Filed 11/30/06 P. v. Sledge CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM L. SLEDGE et al., Defendants and Appellants.	B182288 (Los Angeles County Super. Ct. Nos. PA045508, MA025218)

APPEALS from judgments of the Superior Court of Los Angeles County, Meredith C. Taylor, Judge. Affirmed.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant William L. Sledge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Errick J. Cooks.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Napoleon O. Kimble.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant Eddie L. Quinn, III.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kyle S. Brodie and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants William Lamont Sledge (Sledge), Errick Jamell Cooks (Cooks), Napoleon Oneal Kimble (Kimble), and Eddie Lee Quinn, III (Quinn) appeal from judgments of conviction entered after a jury trial. The defendants were charged with five counts of attempted willful, deliberate, premeditated murder, in violation of Penal Code[1] sections 187, subdivision (a), and 664.

The defendants were found not guilty of attempted murder. However, they were found guilty of the lesser included offense of attempted voluntary manslaughter (§§ 192, subd. (a), 664) in counts 1 through 5. As to counts 1 through 5, regarding Cooks, Kimble, and Sledge, the jury found the personal firearm use (§ 12022.5, subd. (a)) and the armed principal allegations (§ 12022, subd. (a)(1)) to be true. As to counts 1 through 5 regarding Quinn, the jury found the personal firearm use and armed principal allegations to be false.[2]

Defendants Cooks, Kimble, and Sledge were each sentenced to a total of 16 years and 4 months in state prison as follows: On base count 1, the three defendants were sentenced to the midterm of three years, plus the midterm of four years for the section 12022.5, subdivision (a), enhancement, which totaled seven years. On each of counts 2

---

[1] All further statutory references will be to the Penal Code, unless otherwise indicated.

[2] Regarding Quinn, the trial court found him in violation of his probation in case number MA025218, based on the evidence in the instant case.

through 5, the defendants were sentenced to 12 months (one-third the midterm of 36 months), plus 16 months (one-third the midterm of 4 years for the section 12022.5, subdivision (a), enhancement), which totaled a consecutive term of 28 months for each count. The section 12022, subdivision (a)(1), enhancements were stricken in counts 1 through 5.

Defendant Quinn was sentenced on base count 1 to the midterm of three years. On each of counts 2 through 5, he was sentenced to a consecutive term of one year (one-third the midterm of three years). Quinn was sentenced to a total of seven years in state prison. Quinn was also sentenced to a consecutive term of one year and four months for the probation violation in case number MA025218. We affirm the convictions of each defendant.

FACTS

On the evening of September 26, 2003, Joseph Sanchez (Joseph)[3] parked his Chevrolet Tahoe at an angle facing the wrong direction. Joseph, who was on parole for a 1996 conviction of an assault with a firearm, was in the driver's seat of the Tahoe, his nephew Jesus Sanchez (Jesus) was in the front passenger seat, and his friend Jose Quintero (Jose) was in the back passenger seat. The occupants of the Tahoe were talking to Carlos Arellano (Carlos) and Omar Arellano (Omar), who were on the sidewalk. A black Toyota Camry with a moon roof slowly moved toward the Tahoe. Joseph made eye contact with four Black men who were in the car. Joseph then heard gunshots and saw that three of the men in the car—the two passengers in the back seat and the front

[3] For ease of reference, the five victims in the instant case will be referred to by their first names.

seat passenger—had guns and were firing.[4] The car stopped behind the Tahoe and Joseph heard more than 10 shots fired. The car then drove away.

Joseph tried to chase the Toyota but was unable to catch it, so he returned to where the shooting took place. Omar and Carlos had both been shot in the leg. After the defendants were apprehended, Joseph was taken to an in-field show up, where he identified Cooks and Kimble as two of the men in the Toyota.

Gunshot residue tests were conducted on all the defendants, but gunshot residue was found only on Sledge. The Tahoe had a bullet mark on its right front hubcap and a bullet mark above its rear right taillight.

When the police talked to Joseph, he did not mention that he was on parole or that he attempted to chase the Toyota. Joseph told police that he was standing outside the car when the shooting occurred, but actually Joseph was sitting inside the Tahoe.

