THE PEOPLE v. OBED ESTRADA

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Court of Appeal, Second District, California.

THE PEOPLE, Plaintiff and Respondent, v. OBED ESTRADA, Defendant and Appellant.

B226963

Decided: November 28, 2011

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, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

A jury convicted Obed Estrada of one count of first degree murder.   On appeal, Estrada contends the trial court improperly admitted gang expert testimony, erroneously commented on the defense's cross-examination of the gang expert and sustained objections to some of the cross-examination questions, and prejudicially erred in its instruction to the jury on aiding and abetting liability.   We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts in accordance with the usual rules on appeal.   (People v. Virgil (2011) 51 Cal.4th 1210, 1263.)   On May 30, 2009, Ricardo Chavez and David C. were together in the City of Paramount.   Chavez was a member of the Paramount Varrio San Streets (San Streets) gang, a primarily Hispanic gang.   David C. was at one time a member of the Compton Varrio 132nd Street gang.   Chavez lived in a neighborhood claimed by the Paramount Gundry Bloc Crips (Gundry Bloc Crips), a primarily African–American gang.   The San Streets and Gundry Bloc Crips gangs were rivals.   On May 30, Chavez tagged—placed gang-related graffiti—on a wall in the neighborhood.   The wall was in an area claimed by the Gundry Bloc Crips.

On May 31, 2009, Chavez and David C. were at Chavez's house.   They walked outside when their friend, Patricia L., arrived by car.   While they were standing outside the car talking to Patricia L., two African–American men approached.   One of the men said to Chavez, “Hey, you know where you at?”   Chavez replied, “Yes. I know where I'm at.”   The man then asked, “Where are you from?”   Chavez answered with the name of his gang.   The man asked if Chavez was the person who had been “mobbing up his block,” or tagging.   Chavez said he was.   At that, one of the two men pulled out a gun and repeatedly shot Chavez.   David C. ran away when he heard the gunshots.   Patricia L. told Chavez to get in the car.   She drove away and picked up David C. They drove to a hospital.   Chavez suffered five gunshot wounds, three of which were fatal.

David C. initially told police he could not identify either of the two African–American men, but he told police the shooter drove a brown Cadillac and provided a physical description of both men.   He said the “same guys” attacked his epileptic brother and stole his cell phone in an earlier incident.   David C. was not present when his brother was attacked;  Chavez saw the incident from afar and told David C. what he saw.   Police interviewed David C. three times.   At the second interview, police showed David C. a photographic lineup that included Estrada's photograph.   David C. did not identify Estrada.   At the third interview, police again showed David C. a photographic lineup that included Estrada's photograph.   The detective conducting the interview told David C. that if he made an identification it would not be recorded in any “paperwork.”   At the third interview, David C. identified Estrada as the shooter.

The People charged Estrada with murder, shooting at an occupied motor vehicle, and receiving stolen property.   A first trial of Estrada resulted in a conviction for receipt of stolen property.   The jury deadlocked on the murder and shooting at an occupied vehicle charges, causing a mistrial.

During the second trial, David C. testified that he recognized Estrada's voice as the person who spoke to Chavez during the incident.   David C. said he was able to recognize Estrada's voice because he had heard Estrada speak four or five times before.   On those occasions, Estrada “hit him up,” or asked him where he was from.   David C. did not identify Estrada in his first two interviews with police because he did not want to “snitch,” and he was afraid to have his name in “paperwork.”

On cross-examination, David C. admitted that at previous proceedings, he testified he had only encountered Estrada twice before the shooting.   He also admitted that at the preliminary hearing he testified he looked away when the two men confronted Chavez, and he could not see their faces.   At the previous trial he testified he did not see either of the men actually shooting.   Although he had described the shooter to police as around five feet nine inches tall, he conceded on cross-examination that Estrada was not close to that height.   He said he did not know who fired the gun.   He agreed that when he told police the same man who beat up his brother was involved in the shooting, he did not know the statement to be true.

