THE PEOPLE v. GUSTAVO FERNANDEZ

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Court of Appeal, Second District, California.

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO FERNANDEZ et al., Defendant and Appellant.

B228776

Decided: December 05, 2011

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant Gustavo Fernandez. Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Gerson Barillas. Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

This appeal arises out of a gang-related shooting on August 8, 2007, in which Ricardo Favela was killed while standing next to his friend J.M. The jury found defendants and appellants Gustavo Fernandez and Gerson Barillas guilty of first degree murder in violation of Penal Code section 187, subdivision (a).[1](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_1)  The jury also found defendants guilty of conspiracy to commit murder and assault of J.M. with a semiautomatic firearm (§ 182, subd. (a)(1);  § 245, subd. (b)).  The jury specially found all three offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)).   Finally, the jury found Barillas personally and intentionally fired the handgun in committing the murder and assault, and a principal was armed with a firearm as to Fernandez (§ 12022.53, subds.(d) & (e)(1)).[2](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_2)

Fernandez and Barillas were sentenced to 25 years to life for the murder, plus another 25 years to life for the personal weapon use enhancement.   The same term was imposed for the conspiracy conviction, but stayed pursuant to section 654.   A determinate term of nine years plus the five-year gang enhancement was imposed for the assault convictions.

In his timely appeal, Fernandez contends:  (1) the trial court prejudicially failed to instruct the jury that his duress defense as to conspiracy and assault could be based on fear of great bodily harm;  and (2) the trial court erroneously and prejudicially admitted gang expert testimony that it was unlikely that defendants' gang would kill Fernandez for failing to shoot Favela as instructed.   Barillas contends there was constitutionally insufficient evidence to support his first degree murder conviction.

We affirm.

STATEMENT OF FACTS

I. Prosecution

A. The Shooting

Favela was fatally shot while standing on the sidewalk with J.M. near the intersection of Eighth and Oxford Streets in Los Angeles, in territory claimed by the Aztlan street gang.   J.M., who lived in that neighborhood for more than 10 years, was 15 years old at the time of the shooting.   He was “jumped” into the Aztlan gang at 12 years old but did not want to be in the gang and did not associate with it.   Favela, known as Hunter, hung out with Aztlan gang members.   The rival Mara Salvatrucha street gang (M.S.) operated in territory six to eight blocks away.   Some time before the shooting, J.M. and Favela were chased by approximately eight members of M.S. at Los Angeles High School.

At approximately 5:45 p.m. on the day of the shooting, J.M. and Favela were approached by two males as they were walking north on Oxford Street near the intersection of Eighth Street.   The shorter male, identified by J.M. as Fernandez, appeared very nervous and looked around suspiciously.   The taller male, whom J.M. identified as Barillas, stood next to Fernandez.   Barillas asked, “Where are you from?”   Favela “flashed his gang sign”—a hand sign in the shape of an “A” for the Aztlan street gang.   J.M. said he “wasn't from nowhere.”   Barillas said, “Mara Salvatrucha.”

Fernandez appeared nervous and “kept on looking around” in the manner of a lookout during this exchange.   After Barillas identified himself as M.S., Fernandez pulled up his shirt to reveal a black handgun in his waistband.   J.M. and Favela “froze” in place.   Neither one drew a weapon.   Barillas pulled the gun out of Fernandez's waistband, cocked it back, said, “Mara Salvatrucha controlar aqui,” [3](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_3) and fired the weapon at Favela from a distance of four to five feet.   After shooting, Barillas “flashed his gang sign, M.S.” Fernandez stood by, continuing to look around.

Barillas also aimed at J.M. and fired.   J.M. tried to run, but tripped, fell, and “blacked out.”   He opened his eyes to see Barillas and Fernandez running away together as they turned the corner from Eighth Street onto Western.   Favela suffered a fatal gunshot to the chest.   J.M. was not wounded, but there were two bullet holes in his baggy white T-shirt.   After testifying at the preliminary hearing, J.M. “bumped into” some M.S. members, who threatened to kill him and told him “not to show up in court.”

Detective Edward Ruffalo responded to the shooting scene.   There were three shell casings on the ground.   Detective Mark Holguin testified that the casings were from a nine-millimeter Lugar.

