Filed 1/13/11

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.** **DAVID LEE HILL,** **Defendant and Appellant.**	**A117787** **(San Francisco City and County Super. Ct. No. 196842)**

While patrolling San Francisco's Bayview District in an undercover capacity, Police Officer Isaac Espinoza was shot and killed and his partner, Officer Barry Parker, was wounded by David Lee Hill (appellant). Appellant's trial focused primarily on his motivation for shooting the officers. The jury rejected the defense theory that appellant did not realize the victims were police officers and shot them in self-defense. Appellant was convicted of second degree murder with a peace officer special circumstance and firearm enhancements (Pen. Code, §§ 187, 190, subd. (c), 12022.53, subd. (d), 12022.5, subd. (b))[1] (count 1), attempted first degree murder (§§ 664, 187) (count 2), assault on a peace officer with personal use of an assault weapon (§§ 245, subd. (d)(3), 12022.5, subd. (b)) (count 3), and possession of an assault weapon with a gang allegation (§§ 12280,

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

1 All further undesignated section references are to the Penal Code.

subd. (b), 186.22, subd. (b)(1)) (count 4).[2] He was sentenced to life in prison without the possibility of parole on count 1, plus a consecutive term of life with the possibility of parole on count 2. The court stayed the weapon enhancements on count 1, and imposed a 15-year sentence on count 3 and a two-year sentence on count 5. The court imposed a consecutive two-year term plus a three-year enhancement on count 4, to be served first. (§ 669)

Appellant raises claims of evidentiary and sentencing error and prosecutorial misconduct, and contends his motion for new trial was erroneously denied. In the published portion of this opinion, we rule on appellant's numerous challenges to the testimony of the prosecution's gang expert, San Francisco Police Inspector Tony Chaplin. Among other issues, we address the trial court's determination that Chaplin could testify on direct examination about the out-of-court statements he relied on in forming certain of his opinions. The trial court ruled that such statements did not come in for their truth, but only to assist the jury in evaluating Chaplin's opinions. Though we disagree with this ruling, we conclude it rests on relevant Supreme Court precedent, which binds us. We conclude that no reversible error was committed by the trial court and affirm.

BACKGROUND

The Prosecution's Case

Around 9:00 p.m. on April 10, 2004, Parker and Espinoza patrolled the Bayview District (the Bayview) in an unmarked gray Crown Victoria patrol car, dressed in civilian clothes. Parker drove and Espinoza sat in the front passenger seat. As Parker turned from Third Street onto Newcomb Avenue (Newcomb), he heard someone say, "woo woo," usually a signal to people on the street that police are present. Parker continued driving down Newcomb toward Newhall Street (Newhall) and observed two men walking toward the corner of Newcomb and Newhall. As Parker drove closer, the two men appeared startled, stopped walking and looked in the officers' direction. One of the men, appellant, then turned right and walked southbound on Newhall, looking over his

[2] On October 12, 2006, in the middle of trial, appellant pled guilty to participation in a criminal street gang (§ 186.22, subd. (a)) (count 5).

shoulder at the officers. Appellant wore a dark, three-quarter length pea coat. The other man continued walking straight ahead.

As the officers turned onto Newhall from Newcomb and drove "at a crawl," appellant stopped, backed up against a van and appeared to shrug his shoulders or take a deep breath. Seconds later, appellant continued walking on Newhall. The officers followed appellant until they were parallel with and approximately 16 feet from his position on the sidewalk. From inside the patrol car, Espinoza shined his flashlight on appellant's face; appellant immediately turned and looked directly toward the patrol car. Appellant then turned away and continued walking on the sidewalk down Newhall. Appellant's left arm swung in a natural walking motion, but not his right arm. Parker told Espinoza appellant was trying to conceal something from them and suggested the officers stop and talk to him.

Parker and Espinoza exited the patrol car. Parker's police star was outside his shirt. Parker stood between the open driver's door and the driver's seat while Espinoza approached appellant, who was walking on the sidewalk. Espinoza again flashed his flashlight on appellant and said, "Hey, let me talk to you." Appellant was about 10 to 12 feet in front of Espinoza. Appellant twice said, "I don't have any I.D." and looked over his shoulder at Espinoza. Espinoza did not take his gun out. Appellant started walking fast, and Espinoza twice said to him, "Stop, police."

Parker then entered the patrol car and drove about 10 feet further up the street. Appellant continued walking, with Espinoza following him on foot at a distance of five to seven feet. Appellant stopped and turned to face Espinoza. Parker saw the magazine of an assault rifle, and appellant fired two shots. Espinoza fell to the ground.

Parker exited the patrol car, knelt down between the front driver's door and driver's seat and took out his gun. Parker heard more shots fired in his direction; the patrol car's windshield exploded. Parker moved behind the trunk of the patrol car as he continued to receive gunfire. He then ran across the street seeking "good cover" on the sidewalk on the east side of Newhall. Parker never had a chance to fire a shot. At some point the shooting stopped and Parker radioed an "officer down" message.

The "upset, scared" Parker went to Espinoza, who was lying on the sidewalk, with his fully loaded gun inside its fastened holster. Espinoza was transported to the hospital, where he died from loss of blood from gunshot wounds to his thigh and abdomen. Parker was treated at the hospital for bullet fragments in his ankle. At 1:00 a.m., about three hours after the shooting, while at the emergency room, Parker was shown a photo lineup and identified a picture of Reuben Sibley as Espinoza's killer. Parker signed and wrote his star number on Sibley's photo.[3]

Police recovered 12 shell casings at the shooting scene on Newhall between the unmarked patrol car and the street. An AK-style semi-automatic assault rifle with an attached magazine was found nearby at 1790 Oakdale Avenue. Eleven of the 12 shell casings were later determined to have been fired from this weapon.[4] Each bullet fired required a separate trigger pull. A crime scene investigator opined that, based on the trajectory of the shots fired, some shots were fired from the sidewalk, while others were fired after the shooter moved from the sidewalk into the street.

At 1835 Palou Street, police found a pea coat and gloves which residents had seen someone discard. Appellant's California identification card and a small plastic bag containing suspected marijuana were found inside the pea coat.

Between 11:00 and 11:45 p.m. on the night of the shooting, appellant went to the San Francisco home of his grandmother, Annie Lee Clark, and told her he thought he had shot someone. Appellant seemed "nervous and upset."

The next morning, at 11:30 a.m., uniformed San Ramon police officers were dispatched to the San Ramon Regional Medical Center (medical center) in response to a report that a large male in the emergency room was acting "very strange" and paranoid and the staff feared he might become violent. En route, police learned there was a murder suspect in the emergency room. The police arrived with guns drawn and found

---

[3] According to San Francisco Police Homicide Inspector Holly Pera, when Parker was shown the photo lineup he made no identification.

[4] The 12th casing had been "cycled through" the assault rifle, but was not necessarily fired from it.

appellant holding two plastic flowers. Appellant complied with police orders to lie prone on the floor and was handcuffed. Thereafter, he began loudly making repeated comments about being a slave, such as: "Mary Lou made me do it," "Master Charley, don't beat me," and "I pick over 100 pounds of cotton a day." At one point he stood up and yelled, "Guards," three or four times. He moved to within six inches of the glass window in the door and loudly said, "I'm Julius Caesar. I need to go back to Rome." He then twice violently slammed his forehead into the door window.

Out of concern for appellant's safety, he was placed in ankle restraints while on the floor. He was moaning, groaning, grunting and yelling unintelligibly. He then urinated on himself and rolled onto his back so that his hands were wiping the urine. When Pera and her partner (Inspector Toomey) arrived, appellant was continuously saying "master, master, don't hurt me, master." When appellant saw an officer holding a gunshot residue kit he began kicking and screaming and was physically restrained during the performance of the gunshot residue test.

After the medical center cleared appellant for release, he was transported by ambulance to the San Francisco jail. A blood test conducted on him at approximately 4:00 p.m. on April 11, 2004, reflected the inactive metabolite of marijuana. The blood test results indicated that there was no active, psychoactive compound present in appellant's blood, but that at some point he had consumed marijuana, possibly at 4:00 a.m. or 6:00 a.m.[5]

Gang Expert Testimony

Chaplin testified as an expert on gang members, specifically those from African-American gangs in the Bayview/Hunters Point areas of San Francisco. Chaplin said West Mob is a criminal street gang that has continually existed since before 2000. He identified West Mob's geographic "territory," an area between West Point and Middle Point. West Mob members commit rape, homicide, assault with firearms, narcotic sales,

---

5 On cross-examination, the forensic expert conceded it was possible that the blood test result was consistent with appellant having smoked marijuana on the night of the shooting.

car theft, burglary, and robbery. These crimes enhance the gang's reputation and benefit it monetarily. West Mob operates with "situational leadership" and its members, who are predominantly African-American, share guns, cars and the proceeds of their crimes. Between 2000 and mid-2004, West Mob had gang alliances with Oakdale Mob and Sunnydale.

Chaplin stated that Big Block is a criminal street gang in the Bayview that has existed continuously since before 2000. He described its geographic "turf" as Northridge Road between Harbor and Jerrold Avenue on one side and Kiska Road on the "back, including Milton Meyer Recreation Center. Between 2000 and mid-2004 Big Block had gang alliances with BNT ("Broke Niggas Thievin")/Kirkwood Mob and Get Paid. Chaplin said Big Block's leader, Douglas Stepney, admitted a rivalry existed between Big Block and West Mob that began at the end of 1999 and existed actively in April 2004. Gang members cannot move freely throughout the Bayview; if they leave their respective areas, they "fear" being shot or killed. In April 2004, Big Block and West Mob members could not safely sell drugs on each other's turf. As a result of this rivalry, between 2000 and the first half of 2004, there were hundreds of shootings in the area. Chaplin testified that retaliation is a part of gang culture; it instills a sense of pride in the gang. When asked about how gang killings are done, Chaplin said, "Some of them are crime[s] of opportunit[y], some of them are orchestrated events, some of them are orchestrated to get one individual and you end up getting another one. [¶] . . . [¶] . . . So if the guy you're looking for is not there, . . . you're not just going to turn around and run out. You're going to do what you have to do at that point."

Chaplin said that gang members harbor hostile attitudes toward the police. "Retaliation against a [rival] gang member sends a message to other gang members, but the murder of a police officer sends a message to the community, 'Hey, even your protectors can be touched.' "

Chaplin testified that, in April 2004, a West Mob member could safely purchase marijuana anywhere in the Bayview except for Newcomb and Newhall. Newcomb and

Newhall was an area one "would not ever expect to see somebody from West Mob . . . for any reason other than a gang reason, a shooting or a killing."

Chaplin explained the 11 criteria formulated by the San Francisco District Attorney's Office and the San Francisco Police Department to determine whether a person is a member of a Bayview African-American gang. Chaplin said a person must meet two or more of those criteria to be listed as a gang member. Based on specific incidents occurring between March 1998 and December 2003, Chaplin opined that appellant was an active participant in West Mob for at least five years prior to April 2004.

Chaplin said that gang members refer to an unmarked police car as a "ghost," such as "white ghost" or "gray ghost." An audiotape of a conversation between appellant and Deangelo Redd at the San Francisco jail on June 20, 2004, was played for the jury. Chaplin said that appellant's reference in the tape to "white ghost" means an unmarked police car.

Chaplin said Ronnie "Uda" Allen, deceased at the time of trial, was a central figure in the Big Block gang from 2003 through April 2004. Chaplin frequently saw him in Big Block's home turf and BNT's home turf and the "1700 block area" of the Bayview, described as Newcomb and Newhall. On May 3, 2004, Chaplin talked to Allen outside Allen's home at 1662 Newcomb. Chaplin asked Allen why West Mob was "out to get him," and Allen responded, "Because of some shit they think I did. [¶] . . . [¶] That shit that happened to Espinoza was meant for me." Chaplin said that Allen's "extremely active" role in Big Block up to April 2004 made him a target for West Mob retaliation.

Chaplin testified appellant knew Allen because Allen's gang name, Uda, came up in a recorded jailhouse conversation between appellant and another jail inmate on May 30, 2004. Chaplin opined that appellant's actions on the night of the April 10 shooting were consistent with a West Mob member retaliating against a Big Block member based on the following hypothetical facts: (1) appellant's brother, James Hill, was shot in the Bayview in April 2000; (2) West Mob member Deandre Dow was murdered in a drive-by

shooting at West Point and Middle Point in February 2004; (3) Allen murdered Dow; (4) Allen was a member of Big Block; (5) Allen was staying at 1662 Newcomb in April 2004; (6) appellant had been a West Mob member for four or five years before April 2004; (7) at approximately 9:30 p.m. on April 10, 2004, appellant was walking with another African-American male on the 1700 block of Newcomb and appellant had a loaded assault rifle hidden under his pea coat; and (8) appellant walked to about 200 feet from 1662 Newcomb. Armed with a loaded assault rifle, appellant "was walking up to . . . arguably the most dangerous of all rivals of his group."

The Defense

On the evening of April 10, 2004, Louis Telfor testified he was on Newcomb and Newhall selling drugs when he saw appellant talking to Telfor's friend, "Niles." Niles told Telfor he was going to sell appellant some marijuana. On numerous prior occasions, Telfor had seen appellant purchase marijuana at Newhall and Newcomb. As Telfor headed for home, he saw a police Crown Victoria and Espinoza said to him, "Hey Louie." Telfor wanted to avoid the police so he began walking toward McKinnon Avenue to his mother's house. Five or seven minutes later he heard gunfire.[6] Telfor said the unmarked Crown Victorias he sees in the Bayview are either undercover police cars or are driven by people he does not know. According to Telfor, in 2004 it was safer to buy drugs on Newcomb than on Third Street.

Freelance writer Charles Jones lived in the Bayview for most of his life, until late 2003 or early 2004. He opined that at 9:30 p.m. in April 2004 it would be safer for anyone from the Bayview, including a gang member, to walk on Newhall and Newcomb than to walk on Third Street because Newhall and Newcomb is less populated and darker. Similarly, during that time period it would also be safer to buy marijuana on Newhall than at Third and Newcomb.

---

6 On cross-examination, Telfor stated he could have told police on April 15, 2004, that he saw appellant running away after the shooting, but testified at trial he did not see appellant running away.

Neurophysiologist Scott Fraser testified on the effects of high stress on human functioning, particularly perception and memory. He opined that a hypothetical police officer's statement, taken 48 hours after an extremely traumatic event, that his police star was underneath his shirt (or he could not remember the star's location) was more reliable than the same officer's trial testimony two-and-a-half years later that his star was outside his shirt. Fraser also opined that waiting 48 hours to interview a police officer whose partner died in a shooting results in the officer's memory being less accurate than it would have been had he been interviewed much closer to the time of the shooting.