Patricia L. testified that one of the men said, “What's up,” to Chavez.   The “what's up” seemed normal.   Chavez nodded his head in response.   The other man asked if Chavez knew where he was, and asked where Chavez was from.   He then pulled a gun from his waistband and shot at Chavez.   Patricia L. described the non shooter as chunky and dark-skinned.   She could not see his face clearly.   She recalled the shooter had cornrows and lighter skin than the non shooter.   On cross-examination, Patricia L. agreed she had consistently described the shooter as tall and skinny, with braided hair.   She testified she was certain the shooter was taller than Estrada.   She was also certain the shorter non shooter had dark skin.

A police detective testified that Estrada had admitted he was a Gundry Bloc Crips gang member.   The jury heard recordings of two conversations Estrada had with others while in police custody.   Police secretly recorded a conversation between Estrada and his brother and Estrada and another man, Eric A., while they were in a police van.[1](https://caselaw.findlaw.com/ca-court-of-appeal/1587060.html" \l "footnote_1)  Eric A. was a known member of the Gundry Bloc Crips gang.   When talking with his brother, Estrada repeatedly claimed he had done nothing.   After referring to police statements that people had identified him, and that his phone had been tracked to the scene of the murder using GPS technology (a ruse), Estrada said:  “How—Nobody identified me, it was more fucking dark as fuck, nobody was outside, nothing.”   To Eric A., Estrada continued to say he was not involved in the murder.   Estrada told Eric A. the police had asserted that “after that shit happened,” Estrada went to Compton, then returned home.   Eric A. asked, “Where did you go?”   Estrada answered he “just went straight to the house.”

Police also recorded Estrada's conversation with Demetrius J., another Gundry Bloc Crips gang member.   Demetrius J. repeatedly told Estrada he needed to come up with a good alibi.   Later, Estrada said he was going to “try to come up with a better alibi.”   Demetrius J. asked:  “Hey, right after that shit cracked off, who did you call?”   Estrada answered:  “Crete.   Jayev.”  Crete was the moniker for another Gundry Bloc Crips gang member.

The jury also heard testimony from a gang expert.   Based on a hypothetical mirroring the facts of the case, the expert opined the shootings were committed for the benefit of or in association with the Gundry Bloc Crips gang.   We discuss this testimony in further detail below.

Estrada offered testimony from Jesus Y., who lived near the scene of the shooting.   After hearing several gunshots, he saw two men running on the street.   He believed both men were taller than Estrada.   Felipe A. testified that he spoke with David C. a few days after the shooting.   Felipe A. asked several times if David C. knew who did the shooting.   David C. said he did not know.

The jury found Estrada guilty of one count of first degree murder.   (Pen.Code, § 187, subd. (a).) [2](https://caselaw.findlaw.com/ca-court-of-appeal/1587060.html" \l "footnote_2)  The jury also found true a gang enhancement as to the murder count. (§ 186.22, subd. (b)(1)(C).)  It found true allegations that a principal personally and intentionally discharged and used a firearm, within the meaning of section 12022.53, subdivisions (b) and (e)(1), (c) and (e)(1), and (d) and (e)(1).   However, the jury found not true allegations that Estrada personally and intentionally discharged or used a firearm within the meaning of section 12022.53, subdivisions (b), (c), or (d).  The jury also found Estrada not guilty of shooting at an occupied motor vehicle. (§ 246.)   The trial court sentenced Estrada to a total prison term of 50 years to life.

DISCUSSION

I. The Trial Court Did Not Err in Allowing the Gang Expert's Testimony

Estrada argues the gang expert impermissibly testified about the role of the non shooter in Chavez's killing.   We find no error.

A. The Gang Expert's Testimony

Los Angeles Sheriff's Department Detective Daniel Morris testified as a gang expert.   For five years he investigated gang crimes from the Lakewood Paramount Station, an area where the Gundry Bloc Crips and San Streets gangs were active.   Morris testified that gangs controlled certain neighborhoods.   A rival gang member's foray into a claimed neighborhood would be a sign of disrespect.   Morris described the Gundry Bloc Crips' primary activities as assault, murder, narcotics sales, burglary, carjacking, and vandalism.