Thirteen-year-old Jennifer M. witnessed the shooting from where she stood with a friend in front of her apartment building.   Jennifer saw two males, identified as defendants,[4](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_4) walking toward her.   Barillas was the taller of the two.   The males appeared to be angry as they passed by and walked up to Favela, whom she had seen previously in the neighborhood.   Jennifer heard one of the two males say “Fuck” to Favela in an angry tone.   Suddenly, Fernandez removed a black semiautomatic handgun from his waistband and handed it to Barillas, who pointed the gun at Favela's chest and fired approximately two shots.   Defendants ran in the direction they had come.

A few hours after the shooting, Mario Monroy was hanging out with M.S. members, including Fernandez, whom Monroy knew as Maniac or its Spanish equivalent, Maniaco, in his apartment, eight or nine blocks away from the shooting scene.   Monroy was on “house arrest” at the time.[5](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_5)  Fernandez was a M.S. member, but Monroy was not a member of the gang.[6](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_6)  Two other gang members were present.   Monroy heard Fernandez speaking to one of the other gang members, whom Monroy knew as Psycho about “a shooting on Oxford.”   Fernandez said “some other guy” shot the victim because “he didn't have the strength to do it.”   He also heard Fernandez say the victim was a member of the Aztlan.   A week later, Monroy found out that Favela had been the victim.   Favela and Monroy had gone to school together, and they were on good terms with each other.   Monroy did not know Favela was a gang member.

B. The Investigation

Detective Teodoro Urena interviewed Fernandez twice in connection with the Favela shooting.   The first time was on November 21, 2007, in the police station.   The interview was videotaped.   Fernandez waived his Miranda [7](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_7) rights and agreed to the interview.   He initially denied having taken part in the Favela killing but admitted being a M.S. member.

The second interview took place approximately 40 minutes later, in the detective's patrol car, as he drove Fernandez from the police station to the juvenile detention center.   The interview was audiotaped.   Fernandez admitted that he took part in the shooting incident, which he characterized as a M.S. “job.”   Higher ranking members of the gang instructed Fernandez to carry out that job because “he hadn't put in any work for the gang.”   As a younger or newer member of a gang, it was expected that he do some “work” and “carry out a mission or a job” for the gang.   While driving Fernandez around the area of the shooting, Fernandez misidentified persons on the sidewalk as fellow gang members Corrupt and Mysterioso.

Fernandez told the detective the shooting was intended as retaliation for two prior incidents, one of which occurred seven months earlier.   Fernandez saw five or six persons, including Favela, “tagging” a wall near his home.   Fernandez challenged them, claiming the territory for M.S. Favela pulled out a gun and shot Fernandez in the shoulder.   The other incident was a stabbing approximately four weeks before the Favela shooting, in which an Aztlan member was reputed to have attacked a member of the M.S.'s Normandie clique.   The motive for the Favela shooting was vengeance.

Fernandez related how two M.S. members, Sospechoso and Mysterioso, were in a red vehicle “scouting the area for Aztlan gang members” prior to the Favela shooting, using a phone or radio to communicate the location of the intended targets.   The M.S. members who planned the mission included Chino, Little Man, and Demon.   As Detective Urena drove Fernandez around the area of the shooting, Fernandez referred to a member of the Hollywood “clique” of M.S. named Corrupt, who was present during the planning of the mission and was the shooter.   Fernandez admitted being present when Corrupt approached, challenged, and shot Favela.   Fernandez said both he and Corrupt carried handguns.   Fernandez received his weapon from Little Man.

Fernandez told the detective that shortly after the shooting, Corrupt pistol whipped him on the side of the face.   The gang also punished Fernandez by giving him a “courtesy” beating because he failed to do the shooting as planned.   After that, the gang had no further contact with Fernandez.

After the Favela shooting, Detective Urena observed gang-related graffiti:  “Aztlan,” “RIP,” and “Hunter” all in Aztlan territory.  “RIP” stood for “rest in peace,” and “Hunter” was Favela's gang moniker.

C. Gang Evidence

Detective Claudia Lamas specialized in gang crimes and was familiar with M.S. When she met Fernandez while on patrol on August 16, 2007, he claimed membership in M.S. and said his moniker was El Maniaco.   When the detective stopped Barillas on April 8, 2006, he said he was a two-year member of M.S. and his moniker was Corrupt.   On July 27, 2006, Barillas again admitted his moniker was Corrupt and was a M.S. member, but said he had been a member for four years.