Los Angeles Police Officer Matthew Plugge (Plugge) testified as a gang expert concerning the Pacoima Piru Bloods (PPB) gang, which was primarily Black. PPB members tended to wear red clothing.[5] Plugge opined that all the defendants were PPB members. At the time of the shooting, there was an ongoing rivalry between PPB and Sanfers, a predominantly Hispanic gang, in the area where the shooting occurred.

---

[4] According to a police officer who arrested defendants shortly after the shooting, Sledge was sitting in the back seat behind the driver, Quinn. Kimble was in the front passenger seat, and Cooks was sitting in the back seat behind him. Joseph testified that Cooks was in the front passenger seat, while Kimble was in the back seat behind the driver. Joseph identified Cooks as one of the shooters. When Omar made identifications from a photo lineup, he identified Sledge as being in the front passenger seat and stated that he was unsure if the front passenger fired a gun. At the preliminary hearing, Omar stated that Quinn was in the back seat behind the driver and Sledge was in the front seat, but he was unsure if Sledge was the driver or the passenger. Carlos testified that there were three shooters, two in the back seat and one on the driver's side, but not the driver.

[5] At the time of their arrest, Sledge was wearing a red, white, and black Falcons football jersey; Quinn was wearing a red plaid shirt, red shoelaces, and a red belt; Kimble was wearing a Philadelphia Sixers jersey with red on the body of the shirt and black sleeves, and red belt; and Cooks was wearing a white shirt.

Defense[6]

On the night of September 26, 2003, Quinn was driving the Toyota Camry and Kimble was in the front passenger seat. Sledge was sitting in the back seat behind Quinn, and Cooks was in the back seat behind Kimble. As they drove down the street, a Tahoe was parked at an angle on the wrong side of the street. They slowed down, not knowing if the Tahoe was coming or going. As they passed the Tahoe, they heard gunshots and thumping sounds. Sledge testified that he was scared; he pulled out a .40 caliber Beretta semiautomatic handgun and opened fire. He was not aiming at anyone and did not know how many times he fired. When the police started following them, he threw the gun out of the car through the open sunroof.

Sledge acknowledged that he was an associate of PPB but testified that he had never fired a gun prior to that night. Sledge also testified that Kimble and Quinn were members of PPB.

CONTENTIONS[7]

The defendants contend that the trial court violated their constitutional rights by finding that Omar was unavailable as a witness and allowing the jury to be read his preliminary hearing testimony.

Defendants Sledge, Cooks and Kimble claim that there was no substantial evidence to support the attempted voluntary manslaughter convictions as to counts 3, 4 and 5, relating to Jesus, Joseph and Jose.

Defendant Quinn asserts that his attempted voluntary manslaughter convictions must be reversed, because the trial court's erroneous instructions, including CALJIC

---

[6] Counsel for all defendants agreed that all defense witnesses were called on behalf of all defendants.

[7] All defendants join in issues raised by co-defendants in the appeal. (Cal. Rules of Court, rule 13; *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5.)

Nos. 8.66.1 and 3.01, allowed the jury to convict him without first finding that he had the specific intent to kill each of the victims.

Defendant Sledge claims that the cumulative effect of several instances of prosecutorial misconduct deprived him of a fair trial. Defendant Sledge also asserts that the trial court violated his due process rights by allowing improper expert testimony.

Defendant Cooks claims that the trial court abused its discretion in denying him a *Marsden*[8] hearing before his sentencing. Defendant Cooks further claims that his right to a jury trial was denied when he was sentenced to consecutive terms based on facts beyond those found to be true by the jury.

DISCUSSION

The Unavailability of Omar Arellano

The defendants contend that the trial court's finding that witness Omar was unavailable, and the subsequent admission of his preliminary hearing testimony, violated their constitutional right to confrontation. We disagree.

Prior to commencement of testimony, the trial court held a hearing to consider evidence and argument concerning the admission of Omar's preliminary hearing testimony. The hearing was held on January 21, 2005 and January 24, 2005. The prosecutor called three witnesses in its effort to have the trial court declare Omar to be unavailable.