According to Detective Morris, leading up to Chavez's murder San Streets gang members were tagging in the Gundry Bloc Crips neighborhood.   This was an indication to law enforcement that there was an ongoing rivalry between the two gangs.   The prosecutor posed a hypothetical question to Morris based on the evidence in the case.   The hypothetical included such details as a San Streets gang member tagging on a specific street in the area claimed by the Gundry Bloc Crips the night before the shooting;  the arrival of a person by car at the San Streets gang member's house, including the driver's trajectory and turns;  the positions of the San Streets and 132nd Street Compton gang members as they stood near the car;  the arrival of two African–American men;  the exchange between the two African–American men and the San Streets gang member who identified himself as “Ghost,” Chavez's moniker;  and the shooting.   In the hypothetical, the prosecutor identified the two African–American men as a shorter man and a taller man, and indicated the shorter man was a Gundry Bloc Crips gang member.   She identified the shorter man as the shooter.

At several points during the prosecutor's explanation of the hypothetical, defense counsel objected on the ground that it was an improper hypothetical and misstated facts.   The court overruled the objections.   Morris opined the crime, as described, was for the benefit of and in association with the Gundry Bloc Crips gang.   He explained, in relevant part:

“They are approaching an individual who has tagged up within their neighborhood.   You have one Gundry Bloc Crip gang member who's armed with a gun.   You have another one who apparently is not.   We don't know for sure.   But one definitely is armed with a gun.  [¶] In these type of cases, gang members understand, when they are doing any type of gang activity, if a gang member is armed, other gang members in their presence know that that gang member is armed, that's safety.   It's common sense for these gang members.   Hey, I got heat.   Something goes down, I got a heater.   I got steel.   We're covered.  [¶] So you have two individuals approaching one individual whom they obviously or should know is a gang member who has been tagging up in their neighborhood.   They're not going to make that approach alone for a couple reasons.  [¶] Number one, they already see that there is another individual present with the victim.   A gang member is not going to make that approach on his own.   He's going to approach that individual with another gang member.  [¶] ․ That other Gundry Bloc Crip gang member, the one that's made the approach with the shooter, he's got a couple of jobs.   His job is to, number one, make sure that the person that's been put up to the task of putting in this work, that he puts in the work.   He's there to make sure that if any other San Streets gang members come spilling out of the house where this guy just left from that he's there for his backup.   That is the role of that other party.”

The prosecutor then modified the hypothetical so that the shorter man said, “what's up,” and the taller man conducted the rest of the exchange, then shot the gun.   The prosecutor asked what the non-shooter's role would be in that scenario.   The court overruled a defense objection.   Morris opined that “the non-shooter, his role is to ensure that the shooter does what he's supposed to do, that he actually puts in the work.  [¶] And, again, like I said before, this individual came from a residence.   They waited for him to leave the residence.   The other individual's role would be to make sure that any other gang members, any other rivals, come out of that house that they're prepared for that.”

On cross-examination, Morris admitted he did not know if the two African–American men came from a car or house, or whether they saw Chavez before approaching the car.   He conceded the question, “what's up,” could have several meanings, including just a simple greeting.   Morris testified that he did not interview the witnesses personally so he had no idea what they saw.   After making numerous similar concessions, the following colloquy ensued:

“Q: We don't know when the African–American males became aware that the other two were gang members, do we?

[Prosecutor]:  Objection.   Calls for speculation.

[Defense counsel]:  We don't know, your honor.

[The Court]:  These questions are basically – would suggest yes or no, because he wasn't there.   So he basically can't testify to a specific witness, because he wasn't there.  [¶] So these questions don't lead to anything that's intelligible, because he wasn't there.   I think the jury understands he wasn't there, so he doesn't know exactly what happened among the four people.   He wasn't there.   I don't know what these questions are designed to elicit in terms of testimony.   He wasn't there.”