Officer Hector Marquez testified as the prosecution's gang expert.   He was familiar with the M.S. gang and its cliques operating in the Wilshire Division.   There were approximately 200 members within that area.   Officer Marquez had personal knowledge Barillas was a M.S. member called Corrupt.   He was unaware of anyone else with that moniker.   Gangs will typically have juvenile members hold their weapons because juveniles are treated more leniently in the court system.   Younger members are expected to “put in work” for the gang, and if they fail to do so, they might get kicked out of the gang or face a 13–second “beat down” by the gang.   It is expected that a younger member will take responsibility for criminal acts committed with older members.

The Favela shooting occurred in the territory claimed by Aztlan.   M.S. is a criminal street gang.   Based on a hypothetical set of facts consistent with the prosecution evidence, Officer Marquez opined that the Favela shooting was committed to benefit M.S. because the shooters were members who entered a rival gang's territory and shot a member of that rival gang.   Revenge for a prior knife attack by an Aztlan member was one possible motive for the shooting.   In M.S. culture, the prior attack showed disrespect, and failure to take revenge would show weakness.   In order to have influence, the gang wanted a reputation for being willing to commit acts of violence.   Committing acts of violence against a gang located nearby would assist M.S. in expanding its own territory.

On cross-examination, Officer Marquez testified that if a younger gang member was given a mission to shoot someone and he failed to carry it out, it would hurt the gang's reputation.   The gang member would suffer some kind of punishment, “probably get beat up.”   Failure to take part in a gang-ordered shooting would be considered one of the worst kinds of disrespect in gang culture.   It was very “severe” and could result in a “death warrant,” depending on the situation.   On redirect examination, the expert testified that he would not expect that a young, inexperienced gang member would be killed in circumstances like those in which Fernandez failed to shoot Favela—it would be more likely that he would receive a beating.

Detective Urena also testified concerning gang culture.   He explained that the more missions a member does for his gang—and the more violent those missions are—the greater the member's status will be within the gang.   Conversely, within several months after joining a gang, it would be expected that a new member do something for the gang.   If one does not put in an adequate amount of “work” for the gang, the other members will begin to ostracize the new member.

II. Defendant Fernandez

Fernandez testified on his own behalf.   He was 16 years old at the time of the shooting, having arrived in the United States from Honduras two years before.   He was “jumped in”—meaning, beaten—to M.S. eight or nine months before the Favela shooting.   On the day of the shooting, he left home between 4:00 and 5:00 p.m. and walked toward Eight Street and Normandie, where he met other gang members.   They told Fernandez “[t]o shoot somebody.”   A gang member called Little Man told him to shoot a member of the rival Aztlan gang.   Fernandez was scared because he had never hurt anyone and was pressured by older members into doing something he did not want to do.   He “was scared that they would shoot [him]” if he refused.   He also thought his family would be killed if he refused.[8](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_8)  When Little Man gave him a gun, Fernandez took it out of fear.

Fernandez put the weapon into his waistband.   He was accompanied by Corrupt, who carried a .357–caliber handgun.   When they encountered a member of a rival gang, Corrupt asked where “he was from?”   After the rival answered, Corrupt told Fernandez to shoot him, but Fernandez said he “could not.”   Instead, he pulled the gun out of his waistband and pointed it to the ground.   Corrupt took it from him.   After hearing the gunshots, Fernandez ran home.   He stayed at home until he was arrested because he was afraid the older M.S. members might kill him or beat him or his family members.   He had previously been threatened by M.S. as to the consequences of failing to carry out orders.   Fernandez did not visit Monroy after the shooting.

Fernandez admitted his gang moniker was Maniaco or Maniac.   He remembered the incident in which he was shot approximately a month and a half before the Favela shooting.   He did not recall whether it was Favela who shot him.   The prior shooting provided a motive for the gang's ordering him to shoot Favela.   Another motive was a stabbing incident between members of Aztlan and M.S. Fernandez knew that he and Corrupt were going to shoot Favela.   However, Fernandez testified that Barillas was not the same person as Corrupt the shooter.

