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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDGARDO RODRIGUEZ, Defendant and Appellant.	A114910 (Alameda County Super. Ct. No. CH-37369)

Following a jury trial, defendant Edgardo Rodriguez (defendant) was convicted of first degree murder, as well as related offenses, special circumstances, and enhancement allegations. On appeal, defendant contends that the trial court erred by: (1) admitting evidence of defendant's involvement in a prior shooting, (2) failing to give proper instructions on accomplice testimony, and (3) failing to limit the testimony of a police officer who testified as an expert on criminal street gangs. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Charges Against Defendant

The charges against defendant arose from a September 16, 2003 shooting in which Francisco Javier Sanchez was killed and Osvaldo Ramirez was injured. Charges initially were brought in a criminal complaint filed on September 18, 2003. Count one of the complaint charged defendant with the first degree murder of Sanchez and alleged special

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II, A. and part II, C.

circumstances and enhancement allegations. Count two charged defendant and three others–Bryan Giddings, Manuel Robles, and Omar Anwar (the codefendants or the witnesses)–with shooting at an occupied motor vehicle. Count two alleged, as to all four defendants, that the offense was committed for the benefit of a criminal street gang.

All of the defendants initially pled not guilty. However, Giddings, Robles, and Anwar later entered pleas of no contest or guilty to aiding and abetting an assault by defendant with a semiautomatic firearm in violation of Penal Code[1] section 245, subdivision (b), which the prosecutor stated was a "stipulated lesser-related" offense to the charged offense of shooting at an occupied motor vehicle.[2] As part of their plea agreements, they agreed to testify.

On November 10, 2004, defendant was charged by information with: (1) the first degree murder of Sanchez (count one; § 187, subd. (a)), (2) shooting at an occupied motor vehicle (count two; § 246), (3) the attempted murder of Ramirez (count three; §§ 187, subd. (a), 664), and (4) dissuading a witness by force or threat, based on an alleged threat against Anwar (count four; § 136.1, subd. (c)(1)). In connection with count one, the information alleged as special circumstances that the murder of Sanchez was intentional and perpetrated by means of shooting from a motor vehicle (§ 190.2, subd. (a)(21)), and that defendant committed the murder while he was an active participant in a criminal street gang for the purpose of furthering the activities of the gang (§ 190.2, subd. (a)(22)). The information also included special allegations that all four crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that, as to the first three counts, defendant personally discharged a firearm causing great bodily

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 Giddings pled no contest; Robles and Anwar pled guilty. Each of them also admitted that the assault was committed for the benefit of a criminal street gang.

injury and/or death (§ 12022.53, subd. (d)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)).[3]

Defendant pled not guilty to all charges and denied the special allegations.

B. The Evidence Presented At Trial

1. The Shooting

On the afternoon of September 16, 2003, Sanchez was driving his brother's red or maroon car on Mission Boulevard in Hayward, with his friend Ramirez seated in the front passenger seat. Sanchez and Ramirez, who were members of the Laborers Union, had just paid their union dues at a union hall on Mission and were driving toward a supermarket. Sanchez and Ramirez were not involved in gang activity. Sanchez stopped at a red light at the intersection of Mission and Industrial. A white minivan stopped in the left turn lane next to the driver's side of Sanchez's car. Ramirez later identified a photograph of Bryan Giddings's white minivan as the van that stopped next to Sanchez's car. Ramirez testified that a man got out of the back of the van and reached his hand into the driver's side window of Sanchez's car. Ramirez then heard several gunshots. After the first shot, Ramirez felt pain in his leg and ducked down. Sanchez's car rolled forward into the intersection and came to a stop. When Ramirez looked up, he saw that Sanchez was bleeding and had several wounds, including a head wound. Sanchez died of bullet wounds to his head, left shoulder, and right forearm.

Stephanie Koller and her teenage son Kyle were driving on Mission and stopped at the intersection of Industrial at about 3 p.m. on September 16, 2003, in the same southbound lane as Sanchez's car, and two cars behind it. Stephanie saw the white minivan pass her car and stop in the left turn lane next to Sanchez's car. Stephanie then

[3] At the close of evidence at trial, the prosecutor struck certain portions of the firearm and bodily injury allegations. These modifications are not relevant on this appeal.

saw a man get out of the van, approach Sanchez's car, and throw two punches at the driver through the open driver's side window. Kyle also saw the man standing in the street between the white minivan and the maroon car. Kyle then saw a man's right hand and arm come out of the open front passenger's side window of the white minivan, holding a gun that Kyle recognized as a semiautomatic weapon. The man holding the gun pointed it at the driver's side of the maroon car and fired six or seven shots. Stephanie also heard several gunshots. Based on the skin color of the shooter's arm, Kyle believed the shooter was Hispanic. Kyle believed that the man holding the gun out of the window was not the driver of the van, because the driver would not be able to lean over far enough to stick his forearm out of the passenger side window.

Kyle and Stephanie testified that, when the gunshots began, the man standing in the street between the van and Sanchez's car appeared to be startled by the shots. The man in the street jumped back, put his hands in front of his face and turned his head as if he were trying to get out of the way. When the shooting stopped, the white van began making a U-turn on Mission, stopped briefly to let the man in the street run to get into the van, and then continued the U-turn and drove away northbound on Mission. When the van stopped in the middle of its U-turn to let the man in the street get in, Kyle and Stephanie saw the driver of the van. Kyle also noticed the first digit of the van's license plate number. Stephanie called her husband, a Hayward police officer, and gave descriptions of the driver of the van and the man who got out of the van and threw punches at Sanchez. At trial, Stephanie and Kyle both identified Giddings's white minivan as the van involved in the shooting.

The parties stipulated that Ranil Bhukhan, if called as a witness, would testify that he was driving on Mission at the intersection of Industrial on September 16, 2003, at approximately 3 p.m., witnessed a shooting, saw a white van make a U-turn, and wrote down the van's license plate number on a paper bag. The number Bhukhan wrote down was the license plate number of Giddings's van.

Giddings, Robles, and Anwar testified that, on September 16, 2003, they were gang members. Giddings was involved with the VSH (Vario South Hayward) and DGF (Don't Give a Fuck) gangs, which are affiliated with the South Side Hayward gang, which in turn is a Norteno gang. Robles and Anwar were DGF gang members. Giddings, Robles, and Anwar testified that defendant was also a DGF gang member on September 16, 2003. Members of Norteno gangs such as South Side Hayward and DGF view Sureno gangs as their enemies and will attack persons they believe to be Sureno gang members. Norteno gang members use the derogatory term "Scraps" to refer to Sureno gang members.

On September 16, 2003, Giddings drove his white minivan, with defendant seated in the front passenger seat, to pick up Robles. Robles testified that, when Giddings and defendant picked him up at his mother's home, Giddings was driving, defendant was seated in the front passenger seat, and Robles got into the back seat.

Robles's sister, Anna Robles Ramirez (Anna), testified that at around 2:30 p.m. on September 16, 2003, Giddings and defendant arrived at Anna's mother's home (where Anna was then living) in Giddings's van. Anna saw Robles get into the rear sliding door of the van and, as the van pulled away, she saw that Giddings was driving and defendant was seated in the front passenger seat.

Giddings next drove the van to an area called Ranker Court and picked up Anwar, who got into the back seat of the van. The group drove around for a while listening to music, drinking beer, and smoking marijuana, and then arrived at the intersection of Mission and Industrial. During the drive, the group talked about problems they had been having recently with "Scraps" and spoke about wanting to beat up or "smash" a "Scrap." Giddings testified that, during this conversation, defendant said "I want to get me a Scrap." Giddings testified that, prior to arriving at Mission and Industrial, he was not aware that anyone in the van had a gun, although he always assumed it was possible that one of his fellow gang members might have a gun. Anwar testified that he was not aware

that defendant had a gun before the van arrived at Mission and Industrial. Robles had seen a gun in defendant's pocket earlier in the day.