The defense cross-examination continued.   Defense counsel asked additional questions establishing Morris did not know various facts relevant to the actual incident as it occurred.[3](https://caselaw.findlaw.com/ca-court-of-appeal/1587060.html" \l "footnote_3)  He admitted everything he had been told about the incident came from reports from another detective.   Finally, defense counsel asked:  “You don't know who either one [of the two African–American men] are, because everything you know is based upon just the hearsay investigation that another other detective has told you.”   The prosecutor objected, asserting experts may rely on hearsay.   The trial court sustained the objection.

B. The Trial Court Did Not Abuse Its Discretion in Admitting

Testimony About the Role of the Non Shooter

Estrada contends the trial court erred in admitting the gang expert's testimony regarding the role of the non shooter in the hypothetical posed to him at trial.   The People assert Estrada forfeited this argument.   We disagree.   Defense counsel repeatedly objected that the prosecutor's hypothetical was improper and that the expert's testimony infringed on the jury's factfinding role.   These objections were sufficient to preserve the issue for appellate review.   We review a challenge to the trial court's admission of expert testimony for an abuse of discretion.  (People v. Gonzalez (2006) 38 Cal.4th 932, 944 (Gonzalez ).)   We find no abuse of discretion in this case.

In general, “[g]ang sociology and psychology are proper subjects of expert testimony [citation] as is ‘the expectations of gang members ․ when confronted with a specific action’ (People v. Killebrew (2002) 103 Cal.App.4th 644, 648 (Killebrew );  [citation].)   Expert testimony is admissible to establish the existence, composition, culture, habits, and activities of street gangs;  a defendant's membership in a gang;  gang rivalries;  the ‘motivation for a particular crime, generally retaliation or intimidation’;  and ‘whether and how a crime was committed to benefit or promote a gang.’  (Killebrew, at pp. 656–657.)”  (People v. Hill (2011) 191 Cal.App.4th 1104, 1120.)   An expert may properly “render opinion testimony on the basis of facts given “ ‘ “in a hypothetical question that asks the expert to assume their truth.”  ‘ [Citations.]”  (Gonzalez, supra, 38 Cal.4th at p. 946.)

Estrada argues the hypothetical tracked the versions of the shootings given by David C. and Patricia L., including the use of Chavez's actual moniker, thus it was obvious Estrada was supposed to be one of the Gundry Bloc Crips gang members in the hypothetical.   Estrada asserts Morris therefore effectively testified about Estrada's actual knowledge and intent.   We disagree.   Although the hypothetical that formed the basis of Morris's opinions was grounded in the evidence adduced at trial – as is required for such questions (People v. Gardeley (1996) 14 Cal.4th 605, 618) – his testimony was an opinion about hypothetical persons based on his knowledge of gang culture and activities.   His testimony explained, through the lens of gang psychology and gang culture, that the shooter in the type of situation described in the hypothetical would not challenge a rival gang member, in the presence of other persons, and in front of the rival gang member's home, without having backup.   The testimony also explained why the non shooter would accompany the shooter and how even the non shooter's presence and actions would benefit the gang.

People v. Ward (2005) 36 Cal.4th 186 (Ward ), is instructive.   In Ward, the defendant argued the prosecutor “impermissibly used fact-specific hypothetical questions to elicit testimony from [gang experts] that a gang member going into rival gang territory—like defendant—would do so as a challenge and would protect himself with a weapon.”  (Id. at p. 209.)   The defendant maintained “the specificity of the hypothetical questions converted the answers by the experts into improper opinions on his state of mind and intent at the time of the shooting.”  (Ibid.)

Our high court rejected this argument and concluded the experts “did not render an impermissible opinion as to defendant's actual intent;  rather, they properly testified as to defendant's motivations for his actions.”  (Ward, supra, 36 Cal.4th at p. 209.)   The court explained that an expert may properly give opinion testimony on the basis of facts given in a hypothetical question, and that such questions must be rooted in facts shown by the evidence.   (Ibid.) The court concluded that, unlike the expert testimony in Killebrew, the expert opinions in Ward fell “within the gang culture and habit evidence approved People v. Gardeley, supra, 14 Cal.4th at page 617.   The substance of the experts' testimony, as given through their responses to hypothetical questions, related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges.  [Citations.]  This testimony was not tantamount to expressing an opinion as to defendant's guilt.”  (Ward, at p. 210.)