Fraser also testified that a person under the influence of marijuana will have "less acuity in terms of processing information, . . . discerning intentions, assessing consequences . . . ." He said that under the influence of marijuana a person tends to get distracted, has a short attention span, does not process information as carefully, and takes longer to make decisions. He opined that hypothetically, when a person is under the influence of marijuana and is in a high stress situation where they feel their life is threatened, the person is more prone to "automatic fight or flight responses. If [the person has] the resources to fight, the research indicates the person would probably engage in counterattack. If [the person] would have the . . . capability for flight but not the resources to attack, [the person will] try to run . . . try to escape." Fraser said this would include police officers and gang members.

William Gaut testified as an expert in police administration, practices and procedures. He opined that the firearm used in this case could easily fire 11 shots in under five seconds by a rapid pulling of the trigger. Gaut also opined that gray Crown Victorias used for undercover work blend more easily into the pavement so that people are not as likely to notice them and, at night, such a car is less recognizable as a Crown Victoria.

Criminalist Peter Barnett performed a bullet trajectory analysis and opined that the person who fired the shots at the subject Crown Victoria could have been standing on the sidewalk when he did so.

Closing Arguments

The prosecution argued that appellant, a West Mob member, armed himself with the assault rifle with the intent to kill rival Big Block member Allen, who appellant believed was responsible for killing West Mob member Dow. Appellant recognized that Espinoza and Parker were police officers and opened fire on them because he did not want to be taken into custody for possession of the assault rifle.

The defense argued that appellant went to Newcomb and Newhall intending to purchase marijuana and was armed with the assault rifle for his safety. Appellant did not know that Espinoza and Parker were police officers and shot at them in self-defense.

DISCUSSION

I. *Testimony by the Gang Expert*

Appellant raises numerous challenges to the gang expert's testimony. Appellant argues Chaplin lacked the qualifications to provide certain of the opinions admitted, certain opinions were based on unreliable sources, and Chaplin improperly testified to inadmissible matter he relied upon in forming his opinions.

A. *Pretrial Procedural Background*

Pretrial, the prosecution argued for admission of evidence of the Dow murder as relevant motive evidence and evidence a gang expert could rely on when discussing retaliatory motives. Appellant objected on numerous grounds, noting the absence of any evidence that appellant knew or believed that Allen was responsible for Dow's murder. The court granted the motion to admit this evidence.

The prosecution also sought to admit evidence of the federal plea agreements of Big Block members Douglas Stepney and Kim Ellis and of a gang member named Acie Mathews; appellant objected that the confrontation clause as interpreted in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) barred this evidence. The prosecutor argued Chaplin was relying on admissions made in the plea agreements, and those statements were admissible as a basis for his expert opinion. In addition, he argued the plea agreements and the statements therein were themselves admissible evidence. The court ruled that if it permitted Chaplin to testify as an expert, he could rely on the statements

made in the plea agreements as a basis for one or more of his opinions, but took under submission whether *Crawford* prohibited the introduction of the statements in the plea agreements.

The trial court also ruled that Chaplin's gang expert testimony did not need to be qualified under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). Further, the court did not find any item of information relied upon by Chaplin in forming his opinions to be unreliable. The court stated appellant could "attack on cross-examination" any basis for Chaplin's opinions, and any lack of reliability went "to the weight of the evidence and not to the admissibility of the evidence." In reliance on *People v. Thomas* (2005) 130 Cal.App.4th 1202 (*Thomas*), the court rejected appellant's contention that the confrontation clause barred Chaplin from testifying about hearsay statements underlying his opinions because the statements would not be offered for their truth. The court also rejected appellant's argument that *Crawford* applied to bar the introduction into evidence of the Stepney/Ellis/Mathews federal plea agreements that contained statements Chaplin was relying on in forming opinions, and issued a "tentative ruling" permitting admission of the plea agreements into evidence. The court granted appellant's motion for a "standing" *Crawford* objection to the gang expert testimony. On the issue of whether Chaplin qualified as a gang expert, the trial court stated that it would base its ruling on the evidence elicited at the preliminary hearing and Chaplin's supplemental in limine testimony.

Subsequently, the court found Chaplin qualified to testify "as an expert as to gang matters, specifically African-American gangs in the Bayview/Hunters Point area of San Francisco." The court ruled that Chaplin could testify to "gang activity in general," and the "expectations of gang members in general, when confronted with a specific action." However, the court ruled that Chaplin could not testify to appellant's "subjective intent" at the time of the charged crime. It also ruled that "there has been a sufficient showing here that [Chaplin] could talk about the retaliation and gang motivation." Appellant objected, pursuant to Evidence Code section 352, arguing the thrust of Chaplin's testimony was "funneling things he's heard from other people," but the court rejected this

argument. Over appellant's objection, the court ruled the prosecution could introduce evidence of 14 separate shootings, including 13 murders and five gunshot injuries, which occurred in the Bayview between early 2000 and February 2004.

After commencement of the jury trial, appellant again protested the introduction of hearsay evidence and Chaplin's reliance on it. Appellant argued that *Thomas* was wrongly decided, the out-of-court statements Chaplin related were introduced for their truth, and much of the proffered hearsay from unnamed people underlying Chaplin's opinion was unreliable. In rejecting appellant's arguments, the court stated that *Thomas* was controlling authority and the statements at issue were not being introduced as direct evidence against appellant, but only to help the jury evaluate Chaplin's opinions. At the end of the case the court provided a limiting instruction regarding portions of Chaplin's testimony: "Chaplin testified that in reaching his conclusions as an expert witness he considered statements made by various individuals. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true."

B. *Chaplin's Qualifications as a Gang Expert*

Appellant contends the trial court erred in qualifying Chaplin as a gang expert on "anything beyond the existence and general culture of San Francisco Bayview gangs."

A person is qualified to testify as an expert if the person has "special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) The determination that a witness qualifies as an expert and the decision to admit expert testimony are within the discretion of the trial court and will not be disturbed without a showing of manifest abuse. (*People v. Mendoza* (2000) 24 Cal.4th 130, 177). "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness ' " '*clearly lacks* qualification as an expert.' " ' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.)

At the September 2005 preliminary hearing, Chaplin testified he had been a police officer for about 15 years and had been assigned to the San Francisco Police

Department's gang task force for approximately six years. As a gang task force inspector, he patrolled gang neighborhoods, made contact with gang members whenever possible, and investigated hundreds of gang crimes including shootings, attempted murders, assaults, and narcotics sales. Approximately 90 percent of Chaplin's time was dedicated to investigating Bayview gang crime. Since 2000, Chaplin had attended numerous classes regarding gang culture, the investigation of gang crime, and the identification of gang members. In 2004, he taught classes on African-American gangs in San Francisco, including in the Bayview. On numerous occasions Chaplin taught new San Francisco police recruits, school resource officers, and probation and parole officers about gangs, gang culture and investigating gang crimes. Chaplin is a member of the California Gang Investigators Association, which disseminates information throughout the state about current trends and actions by gang members. Chaplin received on-the-job training from other police officers regarding Bayview street gangs, including information about investigating gang crime in the Bayview. Chaplin also routinely talked to officers at the Bayview police station about current trends, "things that are going on" with African-American gangs and graffiti the officers had seen. In the past six years Chaplin had become familiar with Bayview gang-related graffiti and tattoos, and had spoken with members of West Mob and Big Block.

At the July 2006 Evidence Code section 402 hearing, Chaplin testified he continued to work as a gang task force inspector and at least 90 percent of his work was dedicated to investigating Bayview African-American street gangs. He went to the Bayview almost every day he worked, visiting the police station and talking with the officers about what was going on in the neighborhoods. He also talked with young African-American men in the parts of the Bayview controlled by gangs, some of whom are admitted gang members. He also spoke with Bayview parents and community members. Chaplin monitored Bayview gang activity on the internet. He continued to investigate crimes linked with Bayview gangs, which included shootings, drug sales, and illegal weapons possession. Since the preliminary hearing, Chaplin had attended a California Gang Investigators Association conference and a Las Vegas police-sponsored

gang investigation conference, both of which were dedicated to gang investigations and prosecution. In addition, he had arranged for a college professor (a defense expert) to teach a class to gang task force members and the Bayview plainclothes unit, and for an Orange County gang expert to review the gang task force's criteria for identifying and classifying gang members. Chaplin also taught two classes regarding gang investigations, including a discussion of Bayview gangs. Chaplin continued to informally share gang-related information with other San Francisco police officers.

Appellant asserts that Chaplin's experience in investigating gang crimes and talking to gang members "does not translate into sociological or psychological expertise on gang members' intentions, motivations, and actions under specified circumstances," and "[s]treet experience and police workshops on investigation techniques do not transform officers into behavioral scientists who can predict individual or group behavior." Thus, he argues that Chaplin was not qualified to render the following five opinions:

(1) When asked to generalize about how gang hits are done, Chaplin testified, "Some of them are crime[s] of opportunit[y], some of them are orchestrated events, some of them are orchestrated to get one individual and you end up getting another one. [¶] . . . [¶] . . . So if the guy you're looking for is not there, . . . you're not just going to turn around and run out. You're going to do what you have to do at that point."

(2) When asked, "In the gang culture, Bayview, will a shooter who has a plan to carry out a hit approach an area where other people may be close by," Chaplin answered affirmatively.

(3) Chaplin testified, "So to murder a police officer, a protector of the community, it sends the ultimate message. . . . [T]he murder of a police officer sends a message to the community that, 'Hey, even your protectors can be touched.' "

(4) Chaplin testified that Newcomb and Newhall was an area where one "would not ever expect to see somebody from West Mob . . . for any reason other than a gang reason, a shooting or a killing."

(5) Chaplin testified that it is not acceptable in gang culture for a gang member to cooperate; it is "looked down upon" and referred to as "snitching."

The trial court did not abuse its discretion in finding Chaplin qualified to give the challenged expert testimony. Appellant concedes Chaplin was qualified to testify about Bayview gang "culture." Gang sociology and psychology are proper subjects of expert testimony (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550) as is "the *expectations* of gang members . . . when confronted with a specific action" (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*); see *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 (*Olguin*) [approving expert testimony "focused on what gangs and gang members typically expect and not on [a defendant's] subjective expectation in this instance"]). Expert testimony is admissible to establish the existence, composition, culture, habits, and activities of street gangs; a defendant's membership in a gang; gang rivalries; the "motivation for a particular crime, generally retaliation or intimidation"; and "whether and how a crime was committed to benefit or promote a gang." (*Killebrew*, at pp. 656-657.) Chaplin's many years of experience and training demonstrated the special knowledge, skill, experience and training sufficient to qualify him as an expert in these areas. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 949, fn. 4 (*Gonzalez*).)

Appellant argues that the challenged testimony exceeded the scope of Chaplin's expertise. Certainly "a person may be qualified as an expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject. [Citations.]" (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1334.) But each of the challenged opinions was within Chaplin's area of expertise. Thus, his expertise on gang culture, habits, and expectations was adequate to permit him to opine that a gang member, intending to shoot a particular gang rival, would shoot a different member of the rival gang if the intended victim was not present, particularly if other people were in the vicinity. This same expertise supports Chaplin's opinion regarding the motivation for a gang member to shoot a police officer and his opinion that gang rivalries effectively exclude particular gangs from certain areas of the city. (See *Gonzalez, supra*, 38 Cal.4th

at p. 945.) The trial court could reasonably conclude that Chaplin's expertise rendered him qualified to testify to the challenged opinions.[7]

C. *Reliable Bases for Gang Expert Opinions*

Appellant contends the court erred in admitting certain of Chaplin's opinions because they were based on unreliable sources and were a "mere regurgitation of police investigation records and conversations with unknown gang members or community residents."[8]

1. *Legal Background*

Evidence Code section 801, subdivision (b) limits expert opinion testimony to an opinion "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates. . . ." "[*A*]*ny material that forms the basis of an expert's opinion testimony must be reliable*. [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*), italics added.) As long as this threshold requirement of reliability is satisfied, even matter ordinarily inadmissible, such as hearsay, can form the proper basis for an expert's opinion testimony. (*Ibid.*) Thus, a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies. (See *Gonzalez, supra,* 38 Cal.4th at p. 949 ["A gang

---

[7] Separately, appellant argues the court abused its discretion in admitting Chaplin's opinion that it was "significant" that appellant had been observed on numerous occasions in the company of West Mob gang members. Earlier in the trial, other witnesses had testified to these observations. Chaplin testified that appellant's association or affiliation with these gang members was a factor that *helped* establish appellant was a member of a Bayview African-American gang for at least five years before the Espinoza murder. Admitting Chaplin's opinion that these associations were "significant" was not an abuse of discretion. (See *People v. Castenada* (2000) 23 Cal.4th 743, 746.)

[8] Appellant expressly does not challenge the expert testimony regarding "the existence of gangs, police criteria to determine membership, and the meaning of gang graffiti and jargon."

expert's overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable."]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463 (*Duran*); *People v. Gamez* (1991) 235 Cal.App.3d 957, 968 (*Gamez*), overruled on other grounds in *Gardeley*, at p. 624, fn. 10.)

We review the trial court's admission of expert testimony for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) The trial court's exercise of discretion will not be reversed on appeal except on a showing that that discretion was exercised " '. . . ". . . in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" [Citation.]' [Citations.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 225 (*Albarran*).) Appellant has the burden of establishing an abuse of discretion and resulting prejudice. (*Ibid.*)

Appellant challenges the reliability of the information underlying the following gang expert testimony by Chaplin: (1) his opinion a violent rivalry existed between West Mob and Big Block; (2) his opinion Allen killed appellant's friend, Dow, and the shooting of Espinoza was meant for Allen; and (3) his opinion regarding the thought processes and behavior of gang member. We consider each in order.

2. *Chaplin's Testimony Regarding the Violent Rivalry Between West Mob and Big Block*

To help establish that appellant had a gang purpose in arming himself with an assault weapon prior to the Espinoza murder, Chaplin provided an opinion regarding the murderous rivalry between West Mob and Big Block. To support that opinion, Chaplin relied, in part, upon 14 shooting incidents (involving 18 victims, 13 of whom were killed)[9] that occurred between 2000 and mid-2004.[10] In each of these incidents he relied

---

9 As a separate ground for excluding evidence of the shootings, appellant argues the evidence was irrelevant. These shootings provided the basis for the expert's opinion that a gang war involving appellant's gang had been ongoing between 2000 and 2004; the opinion was relevant to establishing a motive for appellant's possession of the assault weapon on the night of the charged offenses. The trial court did not abuse its discretion in finding this evidence relevant.

on statements he had taken from gang members and members of the community, and/or police reports or discussions with police officers investigating the crimes. Physical evidence, such as gang graffiti, was present at some, but not all, of these shootings and supported Chaplin's opinion that the incidents were related to the West Mob/Big Block rivalry. And separate and apart from these shootings, Chaplin read and relied on the

---

10 As to the 14 incidents, Chaplin testified that:

(1) The April 7, 2000 shootings of West Mob members David George and James Hill were gang related and BNT members were responsible for it.

(2) The April 29, 2000 murder of Patrick Brown was gang related.

(3) The May 3, 2000 double murder of Starvell Junious and Jarvis Baker on Third Street was gang related.