The first prosecution witness called was Craig Ratcliff (Ratcliff), an investigator in the district attorney's office. Beginning on January 10, 2005, Ratcliff tried to locate Omar by conducting computer and record checks. He checked with the California DMV and conducted a United States DMV check to determine if Omar had a driver's license in

---

[8] *People v. Marsden* (1970) 2 Cal.3d 118.

another state. He checked for wants or warrants. He also checked Lexis Nexis to determine whether Omar had any addresses identified through the public records system.

Ratcliff had some information that Omar may have had possible connections to Virginia or Washington. There was a social security number listed on a Virginia record, but Ratcliff did not follow up regarding that number. Ratcliff found a California reference to a traffic accident occurring on January 19, 2003, involving a person with the same name as Omar, but there was no California driver's license number or address information. Based on the vehicle's records, Ratcliff learned that the registered address was in Lakeview Terrace, and the vehicle's registered owner had the same last name as Omar. Ratcliff gave this information to Los Angeles Police Officer Pedro Cabunoc (Cabunoc) on January 11, 2005.

Ratcliff prepared a due diligence checklist detailing his efforts to locate Omar. This list was provided to the prosecutor and defense attorneys. Ratcliff did not personally search for or contact Omar's brother, Carlos.

The prosecutor called Cabunoc. Cabunoc was present at the preliminary hearing on March 4, 2004 and considered the victims who testified, including Omar, to be "very cooperative" with the investigation. Prior to leaving Omar and Carlos at their residence, Cabunoc advised both to contact him if they moved from their apartment or moved out of state. Between the time of the preliminary hearing and December 15, 2004, Cabunoc did not make any efforts to contact Omar. On December 15, 2004, Cabunoc went to the residence of Omar and Carlos (the address at the time of the preliminary hearing), knocked on the door, and left his card. On the same day, he learned that Omar and Carlos no longer resided at that address and might have moved to Washington or Oregon. Cabunoc continued to return to that residence in an effort to contact Omar and Carlos' family members, who still lived there.

On January 5, 2005, Cabunoc checked the residence again and contacted Janeth Ruiz (Ruiz), who was the sister-in-law of Omar and Carlos. Ruiz told Cabunoc that she had no contact information for them but informed Cabunoc that Omar was in Washington and Carlos was in Oregon. Ruiz told Cabunoc that she "tried to contact [their] mother

and see if she had any information" and "that she could then relay the information back to [Officer Cabunoc]." Cabunoc left a business card with his information for Ruiz to contact him.

Several days later, Cabunoc went back to the residence and contacted Ruiz. Cabunoc received the telephone number of Carlos and Omar's mother and talked, through an interpreter, to the father of Omar and Carlos. The father advised that Omar was in Mexico and he had no contact number for Omar, but he would have Carlos call.

On January 11, 2005, Cabunoc received a call from Carlos. Carlos told him that he might not be able to afford the cost of transportation to return to California for trial. Cabunoc indicated that he would help with transportation expenses. Carlos told Cabunoc that Omar was in Mexico conducting business and would not be able to return until February. Carlos told Cabunoc that he was having trouble contacting Omar but would attempt to contact Omar.

Cabunoc did not have a social security number for Omar. He did not know of a contact in Virginia regarding Omar. It appeared to Cabunoc that Omar was a Mexican citizen. He did not make any attempts to contact the Mexican Consulate or the American Consulate in Mexico and did not prepare a subpoena for Omar.

The third witness called by the prosecution was Heidi Espinosa (Espinosa), a witness coordinator for the District Attorney's Office. During the week of January 10, 2005, Espinosa was asked to contact Carlos. She contacted him and asked about Omar. Carlos told her that he could not reach Omar. On January 18, 2005, Espinosa learned from Carlos that Omar was in Puerto Vallarta on vacation and would return in February. Carlos had obtained this information from his grandmother, who lived in Mexico. At that time, Carlos indicated that he could not reach his grandmother or Omar. Since January 18, 2005, Espinosa had remained in contact with Carlos, but he had not provided Espinosa with any new information concerning Omar's whereabouts.