More recently, in People v. Vang (2011) 52 Cal.4th 1038 (Vang ), our high court again held that hypothetical questions are proper to elicit gang expert testimony, and that such questions must be rooted in the evidence of the case.  (Id. at pp. 1045–1046.)   Further, the court criticized Killebrew, the case Estrada primarily relies upon to support his argument that the expert's testimony impermissibly described his intent and knowledge.[4](https://caselaw.findlaw.com/ca-court-of-appeal/1587060.html" \l "footnote_4)  In Vang, the court explained:

“To the extent Killebrew, supra, 103 Cal.App.4th 644, purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves.  Killebrew stated that the expert in that case ‘simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact.’  (Killebrew, supra, 103 Cal.App.4th at p. 658.)   But, to the extent the testimony responds to hypothetical questions, as in this case (and, it appears, in Killebrew itself), such testimony does no such thing.   Here, the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related.   The expert did not give an opinion on whether defendants did commit an assault in that way, and thus did not give an opinion on how the jury should decide the case.”  (Vang, supra, 52 Cal.4th at p. 1049.)

Similarly, in this case, the gang expert's testimony was permissible opinion testimony in response to a hypothetical question.   The expert did not give an opinion on whether Estrada was a participant in the shooting as described in the hypothetical question.   Further, he did not opine on whether Estrada knew the shooter planned to kill, rather than warn, threaten, or assault, the San Streets gang member, or whether Estrada intended to encourage or assist a murder.[5](https://caselaw.findlaw.com/ca-court-of-appeal/1587060.html" \l "footnote_5)  Although the expert's opinion was relevant to the ultimate issue of Estrada's intent, the testimony explored a gang member's expectations and probable motivations, and was not tantamount to an opinion on Estrada's guilt.   As in Vang, the gang expert properly could “express an opinion, based on hypothetical questions that tracked the evidence,” whether the non shooter's presence and actions would have served a gang-related purpose.  (Vang, supra, 52 Cal.4th at p. 1048.)

Estrada further contends Morris's opinion lacked evidentiary foundation.   He argues there was no evidence showing Estrada intended to make sure the shooter actually shot Chavez, or that he was present to act as backup.   However, Morris's testimony on these points was an opinion based on the expertise he had developed as a gang investigator.   Morris offered an opinion based on his understanding of gang culture, psychology, and gang activities, as applied to the facts in the hypothetical.   Morris testified he had worked in a gang unit for six or seven years.   As a trainee, he responded to gang-related crimes in progress and contacted hundreds of gang members on a regular basis.   As a gang enforcement deputy, he interviewed thousands of gang members, in and out of custody.   He had also participated in the service of hundreds of search warrants related to gang-related crime, and assisted with the investigation of gang-related homicides, as well as other crimes.   His expertise was sufficient to qualify him to opine on probable gang behavior in a hypothetical scenario drawn from the facts in the case.  (People v. Hill, supra, 191 Cal.App.4th at pp. 1123–1126 [gang expert's extensive experience and training, as well as information from police investigation formed proper basis for opinion].)

The trial court did not abuse its discretion in admitting the gang expert testimony.

II. The Trial Court's Comment and Evidentiary Ruling Were Not

Prejudicial Error

Estrada next argues the trial court deprived him of his right to effective cross-examination when it stated defense counsel's questions of the expert did not “lead to anything intelligible,” and when it sustained the prosecutor's objection that experts may rely on hearsay.