(4) The December 31, 2000 double murder of BNT/Kirkwood members Brian Williams and Curtis Layne at Third and Kirkwood was gang related and committed by West Mob.

(5) The March 10, 2001 murder of West Mob member Tyrone Laury was gang related and committed by Big Block.

(6) The May 1, 2001 murder of Alvin McAldry at Middle Point and Hare was gang related. West Mob member Ricky "Hitman" Heard was shot in the legs in that incident.

(7) The July 5, 2001 murder of Darrell Lewis at West Point was committed by West Mob. Prior to being murdered, Lewis punched West Mob member Kenyana Jones for committing domestic violence against Lewis's niece.

(8) The October 18, 2001 murder of West Mob member Frank Hall was gang related.

(9) The June 21, 2002 murder of West Mob member John Kelley was gang related.

(10) The June 29, 2002 murder of Osceola Mob member Rashad Young at Osceola and LaSalle was gang related.

(11) The December 26, 2002 shooting of Charles Hollins was gang related.

(12) The February 2, 2003 murder of West Mob member Heard by Big Block was gang related.

(13) The October 21, 2003 shooting of West Mob member Lee Collins was gang related.

(14) The February 1, 2004 murder of Dow at West Point and Middle Point was gang related. The suspect in the Dow shooting was Allen.

Chaplin appeared to select these 14 incidents from the "hundreds of shootings and killings we've investigated in the area" during the relevant time frame.

federal plea agreement entered into by former Big Block leader Stepney confirming the existence of a violent rivalry with West Mob.

In contending that the sources of Chaplin's opinion were unreliable, appellant cites *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 (*Daubert*) and argues that an expert may not simply rely on hearsay but "must form his opinion by applying his experience and a reliable methodology to the hearsay material upon which he relies." This argument fails for several reasons. First, California has rejected the *Daubert* analysis in favor of the test in *Kelly, supra,* 17 Cal.3d 24. (*People v. Leahy* (1994) 8 Cal.4th 587, 612.) Second, appellant has cited no California authority for the proposition that a gang expert's opinion is subject to the *Kelly* test or that it must be based on a "reliable methodology," and, generally speaking, *Kelly* does not apply to the type of expert testimony provided by Chaplin. "In applying the *Kelly* standard, it is important to distinguish between expert testimony and scientific evidence; the former is not subject to the special admissibility rule of *Kelly,* which applies to cases involving novel devices or processes. [Citations.]" (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1195.) Third, the argument that Chaplin simply received and " 'repeat[ed] hearsay evidence without applying any expertise whatsoever' " (*U.S. v. Mejia* (2d. Cir. 2008) 545 F.3d 179, 197) ignores the extensive background to which he testified.

To the extent appellant argues that a gang expert may not rely on the hearsay statements of gang members, appellant is wrong. (*Gardeley, supra,* 14 Cal.4th at p. 618; *Duran, supra,* 97 Cal.App.4th at 1463.) *Gamez* is instructive. In that case, the court upheld the admissibility of testimony by gang experts whose opinions were based on personal observations and experience, the observations of other law enforcement officers, police reports, and conversations with gang members. (*Gamez, supra,* 235 Cal.App.3d at pp. 966-969.) In rejecting the defendant's argument that the officers' reliance upon information received from unidentified parties violated the Evidence Code, the *Gamez* court stated, "We fail to see how the officers could proffer an opinion about gangs, and in particular about gangs in the area, without reference to conversations with gang members." (*Gamez,* at p. 968.) Further, the court stated: "While the credibility of those

sources may not be beyond reproach, nevertheless, . . . '[t]he variation in the permissible bases of expert opinion is unavoidable in light of a wide variety of subjects upon which such opinion can be offered.' [Citation.] To know about the gangs involved, the officers had to speak with members and their rivals. Furthermore, the officers did not simply regurgitate that which they had been told. Rather, they combined what they had been told with other information, including their observations, in establishing a foundation for their opinions. . . . [¶] While we are sensitive to defendant's concern that a conviction not be based on hearsay testimony, that is not what occurred here. The officers did not simply recite what they had been told, but instead provided foundational testimony for their opinions which was sufficiently corroborated by other competent evidence, both physical and testimonial." (*Id.* at pp. 968-969.)

The reasoning in *Gamez* is applicable here. Chaplin testified he had worked with the gang task force since 1999, investigating African-Amercian gangs in San Francisco, particularly in the Bayview. He had received training at gang seminars, on-the-job training from other gang task force members, and read books and journal articles about gangs. He had daily conversations with gang members in the Bayview and did follow-up interviews after making gang-related arrests. He had participated in about 600 gang investigations. Although some of the information he received was hearsay, he attempted to corroborate that information.

To comprehend the dynamics of gang rivalry in the Bayview, Chaplin had to be familiar with the typical behavior of Bayview gang members. One significant source of this information was the people involved. Although the credibility of individual gang members might be questionable, Chaplin was not simply recounting or "regurgitating" what he had been told. He made clear that he was relying on his many years of experience and hundreds of communications as one part of the foundation for his testimony. Chaplin's testimony adequately explained the basis for his opinion regarding the Wet Mob/Big Block rivalry and demonstrated the reliability of the evidence he relied on. (See *Gonzalez, supra,* 38 Cal.4th at p. 949.) No error has been demonstrated.

3. *Chaplin's Testimony Regarding the Shooting of Dow*

The murder of Dow was one of the 14 shooting incidents described by Chaplin. Appellant argues that no reliable basis exists for Chaplin's testimony that the Dow murder was gang related and that Allen committed it. We disagree. First, there is clear evidence that Dow's shooting was gang related. It was a drive-by shooting and the firearm used was found one week after the shooting in the possession of Joseph Young, a member of a rival gang. Second, Allen was considered a suspect in that shooting by the investigating officers and had told Chaplin that he was a target for retaliation by West Mob "[b]ecause of some shit they think I did." Allen also said the shooting of "Espinoza was meant for me." Third, Allen and Young belonged to the same gang and were close associates in that gang. Fourth, Young himself did not shoot Dow because Young was in custody at the time. Finally, included in the information available to Chaplin were statements by Berry Adams, a West Mob member, describing Adams's role in arming appellant and driving him to Newhall and Newcomb to shoot Allen.[11]

Appellant argues that the hearsay provided by Allen was a key piece of evidence relied on by Chaplin to conclude that on April 10, 2004, appellant sought revenge for Allen's murder of Dow. Chaplin testified that on May 3, 2004, he talked with Allen outside Allen's residence at 1662 Newcomb, and Allen provided the statements related above. On cross-examination, Chaplin said he did not know the source of Allen's information. However, Chaplin said that based on what he had discovered throughout the investigation leading up to trial, Chaplin was convinced Allen was correct. Chaplin conceded that, in the past, Allen had lied to police about whether or not he possessed a gun or drugs. But simply because a gang member has lied to the police in the past about his possession of contraband does not preclude a conclusion that he is a reliable source of

[11] The trial court precluded Chaplin from testifying about statements Adams made to Chaplin after it found Adams legally unavailable to testify as a witness at trial because Adams had invoked his Fifth Amendment right to refuse to answer questions the defense wished to pose regarding uncharged homicides.

information supporting a gang expert's opinion. (See *Gonzalez, supra,* 38 Cal.4th at p. 949; *Gamez, supra,* 235 Cal.App.3d at p. 968.)

4. *Chaplin's Testimony Regarding the Thought Process and Behavior of Gang Members*

Appellant challenges the bases for Chaplin's opinions "as to what gang members think and how they behave, in particular[, Chaplin's] claims that if the intended target is not there, you end up getting someone else, that the killing of a police officer sends the 'ultimate message' of gang reputation, [and] a West Mob member would not go to Newhall and Newcomb except to commit a gang shooting or killing." We have already explained that Chaplin was qualified to provide these opinions, and gang expert opinions of this nature have consistently been upheld in the past. (*Olguin, supra,* 31 Cal.App.4th at p. 1370 [importance of respect and exclusive gang turf to street gangs, who react violently to disrespect]; *Gamez, supra,* 235 Cal.App.3d at p. 968, fn. 3 [retaliation]; *Killebrew, supra,* 103 Cal.App.4th at p. 656 [violence results when one gang goes to another gang's turf].) We also previously noted Chaplin's extensive experience and training, which provided reasonable bases for these opinions. Citing *U.S. v. Mejia, supra,* 545 F.3d 179, appellant contends Chaplin failed to explain how he "analyzed his knowledge and experience to reach a studied conclusion." But each of Chaplin's opinions flows logically from his testimony regarding the importance to each gang of its reputation, and how this triggers a retaliatory dynamic of violence. This retaliatory violence, in turn, creates exclusive zones where rival gang members may not go safely. A West Mob member, for example, could not walk safely on Big Block turf. If a West Mob member, armed with an assault weapon, was present on Big Block turf, it is reasonable to conclude he was there to retaliate for prior violence, not to engage in a peaceful pursuit. And if the intended Big Block victim was absent, it is reasonable to conclude the West Mob member would try to shoot a different Big Block member who was present; the shooter would not just "turn around and run out." Finally, when animosity toward the police resulted in the shooting of an officer, the gang's reputation

was enhanced by, as Chaplin explained, sending "a message to the community, 'Hey even your protectors can be touched.' "

Because each of the challenged opinions is rooted in other opinions properly reached by Chaplin, admitting them was not an abuse of the trial court's discretion.

D. *The Admissibility of Out-of-Court Statements Relied On by Chaplin to Support His Opinions*

As we discussed in parts I.B. and I.C., Chaplin was qualified to render his opinions and, because they were based on reliable information, he was permitted to testify to those opinions. In addition, on direct examination the court allowed Chaplin to provide the jury with some of the information serving as the basis of these opinions (basis evidence) as well as the sources of the information.[12] Some of this basis evidence consisted of out-of-court statements, and appellant contends that permitting Chaplin to testify to those statements violated the hearsay rule and the confrontation clause of the Sixth Amendment to the United States Constitution.[13] In this part of the opinion, we focus on two of the opinions Chaplin rendered: (1) there was an ongoing violent rivalry between West Mob and Big Block; and (2) appellant had a gang purpose in being present at the corner of Newhall and Newcomb while armed with an assault rifle.

In his briefing, appellant argues that the following out-of-court statements, introduced as basis evidence for these opinions, were admitted for their truth: (1) Allen told Chaplin the Espinoza shooting was "meant for [Allen]"; (2) in his federal plea agreement, Stepney stated he had been the leader of Big Block since its inception, and had been involved in a "war" with West Mob and participated in drive-by shootings; (3) West Mob member Tony Bedford told Chaplin he had taken an assault rifle away from younger West Mob members because they were planning a retaliatory shooting on Harbor Road; (4) Kevin Butler told Chaplin the murder of Hall was possibly an internal

---

[12] Evidence Code section 802 provides, in pertinent part: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter . . . upon which it is based . . . ."

[13] In pertinent part, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

West Mob murder; and (5) Terrence Joseph told Chaplin West Mob members could not buy drugs at Newhall and Newcomb.

In admitting this evidence, the trial court relied principally on *Thomas, supra*, 130 Cal.App.4th 1202, to conclude the statements were not introduced for their truth, but only to assist the jury in evaluating Chaplin's opinion. Though we disagree with *Thomas'*s analysis of this important issue, *Thomas* appropriately relies on relevant Supreme Court precedent, principally *Gardeley, supra*, 14 Cal.4th 605, that we are required to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).) Consequently, we may not find erroneous the trial court's conclusion that the challenged statements were not admitted for their truth. This determination precludes appellant's challenge under state hearsay rules and the confrontation clause. (*Crawford, supra*, 541 U.S. at p. 59.) However, we respectfully critique *Thomas* and its antecedents and propose an approach that preserves *Gardeley*'s goals, while recognizing the reality of how jurors treat out-of-court statements admitted as basis evidence.

1. *Current California Law*

The Evidence Code states that an expert witness may, on direct examination, provide the reasons for an opinion as well as the information upon which it is based, even if that information is inadmissible. (Evid. Code, §§ 801, subd. (b), 802.) In analyzing Evidence Code section 802, our Supreme Court has allowed an expert to testify about basis evidence consisting of out-of-court statements. In *People v. Catlin* (2001) 26 Cal.4th 81, 137, the court stated, " '[a]n expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible . . . . [Citations.] On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. . . .' [Citations.]" (See *Gardeley, supra*, 14 Cal.4th at pp. 618-619; *People v. Carpenter* (1997) 15 Cal.4th 312, 403; *People v. Price* (1991) 1 Cal.4th 324, 416; *People v. Coleman* (1985) 38 Cal.3d 69, 92.) This basis evidence is inadmissible, however, for its truth. (*Gardeley*, at p. 619 [testimony relating the basis evidence may not "transform inadmissible matter into 'independent proof' of any fact"]; see *People v. Vanegas* (2004) 115 Cal.App.4th 592, 597-598.) The trial court

in *Gardeley* had instructed the jury that the out-of-court statements related by the gang expert were not elicited " 'for the truth of the matter,' " but only to allow the jury to evaluate the expert's opinion. (*Gardeley*, at p. 612.) *Gardeley* held the trial court correctly determined that "an expert witness . . . could reveal the information on which he had relied in forming his expert opinion, including hearsay" (*id.* at p. 619), and that the jury " 'may not consider those [hearsay] statements for the truth of the matter,' " but only to evaluate the expert opinion (*id.* at p. 612).

This approach to basis evidence is not uncommon. For example, effective December 1, 2000, rule 703 of the Federal Rules of Evidence (28 U.S.C.) was amended to reflect a similar, though not identical approach: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion . . . unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."[14] The Committee Notes on Rules—2000 Amendment, following rule 703, provides, "When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other."

Thomas followed the "long established" principles expressed in *Gardeley*. (*Thomas, supra,* 130 Cal.App.4th at p. 1209) It concluded that the out-of-court statements admitted as basis evidence were not admitted for their truth but only to help evaluate the expert's opinion, and for this reason the confrontation clause did not apply. (*Thomas*, at pp. 1209-1210.) The trial court here took the same approach.

---

[14] Under California law, basis evidence is presumptively admissible; though under Evidence Code section 352, the trial court may exclude it if the likelihood of undue prejudice resulting from it substantially outweighs its probative value. Rule 703 of the Federal Rules of Evidence (28 U.S.C.) states the converse: otherwise inadmissible basis evidence is excluded unless its probative value substantially outweighs its prejudicial effect.

2. *A Critique of the Current Law*

In *Gardeley*, the gang expert opined that an assault was gang related and, as part of the basis evidence, testified he had been told by one of the assailants that the individual was a gang member. (*Gardeley*, *supra*, 14 Cal.4th at pp. 612-613.) In *Thomas*, after opining the defendant was a member of a gang, the expert was allowed to testify that in forming the opinion he had relied on statements from other members of that gang that defendant was a member. (*Thomas*, *supra*, 130 Cal.App.4th at pp. 1205-1206.) *Thomas* rejected a confrontation clause challenge after concluding the out-of-court statements were not admitted for their truth. "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are *not elicited for the truth* of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' [Citation.]" (*Thomas*, at p. 1210, italics added; see *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154 [out-of-court statements admitted as basis evidence are not admitted for their truth, but only to assess the weight of the expert's opinion]; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 [same]; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747 [same].)