The three codefendants all testified that, when the van arrived at Mission and Industrial, Giddings was driving, defendant was in the front passenger seat, Robles was in the back seat behind Giddings, and Anwar was in the back seat behind defendant. Giddings stopped at the red light in the lane to the left of the maroon car driven by Sanchez. The occupants of the van noticed that there were two young Hispanic men in the car and that the driver (Sanchez) was wearing a baby blue University of North Carolina baseball cap. Surenos claim the color blue, and Nortenos claim the color red.

Giddings and Anwar testified that defendant said "There goes a Scrap" or something similar. Defendant told Anwar to get out of the van and confront or punch the driver of the maroon car. Anwar testified that when defendant told him to get out of the van, defendant had taken out a gun and was waving it at Anwar. Giddings, Robles, and Anwar testified that they did not believe the men in the maroon car were Surenos, because they did not present themselves the way gang members do, and because the driver (Sanchez) smiled at Giddings. However, Anwar got out of the van, approached the maroon car, and said "No Sureno." When Sanchez did not respond, Anwar threw a punch at Sanchez but missed. Sanchez did not fight back and appeared to not know how to react. Giddings started yelling at Anwar to get back in the van.

The three codefendants testified that defendant then started shooting at the driver of the maroon car. Robles ducked down onto the floor of the van. Anwar was startled by the gunshots, moved back and put his hands up near his face. Giddings was afraid of being caught and yelled at defendant, "What the fuck you doing? What you doing, doing that shit right here for?" Giddings began making a U-turn to leave the scene, but defendant told him to stop and wait for Anwar to get back in the van. Defendant yelled at Giddings, saying "Stop, stop. Wait for [Anwar] to get in. Don't fuck up now." By then,

defendant had the gun on his lap pointing in Giddings's direction. Giddings stopped the van; Anwar got in; and Giddings drove away.

Giddings drove the van to defendant's apartment, where the group stayed for between a half hour and 45 minutes. Defendant showered and changed his clothes, and Anwar changed his shirt. One or more of the men suggested that defendant urinate on his hands to remove the gunpowder residue. At the apartment, Anwar saw the gun that defendant apparently had used.

The group left the apartment in Giddings's van. This time, Robles drove; Giddings sat in the front passenger seat; Anwar sat in the back seat behind the driver; and defendant sat in the rear, passenger-side seat.

2. The Arrest

The police had been given a description and license plate number of the van and were looking for it. Hayward Police Lieutenant Thomas Perry spotted the van and began following it, and Robles pulled the van into the parking lot of a pizza restaurant. Other officers arrived and arrested the four occupants of the van.

Stephanie and Kyle Koller arrived at the scene of the arrest and identified Giddings as the driver of the van at the time of the shooting and Anwar as the man who was standing in the street between the van and Sanchez's car.

Officer Donald Jenkins obtained identifying information from defendant at the scene. A crowd of spectators had gathered. Officer Jenkins noticed a group of eight to ten Hispanic males, two of whom Jenkins recognized as gang members, standing together and looking at the suspects who were being arrested. Jenkins pointed out the group to other officers, and the group then ran behind a building.

3. The Search of Defendant's Apartment

On the day after the shooting, police officers, including Inspector Robert Coffey, searched defendant's apartment pursuant to a warrant. A window next to the door of the apartment had been broken. Clothing and other items were strewn around the apartment,

and there was no bedding on the bed. Based on his observations, Inspector Coffey opined that someone had broken the window and entered and ransacked the apartment. In the apartment police found a box of .22 caliber long rifle ammunition, 13 rounds of .38 caliber ammunition, and an empty box of Winchester brand 9-millimeter Luger ammunition. Police also found several items of red clothing in the apartment, the color claimed by Norteno gang members.

4. Ballistics Evidence

Joseph Fabiny, a firearms expert, testified that he tested the six shell casings found at the scene of the shooting. The casings included four Winchester brand 9-millimeter Luger casings, one Speer brand 9-millimeter Luger casing, and one PMC brand 9-millimeter Luger casing, all of which had been fired from the same gun.

Defendant did not testify and called no witnesses.

C. The Jury's Verdict And Sentencing

On April 3, 2006, the jury found defendant guilty of first degree murder, shooting at an occupied vehicle, and attempted murder (counts one, two, and three). The jury also found true the special circumstances as to count one and all enhancement allegations relating to counts one, two, and three. The jury was unable to reach a verdict on count four, witness intimidation, and the trial court declared a mistrial on that count.

On August 9, 2006, the trial court sentenced defendant to life imprisonment without the possibility of parole on count one, plus additional consecutive terms for the count three conviction and certain of the enhancement allegations. The court stayed the sentence on count two pursuant to section 654.

Defendant filed a timely notice of appeal.

II. DISCUSSION

A. The Meekland Shooting*

1. Trial Testimony

Giddings and Robles testified that a few days before the shooting on Mission Boulevard, they and defendant were driving in Giddings's van in the Meekland neighborhood of Hayward. Giddings was driving; defendant was in the front passenger seat; and Robles was in the back seat. They saw a Hispanic man wearing blue clothing walking down the street. Defendant believed the man was a Sureno gang member. Giddings made a U-turn and drove up next to the man, and defendant fired shots at him.

2. Procedural Background

Prior to trial, defendant moved in limine to exclude evidence of the Meekland shooting on the grounds that it was unfairly prejudicial and that there was no corroboration of the testimony by Giddings and Robles that defendant was involved in the Meekland shooting. The prosecutor argued that the evidence was admissible under Evidence Code section 1101, subdivision (b), to prove matters such as defendant's motive and intent. After hearing argument, the trial court ruled that evidence of the Meekland shooting was admissible for the limited purposes of proving defendant's motive, intent, and premeditation and deliberation in connection with the Mission shooting, including proving that the defendant committed the Mission shooting for the benefit of a criminal street gang as alleged in the special circumstance and sentence enhancement allegations. After the close of evidence, the trial court instructed the jury that it could only consider evidence of the Meekland shooting for purposes of determining whether defendant had the requisite intent, a motive, or a plan or scheme in connection with the Mission shooting.

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* See footnote, *ante*, page 1.

3. Analysis

Defendant claims that the trial court erred by admitting evidence of the Meekland shooting. We disagree.

Evidence of uncharged criminal conduct by the defendant generally is inadmissible when offered solely to prove the defendant's propensity to commit similar acts. (Evid. Code, § 1101, subds. (a), (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).) However, Evidence Code section 1101, subdivision (b) authorizes the admission of such evidence when it is relevant to prove a fact other than the defendant's character or disposition, such as the defendant's motive, intent, or plan in connection with the charged offense. (Evid. Code, § 1101, subd. (b);[4] *Ewoldt*, *supra*, 7 Cal.4th at p. 393.)[5] As the Supreme Court has explained, " 'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th

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[4] Evidence Code section 1101 provides:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

[5] Although the rule of *Ewoldt* has been superseded by statute in certain sex-related crimes (see *People v. Britt* (2002) 104 Cal.App.4th 500, 505), those statutory changes are not relevant here.

1230, 1243 (*Steele*).) As to the third factor, trial courts may exclude other crimes evidence under Evidence Code section 352 if its probative value is substantially outweighed by the danger of unfair prejudice. (Evid. Code, § 352; *Ewoldt, supra,* 7 Cal.4th at p. 404.)

A ruling admitting other crimes evidence is reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369 (*Kipp*).) A trial court abuses its discretion only when its decision " 'falls outside the bounds of reason.' " (*Kipp, supra,* 18 Cal.4th at p. 371, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) This standard applies both to the trial court's determination that the evidence is relevant to a non-propensity purpose under Evidence Code section 1101, subdivision (b), and to the court's balancing of the probative value of the evidence against its prejudicial impact under Evidence Code section 352. (*Kipp, supra,* 18 Cal.4th at pp. 369, 371; *People v. Callahan* (1999) 74 Cal.App.4th 356, 367, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Applying the three factors listed above, the trial court did not abuse its discretion in admitting evidence about the Meekland shooting. First, the facts that the evidence was admitted to prove, i.e., defendant's motive, intent, and premeditation or plan in connection with the Mission shooting, were material issues in the case. (See *Steele, supra,* 27 Cal.4th at p. 1243.) The information charged, and the prosecution had to prove, that defendant intended to kill Sanchez and Ramirez, that the shooting was willful, deliberate and premeditated, and that defendant carried out the crimes for the benefit of a criminal street gang and with the specific intent to promote the activities of the gang.