Initially, we address the People's argument that Estrada forfeited this argument by failing to object in the trial court.   Estrada responds that no objection was necessary since he is challenging the trial court's rulings on the prosecutor's objections.   To the extent Estrada is arguing the trial court's comment constituted judicial misconduct, Estrada was required to object on this basis in the trial court.[6](https://caselaw.findlaw.com/ca-court-of-appeal/1587060.html" \l "footnote_6)  His failure to do so forfeits this aspect of the argument on appeal.  (People v. Sturm (2006) 37 Cal.4th 1218, 1237.)   In any event, assuming Estrada preserved all facets of his argument on appeal, we conclude there was no prejudicial error.

When considering whether a trial court's conduct requires reversal, “ ‘[o]ur role ․ is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid.   Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.’  [Citation.]”  (People v. Snow (2003) 30 Cal.4th 43, 78.)   A trial court's improper restriction of the defendant's ability to cross-examine a witness will not require reversal “ ‘unless the defendant can show the prohibited cross-examination would have produced “a significantly different impression of [the witnesses'] credibility” [citation].’  ․” (People v. Carpenter (1999) 21 Cal.4th 1016, 1051.)   And even if the court errs in its evidentiary rulings, we will not reverse unless it is reasonably probable the verdict would have been more favorable to the defendant absent the error.   (People v. Samuels (2005) 36 Cal.4th 96, 119;  People v. Watson (1956) 46 Cal.2d 818, 836.)

We begin our analysis with the trial court's comment that the defense questioning did not “lead to anything intelligible.”   Even if the trial court's comment on the defense cross-examination was improper, it was an isolated comment made in response to one question in a longer cross-examination.   Before the comment, defense counsel asked several questions establishing the gang expert's testimony was not based on personal knowledge, at times over the prosecutor's objections.   In addition, although the trial court stated the questions did not “lead to anything intelligible,” he also explained that the jury understood defense counsel's point:  the expert was not present during the crime and did not know exactly what happened on the night of the incident.   After the court's “nothing intelligible” comment, defense counsel asked several additional questions that further established the gang expert did not have personal knowledge of the circumstances of the shooting.   We cannot agree with Estrada that the trial court's comment infringed on Estrada's ability to effectively cross-examine the gang expert, since, even after the comment, defense counsel was able to continue and complete the cross-examination along the same lines, without interruption.

We also disagree with Estrada's suggestion that the court's isolated comment on the defense questioning permitted the jury to disregard the entire cross-examination.  (People v. Geier (2007) 41 Cal.4th 555, 614 [even if improper, brief, isolated comments did not warrant reversal].)   The trial court's comment did not distort the law or the record, or withdraw evidence from the jury's consideration, as Estrada suggests.  (People v. Proctor (1992) 4 Cal.4th 499, 557.)   Instead, the court in essence said:  “you are making a point the jury already understands,” which is different from commenting on the merits of the evidence, repeatedly disparaging defense counsel, or expressing a view on the merits of the expert's testimony.   The trial court also instructed the jury at the beginning and end of the trial that it should not take anything the court said or did as an indication of what it thought about the facts, witnesses, or what the verdict should be.   We find no prejudicial error.

Our conclusion is the same if we construe Estrada's argument as challenging the court's comment and ruling as an infringement of his confrontation rights, or merely an incorrect ruling on an evidentiary objection.   In the context of the entire cross-examination, this one comment was minor.  (Carpenter, supra, 21 Cal.4th at p. 1052 [where witness was minor in context of the entire case, any error in letting defense elicit too little information was harmless under any standard].)   And, although the court said it did not know what the line of questioning was intended to elicit, it permitted nearly the entire cross-examination.   Estrada has not shown that had the court not commented and allowed Morris to answer this question on cross-examination, the jury would have received a significantly different impression of his credibility.

Similarly, the trial court's ruling sustaining the prosecutor's objection that an expert may rely on hearsay was harmless, even if error.   Immediately before asking the question to which the court sustained an objection, defense counsel established that everything the gang expert knew about the incident came from the reports of another police detective, and that the gang expert had no personal knowledge about the two African–American men involved in the shooting.   The defense question was:  “You don't know who either one of them are, because everything you know is based upon just the hearsay investigation that another detective has told you.”   The gist of this question had already been addressed in the preceding questions.   In addition, the jury was instructed that it had to decide whether the information on which the expert relied was true and accurate, and that it could disregard any opinion it found unsupported by the evidence.   The court also instructed the jury that it was not required to accept the expert's opinion as true or correct.   And, as noted above, the court twice instructed the jury not to take anything it said or did as an indication of what it thought of the evidence or witnesses.   Even if the court erred in sustaining the prosecutor's objection, the error was harmless under any standard.

