.   [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.   In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.”.  FN8. The jury here was instructed with CALJIC No. 2.01, which provides in relevant part that:  “However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.   [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.   In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.”

FN9. CALJIC No. 8.67 instructed the jury on willful, deliberate and premeditated murder.   The instruction states that the prosecution has the burden of proving the truth of the allegation of premeditation, stating, “If you have a reasonable doubt that [this allegation] is true, you must find it to be not true.”.  FN9. CALJIC No. 8.67 instructed the jury on willful, deliberate and premeditated murder.   The instruction states that the prosecution has the burden of proving the truth of the allegation of premeditation, stating, “If you have a reasonable doubt that [this allegation] is true, you must find it to be not true.”

MALLANO, P. J. CHANEY, J.