Defendant suggests that admission of the Meekland evidence on the issues of intent and premeditation was not appropriate because at trial he primarily disputed the issue of the shooter's identity and did not contest that whoever committed the shooting acted intentionally and with premeditation. However, defendant's not guilty plea put in issue all elements of the charged offenses and special allegations. (*Steele, supra,* 27

Cal.4th at p. 1243; *People v. Rowland* (1992) 4 Cal.4th 238, 260.) Moreover, when the issues of intent and premeditation are critical to the question of guilt, the prosecution is entitled to prove those issues fully. (*Steele*, *supra*, 27 Cal.4th at pp. 1243, 1246.) Finally, defendant does not concede that the shooting was committed for the benefit of a gang and with the intent to promote the activities of the gang, and those issues were central to the prosecution's case as well because of the special circumstance and enhancement allegations. (See *People v. Martin* (1994) 23 Cal.App.4th 76, 81-82 [motive was important issue where prosecution charged crime was committed for benefit of gang under § 186.22, subd. (b)(1)].)

As to the second factor governing admissibility of other crimes evidence, testimony about the Meekland shooting was probative of defendant's motive, intent, and premeditation or plan in connection with the Mission shooting. (See *Steele*, *supra*, 27 Cal.4th at p. 1243.) When a defendant is charged with an intentional and premeditated attack or killing, evidence that the defendant has committed prior similar attacks is probative of the defendant's intent and premeditation, because "the more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous." (*Id.* at p. 1244; accord *Kipp*, *supra*, 18 Cal.4th at pp. 369-371.) Here, the Meekland and Mission shootings were very similar. In both instances, defendant was driving around with fellow Norteno gang members, saw people that he perceived to be Sureno gang members, and shot at them. Evidence of the Meekland shooting thus tended to prove that defendant's shooting of Sanchez and Ramirez was intentional and premeditated, rather than accidental or random.

In addition, evidence of a defendant's gang affiliation or prior gang-related assaults is relevant to show that the charged crime was motivated by gang-related animus or was committed to benefit a gang. (E.g., *People v. Williams* (1997) 16 Cal.4th 153, 193-194; *People v. Martin*, *supra*, 23 Cal.App.4th at pp. 81-82; *People v. Frausto* (1982) 135 Cal.App.3d 129, 140-141.) Defendant's unprovoked attack on a perceived Sureno in

the Meekland neighborhood helped to explain defendant's actions on Mission a few days later, and was relevant to show that his motive for shooting Sanchez and Ramirez was his desire to attack Surenos for the benefit of the Norteno gangs.

Defendant appears to concede that, if there was sufficient evidence of his involvement in the Meekland shooting, that evidence would be relevant to the issues of motive and intent. Defendant contends, however, that the evidence of his involvement in the Meekland shooting was insufficient to support its admission because it consisted solely of uncorroborated testimony of Giddings and Robles, who defendant claims were "accomplices." This argument provides no basis for exclusion of the evidence.

As discussed in greater detail in section II.B below, section 1111 provides that a defendant cannot be convicted of a crime on the basis of an accomplice's testimony unless that testimony is corroborated by other evidence connecting the defendant with the offense. (§ 1111.)[6] However, even if Giddings and Robles met the legal definition of "accomplices" as to the crimes charged against defendant in connection with the Mission shooting (a question we address in section II.B below), section 1111 only provides that defendant cannot be *convicted* of those crimes on the basis of uncorroborated accomplice testimony. (*Ibid.*) Section 1111 does not provide that corroboration is a prerequisite to the *admissibility* of an alleged accomplice's testimony about the defendant's other crimes. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1190 ["Although accomplice testimony must be corroborated to support a conviction (§ 1111), the corroboration requirement relates to the sufficiency, not admissibility, of evidence."]; cf. *Ewoldt, supra,*

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[6] Section 1111 provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

7 Cal.4th at pp. 407-408 [trial court did not err in admitting uncorroborated testimony of complaining witness about defendant's other crimes].) Indeed, in his reply brief, defendant disavows any argument that corroboration under section 1111 is a prerequisite to the admissibility of other crimes evidence.[7]

Defendant thus falls back on arguing that the testimony of Giddings and Robles about the Meekland shooting, although it did not need to be corroborated under section 1111, should not have been admitted because it was not reliable or credible. But questions about the credibility of a witness do not establish that the witness's testimony about the defendant's other crimes is irrelevant or inadmissible.

The third factor governing the admissibility of other crimes evidence is whether the evidence should be excluded pursuant to an exclusionary rule such as Evidence Code section 352. (See *Steele*, *supra*, 27 Cal.4th at p. 1243.) Evidence of other gang-related crimes, although it may have an inflammatory impact on the jury, is not made inadmissible by Evidence Code section 352 unless its probative value is substantially outweighed by its prejudicial effect. (See Evid. Code, § 352; *People v. Williams*, *supra*, 16 Cal.4th at p. 193.)

The trial court here did not abuse its discretion in declining to exclude evidence of the Meekland shooting under Evidence Code section 352. Although evidence of other crimes always poses some risk of prejudice (*Kipp*, *supra*, 18 Cal.4th at p. 372), the risk of prejudice was not unusually grave here. The Meekland evidence was no more

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[7] Moreover, even when corroboration of an accomplice's testimony is required to support a conviction under section 1111, that corroboration need not extend to every aspect of the accomplice's testimony or every element of the charged crimes. (*People v. Szeto* (1981) 29 Cal.3d 20, 27.) So even if Giddings and Robles were accomplices as to the crimes charged against defendant in connection with the Mission shooting, the corroboration that would be required to support convictions of those charges would not need to include corroboration of the portions of their testimony that specifically related to the Meekland shooting. Defendant appears to concede this point in his reply brief as well.

inflammatory than the evidence about the charged crimes, so it was unlikely that the Meekland evidence inflamed the jury's passions or led the jury to convict defendant based on that evidence. (See *Ewoldt, supra*, 7 Cal.4th at p. 405; *Kipp, supra*, 18 Cal.4th at p. 372.) The testimony about the Meekland shooting did not consume very much time or dominate the trial testimony. It was confined to a short series of questions to Giddings and Robles. The trial court instructed the jury on the limited purposes for which it could consider the evidence of the Meekland shooting, which reduced the risk of prejudice. (See *Kipp, supra*, 18 Cal.4th at p. 372.)

The trial court noted that evidence of the Meekland shooting would not be unfairly prejudicial because the jury would likely believe or disbelieve the testimony of Giddings and Robles about both the Mission and Meekland shootings. If the jury disbelieved the testimony about both shootings, then the Meekland evidence would not harm defendant. Conversely, if the jury believed the testimony that defendant committed both shootings, then the Meekland evidence would be probative of defendant's state of mind in committing the Mission shootings. Defendant takes issue with the trial court's conclusion, contending that there was evidence casting doubt on the credibility of Giddings's and Robles's testimony about the Mission shooting, but that the jury might have believed their testimony about the Meekland shooting and convicted defendant on the basis of that testimony. But the trial court's conclusion that the jurors were likely to make an assessment of the witnesses' credibility and apply that conclusion to their testimony about both shootings was reasonable and was not an abuse of discretion. (See *Ewoldt, supra*, 7 Cal.4th at p. 405.)