Inasmuch as a defendant has the right to confront witnesses against him (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15), prior testimony of a witness may be admitted only under certain conditions. (*People v. Enriquez* (1977) 19 Cal.3d 221,

235.) The witness must be unavailable and must have given the prior testimony at previous judicial proceedings against the same defendant where the witness was subject to cross-examination by the defendant. (*Ibid*.; see Evid. Code, § 1291.)

A witness is unavailable if the witness is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) In criminal cases, "the prosecution 'must make a good faith effort and exercise reasonable diligence [in attempting] to procure the witness's appearance. '" (*People v. Robinson* (1991) 226 Cal.App.3d 1581, 1585, quoting from *People v. Hovey* (1988) 44 Cal.3d 543, 562.) The proponent of the evidence has the burden of proving by a preponderance of the evidence due diligence and thus unavailability. (*People v. Enriquez, supra*, 19 Cal.3d at p. 235; *People v. Turner* (1990) 219 Cal.App.3d 1207, 1213.) The circumstances which should be considered in determining whether due diligence was exercised include when the attempt was made to compel the witness's attendance, the nature of the attempts made, characteristics of the witness and whether there was reason to believe the witness would appear for trial. (See *People v. Louis* (1986) 42 Cal.3d 969, 991-993.)

The record shows that the prosecution made numerous attempts to try to locate Omar. The effort began in mid-December 2004 by Officer Cabunoc. He continued to attempt to contact someone at the address he had for Omar. Cabunoc eventually learned from Carlos that Omar was in Mexico, and Carlos indicated that he was having problems reaching Omar but would try and provide additional information to him.

Beginning on January 10, 2005, Ratcliff started his efforts to locate Omar. In addition, Espinosa maintained contact with Carlos in order to obtain information regarding Omar's whereabouts.

The prosecution cannot be faulted for its loss of contact with Omar and its attempts to locate him as trial approached. As in *People v. Wise* (1994) 25 Cal.App.4th 339, 344, "the witness was a citizen-victim. He was not facing criminal charges and the record does not indicate any reason for the prosecution to believe he would disappear."

When the prosecution learned he no longer was at his former address, it made reasonable attempts to try to locate him. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.)

Once the prosecution learned that Omar was in Mexico, however, it made no serious attempts to locate him and compel his attendance at trial. The mere fact that he was in Mexico did not excuse further efforts to obtain his presence at trial. This failure is sufficient to support a finding of lack of due diligence. (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1443-1444.)

Any error in declaring Omar unavailable as a witness and admitting his preliminary hearing testimony was, however, harmless beyond a reasonable doubt. (*People v. Sandoval*, *supra*, 87 Cal.App.4th at p. 1444.) First, his testimony was largely cumulative to that of the other witnesses. Second, he identified only two of the defendants, Sledge and Quinn, and his testimony as to where they were sitting in the Toyota contradicted that of the other witnesses, rendering his testimony suspect. Inasmuch as all four defendants were convicted, it is clear that Omar's testimony was not the crucial factor in the jury's determination.

The Evidence Supporting the Attempted Voluntary Manslaughter Convictions as to Counts 3, 4 and 5 (Jesus, Joseph and Jose)

The defense argues that there was insufficient evidence to support the convictions for attempted voluntary manslaughter as to the three occupants of the Tahoe. We disagree.

In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. The test to determine sufficiency of evidence is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, the reviewing court must view the evidence in the light most favorable to the prevailing party and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

There was substantial circumstantial evidence of the defendants' intent to kill the three victims inside the Tahoe. The evidence showed that there were three shooters in the Toyota. Joseph testified that the Toyota's front seat passenger and the back seat passenger behind the front seat passenger pointed their guns toward the Tahoe. The Tahoe had a bullet mark on its front right hubcap and another bullet mark above its right rear taillight. That there were three occupants in the Tahoe and only two bullets hit the Tahoe does not require the conclusion that the evidence is insufficient to support the convictions. In *People v. Smith, supra*, 37 Cal.4th at page 748, the court found substantial evidence to support a defendant's two convictions for attempted murder even though the defendant fired a single bullet at a vehicle, narrowly missing both the driver and her baby in the back seat.