Central to the reasoning in *Gardeley* and *Thomas* is the implied assumption that the out-of-court statements may help the jury evaluate the expert's opinion without regard to the truth of the statements. Otherwise, the conclusion that the statements should remain free of *Crawford* review because they are not admitted for their truth is nonsensical. But this assumption appears to be incorrect.

In *People v. Goldstein* (N.Y. 2005) 843 N.E.2d 727 (*Goldstein*), New York State's highest court rejected reasoning identical to that in *Gardeley* and *Thomas*. In *Goldstein*, the defendant was charged with murdering a woman by pushing her in front of a subway

train. (*Goldstein*, at p. 729) The prosecution's forensic psychiatrist (Hegarty) relied upon and testified to certain out-of-court statements that helped form the basis for her opinion refuting an insanity defense.[15] (*Id.* at pp. 729-730.) The prosecution argued that the statements were not admitted for their truth but only to help the jury evaluate Hegarty's opinion. (*Id.* at p. 732.) The *Goldstein* court disagreed. "We do not see how the jury could use the statements . . . to evaluate Hegarty's opinion without accepting as a premise either that the statements were true or they were false. Since the prosecution's goal was to buttress Hegarty's opinion, the prosecution obviously wanted and expected the jury to take the statements as true. . . . The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context." (*Id.* at pp. 732-733.)[16]

---

[15] Hegarty relied upon out-of-court statements by a security guard who had apprehended the defendant following an earlier violent attack on a different woman and by an acquaintance of the defendant, who related an incident in which a woman, who looked remarkably like the murder victim, had "sexually frustrated" the defendant. (*Goldstein, supra,* 843 N.E.2d at pp. 729-730.)

[16] Substantial academic commentary agrees. (See, Kaye et al., New Wigmore Treatise on Evidence (2010 Cumulative Supp.) Expert Evidence, § 3.10.1, p. 59 (*Kaye*) ["To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases skepticism about the expert's conclusions. The factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a constitutional prohibition." (Fn. omitted.)]; Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington (2007) 15 J.L. & Pol'y 791, 816 ["To say that [inadmissible] evidence offered for the purpose of helping the jury to assess the expert's basis is not being introduced for the truth of its contents rests on an inferential error."]; Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After* Crawford v. Washington (2004) 55 Hastings L.J. 1539, 1555-1560.) Professor Mnookin sets out a lengthy list of pre-*Crawford* academic commentary on this issue. (Mnookin, *supra,* p. 803, fn. 24.)

We agree with *Goldstein* that where basis evidence consists of an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion.[17]

It is noteworthy that the California Supreme Court decisions concluding basis evidence is not admitted for its truth were reached before the United States Supreme Court reconsidered the confrontation clause in *Crawford*, *supra*, 541 U.S. 36. (See discussion in part I.D.1.) Since that reconsideration, there has been a heightened concern regarding an expert's disclosure of basis evidence consisting of out-of-court statements. (*Kaye*, *supra*, § 3.10, p. 56.) And, although the California Supreme Court considered the hearsay implications of such evidence, none of the cases specifically considered the argument raised by appellant here: admitting the out-of-court statements to *evaluate* the opinion effectively admitted them for their *truth*.

But for the long line of California Supreme Court precedent supporting *Thomas*, we would reject that opinion and adopt *Goldstein*'s logic, which seems compelling. But our position in the judicial hierarchy precludes that option; we must follow *Gardeley* and the other California Supreme Court cases in the same line of authority.[18] We conclude that the trial court here properly determined that the challenged basis evidence related by

---

[17] This would seem to apply even to specialized knowledge gained by an expert in an academic setting. For example, if an accident reconstruction expert relies on and testifies to a formula he or she learned that is used to derive vehicle speed from the length of a skid mark, the jury seemingly may use that evidence to evaluate an opinion on the cause of the accident only after deciding if or assuming that the formula is accurate.

[18] There is some reason to believe that the California Supreme Court may be prepared to recognize the logical error in *Gardeley* and *Thomas*. *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*) involved a Sixth Amendment challenge to a DNA expert's testimony. The expert opined on the probability of a match between the defendant's DNA and the DNA extracted from the vaginal swabs of a rape-murder victim in reliance on a nontestifying technician's report regarding the technician's comparison of the known and unknown DNA samples. The court impliedly assumed the information in the technician's report was admitted for its truth, but concluded no *Crawford* error occurred because the report was not testimonial. (*Id.* at pp. 605-607.)

Chaplin was not offered for its truth but only to evaluate Chaplin's opinions. Therefore, its admission did not violate the hearsay rule or the confrontation clause.[19]

3. *Implications of Accepting the* Goldstein *Analysis*

If our Supreme Court reconsiders *Gardeley* and adopts *Goldstein*'s conclusion that basis evidence is offered for its truth, we would face significant issues of admissibility under the hearsay rule as well as the confrontation clause. We examine these issues in the context of the five challenged statements admitted to evaluate Chaplin's opinions. Three of these statements could be utilized by the jury for this purpose only after deciding if they were true. Further, the prosecution seems to have intended for the jury to accept the statements as true.

Chaplin testified Allen told him that West Mob was out to get him (Allen) "[b]ecause of some shit they think I did. [¶] . . . [¶] That shit that happened to Espinoza was meant for me." Chaplin testified he believed the statement was true based "on what I've discovered throughout the investigation." The prosecutor treated the statement as true, arguing appellant was at the corner of Newhall and Newcomb to shoot Allen on the night the officers were shot. As with Hegarty's testimony in *Goldstein*, Chaplin's opinion that appellant had a gang-related purpose for being in the area of Newhall and Newcomb finds support in Allen's statement only if that statement is believed to be true. Similarly, Chaplin's testimony about the contents of Stepney's federal plea agreement is useful in evaluating Chaplin's opinion that a gang war existed only if the jury decides or accepts that Stepney's statements are true. In addition, Joseph's statement to Chaplin that

---

19 Appellant argues that even if the hearsay statements he challenged were not admitted for their truth, they should have been excluded because, under *Tennessee v. Street* (1985) 471 U.S. 409 (*Street*), they were not critical to the prosecution's case and could have been redacted or paraphrased to blunt the risk of improper use by the jury. We reject that argument because appellant forfeited this claim by failing to raise it below. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) To the extent appellant claims he satisfied this requirement by citing *Crawford*, which had cited *Street*, we disagree because *Crawford* did not cite *Street* for this proposition.

West Mob members could not buy drugs at Newhall and Newcomb supports Chaplin's opinion to that effect only if it is believed to be true.[20]

(a) *The Hearsay Rule and Basis Evidence*

In our case, each of the three challenged statements that the jury considered for its truth would be barred by the hearsay rule under *Goldstein*'s analysis. In fact, adopting this analysis would exclude from evidence, as hearsay, many if not most of the out-of-court statements serving as basis evidence in civil and criminal cases. The Supreme Court may conclude that this is too costly a result because it will deprive jurors of highly useful information. If so, the court should create a hearsay exception admitting such statements for their truth, but limiting their admissibility to assisting the jurors' evaluation of the opinion. Significantly, if our high court adopts the *Goldstein* analysis, but fails to adopt a suitable hearsay exception, trial courts will often lack the discretion to admit out-of-court statements relied upon by the expert.

Since the adoption of the Evidence Code, the judicial creation of nonstatutory hearsay exceptions has been uncommon. In 1997, the California Supreme Court approved the child dependency hearsay exception, created by the Court of Appeal in *In re Carmen O.* (1994) 28 Cal.App.4th 908. (*In re Cindy L.* (1997) 17 Cal.4th 15.) After concluding that appellate courts have the authority to create additional hearsay exceptions (*id.* at pp. 25-27), the Supreme Court went on to "emphasize that in developing new exceptions to the hearsay rule, courts must proceed with caution" (*id.* at p. 27). "Despite this cautionary note, it may nonetheless be appropriate for courts to create hearsay exceptions for classes of evidence for which there is a substantial need, and which possess an intrinsic reliability . . . . [Citation.]" (*Id.* at p. 28.)

---

[20] Butler's statement about the murder of Hall seems irrelevant to or inconsistent with Chaplin's opinion that West Mob was engaged in a gang war because it suggests West Mob members killed another member of their own gang. Clearly, it was not admitted for its truth. And Bedford's statement about weapon sharing seems irrelevant to the facts of this case as they developed at trial because no evidence of weapon sharing was admitted with regard to the charged offenses.

Both "substantial need" and "intrinsic reliability" seem to exist here. The importance of providing the jury with basis evidence in the appropriate case appears substantial. Section 802 of the Evidence Code, rule 703 of the Federal Rules of Evidence (28 U.S.C.), and numerous California appellate court opinions implicitly recognize its importance and authorize its admission. *Gardeley* was no outlier. (*Gardeley, supra,* 14 Cal.4th at pp. 618-619; *People v. Coleman, supra,* 38 Cal.3d at pp. 91-92, and cases cited therein.) Moreover, these hearsay issues will exist even where experts testify in a context free from confrontation clause concerns: in civil cases and in criminal cases where a defense expert testifies. Finally, creating a hearsay exception for this basis evidence not only seems to respond to a substantial need but does no more than maintain the status quo that admits this evidence under a different rationale.

The reliability of such basis evidence is ensured by subdivision (b) of Evidence Code section 801 (the expert's opinion must be based on matter "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates"). Moreover, in considering reliability, it is important to keep in mind that the admissibility of such hearsay is expressly limited to evaluating the opinion. This basis evidence is not admissible as independent proof of the facts stated therein or to help establish a prima facie case. Finally, if the trial court is concerned the jury will utilize the basis evidence improperly, it retains the discretion granted by Evidence Code section 352 to exclude it, even if the proposed hearsay exception is created. (Cf. *Gardeley, supra,* 14 Cal.4th at p. 619.)

(b) Crawford *and Basis Evidence*

Though it would eliminate the hearsay problems resulting from the acceptance of *Goldstein*'s analysis, the proposed common law hearsay exception would not alleviate the confrontation clause issues. However, under *Crawford,* much of this basis evidence would be admissible.

The confrontation clause protects a criminal defendant's right to confront and cross-examine the witnesses against him. In *Crawford, supra,* 541 U.S. 36 and its progeny, the United States Supreme Court has concluded that where a prosecutor

attempts to introduce an out-of-court statement for its truth, even if the statement is admissible under state law hearsay rules, it is barred by the confrontation clause if the statement is "testimonial," unless the declarant was available at trial and subject to cross-examination, or if unavailable at trial, had been subject to an earlier cross-examination. (*Davis v. Washington* (2006) 547 U.S. 813, 821 (*Davis*); *People v. Cage* (2007) 40 Cal.4th 965, 978, fn. 7 (*Cage*).)

"Testimonial" is a critical component of the new analysis, but *Crawford* made no attempt to provide an overarching definition of the term. In *Crawford,* the court concluded that a witness statement obtained in a custodial interrogation was testimonial. (*Crawford, supra,* 541 U.S. at pp. 52, 53, fn. 4.) *Davis* considered statements in two different factual contexts. Statements by a domestic violence victim in a 911 call made during an ongoing emergency were determined to be nontestimonial. (*Davis, supra,* 547 U.S. at p. 827.) Statements by a different domestic violence victim in her home to the police were testimonial because the assault against her was complete and officers had removed the assailant to another part of the house. (*Id.* at pp. 829-830.) In *Cage*, the California Supreme Court concluded a victim's statement made to a police officer one hour after the assault was testimonial where the primary purpose of the conversation was to investigate the prior assault. (*Cage, supra,* 40 Cal.4th at pp. 984-986.)

Cage reached this result after deriving several basic principles from *Davis* regarding the definition of "testimonial": "First . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and

solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Cage, supra,* 40 Cal.4th at p. 984, fns. omitted.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*) and *Geier*, *supra*, 41 Cal.4th 555, the United States and California Supreme Courts, respectively, defined testimonial in the context of expert evidence. In *Melendez-Diaz,* the court held testimonial a sworn affidavit submitted by the prosecution in a drug prosecution, which stated that the substance seized from the defendant was cocaine of a certain weight. (*Melendez-Diaz,* at pp. 2530-2532.) *Geier* found nontestimonial a testifying DNA expert's recitation of a nontestifying technician's report in which the technician set out her compliance with a laboratory protocol and her observations regarding the genetic profiles extracted from a known and an unknown sample of DNA. (*Geier*, at pp. 593-607.) It is noteworthy that *Melendez-Diaz* and *Geier*[21] assumed that the definition of testimonial articulated in *Davis* governed; neither case suggested that a different meaning was required because expert testimony was at issue.[22]

(c) Crawford *and the Basis Evidence in this Case*

Even if admitted for their truth, only one of the five challenged statements here would be considered testimonial. Allen provided his statement to Chaplin in an informal,

---

[21] The California Supreme Court has granted review in several cases to examine the effect of *Melendez-Diaz* on *Geier*. (See, for example, *People v. Rutterschmidt*, review granted Dec. 2, 2009, S176213; *People v. Gutierrez*, review granted Dec. 2, 2009, S176620; and *People v. Lopez*, review granted Dec. 2, 2009, S177046.)

[22] Indeed, the *Melendez-Diaz* court rejected the dissent's suggestion that the confrontation clause was inapplicable because the drug analysts were not " 'conventional witnesses' " who had observed the crime or ". . . 'any human action related to it.' " (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2535.)

unstructured setting. While driving in the vicinity of Newhall and Newcombe, Chaplin saw Allen run into his residence. Chaplin talked to two men outside the residence and then Allen came outside and Chaplin talked to him. There is no evidence that Allen was under arrest or that the circumstances surrounding the conversation were sufficiently formal that Allen's statements were analogous to testimony. Chaplin had worked on the gang task force since 1999 and, in his role as a gang expert, he spoke with gang members on a daily basis, "[w]henever [he was] in the Bayview." Nothing distinguishes the nature of his conversation with Allen from hundreds of others he had conducted. Further, nothing in the record suggests that Chaplin was investigating Espinoza's murder at the time of the conversation with Allen, or that his purpose in engaging in the conversation was to develop information regarding that homicide or any other specific crime. In fact, though Chaplin prepared a field interview card concerning this conversation on the date it occurred, he did not record Allen's statement that the Espinoza shooting had been "meant for him" until a year later. This conversation lacked any indicia of testimony and, under *Crawford* and *Davis*, Allen's statements were not testimonial. (Kaye, *supra*, § 3.10.1, p. 57 [When "an expert in gang structure relies on interviews conducted with former gang members over many years and not related to the particular case, no plausible understanding of 'testimonial' would encompass these statements."].)