Defendant next argues that evidence of the Meekland shooting was cumulative of other evidence establishing that the Mission shooting was premeditated and gang-related, such as the testimony of the three codefendants and the gang expert. However, the testimony of these witnesses did not prove these facts so conclusively that the trial court was required to exclude the Meekland evidence as merely cumulative. (See *Kipp, supra*,

18 Cal.4th at p. 372.) Instead, the Meekland evidence illustrated the animosity between Nortenos and Surenos and helped to explain defendant's actions in connection with the Mission shooting.

Finally, defendant contends that admission of the Meekland evidence violated his right to due process under the United States Constitution, citing *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, and *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384. In those cases, the United States Court of Appeals for the Ninth Circuit held that admission of other bad acts evidence can violate due process " 'if there are *no* permissible inferences the jury may draw from the evidence.' " (*Id.* at p. 1384, quoting *Jammal v. Van de Kamp, supra*, 926 F.2d at p. 920.) We need not address here to what extent, if any, evidence relevant *solely* to a defendant's character might violate due process, because, as explained above, evidence of the Meekland shooting supported permissible inferences about defendant's intent, motive, and premeditation in connection with the Mission shooting. (See *Steele, supra*, 27 Cal.4th at p. 1246.)

B. Jury Instructions on Accomplice Testimony

1. Background

Defendant requested that the trial court instruct the jury (pursuant to CALCRIM No. 335) that Giddings, Robles, and Anwar were as a matter of law accomplices whose testimony required corroboration. The trial court declined this request, ruling that the accomplice status of the three witnesses was a disputed factual issue to be resolved by the jury. The court ruled that it would instruct the jury on this issue using CALCRIM No. 334, which explains in substance that a witness is an accomplice to a crime if he personally commits the crime or aids and abets its commission, i.e., aids in the commission of the crime with knowledge of "the criminal purpose of the person who committed the crime."

Defendant argued that, if the trial court submitted the accomplice question to the jury, it should supplement CALCRIM No. 334 with an instruction explaining the "natural

and probable consequences" doctrine of aiding and abetting liability. Defendant submitted a proposed instruction (based on CALCRIM No. 402) stating that the three codefendants had pled guilty or no contest to assault with a semiautomatic firearm and that, if the crimes charged against defendant were natural and probable consequences of that assault, then the three witnesses were accomplices to the charged crimes. In addition to submitting this specific instruction, defendant argued generally that "some natural and probable consequences doctrine instruction" should be given to the jury as part of the court's instructions on accomplice testimony. The trial court declined defendant's request and stated that neither CALCRIM No. 402 nor defendant's modified version of it was necessary.

2. Analysis

On appeal, defendant contends that the trial court erred by refusing to instruct the jury that Giddings, Robles, and Anwar were accomplices as a matter of law. Because the parties' briefing on that issue raised the applicability of the natural and probable consequences doctrine, we requested supplemental briefing on the question of whether the trial court was obligated to instruct the jury on that doctrine as part of its instructions on accomplice testimony. We also asked the parties to address whether the guilty and no contest pleas entered by the codefendants were relevant to the accomplice issue. We hold that the trial court correctly declined to instruct that the witnesses were accomplices as a matter of law. We hold that the trial court erred by failing to instruct the jury on the natural and probable consequences doctrine but that the error was harmless.

a. The Accomplice as a Matter of Law Instruction

Section 1111 provides that a defendant cannot be convicted of a crime on the basis of an accomplice's testimony unless that testimony is corroborated by other evidence connecting the defendant with the commission of the charged offense. (§ 1111.) An accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant on trial . . . ." (*Ibid.*) This definition encompasses all persons who

are "principals" to the charged crime, including perpetrators and aiders and abettors, but does not include persons who are merely accessories. (*People v. Fauber* (1992) 2 Cal.4th 792, 833-834 (*Fauber*); *People v. Stankewitz* (1990) 51 Cal.3d 72, 90 (*Stankewitz*).) Whether a witness is an accomplice is a question of fact for the jury "unless there is no dispute as to either the facts or the inferences to be drawn therefrom." (*People v. Garrison* (1989) 47 Cal.3d 746, 772 (*Garrison*); accord *People v. Rodriguez* (1986) 42 Cal.3d 730, 759.) The defendant has the burden to prove by a preponderance of the evidence that a witness is an accomplice. (*Fauber, supra,* 2 Cal.4th at p. 834; *People v. Tewksbury* (1976) 15 Cal.3d 953, 960 (*Tewksbury*).)

The trial court properly declined to instruct the jury as a matter of law that Giddings, Robles, and Anwar were accomplices. There were factual disputes as to whether they aided and abetted the "identical" offenses charged against defendant, i.e., the murder of Sanchez, shooting at an occupied motor vehicle, and the attempted murder of Osvaldo Ramirez. (See § 1111.) In general, a person is liable as an aider and abettor if he or she (1) has knowledge of the unlawful purpose of the perpetrator, (2) intends to assist the perpetrator in the commission of the crime, and (3) does assist in the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*); *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) In addition, under the "natural and probable consequences" doctrine, a person who aids and abets a crime (the target crime) is also liable for any other crime (the nontarget crime) that was a natural and probable consequence of the target crime. (*Prettyman, supra,* 14 Cal.4th at pp. 260-262.) Here, the evidence did not establish as a matter of law that the three witnesses aided and abetted the charged crimes, either directly or under the natural and probable consequences doctrine.[8]

[8] Defendant notes that perpetrators, as well as aiders and abettors, are accomplices within the meaning of section 1111. However, there was, of course, no basis for

First, as to direct aiding and abetting of the charged crimes, the evidence did not establish as a matter of law that the witnesses had the requisite " ' "guilty knowledge and intent" ' " (see *Fauber, supra*, 2 Cal.4th at p. 834, quoting *Tewksbury, supra,* 15 Cal.3d at p. 960, quoting *People v. Duncan* (1960) 53 Cal.2d 803, 816), i.e., that they knew of defendant's purpose to commit the charged crimes or intended to assist him in the commission of those crimes. (See *Prettyman, supra,* 14 Cal.4th at p. 259.) To the contrary, the testimony of the witnesses supports a conclusion that they did not know of defendant's purpose. Giddings, the driver of the van, was frightened and angry and yelled at defendant. Anwar, who was outside the van next to Sanchez's car, was startled by the gunshots, moved back and put his hands up to his face. Robles ducked down onto the floor of the van. In addition, both Giddings and Anwar testified that, prior to arriving at Mission and Industrial, they were not aware that defendant had a gun.[9]

In *Garrison*, on which the trial court relied, the key prosecution witness was present during the defendant's commission of burglary, robbery, and murder, but denied harboring the intent to facilitate the crimes. (*People v. Garrison, supra,* 47 Cal.3d at pp. 761, 772.) The Supreme Court held that the trial court "could not have instructed that [the witness] was an accomplice as a matter of law without offering to the jury the court's belief that the witness had given false testimony." (*Id.* at p. 772.) Similarly, here, if the trial court had instructed the jury that the witnesses were accomplices as a matter of law, it would have been tantamount to instructing the jury that the witnesses' testimony about the incident and their reactions to it was false.

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instructing the jury as a matter of law that any of the three witnesses was the perpetrator, as all three of them testified that defendant committed the shooting.

[9] Robles testified that he had seen a gun in defendant's pocket earlier in the day, and that he was not "surprised" by defendant's actions in light of the shooting on Meekland a few days earlier. However, Robles's lack of surprise does not dictate a conclusion that he knew of defendant's purpose to commit the charged crimes or intended to assist in their commission.