DISCUSSION

Duress Instruction

As Fernandez requested, the trial court instructed the jury on the affirmative defense of duress as to the conspiracy, attempted murder, and assault counts.[9](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_9)  However, the court refused Fernandez's request to modify Judicial Council of California Criminal Jury Instructions (2009–2010) CALCRIM No. 3402 to allow for a finding of duress if “[Fernandez] would suffer great bodily harm” as a consequence of refusing the gang's demand to commit the crime.   Fernandez contends the court committed prejudicial error in refusing the requested modification.   As we explain, even assuming a duress defense may be premised on fear of great bodily injury, any error in this case was harmless.   Fernandez's affirmative defense was premised on his fear of being shot, which implicated a fear of life endangerment.   There was no evidence that he feared being shot in a manner that would not put his life in danger, but only cause great bodily injury.   Accordingly, the modification was not required based on the facts, and there is no reasonable basis to find the modified instruction would have affected the verdicts.

The defense of duress is set forth in section 26, which includes among the classes of persons incapable of committing crimes, persons “who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.” (§ 26, subd.   Six.) “In other words, the defense of duress negates the intent or capacity to commit the crime charged.   Defendant needs to raise only a reasonable doubt that he acted in the exercise of his free will.  [Citation.]  In order to show that his act was not the exercise of his free will, defendant must show that he acted under an immediate threat or menace.  [Citation.]”  (People v. Petznick (2003) 114 Cal.App.4th 663, 676.)   That is, “[d]uress is available as a defense to defendants who commit a crime ‘under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.’ (§ 26, subd.   Six;  People v. Otis (1959) 174 Cal.App.2d 119, 124–125 [ (Otis ) ].)” (People v. Saavedra (2007) 156 Cal.App.4th 561, 567.)

Trial counsel for Fernandez submitted various proposed jury instructions, including a modified version of CALCRIM No. 3402.   We set forth the proposed modification in italics:  “The defendant is not guilty of conspiracy to murder, attempted murder or assault if he acted under duress.   The defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger, or that he would suffer great bodily harm, if he refused a demand or request to commit the crimes.   The demand or request may have been express or implied․”  In arguing for the modification, Fernandez relied on evidence that Barillas put him in fear of bodily injury and cited Otis, supra, 174 Cal.App.2d at pages 124–125 for the proposition that fear of great bodily injury “can also raise the defense of duress.”

In discussing the duress instruction, the parties focused on whether it was available for conspiracy to commit murder and whether Fernandez had presented substantial evidence to support the instruction.   Trial counsel argued the defense was available based on Fernandez's testimony that “he was afraid he would be killed․”  Because Fernandez had refused an assignment from “an extremely violent gang,” it was reasonable to believe “these people have the facility to kill [him] right now.”   Although the prosecutor initially argued there was no substantial evidence of an express or implied threat, he eventually agreed the instruction should be given on all the counts other than murder.   There was no discussion reported as to the inclusion of language as to fear of great bodily harm, and the jury was instructed pursuant to CALCRIM No. 3402 without the requested modifications.[10](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_10)

In his argument, defense counsel referred to Fernandez's testimony that he did not want to go on the “mission” to shoot somebody, but took the gun and went along with Corrupt out of fear.   When Corrupt made the gang challenge to Favela, Fernandez pulled out the gun, but kept it at his side and told Corrupt that he could not shoot.   Corrupt responded by taking the gun and shooting Favela.   This evidence, it was argued, showed Fernandez withdrew from the conspiracy and acted out of duress.   In response to the prosecutor's argument that Fernandez could have been “jumped out” of the gang if he really did not want to commit acts of violence, defense counsel asserted that was not a realistic alternative to someone as young and inexperienced as Fernandez.   Instead, Fernandez was worried “about immediate retribution [from the gang members] for not doing an act.”   His failure to shoot Favela was “a serious violation of gang rules,” which meant that he and his family could “get killed” in retribution.

In rebuttal, the prosecutor argued it strained credulity to believe that in the nine months of Fernandez's membership in M.S. leading up to the killing, he did not appreciate the acts of violence he would be expected to carry out.   He could have left the gang if he truly was opposed to committing such acts.   Doing so would merely require a 13–second beating.   More specifically, with regard to duress, the prosecutor argued there was no evidence that Fernandez received any direct threat of violence from M.S. members.   In addition, according to the prosecutor, there was no evidence that Fernandez “believe[d] his life [was] in immediate danger.”   Fernandez did not testify as to when he thought the fatal retribution would come—and even if he believed he would be subject to such retribution, such a belief would be unreasonable.