Similarly, Chaplin's interviews with gang members about the rivalry between West Mob and Big Block, and with Bedford, Butler and Joseph, were not testimonial. Many, perhaps all, of these statements were obtained from people in custody. However, as discussed above, in his role as a gang expert, Chaplin constantly interviewed Bayview residents, including gang members, to learn about gang structure, culture and sociology. The custodial status of the interviewees, without more, is not enough. We have no basis for concluding Chaplin's interviews were part of a specific criminal investigation or that any participant in these conversations had, as a primary purpose, "to establish or prove some past fact for possible use in a criminal trial." (*Cage*, *supra*, 40 Cal.4th at p. 984.) The statement elicited in these interviews are no more testimonial than the facts recited in

a treatise read by an expert in an academic setting, as he or she develops expertise in the field.[23]

The federal plea agreement containing Stepney's statements testified to by Chaplin is, however, the type of formalized document that *Crawford* and *Davis* would treat as testimonial. (*U.S. v. McClain* (2d Cir. 2004) 377 F.3d 219, 221 (a guilty plea allocution is testimonial); accord, *U.S. v. Hardwick* (2d Cir. 2008) 523 F.3d 94, 98.) If we treat Stepney's statements as admitted for their truth, their admission would violate the confrontation clause.[24]

4. *Conclusion*

Appellant challenged the admissibility of certain out-of-court statements relied on by Chaplin to support his opinions. Following *Thomas,* the trial court concluded none of this basis evidence was admitted for its truth and overruled objections under the hearsay rule and the confrontation clause. Though free to disagree with *Thomas,* we must follow relevant Supreme Court precedent; that precedent compels the result reached by the trial court. Thus we affirm its ruling.

---

23 Appellant also contends that Chaplin's reliance on nontestimonial hearsay violated appellant's rights to due process and confrontation pursuant to *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*). *Roberts* had been the leading case defining the confrontation clause before *Crawford* overruled it. (*Crawford, supra,* 541 U.S. at pp. 62-68.) In *Cage, supra,* 40 Cal.4th at page 982, footnote 10, our Supreme Court noted that after *Davis*, "there is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution." Moreover, as we previously noted, Chaplin did not rely on any unreliable information in reaching his opinions, and appellant's conclusory claim of error under *Roberts* fails to specify any nontestimonial hearsay as unreliable. No due process violation is demonstrated.

24 In the particular facts of this case, admitting the Stepney plea agreement, though error, would not have been reversible, even under the stringent *Chapman* test. Under *Chapman v. California* (1967) 386 U.S. 18, a federal constitutional error requires reversal, unless the prosecution demonstrates the error was harmless beyond a reasonable doubt. (*Id.* at p. 24.) Admissible evidence of a violent gang war between West Mob and Big Block was overwhelming and undisputed. Beyond a reasonable doubt, this error would be harmless.

We note, however, our disagreement with that precedent. In our view, the *Goldstein* analysis is the correct one: several of the challenged statements were introduced for their truth, in the sense that the jury was not able to utilize the out-of-court statements to evaluate the opinion rendered without first determining if, or accepting that, those statements were true. If our Supreme Court agrees, it may minimize the exclusionary effect of that conclusion by adopting a hearsay exception. If the Supreme Court proceeded in that fashion, the new rule would not affect the result we reach. Though several of the challenged statements would be admitted for their truth, the proposed new hearsay exception would eliminate the attendant hearsay problems, and the trial court would retain the same discretion it currently has under Evidence Code section 352 to exclude the otherwise admissible evidence. The definition of "testimonial" would eliminate confrontation clause issues with all but one of the challenged sets of statements, those found in Stepney's plea agreement. And, any error in permitting testimony about Stepney's statements would be harmless.

E. *The Admissibility of Eight Predicate Gang-Related Offenses and 14 Gang Shootings*

1. *Eight Predicate offenses*

Chaplin testified to eight predicate offenses to prove that appellant possessed an assault rifle for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, §§ 12280, subd. (b), 186.22, subd. (b)(1)). "To prove the allegations under section 186.22, subdivisions (a) and (b), the prosecutor was required to establish that one of the gang's primary activities was the commission of one or more of the crimes listed in [Penal Code] section 186.22, subdivision (e), and that the gang's members engaged in a pattern of criminal activity. [Citation.] ' . . . [S]ufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.' [Citation.] [A] 'pattern' is established by the commission of two or more enumerated offenses committed on separate occasions or by two or more persons. [Citation.]" (*People v. Williams* (2009) 170 Cal.App.4th 587, 608-609 (*Williams*).)

Prior to trial, the prosecution sought to admit evidence of 10 predicate offenses allegedly committed by West Mob members beginning in 1999. In response, appellant argued that, pursuant to Evidence Code section 352, the prosecution should be limited to eliciting evidence of three predicate offenses, and none of the predicate offenses should include offenses by appellant's family members.

The court said it understood the prosecution's need to present evidence of more than the two statutorily required predicate offenses, and exercised its discretion to allow proof of eight such offenses through court documents and the testimony of Chaplin.[25] Appellant argues four predicate offenses would have been "sufficiently safe to withstand theoretical challenges," and therefore the admission of eight such offenses was cumulative and unduly prejudicial (Evid. Code, § 352).

In *Williams, supra,* 170 Cal.App.4th at pages 608-609, the prosecutor introduced evidence of at least eight crimes committed by gang members in an effort to establish the predicate crimes for the gang charge and gang enhancement allegations. In response to

---

25 Chaplin subsequently testified:

(1) In 2004, David Hamilton pled guilty to a federal charge that in December 2003 he possessed cocaine with intent to distribute in the area of West Point and Middle Point.

(2) In 2004, West Mob member Bedford pled guilty to a January 2003 felony assault and admitted to Chaplin it was gang related.

(3) In 2002, gang member Trearl Malone pled guilty to robbery and possession of cocaine with intent to sell.

(4) In 2005, Willie Hill pled guilty to a federal charge that in July 2002 he sold crack cocaine in the area of West Point and Middle Point. Though Willie Hill is appellant's brother, appellant has not alleged the jury was apprised of this fact.

(5) In 2005, Kevin George was convicted of a federal charge of possession of cocaine with intent to distribute and sell in the area of West Point and Middle Point.

(6) In 2001, West Mob members Anthony Knight and Marcus Colbert pled guilty to a 2000 robbery committed while both men were in possession of firearms.

(7) In 2000, Marquell Cain pled guilty to possession of cocaine with intent to sell. Chaplin could not express an opinion as to whether this offense was gang related.

(8) In 2001, Butler pled guilty to a robbery committed in 2000 and possession of cocaine for sale which occurred at West Point and Middle Point.

the defendant's assertion that the evidence was cumulative and unduly prejudicial under Evidence Code section 352, the trial court ruled, " 'the [district attorney] is entitled to the full force of their evidence. If they want to over-prove their case or put on all the evidence they have, that's their right.' " (*Williams*, at p. 610.) On appeal, the appellate court strongly disagreed with this reasoning, concluding the trial court "must take great care to evaluate its admissibility," and "must find the evidence has substantial probative value . . . not outweighed by its potential for undue prejudice." (*Ibid.*) It stated, "We strongly disagree with the view that prosecutors have any right to 'over-prove their case or put on all the evidence that they have.' " (*Ibid.*) "Although no bright-line rules exist for determining when evidence is cumulative, we emphasize that the term 'cumulative' indeed has a substantive meaning, and the application of the term must be reasonable and practical. Here . . . we conclude it was an abuse of discretion to admit cumulative evidence concerning issues not reasonably subject to dispute." (*Id.* atpp. 610-611.) The court found that the volume of evidence extended the trial "beyond reasonable limits" and resulted in a "virtual street brawl" and "endless discussions" among counsel and the trial court on the admissibility of the evidence. (*Id.* at p. 611.)

We do not read *Williams* to create an artificial limit of seven (or fewer) predicate offenses to prove the gang enhancement. The trial court here exercised its discretion and eliminated two offenses the prosecution sought to introduce. This ruling created neither a "street brawl" nor "endless discussions." No error occurred.

2. *14 Gang-Related Shootings*

We ruled in part I.C.2. above, that Chaplin properly relied on the 14 prior gang-related shootings, most of which resulted in homicides, to support his opinion that there was a violent gang rivalry between West Mob and Big Block. This opinion, in turn, supported other opinions Chaplin provided, such as gangs establish their own "exclusive" turf and members of rival gangs who "trespass" on that turf do so for a gang-related purpose. Specifically, Chaplin testified that the corner of Newhall and Newcomb was an area where one "would not ever expect to see somebody from West Mob . . . for any reason other than a gang reason, a shooting or a killing." Cumulatively, these opinions

were admissible to establish that appellant possessed the assault weapon for a gang-related purpose, as alleged in the enhancement to count 4. These opinions were all properly admitted. (See part I.C., above.) Appellant argues the trial court erred in permitting Chaplin to relate the details of each of these shootings to the jury because the limited probative value of this evidence was substantially outweighed by its undue prejudice. (Evid. Code, § 352.)

It is noteworthy that appellant admitted his membership in West Mob and never explicitly disputed the existence of gang violence involving West Mob. While objecting to evidence of certain specific acts of violence, appellant not only conceded the widespread gang violence in the Bayview, but relied on it as the cornerstone of his defense from the first lines of his opening statement. Thus we assume, without deciding, that it was error to permit Chaplin to relate the details of all 14 shooting incidents.

In determining whether this error would be reversible, we apply the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), under which the appellate court must determine if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Williams, supra,* 170 Cal.App.4th at p. 612.) Under *Watson*, we examine the errors made in the context of the entire record to determine if reversal is required. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)

The evidence of the 14 prior gang-related shootings was directly relevant to establish the gang purpose alleged in count 4, possession of the assault rifle. Even if the trial court erred in admitting this evidence, under the *Watson* standard we conclude the error was harmless. The primary danger flowing from admission of these other gang-related crimes evidence is its tendency to persuade the jury that the defendant "had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished." (*Albarran, supra,* 149 Cal.App.4th at p. 230; see also *People v. Memory* (2010) 182 Cal.App.4th 835, 859.) Such evidence may, therefore, create an emotional bias against the defendant that impacts the jury's determination of all of the charges, not just the gang enhancement. (*Albarran*,

at p. 230.) But this danger was much reduced because in this case none of the shootings involved appellant. In addition, it is clear that the "jury's passions were [not] inflamed by the evidence of [the] uncharged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) The prosecutor sought a first degree murder verdict and argued that the evidence established premeditation and deliberation in the shooting of Espinoza. But the jury rejected this and found only murder of the second degree. (Cf. *Williams, supra,* 170 Cal.App.4th at pp. 612-613.) Finally, appellant's trial strategy undermines his claim of prejudice. (See *People v. Jennings* (2010) 50 Cal.4th 616, 653.) Appellant did not dispute the existence of a violent gang rivalry, punctuated by numerous revenge shootings. In fact, as his opening statement made clear, his defense was premised on it: "To hesitate is to die. To hesitate as a gang member is to die. To hesitate as a gang member on rival turf in the Bayview at night is to die." There were "gunfights beyond sight between West Mob and Big Block." The evidence of the 14 prior gang-related shootings helped provide essential background for *appellant's* claim of self-defense in shooting two strangers who approached him.[26] Without that evidence, the defense would have had no logical basis for its theory of the case.[27]

II. *Testimony by Other Police Officers*[*]

Appellant next contends the court erred in overruling his hearsay and relevancy objections to testimony by 11 different police officers to support the prosecution's theory that it was common knowledge in the Bayview that police officers patrolled in unmarked police cars and gang members alerted each other to the presence of such unmarked police

---

[26] In his opening brief, appellant argues that the evidence of gang shootings and predicate crimes made it "extremely probable that the jury concluded that [he]. . . acted with a gang intent to kill in counts one through three." But this contention completely ignores the fact that in its opening statement, the defense claimed that because of the endemic gang violence in the Bayview appellant started shooting before he knew who he was confronting.

[27] Because we do not find multiple errors in the court's rulings on the expert testimony, appellant's request for a cumulative error analysis is moot.

[*] See footnote, page 1, *ante*.

cars. The trial court found the evidence relevant and overruled the hearsay objections on the ground the evidence was not admitted for its truth.[28]

Appellant expressly points to the following testimony:

(1) Parker testified that young men he believed to be West Mob members told him, "We can see you coming a mile, miles away."

(2) Former San Francisco Police Officers Scott Kendall and Stephen Jonas testified that while patrolling the Bayview in plainclothes and in unmarked police cars, each would sometimes exit the patrol car and, while on foot, have conversations with young men thought to be West Mob members. Each witness testified these young men would sometimes be adversarial and would say things such as, "Fuck the police," "Fuck you," "You guys are always hassling us," "What the fuck are you looking at," and "Get the fuck out of here."

(3) San Francisco Police Officer Len Broberg testified that, in 2002, he saw graffiti in the Bayview that said, "Fuck Officer Len and the White Ghost," with Broberg's name crossed out.

(4) Numerous San Francisco police officers testified that sometimes, while patrolling the Bayview in plainclothes and in an unmarked police car, they would hear people mimic a siren or give verbal signals or alerts that the police had arrived such as, "oh, oh, oh," "wooop," "five-oh on the block," "po-po," "white whale," "gray ghost," "woo-woo," "yo," "lay-ow, lay-ow," "aye-oh" and "roller."

The trial court's rulings on the admissibility of evidence are reviewable for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Hearsay evidence is evidence of a statement made by an out-of-court declarant that is offered to prove the truth of the matter stated and is inadmissible unless the proffered evidence comes within an exception to the hearsay rule. (Evid. Code, § 1200.) Thus, if an extrajudicial

---

28 We reject respondent's assertion that appellant partially forfeited this claim by failing to make specific hearsay objections to the challenged testimony. The record discloses that appellant made a generalized objection to the hearsay testimony of police officers other than Chaplin, and the court overruled the objection, concluding the evidence was not admitted for its truth.

utterance is offered without reference to the truth of the matter asserted, the "[h]earsay rule" does not apply. (*People v. Dalton* (1959) 172 Cal.App.2d 15, 19.)

Statements (2) through (4), listed above, were not admitted for their truth, but only to show that gang members were hostile to the police or recognized unmarked police cars. Even if statement (1) were admitted for its truth, any error in overruling the defense objection to it would have been harmless because of the large volume of other admissible evidence to the same effect.

III. *There Was No* Brady *Error, Prosecutorial Misconduct or Instructional Error Regarding Adams*[*]

Appellant contends that, as to West Mob member Adams, the prosecutor repeatedly refused to comply with his discovery obligations under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Appellant further contends the court erred in refusing to instruct the jury not to consider the prosecutor's improper comments made about Adams during the opening statement. He argues that the impact of these errors was prejudicial.