Other evidence, although relevant to the jury's determination of the accomplice question, did not establish *as a matter of law* that Giddings, Robles, and Anwar aided and abetted the charged crimes. Evidence that the witnesses were present at the scene of the shooting and failed to prevent it does not establish aiding and abetting liability. (*Stankewitz, supra,* 51 Cal.3d at p. 90.) Evidence that the witnesses assisted in defendant's efforts to escape would only support their liability as accessories, rather than principals, and would not establish their accomplice status. (*People v. Hoover* (1974) 12 Cal.3d 875, 879.) The fact that the witnesses were originally prosecuted for one of the same offenses as defendant (shooting at an occupied motor vehicle) also does not establish that they were accomplices. (*Garrison, supra,* 47 Cal.3d at p. 772; *Tewksbury, supra,* 15 Cal.3d at pp. 962-963.) Finally, the witnesses' guilty and no contest pleas to aiding and abetting an assault with a semiautomatic firearm, although relevant, do not establish as a matter of law their liability for the crimes with which defendant was charged. (*People v. Chavez* (1985) 39 Cal.3d 823, 830 [witness's guilty plea to being an accessory in connection with murder and robbery charged against defendant was relevant to accomplice issue but did not establish accomplice status as a matter of law]; *People v. Martinez* (1982) 132 Cal.App.3d 119, 130 [witness pled guilty to one count of robbery after being arrested and charged with same robberies for which defendant was tried; plea did not, in and of itself, establish his status as an accomplice].)

Second, defendant contends that the witnesses were accomplices as a matter of law under the natural and probable consequences doctrine. Defendant argues that the witnesses aided and abetted a target crime (either assault with a semiautomatic firearm, as reflected in their pleas, or Anwar's unarmed assault on Sanchez), and that the charged crimes were the natural and probable consequences of the target crime(s).

Although the natural and probable consequences doctrine provides an alternative avenue for defendant to seek to prove that the three witnesses were accomplices, it does not convert the accomplice issue from a question of fact to a question of law. Whether a

particular criminal act (a nontarget crime) was a natural and probable consequence of another criminal act (the target crime) is a factual question to be resolved by the jury. (See *People v. Rodriguez, supra,* 42 Cal.3d at p. 760, citing *People v. Durham* (1969) 70 Cal.2d 171, 181; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) The issue for the jury is "whether, under all of the circumstances presented, a reasonable person in the [alleged accomplice's] position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the [alleged accomplice]." (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 531.) Accordingly, even if it were conclusively established that one or more of the witnesses aided and abetted a target crime, the jury, not the trial court, would need to determine whether the crimes charged against defendant were natural and probable consequences of the alleged target offenses.

Defendant argues that, under the natural and probable consequences doctrine, Giddings, Robles, and Anwar were guilty of murder and the other charged crimes because they knew that any gang-related confrontation could escalate into violence, especially in light of the Meekland shooting a few days earlier. Defendant notes that, in *People v. Gonzales* (2001) 87 Cal.App.4th 1, and *People v. Montes* (1999) 74 Cal.App.4th 1050, the courts held that, when one of the participants in a gang-related confrontation used a gun to commit murder or attempted murder, his companions could be liable for those crimes under the natural and probable consequences doctrine even if they were not aware that their codefendant intended to use a gun. (*People v. Gonzales, supra,* 87 Cal.App.4th at pp. 9-10; *People v. Montes, supra,* 74 Cal.App.4th at pp. 1054-1056.) However, in those cases, the appellate courts held only that the gang-related nature of the assaults provided a basis for *the jury* to conclude that the defendants were liable under the natural and probable consequences doctrine. (*People v. Gonzales, supra,* 87 Cal.App.4th at pp. 9-10 [there was sufficient evidence from which jury "could" conclude that nontarget crime was reasonably foreseeable]; *People v. Montes, supra,* 74

Cal.App.4th at pp. 1054-1056 [trial court properly instructed jury it could find defendants guilty under natural and probable consequences doctrine].) Neither case purported to alter the rule that the jury, not the trial court, must determine whether one criminal act is a natural and probable consequence of another. (See *People v. Rodriguez, supra,* 42 Cal.3d at p. 760; *People v. Nguyen, supra,* 21 Cal.App.4th at p. 531.) We next address whether the trial court provided the jury with adequate instructions to make that determination.

b. Instruction on the Natural and Probable Consequences Doctrine

In general, if there is sufficient evidence that a witness is an accomplice, the trial court has a sua sponte obligation to instruct the jury on "the principles governing the law of accomplices[,]" including the definition of an accomplice and the rule that accomplice testimony requires corroboration. (*People v. Frye* (1998) 18 Cal.4th 894, 965-966; *People v. Gordon* (1973) 10 Cal.3d 460, 469-470, disapproved on another point in *People v. Ward* (2005) 36 Cal.4th 186, 212.) As the Attorney General notes, if the trial court gives standard, correct instructions on accomplice liability, and no party objects or requests additional instructions, the court does not have a sua sponte duty to give additional instructions that clarify or add to the standard instructions. (E.g., *People v. Guiuan* (1998) 18 Cal.4th 558, 569-570; *People v. Lawley* (2002) 27 Cal.4th 102, 160-161.)

As to the natural and probable consequences doctrine, the Supreme Court has held that, when the prosecution relies on that doctrine in proving a defendant's guilt, the court has a sua sponte duty to instruct on the doctrine and the elements of the target offense or offenses. (*Prettyman, supra,* 14 Cal.4th at pp. 268-269.) However, this duty only arises when, and only to the extent, there is sufficient evidence to support these instructions.

(*Ibid.*)[10] Thus, when a theory of a defendant's guilt is presented to the jury, the court must fully instruct on that theory to the extent the evidence would support the theory.

Here, the prosecution did not rely upon the natural and probable consequences doctrine to prove defendant's guilt. Indeed, the prosecution's theory was that defendant was the actual perpetrator, not an aider and abettor. Thus, the rule of *Prettyman* is not directly applicable. However, the prosecution did rely upon the testimony of potential accomplices to prove defendant's guilt. As noted already, when such is the case, the court is required to instruct the jury on the definition of an accomplice and on the rule that an accomplice's testimony must be corroborated. (*People v. Frye, supra,* 18 Cal.4th at pp. 965-966; *People v. Gordon, supra,* 10 Cal.3d at pp. 469-470.) Here, the court explained the corroboration requirement and instructed the jury that it was to determine whether the relevant witnesses were or were not accomplices. However, the court did not explain that the witnesses would be accomplices if they aided and abetted the committed crime *or* if they aided and abetted a target crime of which the committed crime was a natural and probable consequence. Thus, the full extent of the witnesses' potential accomplice liability was not explained to the jury.

The court in *People v. Gonzalez* (2002) 99 Cal.App.4th 475 (*Gonzalez*), considered a similar situation. In that case, there was evidence that a witness had aided and abetted the defendant in the assault upon and ultimate death of a rival gang member. (*Gonzalez, supra,* 99 Cal.App.4th at pp. 481-483.) That situation, like the one before us, presents the possibility that the jury could believe the witness intended an assault but not necessarily a murder. If, under the circumstances, the murder was a natural and probable

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[10] In *Prettyman*, the prosecution did not rely upon the natural and probable consequences doctrine; however, the trial court on its own initiative instructed on that theory. (*Prettyman, supra,* 14 Cal.4th at pp. 269-270.) Having done so, the court was also obliged to identify and instruct the jury on the relevant target offenses. (*Id.* at p. 270.)

consequence of the assault, the witness would nonetheless be an accomplice whose testimony would require corroboration. (See *Prettyman, supra,* 14 Cal.4th at pp. 260-262.) The jury in *Gonzalez* was instructed on the requirement of corroboration and on the basic rule of accomplice liability. (*Gonzalez, supra,* 99 Cal.App.4th at pp. 481-482.) However, no party requested instructions on the natural and probable consequences doctrine, and the trial court gave no such instructions. (*Id.* at pp. 482-483.) Relying on *Prettyman*, the majority in *Gonzalez* found that the trial court had no sua sponte duty to instruct on the natural and probable consequences doctrine. (*Id.* at pp. 484-485.) The *Gonzalez* majority noted that the sua sponte duty set forth in *Prettyman* only applied when the prosecution was relying on the natural and probable consequences doctrine. (*Ibid.*) However, in our view, there is a difference between a situation in which the prosecution is proving a defendant's guilt as an accomplice and one in which the prosecution is offering an accomplice as a witness to prove a defendant's guilt. In the latter situation, the prosecution cannot ever be said to rely on a particular theory of accomplice liability. Instead, the defendant is entitled to have the jury instructed on all potential theories of accomplice liability because under any one of them the witness would require corroboration. What is essential is that the prosecution is relying upon the testimony of the potential accomplice to prove the defendant guilty. To that extent, we agree with the concurring opinion in *Gonzalez*: The trial court is required, in fulfilling its sua sponte duty to instruct on the law of accomplices and the requirement that accomplice testimony be corroborated, to instruct on both theories of accomplice liability if the evidence would support a finding under both. (See *id.* at pp. 486-487 (conc. opn. of Mosk, J.).)