Our review of the trial shows no evidentiary basis for the first aspect of Fernandez's instructional error claim—that the trial court was legally bound to instruct the defense of duress could be predicated on a fear of great bodily injury separate from a fear of life endangerment.   Moreover, as the Attorney General points out, the statutory authority for the defense does not mention the fear of great bodily injury, but limits its application of those who have “reasonable cause to and did believe their lives would be endangered if they refused.” (§ 26, subd.   Six.) The unmodified version of the CALCRIM pattern instruction given tracked the statutory language.  (CALCRIM No. 3402.)

In People v. Subielski (1985) 169 Cal.App.3d 563 (Subielski ), the court rejected an argument analogous to the one on which Fernandez relies—that the affirmative defense of duress was available based on a defendant's “honest but unreasonable belief that he would suffer physical injury.”  (Id. at p. 567.)   The Subielski court concluded there was no authority in support of the defense theory because duress “requires a reasonable fear for one's life,” but the defendant “only feared that he might be subjected to a physical beating if he did not participate.”  (Ibid.)

Fernandez acknowledges that Subielski makes duress unavailable to defendants who present nothing more than a fear of a physical beating, but asserts he presented evidence that he feared more than a beating—specifically, he feared a retributive shooting.   We find that distinction unpersuasive because the rationale for the Subielski holding was that the affirmative defense of duress must be premised on a reasonable fear that one's life is endangered.  (Subielski, supra, 169 Cal.App.3d at p. 567.)   Therefore, a fear of injury that does not rise to that level will not support the defense, regardless of whether the fear is premised on a physical beating or a shooting.

In any event, under the facts of this case, it is difficult to imagine how inclusion of the “great bodily injury” alternative would have been justified or helpful.   Fernandez testified that he initially went on the “mission” to shoot an Aztlan member because the older M.S. members pressured him to do so—if he refused, “they would shoot [him].”   He also testified that he went along with Corrupt because he “was scared that if [he] ran away [Corrupt] might shoot [him].”   As the Attorney General points out, a reasonable person would consider the prospect of receiving a gunshot wound something that would place one's life in danger.

Fernandez counters that because he had previously received a nonfatal gunshot wound, his fear might not have risen to the level of life endangerment.   However, not only did Fernandez fail to testify as to such a limited fear (or make that argument below), but the distinction would have been entirely artificial.   Indeed, in Otis, supra, 174 Cal.App.2d 119, Justice Tobriner explained that such a distinction was psychologically unrealistic, noting that it was not resolved whether fear of “bodily harm,” rather than “fear that the person's life would be endangered,” would suffice to support the defense of duress.  (Id. at p. 123.)   However, “precision in separating [the two types of fear] has become somewhat unrealistic in the light of recent psychological research,” which “at least throws some doubt on the extreme niceties of these legal distinctions between fear of serious bodily harm and fear of life itself.” [11](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_11)  (Id. at pp. 124–125.)   That kind of doubt would have been especially acute here, given that Fernandez would have to argue that he feared getting shot in such a manner that his life would not be in danger.

Finally, we hold that refusal to modify the pattern was nonprejudicial, whether assessed in terms of People v. Watson (1956) 46 Cal.2d 818, 836, “which asks whether it is reasonably probable appellant would have achieved a more favorable result if the court had not given the instruction” (People v. Lawson (2005) 131 Cal.App.4th 1242, 1249, fn. 7), or the harmless beyond-a-reasonable-doubt standard for federal constitutional error under Chapman v. California (1967) 386 U.S. 18, 24.   The trial testimony presented the jury with two alternatives:  either Fernandez took part in the shooting out of fear that Corrupt or other M.S. members would shoot him if he refused, as he testified, or that there was no reasonable basis for fear of anything more than a beating in light of his youth and inexperience, as the prosecution expert testified.   There was no evidence that Fernandez actually feared a non-life-threatening retributive shooting for his failure to complete the mission, much less any evidence that he had reason for such a fear.

Gang Expert Testimony

Fernandez contends Detective Urena impermissibly testified as a gang expert, over objection, that it was unlikely M.S. would kill Fernandez for failing to shoot Favela.   As we explain, there was no abuse of discretion in admitting the evidence because the testimony pertained to a subject that was sufficiently beyond common experience so as to justify an expert opinion.