III. The Trial Court Did Not Err in Instructing the Jury with CALCRIM No. 400

Estrada further argues the trial court erred in instructing the jury with CALCRIM No. 400.   As given, the instruction stated:  “A person may be guilty of the crime in two ways.   One, he may have directly committed the crime.   I will call the person a perpetrator.   Two, he may have aided and abetted a perpetrator who directly committed the crime.   A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it.”   Estrada contends the instruction was misleading and the court prejudicially erred in so instructing the jury.

First, we agree with the People that Estrada forfeited this argument by failing to request a modification of the instruction below.   In People v. Samaniego (2009) 172 Cal.App.4th 1148, 1163 (Samaniego ), the court noted “CALCRIM No. 400 is generally an accurate statement of the law, though misleading in this case.  [The defendant] was therefore obligated to request modification or clarification and, having failed to have done so, forfeited this contention.”   We agree with the reasoning.   Since Estrada did not request clarification or modification of the instruction in the trial court, he forfeited his claim.  (People v. Lopez (2011) 198 Cal.App.4th 1106, 1118–1119 (Lopez ).)   However, even if Estrada had preserved his argument for appeal, we would conclude there was no prejudicial error.

In Samaniego, the court concluded that in accordance with the reasoning of People v. McCoy (2001) 25 Cal.4th 1111, an aider and abettor's criminal liability depends on his own mental state, rather than that of the perpetrator.   As a result, “an aider and abettor's guilt may ․ be less than the perpetrator's, if the aider and abettor has a less culpable mental state.   [Citation.]  Consequently, CALCRIM No. 400's direction that ‘[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it’ ․ while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified.”  (Samaniego, supra, 172 Cal.App.4th at pp. 1164–1165.)

However, the Samaniego court found the instructional error was harmless because the trial court's other instructions required the jury to find the defendants acted with the requisite mental state for the crime at issue—first degree murder—even as aiders and abettors.   Similarly, in this case, the trial court gave other instructions that required the jury to determine whether Estrada had the mental state necessary to find him guilty of first degree murder.   The court instructed the jury with CALCRIM No. 401, which explained that to find Estrada guilty of a crime as an aider and abettor, the People were required to prove the defendant “knew the perpetrator intended to commit the crime,” and “[b]efore or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime.”   Further, the instruction informed the jury “[s]omeone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.”

The trial court also instructed the jury with CALCRIM No. 520, which explained that to prove the defendant was guilty of murder, the People were required to show the defendant committed an act that caused the death of another person, and the defendant acted with malice aforethought.   The instruction then defined malice aforethought.   In addition, the trial court gave CALCRIM No. 521, which stated in part that the defendant is guilty of first degree murder “if the People have proved that he acted willfully, deliberately, and with premeditation.   The defendant acted willfully if he intended to kill.   The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill.   The defendant acted with premeditation if he decided to kill before committing the act that caused death.”   The instruction stated that if the People had not met their burden of establishing the elements of first degree murder beyond a reasonable doubt, the jury was required to find the defendant not guilty of first degree murder.