Here, whether there is a sua sponte duty to instruct is not dispositive, because defendant's trial counsel *did* ask that the trial court instruct the jury on the natural and probable consequences doctrine, and the trial court declined to do so. On the same basis,

we reject the Attorney General's contention that the trial court need not elaborate on the general principles of accomplice liability absent a request. Here, there was a request.

When a defendant requests an instruction that is legally correct and supported by the evidence, the trial court generally must give an instruction that covers the point requested by the defendant (see §§ 1093, subd. (f), 1127; *People v. Marshall* (1997) 15 Cal.4th 1, 39), although the trial court may modify or replace a proposed instruction if the modifications are themselves correct and pertinent to the issues. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.) Here, there was sufficient evidence to submit to the jury the question of whether the witnesses were accomplices under the natural and probable consequences doctrine, and the Attorney General does not contend otherwise. (See *Prettyman, supra,* 14 Cal.4th at p. 269.) According to their own testimony, the three witnesses were present with defendant at the scene of the shooting and left with him in Giddings's van. Giddings drove to and from the scene of the shooting, and Anwar confronted and tried to punch Sanchez before the shooting started. All three witnesses were originally charged with the crime of shooting at an occupied motor vehicle (one of the charges on which defendant was tried), and they pled guilty or no contest to aiding and abetting an assault with a semiautomatic firearm. Giddings and Robles had been with defendant a few days earlier on Meekland when he shot at a perceived Sureno, which would have been relevant to the jury's determination of whether defendant's actions were foreseeable. Moreover, Michael Roemer, the prosecutor who decided which charges to bring and negotiated the plea agreements with the three witnesses, testified that he believed he could have charged them with murder, either on an aiding and abetting theory or on a conspiracy theory. The record thus contained substantial evidence that the witnesses aided and abetted a target offense, and the jury could reasonably have found that the crimes charged against defendant were natural and probable consequences of the target offense. (See *Prettyman, supra,* 14 Cal.4th at p. 269 [evidentiary showing justifying instruction on natural and probable consequences doctrine].)

Thus, we find the court's failure to instruct on the natural and probable consequences doctrine and the relevant target crimes was error.[11] The question remains whether that error was harmful under the appropriate standard of review.

A failure to instruct on accomplice testimony is harmless if there is sufficient corroborating evidence in the record. (*People v. Frye*, *supra*, 18 Cal.4th at p. 966; *People v. Miranda* (1987) 44 Cal.3d 57, 100, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) The requisite corroboration must connect the defendant with the commission of the offense, rather than simply showing that the offense occurred. (§ 1111.) However, the corroborating evidence need not corroborate every fact to which the accomplice testified or establish every element of the crime charged, but is sufficient if it "tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*Fauber, supra,* 2 Cal.4th at pp. 834-835; *Garrison, supra*, 47 Cal.3d at p. 772.) The corroborating evidence " 'may be slight and entitled to little consideration when standing alone' [citation]" (*Tewksbury, supra*, 15 Cal.3d at p. 969), and may consist of circumstantial evidence. (*Garrison, supra*, 47 Cal.3d at p. 773.) Corroboration must come from a source other than another accomplice. (*Tewksbury, supra*, 15 Cal.3d at p. 958.)

Here, there is sufficient corroborating evidence connecting defendant with commission of the charged crimes. Manuel Robles's sister, Anna Robles Ramirez, testified that at around 2:30 p.m. on September 16, 2003 (about one-half hour before the shooting), defendant was seated in the front passenger seat of Giddings's van as Giddings

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[11] In concluding that the court was required to instruct on the natural and probable consequences doctrine, we do not hold that the court was required to instruct the jury using the precise wording of defendant's proposed instruction on that issue, and we do not address whether that particular instruction was appropriate in all respects. As noted above, a trial court may make appropriate modifications to a proposed instruction, or replace it with a different instruction that correctly covers the issues. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 277.)

drove the van away from Anna's mother's home. Several witnesses, including Stephanie Koller, Kyle Koller, and Ranil Bhukhan, confirmed that Giddings's van was at the scene of the shooting, which Stephanie Koller testified occurred shortly after 3 p.m. Kyle Koller testified that the shots were fired by a man seated in the front passenger seat of the van. This evidence connects defendant to the shooting and corroborates the testimony of the codefendants that defendant was in the van, sat in the front passenger seat, and fired the shots.

Other testimony provides additional corroboration of defendant's involvement in the crimes. Lieutenant Perry testified that, when the police stopped the van later in the afternoon, defendant was in the van (although he was no longer seated in the front passenger seat). The parties stipulated at trial that Osvaldo Ramirez had testified at the preliminary hearing that defendant was one of the men he saw in the van.[12] Finally, when police searched defendant's apartment the day after the shooting, they found an empty box of Winchester brand 9-millimeter Luger ammunition. The shell casings recovered at the scene of the shooting were 9-millimeter Luger casings, some of which were Winchester brand casings.

Because the record contains sufficient evidence corroborating the testimony of the codefendants and connecting defendant to the charged crimes, the trial court's error in failing to instruct the jury on the natural and probable consequences doctrine as part of its instructions on accomplice testimony was harmless.

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[12] The parties stipulated that Ramirez had testified that Robles was seated in the front passenger seat, Giddings was the driver, and defendant was in the back of the van and got out and threw a punch at Sanchez. The parties further stipulated that Ramirez had testified that he might have mixed up the locations of the men he saw in the van.

C. Expert Testimony*

1. Background

a. Inspector Lage's Testimony

Hayward Police Inspector John Lage testified as an expert on criminal street gangs, specifically the Hispanic Norteno and Sureno gangs active in southern Alameda County. The South Side Hayward gang is a Norteno gang and includes several component gangs, including DGF. South Side Hayward and DGF, like other Norteno gangs, claim the color red. Lage testified that it was his opinion that defendant was an active member of the South Side Hayward/DGF gang on September 16, 2003. Lage based this opinion on the facts of this case and other sources, including defendant's self-admissions and criminal record and information Lage received from other police officers, school officials, and gang members. Lage also opined that Giddings, Robles, and Anwar were active gang members on September 16, 2003, and that defendant had been associated with Giddings and Robles prior to September 16, 2003.

Inspector Lage testified that members of Norteno gangs such as South Side Hayward and DGF view Sureno gang members as enemies and use the derogatory term "Scrap" to refer to Sureno gang members. Norteno gang members will look for and attack people they believe to be Sureno gang members. Gang members frequently try to help their fellow gang members avoid prosecution by destroying or concealing evidence, such as weapons. If a gang member is arrested for a serious crime, other gang members will sometimes break into the arrested gang member's residence to destroy or conceal evidence. Lage testified that the two men Officer Jenkins had seen watching defendant's arrest were active South Side Hayward/DGF gang members on September 16, 2003.