The governing law is well established.   A trial court has discretion concerning the admission of evidence, including gang expert testimony.  (See, e.g., People v. Carter (2003) 30 Cal.4th 1166, 1194 (Carter ).)   An expert may offer opinion testimony if the subject is sufficiently beyond common experience so that it would assist the trier of fact.  (Evid.Code, § 801, subd. (a);  People v. Ochoa (2001) 26 Cal.4th 398, 438;  People v. Gardeley (1996) 14 Cal.4th 605, 617 (Gardeley );  People v. Killebrew (2002) 103 Cal.App.4th 644, 651 (Killebrew.)   Expert testimony “concerning the culture, habits, and psychology of gangs” meets this criterion.  (People v. Valdez (1997) 58 Cal.App.4th 494, 506 (Valdez );  see Gardeley, supra, at p. 617.)   A properly qualified gang expert may therefore, where appropriate, testify to a wide variety of matters, including whether and how a crime was committed to benefit or promote a gang;  the motivation for a particular crime;  a gang's culture, habits, size, composition, existence, territory, and primary activities;  a defendant's gang membership;  rivalries between gangs;  and gang graffiti, tattoos, hand signs, and attire.  (Killebrew, supra, at pp. 656–657, and authorities cited therein;  see also People v. Ferraez (2003) 112 Cal.App.4th 925, 930 (Ferraez ).)

The relevant lower court proceedings were as follows:  During the cross-examination of Detective Urena, counsel asked what the punishment would be for not completing a gang mission.   The detective answered that it would range from being ostracized to being “jumped out” of the gang and receiving a beating — but it could even include the murder of that person.   Counsel followed up by asking whether a gang member's backing out of a “serious situation, like a homicide” would call for consequences worse than merely being jumped out of the gang.   The expert replied, “they could be, but I think in this case we know what the consequences were and they didn't appear that bad.”

On redirect examination, the prosecutor asked whether Fernandez's failure to complete his gang assignment by shooting Favela would be treated in the same way as the situation in which a gang member would be killed for trying to leave the gang.   The detective stated that it would not.   When the prosecution asked him to explain, the defense objected on the ground that the question called for an improper expert opinion because the subject was outside the witness's “field of expertise” and was one of “common knowledge.” [12](https://caselaw.findlaw.com/ca-court-of-appeal/1587341.html%22%20%5Cl%20%22footnote_12)  The objections were overruled.   Detective Urena explained that because Fernandez was relatively young (16 years old), had only been a gang member for nine months, and had not carried out any significant violent acts for the gang, he would not be considered a threat by the gang.  “And so taking his life was probably not the probable consequence of not having carried through with the acts.”   The expert believed that death would be a likely consequence if the person leaving the gang was a “hard core” member who had committed many crimes and had damaging information about other gang members.   Over the same objection, Detective Urena testified that a gang member in Fernandez's position would “open himself up to a beating by the gang, but not likely to be killed by the gang.”

Contrary to Fernandez's assertion, the challenged evidence falls within the general rule that testimony concerning the culture and habits of criminal street gangs meets the criteria for the admission of expert testimony because such evidence is sufficiently beyond common experience that the

Fernandez's reliance on People v. Page (1991) 2 Cal.App.4th 161 (Page ) is therefore misplaced.   In Page, the trial court permitted an expert social psychologist to outline “the factors which might influence a person to give a false statement or confession during an interrogation,” but excluded expert testimony as to how those factors applied to the circumstances of the case.   (Id. at p. 189.)   The Page court found no abuse of discretion in the trial court's limitation:  “Having been educated concerning those factors, the jurors were as qualified as the professor to determine if those factors played a role in Page's confession, and whether, given those factors, his confession was false.”  (Ibid.) Detective Urena's challenged testimony, in contrast, did not rely on a scientifically derived set of factors that could be readily applied by a layman.   Rather, he testified as to a matter of specialized knowledge — the manner in which a criminal street gang engaged in self-policing its wayward members.

Nor is Fernandez correct that there was inadequate foundation as to Detective Urena's knowledge as to a gang's approach to self-policing.   The detective testified as to his academic study of gangs, as well as his gang-related studies at the police academy.   As a police officer, Detective Urena worked with gang officers who instructed him on “the street level operations of gangs.”   As a member of a gang unit, the detective “made hundreds of contacts with gang members,” providing him with “the opportunity to question them and find out their method of operation.”   He had 15 years of experience as a police officer, including assignments in gang units.   The detective was “somewhat” familiar with the M.S. gang.   There was sufficient foundation of the detective's specialized knowledge of gang operations to provide adequate foundation for his opinion.   To the extent that knowledge might be deemed wanting, it merely went to the testimony's weight, not its admissibility.