Further, Carlos testified that the shooter in the back seat of the Toyota pointed his gun toward the Tahoe. Joseph testified that the occupants of the Toyota made eye contact with the occupants of the Tahoe. These circumstances also support an inference of intent to kill the occupants of the Tahoe.

In addition to the circumstantial evidence of the specific intent to kill the Tahoe victims, there is evidence that the victims in the Tahoe were in the "kill zone" when the three shooters fired at Carlos and Omar, who were standing next to the Tahoe. Given that the Tahoe's occupants were in close proximity to Carlos and Omar when the shooting began, there is sufficient evidence showing that the three shooters in the Toyota intended to kill not only Carlos and Omar, but also the Tahoe's occupants. (*People v. Smith*, *supra*, 37 Cal.4th at pp. 745-746; *People v. Bland* (2002) 28 Cal.4th 313, 329-331.)

The Trial Court's Instructions (CALJIC Nos. 8.66.1 and 3.01)

Quinn, the driver of the Toyota, claims that his attempted voluntary manslaughter convictions must be reversed because the trial court's erroneous instructions, specifically

CALJIC Nos. 8.66.1[9] on intent to kill everyone within a zone of risk and 3.01[10] on aiding and abetting, permitted the jury to convict him without first finding that he harbored the specific intent to kill each of the victims. Counsel for Quinn was aware that CALJIC Nos. 8.66.1 and 3.01 would be given to the jury and failed to object to the instructions.

A defendant has an obligation to object and request clarification if he believes a jury instruction is unclear. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) As a general rule, failure to object to an instruction given waives any objection thereto. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) An exception to the rule of waiver arises, however, if the instruction affected defendant's substantial rights. (§ 1259; *Rivera, supra*, at p. 146.) Defendant's substantial rights are affected if the instruction results in a miscarriage of justice, making it reasonably probable that absent the erroneous instruction defendant would have obtained a more favorable result. (*Rivera, supra*, at p. 146; see Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, any error in giving both CALJIC Nos. 8.66.1 and 3.01 was harmless. First, the parties did not argue about concurrent intent and the "kill zone" when addressing the issue of Quinn's liability as an aider and abettor. Rather, both the prosecutor and counsel

---

[9] CALJIC No. 8.66.1 provides: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a zone of risk is an issue to be decided by you."

[10] CALJIC 3.01 provides: "A person aids and abets the commission of a crime when he: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

for Quinn focused on the issue of whether Quinn had the requisite specific intent to kill the victims. Specifically, they focused on Quinn's acts of driving the Toyota slowly by the victims to argue either that he knew what was going to happen or that he was completely unaware.

Second, there was strong circumstantial evidence that Quinn had the requisite intent to kill the victims. He drove the Toyota, slowing by the victims and positioning the car so that the other defendants could shoot at the victims and easily escape by driving away after the shooting, and allowing his codefendants to shoot at the victims from the Toyota multiple times. In addition, Quinn was dressed in gang attire, driving a car containing fellow PPB gang members, in an area where there was an ongoing rivalry between PPB and Sanfers gangs. It is not reasonably probable that the jury would have found Quinn intended to further his codefendants' unlawful purpose but not that he intended to kill the victims had it been instructed differently. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Rivera*, *supra*, 162 Cal.App.3d at p. 146.)

The Allegations of Prosecutorial Misconduct

Defendant Sledge claims that the cumulative effect of several instances of prosecutorial misconduct deprived him of a fair trial. We disagree.

A. Question to Carlos

Defendant Sledge complains that the prosecutor asked Carlos, "Now when you began to run you were running for your life obviously?" The question and answer "yes" given by Carlos were both stricken. The jury was given instruction CALJIC No. 1.02 indicating that questions by attorneys are not evidence and if any evidence is stricken by the court, it is to be disregarded. A timely admonishment is presumed to have cured any harm caused by any asserted misconduct. (See *People v. Wharton* (1991) 53 Cal.3d 522, 565-566.)