In response to hypothetical questions based on the facts of the attack on Sanchez and Ramirez, Lage opined that the hypothetical crime (1) was committed for the benefit

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* See footnote, *ante,* page 1.

of, at the direction of, or in association with members of the South Side Hayward/DGF gang and with the specific intent to promote, further, or assist in criminal conduct by members of the gang, and (2) was carried out to further the activities of the gang.

b. Procedural Background

Prior to trial, defendant moved in limine to exclude or limit Inspector Lage's testimony, arguing that gang culture and habits are not the proper subject of expert testimony and that the proffered testimony would include improper character or propensity evidence, would be unduly prejudicial, and would violate defendant's due process rights. The trial court denied defendant's global motion to exclude Lage's testimony. The trial court ruled that Inspector Lage could not testify that defendant had a particular mental state when he committed the crime, but that the prosecutor could ask Lage hypothetical questions based on the facts of the case that addressed the purpose for which the crime was committed.

During trial, defendant renewed his global objection to Inspector Lage's testimony, which the trial court overruled. Defendant also raised specific objections to particular questions and answers during Inspector Lage's testimony.

2. Analysis

" 'As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]' " (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506 (*Valdez*), quoting *People v. Page* (1991) 2 Cal.App.4th 161, 187.)

When a gang enhancement is alleged, expert testimony about the culture, habits, and psychology of criminal street gangs is generally permissible because these subjects are " 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' " (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*), quoting Evid. Code, § 801, subd. (a).; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512 (*Garcia*); *Valdez, supra,* 58 Cal.App.4th at p. 506.) For example, an expert properly may

testify about whether an individual defendant was a member of a gang, the "motivation for a particular crime, generally retaliation or intimidation," and "whether and how a crime was committed to benefit or promote a gang." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657 (*Killebrew*); *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; *Garcia*, *supra*, 153 Cal.App.4th at p. 1512.)

On appeal, defendant does not challenge the trial court's decision to permit Inspector Lage to testify as an expert on the culture and habits of Norteno and Sureno gangs. Defendant contends, however, that the trial court should have limited certain aspects of Inspector Lage's testimony. We disagree with defendant's arguments and hold that the trial court did not abuse its discretion.

a. Testimony About the "Ultimate Issues" in the Case

First, defendant argues generally that in some circumstances an expert witness cannot give an opinion about the ultimate issue in a case where that opinion will not assist the trier of fact. However, defendant does not state whether he is challenging the admission of any of Inspector Lage's testimony on this ground, nor does he cite any specific testimony that he contends constituted improper opinion on the "ultimate issues" in this case. If defendant is seeking to challenge the admission of testimony on this ground, his failure to state that argument and to cite the testimony in question waives the issue. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [arguments not supported by citations to the record are waived].)

In any event, if we assume that defendant is seeking to challenge Inspector Lage's responses to hypothetical questions about the gang-related motive for the crimes (which was the ultimate issue for the jury to decide in connection with the gang enhancement and special circumstance allegations), there was no error in admission of that testimony.

Expert opinion testimony about criminal street gangs that is otherwise admissible is not made inadmissible because it encompasses the ultimate issues in the case. (Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 (*Olguin*), overruled on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965 (*Gamez*), overruled on other grounds in *Gardeley, supra,* 14 Cal.4th at p. 624, fn. 10.) Specifically, as noted above, courts have frequently permitted expert testimony about whether there was a gang-related motive for a particular crime. (*Killebrew, supra,* 103 Cal.App.4th at p. 657; *People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1550; *Garcia, supra,* 153 Cal.App.4th at p. 1512; *Valdez, supra,* 58 Cal.App.4th at pp. 507-509.)

The court in *Killebrew* stated one limitation in this area, holding that an expert may not testify that an individual had specific knowledge or possessed a specific intent. (*Killebrew, supra,* 103 Cal.App.4th at p. 658.) However, in the subsequent case of *People v. Gonzalez* (2006) 38 Cal.4th 932, the Supreme Court stated that *Killebrew* only prohibits an expert from " 'testifying to his or her opinion of the knowledge or intent of a defendant on trial.' " (*People v. Gonzalez, supra,* 38 Cal.4th at p. 946, quoting *People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1551.) The Supreme Court in *People v. Gonzalez* stated that, assuming, without deciding, that *Killebrew* was correct on this point, *Killebrew* does not prohibit the use of hypothetical questions about hypothetical persons. (*People v. Gonzalez, supra,* 38 Cal.4th at pp. 946-947 & fn. 3; accord *Garcia, supra,* 153 Cal.App.4th at p. 1513.)

As noted above, Inspector Lage testified, in response to hypothetical questions based on the facts of this case, that the hypothetical crime in question was committed for the benefit of the South Side Hayward/DGF gang. The trial court did not abuse its discretion in admitting this testimony. (See *Garcia, supra,* 153 Cal.App.4th at pp. 1512-1514.)

b. Hearsay Issues

Defendant contends the trial court erred by permitting Inspector Lage to testify about certain out-of-court statements and other matters, which defendant characterizes as inadmissible hearsay, that contributed to Lage's expert opinions.

Defendant identifies five portions of Inspector Lage's testimony that he claims were improperly admitted, four of which relate to information that Inspector Lage described when testifying about the bases for his opinion that defendant was an active DGF gang member on September 16, 2003. Inspector Lage testified that his opinion on this issue was based, among many other things, on the following: (1) an Officer Stanley told Lage that in 2000 defendant was with a known DGF gang member at a liquor store frequented by gang members and admitted to Stanley that he hung out with the gang member; (2) an Officer Snell told Lage that on May 1, 2003 he stopped defendant and Anwar in an area frequented by gang members and concluded that both defendant and Anwar were gang-affiliated; (3) Margaret McCullum, a school administrator at Tennyson High School, told Lage that defendant was affiliated with the South Side Hayward gang at the school; (4) in January 2006, defendant was involved in a gang-related fight at Santa Rita jail, which Lage learned about through an investigation that included speaking to witnesses and participants and reading reports prepared by sheriff's deputies. The fifth portion of testimony that defendant challenges as improper hearsay relates to Inspector Lage's testimony that when a gang member is arrested for a serious crime, fellow gang members frequently seek to help the arrested gang member avoid prosecution by destroying or concealing evidence. Inspector Lage testified that this opinion was based on his own investigations of gang-related crimes, as well as the statements of gang members and other police officers.

An expert witness may offer opinion testimony based on material that is not otherwise admissible, including hearsay, as long as the material is of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (Evid.

Code, § 801, subd. (b); *Gardeley, supra,* 14 Cal.4th at pp. 617-618.) On direct examination, an expert may describe the otherwise inadmissible material that forms the basis of the opinion. (Evid. Code, § 802; *Gardeley, supra,* 14 Cal.4th at pp. 618-619; *Valdez, supra,* 58 Cal.App.4th at p. 510.) The expert's recitation of the sources relied on to form the opinion does not, however, "transform inadmissible matter into 'independent proof' of any fact." (*Gardeley, supra,* 14 Cal.4th at pp. 618-619.)

"Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*People v. Montiel* (1993) 5 Cal.4th 877, 919; *Valdez, supra,* 58 Cal.App.4th at p. 510.)

Ordinarily, the trial court can protect the defendant's interest by instructing the jury that the out-of-court statements on which the expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the statements. (*People v. Coleman* (1985) 38 Cal.3d 69, 92; *Valdez, supra,* 58 Cal.App.4th at pp. 510-511.) Here, when Inspector Lage recounted Officer Stanley's statements about his encounter with defendant, defense counsel asked the trial court to instruct the jury that Officer Stanley's statements were offered not for their truth but to show the bases for the expert's opinion. The trial court declined to give a limiting instruction, stating that it believed Officer Stanley's statements were offered for their truth because if the statements were not reliable, they could not be the basis for the expert's opinion.[13] However, at the end of the trial, the court instructed the jury categorically that all statements recounted by Inspector Lage as bases for his opinions could be considered only to evaluate Lage's opinions and

[13] In connection with the other testimony challenged by defendant, defense counsel objected but did not repeat the request for a limiting instruction.

could not be considered for the truth of the information in the underlying statements.[14] We conclude that this instruction at the end of the trial was sufficient to guide the jurors as to the proper uses of the evidence. (See *People v. Dennis* (1998) 17 Cal.4th 468, 533-534 [trial court has discretion as to timing of limiting instructions and may give them at end of case rather than when evidence in question is introduced]; *People v. Johnson* (1967) 253 Cal.App.2d 396, 399-400 [same]; see § 1093, subd. (f).) Moreover, we conclude that this instruction, which was given just before the jurors began their deliberations and was included in the set of written instructions given to each juror, was sufficient to alleviate any confusion arising from the trial court's earlier statements about whether Officer Stanley's statements could be considered for their truth.