Separately and independently, we find the admission of Detective Urena's expert testimony was nonprejudicial.  “The erroneous admission of expert testimony only warrants reversal if ‘it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’  (People v. Watson (1956) 46 Cal.2d 818, 836 (Watson );  see also People v. Venegas (1998) 18 Cal.4th 47, 93 [applying Watson standard to the erroneous admission of expert testimony].)”  (People v. Prieto (2003) 30 Cal.4th 226, 247.)

As the Attorney General points out, the prosecution's other gang expert offered similar testimony, without objection.   Officer Marquez testified that if a younger gang member was given a mission to shoot someone and he failed to carry it out, the gang member would suffer some kind of punishment, likely a beating.   Failure to take part in a gang-ordered shooting would be considered very “severe” and could result in a “death warrant.”   On redirect examination, the expert testified that he would not expect that a young, inexperienced gang member would be ordered killed in circumstances like those in which Fernandez failed to shoot Favela.   It would be more likely that he would receive a beating.   As Detective Urena's challenged testimony added little to Officer Marquez's expert testimony, there is no reason to think that the former had a substantial effect on the verdicts.

Finally, Fernandez's appellate invocation of the due process clause lacks merit.  “[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair.”  (People v. Partida (2005) 37 Cal.4th 428, 439 (Partida ), citing Estelle v. McGuire (1991) 502 U.S. 62, 70;  Spencer v. Texas (1967) 385 U.S. 554, 563–564;  People v. Falsetta (1999) 21 Cal.4th 903, 913.)   We consider the “very narrow due process argument on appeal” that “the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process.”   (Partida, supra, at p. 435.)   There was no such evidentiary objection, and we find no due process violation for the same reasons we found no prejudicial error under state law.  (See also People v. Ayala (2000) 23 Cal.4th 225, 253 [“There was no violation of state law, and because defendant's constitutional claims are predicated on his assertion that state law was violated, they too must fail.”].)

Defendant Barillas

Barillas argues there was constitutionally insufficient evidence to support his first degree murder conviction because there was no substantial evidence of premeditation and deliberation.   His contention fails because the evidence supported a reasonable inference that he fatally shot Favela pursuant to a plan to kill an Aztlan member, and that he was motivated by the desire to avenge prior attacks on members of his own gang.

A willful, deliberate, and premeditated killing “is murder of the first degree.   All other kinds of murders are of the second degree.” (§ 189.)   There are three common categories of evidence bearing on the existence of the premeditation and deliberation in the context of murder—planning activity, motive, and the manner of killing.  (People v. Perez (1992) 2 Cal.4th 1117, 1125 (Perez );  People v. Anderson (1968) 70 Cal.2d 15, 25–27 (Anderson ).)   These “factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.”  (Perez, supra, at p. 1125.)   In assessing the sufficiency of the evidence as to the element of premeditation and deliberation, “ ‘[t]he 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, but the express requirement for a concurrence of deliberation and premeditation excludes ․ those homicides ․ which are the result of mere unconsidered or rash impulse hastily executed.’  [Citations.]”  (People v. Velasquez (1980) 26 Cal.3d 425, 435 (Velasquez ), vacated and remanded on other grounds in California v. Velasquez (1980) 448 U.S. 903;  People v. Hughes (2002) 27 Cal.4th 287, 370–371.)

“In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.  (People v. Johnson (1980) 26 Cal.3d 557, 578.)   The federal standard of review is to the same effect:  Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.  (Jackson v. Virginia (1979) 443 U.S. 307, 317–320.)   The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.  (People v. Stanley (1995) 10 Cal.4th 764, 792.)”  (People v. Rodriguez (1999) 20 Cal.4th 1, 11.)  “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact.  [Citation.]  Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.  [Citation.]”  (People v. Young (2005) 34 Cal.4th 1149, 1181.)

Here, all three of the Anderson factors weigh heavily in favor of the jury's determination.   The testimony of Fernandez provided strong evidence of planning.   Just prior to the shooting, M.S. members including Barillas planned a retributive killing of an Azlan member.   Fernandez and Barillas were given handguns and sent out to accomplish that mission.   M.S. members assisted them in locating a victim.   The evidence of motive was overwhelming.   Not only did Fernandez testify that the killing was motivated as retribution for two prior attacks by Azlan members on M.S. members, but the two eyewitnesses testified that Barillas instigated the shooting by, first, making a gang challenge to the victim and, second, firing on Favela after the victim identified himself as rival gang member.   Finally, the manner of killing—a close-range gunshot to the chest of victim who had just responded to Barillas's gang challenge with a challenge of his own—is inconsistent with killing pursuant to a “ ‘mere unconsidered or rash impulse hastily executed.’  [Citations.]”  (Velasquez, supra, 26 Cal.3d at p. 435.)