Prior to trial, on March 14, 2006, defense counsel stated that the prosecutor had declared his intention to have Adams testify at trial; and, therefore, defense counsel asked for "full discovery" regarding Adams, including "*Brady* material." On July 12, 2006, at an Evidence Code section 402 hearing (402 hearing) regarding Adams's interaction with appellant on the night of April 10, 2004, Adams invoked the Fifth Amendment, was granted immunity and ordered to testify regarding the Espinoza murder. Defense counsel stated he still did not have full discovery regarding Adams, particularly regarding statements made by appellant to Adams. On numerous other occasions, appellant sought *Brady* material regarding Adams, including material in the hands of federal authorities. On October 10, 2006, following jury selection, the prosecutor provided the defense with discovery documents regarding Adams, which the federal court had ordered released pursuant to a federal protective order.

During his opening statement on October 16, 2006, the prosecutor described the role Adams had played in the events of April 2004: (1) a few days before Espinoza was

---

[*] See footnote, page 1, *ante*.

killed, Adams took appellant and West Mob member Hamilton to the San Ramon apartment of West Mob member Marvin Jeffery, where assault weapons were provided to appellant and Hamilton; (2) on the day of the shooting, appellant telephoned Adams and said he had "a line on" Dow's killer; (3) appellant decided to avenge Dow's murder by killing Dow's murderer, Allen, and Allen lived near the intersection where Espinoza was killed; (4) after killing Espinoza, appellant asked Adams to pick him up at his grandmother's house, which Adams did; (5) Adams then drove appellant to Oakland; and (6) appellant ended up at Jeffery's San Ramon apartment.

On October 23, 2006, at the conclusion of a 402 hearing, defense counsel asserted there was a joint federal/state investigation of Adams and requested all *Brady* material on Adams in the possession of federal authorities. On November 6, appellant submitted a written request for federal *Brady* material regarding Adams and others. Defense counsel requested that Adams not testify due to the prosecutor's *Brady* violation. The trial court denied, without prejudice, the motion to exclude Adams, but excused the jury for a week to review the issues involved.

Later that day at a defense ex parte hearing, the court reviewed two FBI incident reports (called "302's") just received from the United States Attorney, which defense counsel stated established the *Brady* violation and should bar Adams as a witness. The two documents regarded FBI interviews with Adams conducted in November and December 2004 that defense counsel said were exculpatory because Adams repudiated "the heart of what he has to say in this case" as a prosecution witness. Adams's statements were made in the presence of San Francisco Police Officer Robert McMillan, an officer "cross-designated" as a gang expert between state and federal authorities, and San Francisco Police Officer Michael Philpott. Defense counsel argued that if the court was unwilling to exclude Adams as a witness, the two 302's should not be revealed to the prosecution and the jury should be instructed that there was a *Brady* violation. The court deferred the request to exclude Adams until his testimony at a 402 hearing.

On November 8, 2006, the federal prosecutor provided defense counsel and the state prosecutor with the two 302's regarding Adams that the court had considered at the

ex parte hearing on November 6. Defense counsel asserted there was a "serious *Brady* issue" because the two reports had been withheld from the defense. Thereafter, defense counsel conceded he had been provided with the reports in May 2005, but insisted the prosecution had still violated *Brady*. Defense counsel stated that at the time he received the reports in May 2005, it "wasn't that important to me" because Adams was not a "substantial" witness in the case. However, defense counsel said the two 302's were *now* of "central importance" because the prosecutor was "putting [Adams] at the center of the case" based on Adams's claims about his telephone call with appellant on the day of the shooting. He also argued that in late 2004, when Adams made the statements in the 302's, Adams was out of custody and had not yet made the incriminating statements on which the prosecutor intended to rely.

At the November 9, 2006 continued 402 hearing, McMillan testified that in 2004 he was sworn in and cross-designated to perform certain federal duties and investigations. He admitted being present on November 22, 2004, when FBI agents took a statement from Adams at the San Mateo County jail. McMillan said he did not take notes or record the interview and did not provide a 302 to Pera, Toomey or the prosecutor. McMillan said he and Philpott (also cross-designated) were present on December 1, 2004, when FBI agents took another statement from Adams at the San Mateo County jail. Again, McMillan did not tape, create notes, or provide a report regarding the December 1 statement to Pera, Toomey or the prosecutor. The December 1 interview of Adams focused almost completely on the death of Espinoza and the prosecution of appellant. A week later, McMillan told Pera that Adams's second statement, from December 1, contradicted a statement McMillan took from Adams in July 2004. Specifically, in the July 2004 statement, Adams denied driving appellant and Hamilton "to San Francisco from Oakland"; in the December 2004 statement, Adams said he did so. McMillan did not otherwise discuss the December 1 statement with Pera.

The court found that the two incident reports regarding Adams were material statements and the prosecutor violated section 1054 by failing to timely disclose them.

However, it concluded there was no *Brady* violation and no prejudice to the defense because the defense was already in possession of the information.

Subsequently, at a closed hearing, Adams stated he would invoke his Fifth Amendment right not to testify as to three unrelated homicide cases between 1997 and 2001 and various other offenses that the defense wished to cross-examine him on. Adams was prepared to testify regarding other offenses. The court stated that, because Adams had invoked the Fifth Amendment, the defense could not effectively cross-examine him. *At the request of the defense*, the court ruled Adams unavailable as a witness.

The court proposed a witness unavailability instruction regarding Adams, which it ultimately provided to the jury: "On November 16, 2006, the [c]ourt declared . . . Adams legally unavailable to be a witness at trial. Neither the [p]rosecutor nor the [d]efense is responsible for that legal unavailability. The jury must not draw any inference as to any matter at issue in the trial from the fact that . . . Adams was legally unavailable to be a witness." The court rejected the defense request to modify the instruction to add, "The jury should not consider for any reason any reference to . . . Adams made during opening statement by the district attorney or the defense."

A. *There Was No* Brady *Violation*

"In *Brady*, the United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' [Citation.] The high court has extended the prosecutor's duty to encompass the disclosure of material evidence, even if the defense made no request concerning the evidence. [Citation.] The duty encompasses impeachment evidence as well as exculpatory evidence. [Citation.]" (*People v. Hoyos* (2007) 41 Cal.4th 872, 917 (*Hoyos*).) ". . . 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this

context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043 (*Salazar*).) To establish materiality a defendant " 'must show a "reasonable probability of a different result" ' " had the prosecution disclosed the evidence. (*Ibid.*) " 'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Hoyos,* at p. 918.)

We apply a de novo standard of review to the issue of whether appellant established the elements of a *Brady* claim. (*Salazar, supra,* 35 Cal.4th at p. 1042.)

Appellant asserts that the two Adams statements provided in 2004 and memorialized in 302's did not "com[e] to light" until November 2006, two weeks after the prosecutor's opening statement. He argues that since "the Adams impeachment material was not discovered by the defense and/or disclosed by the prosecutor" until after the prosecutor's opening statement, appellant was unable to effectively counter the impact of the prosecutor's opening statement, resulting in a *Brady* violation that deprived him of due process.

Appellant's argument ignores the fact that he had received these 302's from an independent source long before the prosecution's opening statement. As our Supreme Court stated in *Salazar*: "If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, *even if the prosecution is not the source of the evidence*. [Citations.] Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it ' "by the exercise of reasonable diligence." ' [Citations.]" (*Salazar, supra,* 35 Cal.4th at p. 1049, italics added.)[29]

---

29 Appellant also argues that the prosecutor committed misconduct by reciting in his opening statement incriminating testimony he expected Adams to provide. This argument fails because, in large part, it depends upon the assumption that a *Brady* error was committed.

B. *The Court Did Not Err in Refusing Appellant's Requested Instruction*

After the trial court granted appellant's request to exclude Adams's testimony, appellant requested that the jury be instructed that it "should not consider for any reason any references to . . . Adams made during opening statement by the district attorney or the defense." Appellant argues the trial court's refusal to do so violated his rights to due process and a fair trial.

The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction standing alone. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) The court instructed the jury, pursuant to CALCRIM No. 102: "Opening statements are not evidence." It also instructed, pursuant to CALCRIM Nos. 104 and 222: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys . . . discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence." The court also instructed, pursuant to CALCRIM No. 200, "You must decide what the facts are. It is up to you, exclusively, to decide what happened, based only on the evidence that has been presented to you in this trial."

Appellant contends the court had a duty to instruct "as to what is *not* evidence." Appellant further argues that his requested instruction was a pinpoint instruction related to the defense theory of the case, i.e., that Adams was a liar and Adams's statements, referred to in the prosecutor's opening statement, were untrue.

Though imaginative, this argument fails. Upon request, the trial court must give jury instructions that pinpoint a theory of the defense, but it may refuse instructions that highlight " 'specific evidence as such.' " (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) Appellant succeeded in his efforts to obtain a court ruling barring Adams from testifying. It is illogical for appellant to argue that, following this ruling, a "theory" of his defense was that Adams's *testimony* was a lie and he was entitled to a pinpoint instruction supporting this *theory*. Further, the trial court need not give a pinpoint

instruction if it merely duplicates other instructions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99.)

We conclude the instructions given by the court adequately informed the jury that it was to decide the case based solely on the evidence and that counsel's opening statement was not evidence. "In the absence of evidence to the contrary, we presume the jury followed the court's instructions. [Citation.]" (*People v. Osorio* (2008) 165 Cal.App.4th 603, 618.)

IV. *Prosecutorial Misconduct*[*]

Next, appellant contends the prosecutor committed misconduct during cross-examination of defense expert Fraser by insinuating that Fraser was forced to resign his position at the University of Southern California (USC). He also contends the prosecutor committed *Griffin* error (*Griffin v. California* (1965) 380 U.S. 609) by posing questions to Fraser that only appellant could have answered. He asserts these prosecutorial errors violated his Fifth and Fourteenth Amendment rights.

A. *The Prosecutor's Cross-examination of Fraser Was Not Misconduct*

Fraser, a neurophysiologist, testified as an expert on the effects of high stress on human functioning. On direct examination, Fraser stated that for more than 35 years, he had taught at the medical school and psychology departments at the University of Washington, Stanford University, and USC, and currently taught at the University of California, Los Angeles (UCLA), and the medical school at USC.

Appellant points to the following colloquy during the prosecutor's cross-examination of Fraser:

"[The Prosecutor:] You mention you teach at some universities. Are you a tenured professor at the University of Washington?

"[Fraser:] No.

"[The Prosecutor:] Are you a tenured professor at [USC]?

"[Fraser:] I'm currently not. I was a tenured professor but I'm not anymore.

---

[*] See footnote, page 1, *ante*.

"[The Prosecutor:] When you left USC, that was against your will; is that correct?

"[Fraser:] Absolutely false. I resigned.

"[The Prosecutor:] You resigned from being a tenured professor at USC?

"[Fraser:] Correct. I accepted a position as CEO, I had a number of medical health problems. I needed a different career path.

"[The Prosecutor:] Are you a tenured professor at [UCLA]?

"[Fraser:] No, I'm not a tenured professor anywhere."

Defense counsel objected that there was "no good faith basis" for the prosecutor's allegation that Fraser resigned from USC against his will and the question was a "stab in the dark." Defense counsel requested that the court admonish the jury. The court ruled that the prosecutor's questioning was not done in bad faith, denied the request that the jury be admonished, and noted the jury would be generally instructed that the questions of counsel are not evidence.

In reliance on *People v. Hill* (1998) 17 Cal.4th 800, appellant argues the court "used the wrong standard by implying that the prosecutor's questioning would be misconduct only if it was done in bad faith." " 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]" (*Hoyos, supra,* 41 Cal.4th at p. 923.) The trial court acted within its discretion in concluding that the prosecutor's questions regarding Fraser's reasons for leaving USC did not render the trial fundamentally unfair and were not "deceptive or reprehensible"; no prosecutorial misconduct is demonstrated. Moreover, the court did not abuse its discretion when it rejected defense counsel's request for an admonition and concluded that other instructions would ameliorate any harm from the prosecutor's questioning of Fraser.

B. *There Was No* Griffin *Error*

Noting that he did not testify at trial, appellant argues the following cross-examination of Fraser constituted *Griffin* error:

"[The Prosecutor:] And here today, . . . you're not representing yourself as an expert on gang culture, gang habits in any way, sir?

"[Fraser:] Certainly not.

"[The Prosecutor:] Which means you can't tell us about [appellant]'s knowledge of unmarked police cars, whether he's a gang member or not, you can't tell us about his knowledge of unmarked police cars, can you sir?

"[Fraser:] I can tell you nothing about [appellant]'s history and knowledge base. I made no assessment of that.

"[The Prosecutor:] Based on that last answer, you can't tell us about [appellant]'s experience with police officers in the Bayview?

"[Fraser:] No, that's correct.

"[The Prosecutor:] You can't tell us about his attitude towards the police based on his experience in the Bayview?

"[Fraser:] That's also correct.

"[The Prosecutor:] You can't tell us how [appellant] reacted when he saw a Crown Victoria in the area of Newhall . . . that night?"

The court then overruled defense counsel's objection that the prosecutor was "commenting on [appellant's] sitting here in trial and not testifying." Thereafter, the following colloquy ensued:

"[Fraser:] I don't know anything about that . . . .

"[The Prosecutor:] Now, . . . please assume [appellant] is a gang member and assume that he's in possession of an assault rifle, and assume that he sees police officers approaching, and he recognizes them as police officers at 9:30 at night on the 1300 block of Newhall. As I understood some of the things you told us earlier, that set of circumstances could set off some kind of threat reaction in [appellant]; is that right?

"[Fraser:] It could.

"[The Prosecutor:] And [appellant] could perceive a threat not to his life, but one of the other kinds of threats that you mentioned a few minutes ago, a threat of being arrested, could have perceived a threat that he would be arrested?

"[Fraser:] Certainly.

"[The Prosecutor:] But you can't tell us what kind of threat, if any, [appellant] perceived that night on Newhall, can you, sir?

"[Fraser:] That's correct, I cannot, both legally and ethically, that's correct. I mean I as an individual could make a judgment if I were a trier of fact, obviously, but that's not my role and I can't do that from the witness box, and I won't. That's for the jury to decide."

Appellant argued that the prosecutor's questions were designed to highlight appellant's decision not to testify at trial and therefore constituted *Griffin* error. The court disagreed and rejected the claim of *Griffin* error.

Under *Griffin*, a defendant's Fifth Amendment privilege against self-incrimination is violated when the prosecutor comments directly or indirectly upon the defendant's failure to testify in his defense or urges the jury to infer guilt from the defendant's silence. (*Griffin, supra*, 380 U.S. at p. 615; *People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Hardy* (1992) 2 Cal.4th 86, 154.) In assessing a claim of *Griffin* error, we view the prosecutor's allegedly offensive comments (here questions) in context. (*People v. Mayfield* (1993) 5 Cal.4th 142, 178.)

On direct examination, Fraser testified hypothetically about how persons act when they are under the influence of marijuana and in high stress situations. The questions posed by the prosecutor on cross-examination served to highlight the differences between this testimony and the testimony of certain prosecution witnesses who were able to opine on appellant's membership in a gang, gang members' knowledge of police practices and the relationship between gang members and the police. The question also highlighted that Fraser's testimony about the reactions of people under stress was not inconsistent with the prosecution's theory that appellant responded to the threat of arrest in shooting Espinosa. The prosecutor's cross-examination questions were proper and did not

constitute comments on appellant's not testifying at trial. No *Griffin* error is demonstrated.