B. Questions to Sledge Regarding Gunshots

Although Sledge challenges the prosecutor's use of the words "supposedly" and "you claim" during cross-examination, he did not object to their use below. This waives any claim of prosecutorial misconduct on appeal. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1056; *People v. Lewis* (1990) 50 Cal.3d 262, 282.) In any event, it is not misconduct to challenge the truthfulness of a defendant's testimony (*People v. Carter* (2003) 30 Cal.4th 1166, 1207-1208; *People v. Smith* (2003) 30 Cal.4th 581, 614), and any possible harm was cured by CALJIC No. 1.02, which instructed the jury not to "assume to be true any insinuation suggested by a question asked a witness" (*People v. Holt* (1997) 15 Cal.4th 619, 662 [presumption jury followed instructions given]; *People v. Delgado* (1993) 5 Cal.4th 312, 331 [same]).

C. Questions to Sledge Regarding the Toyota

Defendant Quinn asserts that the prosecutor committed misconduct in asking a question that may have implied that the defendants were fleeing from the police and alleging that the prosecutor was calling the witness a liar. The objection to the form of the question was sustained as argumentative. The question was not answered by Sledge and the jury was instructed with CALJIC No. 1.02 not to "assume to be true any insinuation suggested by a question asked a witness." Again, this timely admonishment is presumed to have cured any harm caused by any asserted misconduct. (See *People v. Wharton*, *supra*, 53 Cal.3d at pp. 565-566.)

D. Alleged Mischaracterization of Carlos' testimony

Sledge complains that the prosecutor misstated evidence or argued facts not in evidence during questions asked of Carlos. The questions by the prosecutor were her attempt to clarify Carlos' answers during his testimony. As previously stated, the jurors were instructed that an attorney's statements are not evidence. (CALJIC No. 1.02.) The jurors also were instructed that they were "the sole judges of the believability of a witness." (CALJIC No. 2.20.) We presume the jury followed these instructions (*People*

v. Holt, *supra*, 15 Cal.4th at p. 662; *People v. Delgado*, *supra*, 5 Cal.4th at p. 331) and disregarded any mischaracterizations of Carlos's testimony.

E. Closing Argument Comments

Sledge objects to the prosecutor's comments that the defense had the jury focus on only one of the victims, Joseph, without remembering that there were four other victims who did not share the same criminal history as Joseph. Sledge complains that there was a question about the possible prior criminal history of Jesus. According to Sledge, the prosecutor misspoke when she said that there were "four other victims" who didn't have the history of Joseph. We find no prejudice because Jesus did not testify at trial and the issue of his alleged criminal past was not relevant because the jury did not evaluate Jesus' version of events.

F. Prosecutor Arguing Personal Opinion

Sledge objects to the personal opinion comment made by the prosecutor during closing argument when the prosecutor stated: "What do you think they were up to that night? Going to a Skate Club? I don't think so." Assuming this was an improper statement of personal belief (*People v. Sandoval* (1992) 4 Cal.4th 155, 180), Sledge's claim of prosecutorial misconduct based thereon is waived by his failure to object below (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1056; *People v. Lewis*, *supra*, 50 Cal.3d at p. 282). Moreover, any error was harmless, in that it is not reasonably probable that the prosecutor's comment contributed in any way to the verdicts. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

G. Burden of Proof

Sledge objected to comments by the prosecutor during closing argument that "there is nothing that prevented anyone else from requesting, including the defense, to have further analysis done if it was warranted. [¶] And I'm not saying the defense has to put on evidence. That's not what I'm saying. [¶] We do have the burden of proof

beyond a reasonable doubt; but if the defense is going to throw something out there, they need to back it up."

Prosecutorial misconduct does occur if the prosecutor suggests to the jury that the prosecution does not have the burden of proving every element of the crime charged, but that the defendant has the burden of presenting some affirmative evidence demonstrating a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 831-832.) The prosecutor is permitted to comment, however, on the defense's failure to introduce material evidence or call logical witnesses. (*People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Mincey* (1992) 2 Cal.4th 408, 446.) That was all the prosecutor did here, commenting on the defense's failure to have done any further analysis it believed was warranted.