Because a limiting instruction will not always be sufficient, Evidence Code section 352 authorizes the trial court to exclude from an expert's testimony "any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." (*People v. Montiel, supra,* 5 Cal.4th at p. 919.) The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason. (*Valdez, supra*, 58 Cal.App.4th at pp. 511.) Although defendant cites Evidence Code section 352, he does not articulate an argument as to why Inspector Lage's testimony should be excluded under that statute. In any event, we find no abuse of discretion. The trial court could reasonably have found that Inspector Lage's opinions were relevant to prove the gang enhancement and special circumstance allegations and that the information upon which he based his opinions was

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[14] The trial court instructed the jury as follows: "Inspector John Lage testified that in reaching his conclusions as an expert witness, he considered statements made by other individuals, so you may consider those statement[s] only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statement[s] is true."

highly probative as to his credibility and the weight to be given to his opinions. The trial court could reasonably have concluded that the prejudicial impact of the testimony challenged by defendant did not outweigh its probative value. The portions of Lage's testimony that defendant challenges on hearsay grounds were relatively brief and did not involve detailed discussions of the statements upon which Lage relied in forming his opinions. Moreover, the information Lage received about defendant from other officers, the school administrator, and others was no more inflammatory than defendant's conduct in connection with the Mission shooting. (*Valdez*, *supra*, 58 Cal.App.4th at p. 511.)

In addition to arguing that the challenged testimony was improper hearsay, defendant contends that its admission violated the confrontation clause of the United States Constitution. Defendant did not expressly object on confrontation grounds prior to or at trial, so this argument is waived.[15] (Evid. Code, § 353, subd. (a).) In any event, an expert's description of the material upon which his or her opinions are based, including hearsay statements, does not violate the confrontation clause because it is offered not for the truth of the underlying statements but to enable the jury to assess the bases for the expert's opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208-1210; *Gamez, supra*, 235 Cal.App.3d at pp. 966-969.)

Finally, defendant argues that Inspector Lage should not have relied on the statements or opinions of other law enforcement officers in forming his expert opinions, because the statements by other officers are not sufficiently "objective" to be reliable under Evidence Code section 801, subdivision (b). We disagree. Police officers

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[15] Defendant argues that objecting on confrontation grounds would have been futile after the trial court declined to give a limiting instruction in connection with Inspector Lage's testimony about Officer Stanley's statements. However, defendant does not explain why an express objection on confrontation grounds would have been futile before that.

testifying as experts on street gangs may base their opinions in part on information received from their fellow officers. (*Gamez, supra,* 235 Cal.App.3d at p. 967.) The *Olguin* case, which defendant cites on this point, is not to the contrary. In the portion of *Olguin* cited by defendant, the court discussed a prior decision, *People v. Hernandez* (1977) 70 Cal.App.3d 271, which held that a police officer could not provide an expert opinion about the import of certain gestures made during an alleged drug transaction, because the officer had no more expertise on that issue than the jury. (*Olguin, supra,* 31 Cal.App.4th at p. 1371, citing *People v. Hernandez, supra,* 70 Cal.App.3d at p. 281.) The *Olguin* court distinguished the testimony in *People v. Hernandez* from the expert testimony of police officers about gangs, noting that gang culture and habits are sufficiently beyond common experience to require expert explanation and interpretation. (*Olguin, supra,* 31 Cal.App.4th at p. 1371.) *Olguin* did not state or imply that officers providing expert opinions about gangs may not rely on information received from other officers.

c. Relevance and Prejudice Issues

Inspector Lage testified that it was his opinion, based on the information available to him, that defendant had associated with Giddings and Robles prior to September 16, 2003, and that Giddings, Robles, and Anwar were active gang members on September 16, 2003. Defendant contends that this testimony was irrelevant and prejudicial. At trial, however, defendant did not object to these portions of Inspector Lage's testimony on relevance grounds, so any relevance argument is waived. (Evid. Code, § 353, subd. (a).) In any event, the testimony was relevant. Defendant's association with gang members before and at the time of the shooting was relevant to whether defendant was an active gang member and committed the shooting for the benefit of the gang as alleged in the gang enhancement and special circumstance clauses.

Defendant asserts that Inspector Lage's opinions about defendant's association with alleged gang members were unnecessary because the gang members themselves had

already testified about these facts. But *Inspector Lage's* knowledge of and opinions about defendant's associations with gang members, as distinct from the testimony of other witnesses on that question, were probative of his credibility and the weight to be given to his opinions on the larger issues of defendant's gang membership and the purpose for the shooting.

Finally, any prejudicial impact of Inspector Lage's opinions about defendant's associations with gang members did not substantially outweigh the probative value of this evidence in establishing the critical elements of the gang enhancement and special circumstance allegations. (Evid. Code, § 352.)

d. Vouching

Inspector Lage opined that a gang member who testified against a fellow gang member would have a bad reputation within the gang that would expose him and his family to the risk of retaliation. Defendant contends that this opinion was improper because (1) the possibility that a testifying gang member would risk retaliation was not beyond the common understanding of jurors and did not require expert testimony, and (2) the opinion constituted impermissible "vouching" for the credibility of Giddings, Robles, and Anwar. Defendant did not object at trial that this testimony constituted improper vouching, so he has waived that argument. (Evid. Code, § 353, subd. (a).) In any event, defendant's claim is meritless.

The Supreme Court in *People v. Gonzalez* rejected a similar contention. (*People v. Gonzalez, supra*, 38 Cal.4th at pp. 944-947.) In *People v. Gonzalez*, a murder case, several witnesses identified defendant as the shooter prior to trial but then claimed to be unable to identify the shooter at trial. (*Id*. at pp. 939-940.) A police officer qualified as a gang expert testified that gang members who testify against fellow or rival gang members face intimidation. (*Id*. at p. 945.) The Supreme Court rejected the defendant's challenges to this testimony, holding that "[w]hether members of a street gang would intimidate persons who testify against a member of that or a rival gang is sufficiently beyond

common experience that a court could reasonably believe expert opinion would assist the jury." (*Ibid*.) Moreover, evidence of the possibility of intimidation was relevant to the credibility of the witnesses and was therefore admissible. (*Id*. at p. 946.) Finally, the court rejected the defendant's argument that the expert had improperly opined about whether the witnesses were telling the truth. (*Id*. at p. 947.) The court stated: "[The expert] was not asked, and did not testify about, any particular witness in this case. He merely provided expert testimony regarding gangs in general. It was up to the jury to determine how much to credit this testimony and, if it found it credible, to apply it to the rest of the evidence it heard." (*Ibid.*)

Similarly, here, Inspector Lage did not opine about whether any particular witness was telling the truth or whether any witness was being intimidated. Instead, he testified in general about the possibility that testifying gang members will face intimidation. This was proper expert testimony that the jury could consider in assessing the credibility of the witnesses. (*People v. Gonzalez*, *supra*, 38 Cal.4th at pp. 944-947.)

III. DISPOSITION

The judgment is affirmed.

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REARDON, J. *

We concur:

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JONES, P. J.

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NEEDHAM, J.

* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial Court	Alameda County Superior Court
Trial Judge	Honorable Reginald P. Saunders
For Plaintiff and Appellant	Cynthia A. Thomas, Esq.
For Respondent	Edmund G. Brown, Jr., Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Stan Helfman, Supervising Deputy Attorney General Christopher J. Wei, Deputy Attorney General