V. *The Prosecution's Rebuttal Evidence Was Properly Admitted*[*]

Appellant next contends the court erred in permitting the prosecution to present improper rebuttal evidence.

A. *The Murders of Junious and Baker*

In the prosecution's case-in-chief, Chaplin testified that the Bayview double murder of Junious and Baker was gang related. In the defense case, during cross-examination of journalist and Bayview resident Jones, the prosecutor elicited that Jones had written about the Junious and Baker murders. According to Jones, Baker was accused of being affiliated with Big Block and Junious was neither accused nor affiliated with any gang. Jones said that while some people he spoke with described the double murder as gang related, he would not.

Thereafter, the prosecutor sought to rebut Jones's testimony with proof that the Junious/Baker murders were gang related through testimony by Chaplin and three photographs. Defense counsel objected, but the court ruled that the prosecutor's proffered rebuttal testimony was "appropriate."

Chaplin then viewed the three photographs and testified that Baker was a member of Big Block at the time he was murdered, and the bandana on the ground near Baker at the scene of the Junious/Baker murders supported Chaplin's opinion that Baker's killing was gang related.

"Prosecution rebuttal evidence must tend to disprove a fact of consequence on which the defendant has introduced evidence. [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1088) The prosecution may not cross-examine a witness on a collateral issue and then introduce impeachment on that issue in rebuttal. (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) "The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of

---

[*] See footnote, page 1, *ante*.

demonstrated abuse of that discretion. [Citations.] ' "[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." ' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 335-336.) "Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid 'unfair surprise' to the defendant from confrontation with crucial evidence late in the trial. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1199.) "The order of proof rests largely in the sound discretion of the trial court, and the fact that the evidence in question might have tended to support the prosecution's case-in-chief does not make it improper rebuttal. [Citations.]" (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 68.)

Appellant argues that the Junious/Baker rebuttal evidence was improper because Jones acknowledged on direct examination that "some" people would describe the Junious/Baker murders as gang related. Further, appellant argues the rebuttal evidence was cumulative to testimony by Chaplin and San Francisco Police Sergeant Lucio Perez, submitted by the prosecution during its case-in-chief, that the Junious/Baker murders were gang related.

Since Jones testified on cross-examination that in his opinion the Junious/Baker double murder was not gang related, the prosecutor was entitled to rebut that testimony with gang-expert testimony by Chaplin and supporting photographs. While it is true Chaplin testified on direct examination in the prosecution's case-in-chief that the Junious/Baker double murder was gang related, his rebuttal testimony and the three photographs did not unduly magnify the importance of the evidence. We conclude there was no abuse of discretion.

B. *Chaplin's Testimony Regarding Telfor*

As we discussed in more detail above, Telfor testified for the defense about his observations minutes before the shootings on April 10, 2004, particularly regarding appellant's purchasing marijuana at Newhall and Newcomb. On cross-examination, Telfor said that in early 2004 he spent a fair amount of time at Newhall and Newcomb selling drugs. He denied being a member of or affiliated with a gang in early 2004. However, he conceded he had a "1700 Block" tattoo on his chest. Telfor said that 1700 Block did not consider itself a gang. Telfor said 1700 Block was predominately African-American men, but it did have one Latino member, Telfor's friend "Chris."

The prosecutor sought to rebut Telfor's testimony that 1700 Block had a Latino member and to establish that a tattoo is evidence of gang membership. Defense counsel objected that the proffered rebuttal by Chaplin was a repetition of testimony elicited during the prosecution's case-in-chief, and it was improper to permit the prosecution to rebut evidence elicited by the prosecution on cross-examination. The court overruled the objection. Thereafter, Chaplin testified he was unaware of any Latino male who, in early 2004, was an active participant in 1700 Block. Chaplin also testified that a tattoo that says "1700 Block" would be evidence of a person's participation in that gang.

Appellant contends that because Telfor did not testify on direct examination as to 1700 Block or its members, this rebuttal evidence was improperly admitted. Because appellant provides no reasoned argument supported by pertinent authorities for the contention that the prosecution may not rebut evidence provided by a defense witness on cross-examination, we treat that argument as waived. (*People v. Dixon* (2007) 153 Cal.App.4th 985, 996.) Appellant further contends that neither Telfor's tattoo and supposed gang affiliation based on that tattoo nor his knowledge of the ethnic makeup of 1700 Block was relevant to his direct examination testimony that he saw appellant buying drugs on Newhall and Newcomb on the night of April 10, 2004. The People rejoin that the rebuttal evidence regarding Telfor's gang membership was properly admitted to undermine his credibility and thereby impeach his testimony on direct examination that appellant was at Newcomb and Newhall to purchase marijuana rather than to carry out a

shooting of a rival gang member. We agree and conclude no abuse of discretion is demonstrated.

VI. *The Court Did Not Err in Refusing to Conduct an Evidentiary Hearing Regarding Alleged Jury Misconduct*[*]

Appellant contends the court erred in failing to hold an evidentiary hearing into alleged misconduct by several jurors who talked about another juror outside of deliberations.

On December 13, 2006, the jury began its deliberations. On December 19, the fourth day of deliberations, after the jurors had posed numerous questions to the court and made various requests for the readback of testimony, Juror No. (hereafter, JN) 9[30] asked to speak to the court regarding another juror's misconduct during the trial. At an in camera hearing, JN 9 said that on multiple occasions during the trial she observed JN 8,[31] whom she sat next to, "falling asleep" and had to nudge her to stay awake and focused. She said other jurors observed this too. On several occasions JN 8 said to JN 9, "You need to help keep me awake." JN 9 said she had a "huge concern" about JN 8's ability to listen to all the evidence and make an informed decision. JN 9 denied having any "open conversations" with other jurors about this issue, but said she and other jurors would look at JN 8 and then at each other. JN 9 apologized for not bringing the issue up sooner and was "terrified" she might be responsible for a mistrial for failing to do so sooner. JN 9 said she was certain she could continue deliberating in good faith.

Next, the court questioned JN 8, who admitted there were times during the trial that she would fall asleep briefly, but did not think she missed any part of the trial. She admitted "maybe in joking," that she asked others to help her stay awake. She also admitted that for about a week during trial she was ill and was prescribed medication containing codeine, which made her drowsy. JN 8 said that for the last two days it had been "11 versus 1 against me here." She also said, "[A]nd I've had to hear my foreman

---

[*] See footnote, page 1, *ante*.

[30] JN 9 is also referred to in the record as JN 1486135.

[31] JN 8 is also referred to in the record as JN 1494923.

today say: Okay, we've spent all day on this. And they told him: Don't talk to her like that. So I'm just saying for someone to say that -- there's a few people that have strong opinions, and I just think this is a lot of -- there's nothing wrong with me and my ability whatever."

The court next questioned jury foreperson, JN 10.[32] JN 10, who sat two seats away from JN 8, said that JN 8 "missed a fair portion of the trial," and it had become evident during deliberations that JN 8 was "missing a lot of things that were said in the trial, [and] doesn't understand some of the stuff that went on." When asked if this was because JN 8 did not hear or see evidence at trial, or because she had a "different understanding and memory" and a "different approach to the evidence," JN 10 responded, "I think [JN 8] has a different approach to it." However, JN 10 said, "the big problem is [JN 8] missed stuff that went on in the trial." JN 10 said that in the last day, three different jurors had approached him and said JN 8's inattentiveness was much greater than what JN 10 was aware of during the trial. JN 10 said he saw JN 8 asleep for at least a minute on three or four occasions. Three or four times JN 10 saw the juror next to him touch JN 8 to awaken her. JN 10 also said on one occasion he heard JN 4[33] snoring. JN 10 said that during deliberations JN 8 had fallen asleep twice.

The court next questioned JN 1,[34] who said that during the trial she saw one or two people from time to time with their eyes closed but did not see anyone "totally asleep." She did not see anyone shaken awake or hear anyone snoring, and during deliberations had not seen anyone fall asleep. After JN 1 was released for lunch, defense counsel objected to "this whole process," and particularly, the court's follow-up questions to JN 1 after she indicated she did not think there was a problem. Defense counsel argued the court was "directing jurors towards a particular result," and devaluing

---

32 JN 10 is also referred to in the record as JN 1318792.

33 JN 4 is also referred to in the record as JN 1528878.

34 JN 1 is also referred to in the record as JN 1500250.

JN 8's "voice in this jury." The court noted the objections and continued with its questioning of the jurors.

The court next questioned JN 2,[35] who said she felt that one or two jurors, "but mainly" JN 8, were falling asleep during the trial, "particularly when the prosecutor was up." JN 2 said that once or twice during trial she saw JN 8 with her eyes closed or appearing to sleep. JN 8 asked JN 2 to tap her if she saw JN 8 nodding off and told JN 2 that she (JN 8) had nodded off a few times. JN 2 never heard JN 8 snore and never woke her up. JN 2 said that about four times during deliberations she had seen JN 8 dozing or sleeping for about a minute. JN 2 said that during the trial, six or seven other jurors had discussed JN 8's sleeping. Defense counsel then argued that by focusing on a single juror the situation appeared to be "extremely coercive" and he objected to any further questioning. The court again noted the objection and continued its juror questioning.

Next, the court questioned JN 3,[36] who opined that all the jurors received all the evidence necessary to enable them to carry out their duties as jurors. She said she saw JN 4 and JN 9 nodding off, but not sleeping, on a "couple of days." Twice, for less than a minute, JN 3 heard snoring. JN 3 was unaware of any juror sleeping during deliberations.

Next, the court questioned JN 4, who said he thought all 12 jurors received all the evidence in the case necessary for them to carry out their duties as jurors. He said "a few of us were probably blinking out at different points" during the trial for less than a couple of seconds at a time. JN 4 said he was only aware of jurors nodding off or sleeping during breaks, not during deliberations.

Next, the court questioned JN 5,[37] who said everyone was paying attention during the trial. JN 5 said he was unaware of anyone nodding off or sleeping during deliberations, but opined that at times jurors were "getting bored." He never heard anyone snoring.

---

[35] JN 2 is also referred to in the record as JN 1381026.

[36] JN 3 is also referred to in the record as JN 1547786.

[37] JN 5 is also referred to in the record as JN 1346336.

The court next questioned JN 6,[38] who stated that all 12 jurors were aware and conscious of all the evidence in the trial and carried that awareness into the deliberation process. He did not know of anyone nodding off or sleeping during the case or during deliberations and had not heard snoring. Defense counsel again argued there appeared to be a division in the jury, with some members hostile to JN 8 and wanting her off the jury.

Next the court questioned JN 7,[39] who opined that all the of the jurors received all of the evidence at trial necessary for them to carry out their duties. She was unaware of anyone snoring, nodding off or appearing to sleep at any time during trial or deliberations.

Next, JN 11[40] said that on at least three or four occasions during trial, JN 8 was unable to stay awake for about a minute at a time. JN 11 said JN 8 "remembered particular evidence in a telescoped way, indicating that the juror may have missed an hour or so of testimony." JN 11 also observed JN 7 and JN 9 nudging JN 8. Once JN 11 heard JN 4 snoring and once she heard JN 8 snoring. Once during deliberations, JN 11 saw JN 8 nodding off.

Next, JN 12[41] opined that all 12 jurors had received all the evidence at trial. JN 12 was unaware of any juror nodding off, sleeping or snoring during trial. On one occasion during deliberations, JN 12 saw that JN 8's eyes were closed.

The court noted the "split" in the jurors and that there appeared to be strong feelings among some of them, but denied the prosecution's request to remove JN 8 because it was not persuaded that she was incapable of carrying out her responsibilities as a juror. The court said it would order the jurors to continue their deliberations.

Thereafter, defense counsel moved for a mistrial due to the "interruption and interference in the deliberative process" in violation of appellant's right to due process. Defense counsel also requested an inquiry into whether JN 8 had been affected by the

---

38 JN 6 is also referred to in the record as JN 1391918.

39 JN 7 is also referred to in the record as JN 1458677.

40 JN 11 is also referred to in the record as JN 1564196.

41 JN 12 is also referred to in the record as JN 1553258.

juror questioning, which "singl[e]d out and focus[ed] on her" as an inattentive juror, and whether the other jurors had discussed JN 8 during breaks, in violation of the court's admonition. Defense counsel argued that since no prejudice to either party was demonstrated there was no basis for removing JN 8, and removing JN 8 would be an "extremely invasive act" amounting to structural error.

The court again ruled there had not been a showing of a "demonstrable reality" (see *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052) that JN 8 was unable to perform her functions as a juror, so the court declined to discharge her. The court rejected as "dangerous and unnecessary," defense counsel's request to inquire of all the jurors as to JN 8's ability to have her voice heard. The court also denied defense counsel's request for an inquiry into jury admonition violations and for a further instruction. Finally, the court denied the motion for mistrial, stating it did not find that the jury deliberation process had been "so infected or tainted" as to warrant a mistrial.

On appeal, appellant contends solely that the court erred in failing to inquire into whether up to seven jurors committed misconduct by discussing JN 8 outside the presence of the entire jury in violation of appellant's Sixth and Fourteenth Amendment rights.

"Jurors are prohibited by law from discussing the case until all the evidence has been presented, the trial court instructs the jury, and the jury has retired to deliberate. Section 1122, subdivision (a) provides in pertinent part that '[a]fter the jury has been sworn and before the people's opening address, the court shall instruct the jury generally concerning its basic functions, duties, and conduct. The instructions shall include, among other matters, admonitions that the jurors shall not converse among themselves, or with anyone else, on any subject connected with the trial.' . . ." (*People v. Wilson* (2008) 44 Cal.4th 758, 838.) Appellant's jury was so instructed pursuant to CALCRIM No. 101.

An evidentiary hearing into allegations of juror misconduct should be held only when the court concludes an evidentiary hearing is " 'necessary to resolve material, disputed issues of fact.' " (*People v. Avila* (2006) 38 Cal.4th 491, 604.) The hearing should be held only when the defense presents evidence demonstrating a strong

possibility that prejudicial misconduct has occurred. " 'Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.' [Citations.]" (*Ibid*.) The trial court's denial of a defendant's request for an evidentiary hearing into allegations of jury misconduct is reviewed for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1216.)

In denying appellant's request for an evidentiary hearing, the court stated, "I do not find that it is necessary to bring out and inquire further about what counsel has described as misconduct by three of the jurors in speaking to the foreperson. I don't find from what the foreperson described that they violated an admonition to have raised the issue that they raised. They did not violate an admonition about talking about the case and the avenues that they pursued are entirely reasonable avenues for a jury. That is why you have a foreperson, to help organize their deliberations. That can be someone with whom they raised concerns, not about the case, but about other things they may observe. [¶] So I don't find that it's necessary or appropriate to conduct any further inquiry into that conduct."