The prosecutor reiterated that the prosecution had the burden of proof beyond a reasonable doubt. In addition, the jury was instructed with CALJIC No. 2.90 [regarding the presumption of innocence, reasonable doubt, and the People's burden of proof] and CALJIC No. 2.61 ["defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him"]. We thus find no misconduct.

The Contentions Concerning Expert Testimony

Defendant Sledge alleges that the trial court allowed improper testimony by gang expert Officer Plugge. We disagree.

During Plugge's testimony, the prosecutor asked him if the events of September 26, 2003 arose from the rivalry between Sanfers and PPB. He opined that they did. She then asked him a hypothetical based on certain facts of this case. Defendants objected to the hypothetical as improper, in that it sought testimony as to defendants' subjective intent relative to the shootings. The trial court overruled the objection, and Plugge opined that the shooting was committed for the benefit of PPB and gave his reasons for his opinion.

"A witness is qualified to testify as an expert if the witness has special knowledge, skill, experience, or education pertaining to the matter on which the testimony is offered.

(Evid. Code, § 720.)" (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.) Expert opinion testimony is admissible if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) In *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371, the court found that expert testimony regarding gangs "is admissible even though it encompasses the ultimate issue in the case."

Defendant's reliance on *People v. Killebrew* (2002) 103 Cal.App.4th 644 is misplaced. In *Killebrew*, defendant was charged with felony conspiracy to possess a handgun. An expert on criminal street gangs testified that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun for their protection. The court found that this was improper expert opinion on an ultimate issue: defendant's subjective intent and knowledge. The evidence should have been excluded because it was the only evidence connecting the defendant to the firearm he was charged with conspiring to possess. The *Killebrew* court concluded that "[s]ince the erroneously admitted testimony provided the only evidence to support the conspiracy theory, reversal of the judgment is required." (*Id*. at p. 659.)

By contrast, in *Gardeley*, the court approved the admission of expert gang testimony. The expert was given the facts of the case and asked, hypothetically, whether the described incident would be "'gang-related activity.'" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619.) The expert opined "that it was a 'classic' example of gang-related activity, explaining that criminal street gangs rely on such violent assaults to frighten the residents of an area where the gang members sell drugs, thereby securing the gang's drug-dealing stronghold." (*Ibid*.) The challenged evidence in the present case was similar in nature and therefore admissible.

Cooks' Marsden Claim

Defendant Cooks claims that the trial court abused its discretion by denying him a *Marsden* hearing before his sentencing. Following argument of counsel, Cooks was

invited to make a statement. He advised the court that he thought that he was wrongfully convicted of the personal use allegation. He also indicated that his attorney had rendered ineffective assistance of counsel; although she did what she could on his behalf, it wasn't good enough. He cited Penal Code section 1181, which allows a new trial or a reduction to a lesser charge where the verdict or finding is contrary to the law or evidence. He then requested a new and a fair trial with a state appointed or more effective counsel. The court then thanked Cooks but stated that he was talking about a motion for a new trial, and that needed to be brought by his attorney. Cooks was then sentenced as previously indicated.

The trial court reasonably interpreted Cooks' comments as a request for a new trial rather than a request to substitute counsel. Although Cooks mentioned ineffective assistance of counsel, the main thrust of his statement was that he was entitled to a new trial, and he specifically cited Penal Code section 1181. The trial court thus was not required to hold a *Marsden* hearing. (*People v. Dickey* (2005) 35 Cal.4th 884, 920.)

Cooks' Claim of Sentencing Error

Cooks claims that under *Blakely v. Washington* (2004) 542 U.S. 296, the imposition of consecutive sentences based on facts that were neither found by the jury nor admitted by him violated his Sixth Amendment right to a jury trial. He concedes correctly that we must reject this claim under *People v. Black* (2005) 35 Cal.4th 1238 (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), but raises it to preserve the issue for federal review.[11]

---

[11] The United States Supreme Court has granted certiorari in a case presenting this issue. (*People v. Cunningham* (Apr. 18, 2005, A103501 [nonpub. opn.]) sub nom. *Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329].)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED

JACKSON, J.*

We concur:

MALLANO, Acting P. J.

VOGEL, J.

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