These instructions, when considered in addition to CALCRIM No. 400, ensured that the jury would only find Estrada guilty of first degree murder, even as an aider and abettor, if it concluded he acted willfully and with intent to kill, rendering him “equally guilty” of the crime.   We are not persuaded by Estrada's argument that the jury may have disregarded CALCRIM Nos. 520 and 521 as applying only to the shooter, and not Estrada.   The instructions referred specifically to the defendant, not a principal, and informed the jury what the People had to prove as to the defendant.   There was only one defendant in this case, Estrada.   We assume the jury followed the instructions rather than disregarding them.  (People v. Yeoman (2003) 31 Cal.4th 93, 139;  cf.   People v. Nero (2010) 181 Cal.App.4th 504 [CALCRIM No. 400 was prejudicially misleading where two defendants were tried jointly and jury specifically asked if it could find the defendant, as an aider and abettor, guilty of a lesser offense than the perpetrator co defendant].)   Any error in the court's instruction with CALCRIM No. 400 was harmless beyond a reasonable doubt.   (Lopez, supra, 198 Cal.App.4th at p. 1120;  Samaniego, supra, 172 Cal.App.4th at p. 1165.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.

FOOTNOTES

FN1. There was some indication Estrada may have known he was being recorded..  FN1. There was some indication Estrada may have known he was being recorded.

FN2. All further statutory references are to the Penal Code..  FN2. All further statutory references are to the Penal Code.

FN3. For example, the exchange included the following questions and answers:“Q: You don't know whether either of the two male blacks was an O.G., an original gangster?A: No, I do not.Q: You don't know whether –if they were both Gundry Bloc Gang members, you don't know whether one had more influence over the other, do you?A: No, I do not.   I don't know who the other Gundry Bloc gang member was, so I couldn't determine that.[¶] ․ [¶]Q: You don't know whether the shooter had any prior altercations with Ricardo Chavez, the person that was shot?A: Not personal knowledge, no.Q: And you don't know how well the two male African Americans knew each other?A: Again, I don't know who the other male African American was, so how could I make that determination.”.  FN3. For example, the exchange included the following questions and answers:“Q: You don't know whether either of the two male blacks was an O.G., an original gangster?A: No, I do not.Q: You don't know whether –if they were both Gundry Bloc Gang members, you don't know whether one had more influence over the other, do you?A: No, I do not.   I don't know who the other Gundry Bloc gang member was, so I couldn't determine that.[¶] ․ [¶]Q: You don't know whether the shooter had any prior altercations with Ricardo Chavez, the person that was shot?A: Not personal knowledge, no.Q: And you don't know how well the two male African Americans knew each other?A: Again, I don't know who the other male African American was, so how could I make that determination.”

FN4. In Killebrew, the defendant was charged with conspiracy to possess a handgun.   The prosecution's theory was that gang members in three cars conspired to possess a handgun in one of the cars, for gang-related purposes.   The gang expert testified that when one gang member in a car possessed a gun, every other gang member in the car knew of the gun and constructively possessed the gun.  (Killebrew, supra, 103 Cal.App.4th at p. 652.)   The Court of Appeal concluded this testimony simply told the jury how the expert thought the case should be decided and was therefore improper.  (Id. at p. 658.).  FN4. In Killebrew, the defendant was charged with conspiracy to possess a handgun.   The prosecution's theory was that gang members in three cars conspired to possess a handgun in one of the cars, for gang-related purposes.   The gang expert testified that when one gang member in a car possessed a gun, every other gang member in the car knew of the gun and constructively possessed the gun.  (Killebrew, supra, 103 Cal.App.4th at p. 652.)   The Court of Appeal concluded this testimony simply told the jury how the expert thought the case should be decided and was therefore improper.  (Id. at p. 658.)

FN5. Even in the context of the hypothetical question, when the expert testified there was only “one way” the altercation would end, the trial court sustained a defense objection to the testimony and ordered it stricken..  FN5. Even in the context of the hypothetical question, when the expert testified there was only “one way” the altercation would end, the trial court sustained a defense objection to the testimony and ordered it stricken.

FN6. On appeal, Estrada argues the trial court's rulings and comment denied him the right to effective cross-examination in violation of the Sixth Amendment;  they were prejudicial judicial misconduct;  and they were incorrect as evidentiary rulings..  FN6. On appeal, Estrada argues the trial court's rulings and comment denied him the right to effective cross-examination in violation of the Sixth Amendment;  they were prejudicial judicial misconduct;  and they were incorrect as evidentiary rulings.