The evidence of premeditation and deliberation against Barillas is stronger than that in People v. Manriquez (2005) 37 Cal.4th 547, 577, in which our Supreme Court found ample evidence to support the inference of preexisting reflection, rather than an unconsidered or rash impulse, where the victim was shot repeatedly several minutes after a verbal altercation with the defendant.  (See also People v. Morris (1988) 46 Cal.3d 1, 22–23 [the defendant's possession of a loaded gun in advance of the killing and rapid getaway are evidence of planning activity];  People v. Koontz (2002) 27 Cal.4th 1041, 1082 [evidence that the defendant fired a shot at a vital area of the victim's body at close range and prevented the witnesses from calling an ambulance represented “a manner of killing indicative of a deliberate intent to kill”].)

DISPOSITION

The judgments are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

FOOTNOTES

FN1. All further statutory citations are to the Penal Code, unless stated otherwise..  FN1. All further statutory citations are to the Penal Code, unless stated otherwise.

FN2. The jury found defendants not guilty of the attempted murder of J.M..  FN2. The jury found defendants not guilty of the attempted murder of J.M.

FN3. “Mara Salvatrucha controls here.”.  FN3. “Mara Salvatrucha controls here.”

FN4. Jennifer identified Barillas at trial.   She was “not sure” if Fernandez was the shorter male, but he “look[ed] like” him.   Jennifer identified defendants at the preliminary hearing held two years before trial.   She also identified them in photographic lineups..  FN4. Jennifer identified Barillas at trial.   She was “not sure” if Fernandez was the shorter male, but he “look[ed] like” him.   Jennifer identified defendants at the preliminary hearing held two years before trial.   She also identified them in photographic lineups.

FN5. When Monroy testified at the preliminary hearing, he was in custody, having been charged with rape.   He was also on probation for felony vandalism..  FN5. When Monroy testified at the preliminary hearing, he was in custody, having been charged with rape.   He was also on probation for felony vandalism.

FN6. On cross-examination, Monroy testified that he was a member of M.S. in 2008, but he was subsequently “jumped out” of the gang..  FN6. On cross-examination, Monroy testified that he was a member of M.S. in 2008, but he was subsequently “jumped out” of the gang.

FN7. Miranda v. Arizona (1966) 384 U.S. 436..  FN7. Miranda v. Arizona (1966) 384 U.S. 436.

FN8. In the prosecution's rebuttal case, Detective Urena testified that a gang member could leave the M.S. gang by being “jumped out,” which consists of a 13–second beating—the same as being “jumped in.”.  FN8. In the prosecution's rebuttal case, Detective Urena testified that a gang member could leave the M.S. gang by being “jumped out,” which consists of a 13–second beating—the same as being “jumped in.”

FN9. Duress is not a defense to crimes punishable by death. (§ 26, subd.   Six;  People v. Anderson (2002) 28 Cal.4th 767, 780 [duress is not a defense to any form of murder].).  FN9. Duress is not a defense to crimes punishable by death. (§ 26, subd.   Six;  People v. Anderson (2002) 28 Cal.4th 767, 780 [duress is not a defense to any form of murder].)

FN10. The trial court and counsel apparently had prior unreported conferences in chambers..  FN10. The trial court and counsel apparently had prior unreported conferences in chambers.

FN11. The Otis court did not find it necessary to resolve the legal question of whether duress could be premised on a fear of injury because the jury instruction at issue “failed to incorporate the element of immediacy of danger.”  (Otis, supra, 174 Cal.App.2d at p. 126.).  FN11. The Otis court did not find it necessary to resolve the legal question of whether duress could be premised on a fear of injury because the jury instruction at issue “failed to incorporate the element of immediacy of danger.”  (Otis, supra, 174 Cal.App.2d at p. 126.)

FN12. Trial counsel also interposed a hearsay objection, which was also overruled and is not at issue on appeal..  FN12. Trial counsel also interposed a hearsay objection, which was also overruled and is not at issue on appeal.