Appellant argues that during the in camera hearing, two jurors, including the foreperson, admitted they discussed JN 8 outside of deliberations with less than the entire jury present, and that such discussion constituted misconduct and violated the court's admonition. Appellant asserts there is "ample evidence" that the accusation against JN 8 arose "*after* it became apparent that she was a holdout." As support, he notes that no complaints about JN 8 were made during the first three days of deliberations. He also asserts that the contradictions in the testimony of the jurors other than JN 8 "indicate that the complaints made against JN 8 had a subtext, i.e., her holdout status."

Appellant's argument is premised on JN 8's status as a "holdout." The only evidence in the record supporting this premise is JN 8's comment that for the last two days of deliberation it has been "11 versus 1 against me here." This comment does not establish an 11 to 1 split among the jurors on the *merits* of the case, as distinct from an identical numerical split regarding whether JN8 was inattentive. The comments from

each of the other jurors focused on JN 8's attentiveness or lack thereof during the trial and the deliberations. None of the jurors stated that they had discussed JN 8's view of the case or that they were hostile to it. Jury foreperson, JN 10, said that in the last day three different jurors had approached him and commented on JN 8's inattentiveness during trial. Nothing in JN 10's statement suggests that the three jurors, or any other jurors, commented on JN 8's status as a holdout, and there certainly was no factual dispute that such conversations had occurred. The trial court could properly conclude that there was no misconduct in the three jurors telling the foreperson that JN 8 appeared to be sleeping during trial. Thus, the court properly exercised its discretion in refusing to hold an evidentiary hearing into the statements of the three jurors to JN 10.

VII. *The Motion for New Trial and Request for Continuance Were Properly Denied*[*]

Next, appellant contends the court erred in denying his motion for new trial based on alleged jury misconduct and in denying his request for a continuance and an evidentiary hearing to determine the nature and extent of the alleged misconduct.

The jury reached its verdicts on January 4, 2007. At the commencement of the April 20, 2007 sentencing hearing, the court noted that appellant had filed, under seal, a motion for new trial based on juror misconduct.[42] The thrust of the alleged juror misconduct claim was the jurors impermissibly considered the consequences of a mistrial in the event of a hung jury and impermissibly considered punishment in reaching their decision in an attempt to ensure that appellant would be sentenced to life in prison without the possibility of parole. The motion was supported with affidavits by another defense counsel, James Conger, and by defense investigator Barry Simon. Defense counsel stated that jurors had been reluctant to talk to him because of the publicity the case had received. Defense counsel requested that the court continue the sentencing hearing and hold an evidentiary hearing to determine the nature and extent of the alleged juror misconduct. Defense counsel said that his discussions with JN 8 and JN 4 were

---

[*] See footnote, page 1, *ante*.

[42] Neither party has requested that we order the new trial motion unsealed.

reflected in the affidavits from Conger and Simon. In particular, he said JN 8 had unequivocally stated that the guilty verdict on the second degree murder charge and the affirmative finding on the special circumstance did not reflect her point of view and it was not her true and correct verdict.

The prosecutor responded that the affidavits merely described the deliberative process and did not establish that the alleged juror discussions "drove votes" by the jurors. The prosecutor argued against continuing the sentencing hearing.

In denying the motion for new trial, the court noted that the motion was not supported by affidavits from jurors describing the alleged misconduct. The court concluded the affidavits submitted were not sufficient to establish a presumption of juror misconduct and shift the burden to the prosecutor, or to require an evidentiary hearing. The court noted that there had already been a lengthy period between the jury's verdicts and sentencing to allow the defense to bring a new trial motion. Defense counsel responded that it was not necessary to support his motion based on juror misconduct with juror affidavits and said, "I can have [JN 8] here today." The court noted the objection and reiterated its denial of the new trial motion.

A new trial may be granted when a jury receives any evidence out of court other than a view of the scene or if the jury has engaged in misconduct that has prevented fair and due consideration of the case. (§ 1181, subds. 2 & 3.) The trial court's denial of the new trial motion without an evidentiary hearing is reviewed for abuse of discretion. (*People v. Duran* (1996) 50 Cal.App.4th 103, 113.)

"When a trial court is aware of *possible* juror misconduct, the court 'must "make whatever inquiry is reasonably necessary" ' to resolve the matter. [Citation.] It must do so, however, only when the defense comes forward with evidence that demonstrates a 'strong possibility' of prejudicial misconduct. [Citation.] [¶] Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct. A similar claim was made in *People v. Cox* (1991) 53 Cal.3d 618, where the appellant had offered to submit both the unsworn statement of a juror and a defense investigator's affidavit recounting the juror's statement to the investigator regarding

alleged juror misconduct. We found no abuse of discretion in the trial court's denial of the new trial motion without a hearing, noting that the court was justified in according little, if any, credence to the assertions the juror would not verify. [Citations.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255-1256 (*Hayes*); *People v. Hedgecock* (1990) 51 Cal.3d 395, 415.)

Here, as in *People v. Cox* (1991) 53 Cal.3d 618 (*Cox*),[43] the only evidence offered to support appellant's claim of juror misconduct consisted of hearsay declarations of a defense counsel and the defense investigator. None of the jurors provided sworn statements. Appellant argues that *Cox* is distinguishable. He asserts "this is not the 'normal' case in which hearsay is insufficient to trigger the hearing requirement" because JN 8 "had already complained under oath about the other jurors—there was no suggestion that JN 8 was unwilling to verify her claim." The assertion lacks merit. Although JN 8 was sworn as a juror following jury selection, her complaints about the other jurors were not made under oath. Although defense counsel argued at the new trial hearing that he could "have [JN 8] here today," the court could properly reject the assertion as speculative. Based on the hearsay declarations filed under seal in support of the new trial motion, and the fact that in the three months between the jury's verdict and the new trial hearing the defense was unable to obtain the sworn statement of any juror, the court acted within its discretion in concluding that the defense's hearsay evidence failed to demonstrate a " 'strong possibility' of prejudicial misconduct" (*Hayes, supra,* 21 Cal.4th at p. 1255), and in denying the new trial motion without an evidentiary hearing.

VIII. *Appellant's Life Without Possibility of Parole Sentence Did Not Violate Equal Protection or Constitute Cruel and Unusual Punishment*[*]

Finally, appellant contends the sentence imposed for his second degree murder conviction, life without the possibility of parole (LWOP), violated his federal and state

---

[43] Overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22.

[*] See footnote, page 1, *ante*.

rights to equal protection and the constitutional prohibitions against cruel and unusual punishment.

Murder is classified in two degrees. First degree murder is defined as a willful, deliberate, and premeditated killing or a killing perpetrated by means showing such deliberation and premeditation, such as poison, torture or lying in wait, or a killing committed in the perpetration or attempted perpetration of certain inherently dangerous felonies. All other kinds of murder are of the second degree. (§ 189.)

First degree murder is punishable by death, LWOP, or 25 years to life in prison. The first two punishments are available only if a special circumstance is found true. Generally, the punishment for second degree murder is 15 years to life in prison. (§ 190, subd. (a).) Where the victim was a peace officer engaged in the performance of his duties and the defendant knew or should have known the peace officer status of the victim, the punishment is 25 years to life in prison. (§ 190, subd. (b).) However, where, in addition, one or more of four aggravating factors are charged and found true, the sentence is LWOP. (§ 190, subd. (c).) The aggravating factors are: "(1) The defendant specifically intended to kill the peace officer. [¶] (2) The defendant specifically intended to inflict great bodily injury, as defined in Section 12022.7 on a peace officer. [¶] (3) The defendant personally used a dangerous or deadly weapon in the commission of the offense, in violation of subdivision (b) of Section 12022. [¶] (4) The defendant personally used a firearm in the commission of the offense, in violation of Section 12022.5." (§ 190, subd. (c).)

Here, the jury found that appellant used an assault weapon in committing the second degree murder of Espinoza, Espinoza was a peace officer killed while engaged in the performance of his duties, and appellant knew or reasonably should have known that Espinoza was a peace officer engaged in the performance of his duties.

A. *Equal Protection*

Appellant contends his LWOP sentence for second degree murder violated equal protection because his sentence is harsher than the sentences imposed on those who commit first degree deliberate and premeditated murders of persons who are not peace

officers. Below, the court relied on *People v. Rhodes* (2005) 126 Cal.App.4th 1374 (*Rhodes*) in rejecting appellant's argument that he was being punished more severely than he would have been had he been convicted of first degree murder. Appellant argues *Rhodes* was wrongly decided.

"The federal and state equal protection clauses (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) prohibit the state from arbitrarily discriminating among people subject to its jurisdiction. The guarantee has been defined to mean that all persons under similar circumstances are entitled to and given equal protection and security in the enjoyment of personal and civil rights and the prevention and redress of wrongs. [Citation.] Those who are similarly situated with respect to the purpose of the law shall receive similar treatment. [Citation.] ' " 'Under the equal protection clause, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " ' [Citations.]" [Citation.]' [Citation.] The equal protection guarantee, ' "however, does not prevent the state from drawing distinctions between different groups of individuals but requires the classifications created bear a rational relationship to a legitimate public purpose." [Citation.]' [Citation.]" (*People v. Ward* (2008) 167 Cal.App.4th 252, 257-258.)

" ' "The use of the term 'similarly situated' [in this context] simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." [Citation.] "Persons who are similarly situated must be treated alike. [Citation.] There is, however, no requirement that persons in different circumstances must be treated as if their situations were similar." [Citation.]' [Citation.]" (*People v. Travis* (2006) 139 Cal.App.4th 1271, 1291.)

In *Rhodes,* Division One of this court held that the LWOP sentence imposed upon a defendant for the second degree murder of a peace officer in the performance of his duties does not violate equal protection. (*Rhodes, supra,* 126 Cal.App.4th at pp. 1381,

1387, 1391.) The *Rhodes* court found that the defendant had failed to establish the initial inquiry in the equal protection analysis—that he was similarly situated to other murderers. (*Id.* at pp. 1383-1384) "The life without possibility of parole sentence [imposed on the defendant] requires not merely a second degree murder of a peace officer in the performance of his or her duties, but may be imposed only if at least one of four additional enumerated facts is found. [The d]efendant's second degree murder conviction thus differs in its essential elements from other forms and degrees of murder." (*Id.* at p. 1384.)

Rhodes determined that "the comparative gravity of distinctive criminal offenses and the commensurate punishment to be selected for them is not an assessment either defendant or this court is entitled to undertake. 'The matter of defining crimes and punishment is solely a legislative function.' [Citation.] . . . 'Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think.' [Citations.] ' " '[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.' [Citations.]" [Citation.]' [Citations.]" (*Rhodes, supra,* 126 Cal.App.4th at p. 1385.)

Rhodes noted that the Legislature had determined that to deter firearm use and save lives, firearm offenses in many contexts should be treated more harshly than the same offenses committed by other means. And, to promote the societal interest in protecting peace officers engaged in the performance of their duties, more serious punishment should be imposed on defendants who kill or injure peace officers. (*Rhodes, supra,* 126 Cal.App.4th at p. 1386.) "[The d]efendant received the same sentence as may be imposed upon all persons in California who are convicted of second degree murder of a peace officer with a firearm. [Citation.] The distinct punishment imposed for other degrees and forms of homicide does not offend due process or equal protection principles if a rational basis exists for the statutory scheme. [Citations.]" (*Ibid*.) "The Legislature reasonably determined that the murder of a police officer with a firearm is a particularly egregious form of homicide, even absent premeditation or deliberation, that requires the

harsh punishment of life without possibility of parole to adequately promote the sentencing objectives of deterrence, protection of the public, and retribution. The increase in the severity of defendant's punishment for the offense of second degree murder of a peace officer, enhanced by his use of a firearm, is neither irrational nor arbitrary, and therefore did not deny defendant equal protection under the law. [Citations.]" (*Id.* at p. 1387.)

Appellant makes three arguments as to why *Rhodes* is flawed. First, he argues *Rhodes* wrongly determined that a rational basis exists for punishing defendants like him more severely than some first degree murderers, solely because he used a firearm. He asserts that a person who does not intend to kill and who does not know the victim is a police officer (even if he should have known) does not have a more culpable mental state than a first degree murderer. In our view, *Rhodes* properly takes account of the fundamental principle in equal protection analysis that courts should avoid a reassessment of the Legislature's determination of the comparative gravity of distinct criminal offenses and the commensurate punishment selected for them. (*Rhodes, supra,* 126 Cal.App.4th at p. 1385.) ". . . 'The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed.' [Citation.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 840-841.)

Second, appellant argues *Rhodes* improperly concluded that the sentencing objectives of retribution and deterrence provide a rational basis for the Legislature's punishment classification. He asserts that police officers engaged in their duties cannot rationally be said to benefit from deterring second degree murderers who, by definition, do not premeditate. He also argues that since a person who commits second degree murder of a peace officer is not more morally culpable than a person who commits first degree premeditated murder of a person who is not a peace officer, the retributive purpose of the increased punishment for second degree murder of a peace officer does not provide a rational basis for that increased punishment. *Rhodes* correctly concluded that singling out those who commit second degree murder of a peace officer with an

aggravating factor bears a rational relationship to the legislative goals of protecting peace officers and deterring firearm use. (*Rhodes, supra,* 126 Cal.App.4th at pp. 1386-1387.)

Finally, appellant argues *Rhodes* was wrong in concluding that equal protection is not denied by imposing an LWOP sentence on a defendant convicted of second degree murder of a peace officer without a trial on mitigating circumstances. He argues that a second degree murder of a peace officer under section 190 may include a variety of mental states and aggravating factors, and determining whether a defendant should be sentenced to LWOP or not demands a trial on aggravating and mitigating circumstances.

Rhodes acknowledged that, pursuant to section 190.05, subdivision (a), the penalty for a person convicted of second degree murder who has suffered a prior prison term for murder is LWOP or a state prison term of 15 years to life, and punishment is decided by the jury, after its consideration of aggravating and mitigating circumstances. (*Rhodes, supra,* 126 Cal.App.4th at pp. 1387-1388.) In concluding there was no irrationality in classifying second degree murder of a peace officer with a firearm as a more serious offense, the *Rhodes* court stated: "We also discern in the distinct characteristics of the two crimes a rational basis for the legislative decision to adopt a mandatory life term for second degree murder of a peace officer with a firearm, but grant discretion for a parole alternative for a violation of section 190.05: the former crime is much more specific in nature, and thus does not lend itself to the need for the exercise of sentencing discretion; the offense of second degree murder with a prior prison term for murder takes into account a more varied category of both current and prior offenses that demands an examination of mitigating and aggravating factors to properly determine the seriousness of the crime and the appropriate punishment." (*Id.* at p. 1388.) We agree with *Rhodes*'s reasoning and result on this point and therefore reject appellant's claim that *Rhodes* was wrongly decided.

B. *Cruel and Unusual Punishment*

Appellant contends his LWOP sentence for second degree murder of a peace officer violates the prohibition against cruel and unusual punishment.

Under the state constitutional standard, a sentence is cruel and unusual if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) " ' "A tripartite test has been established to determine whether a penalty offends the prohibition against cruel . . . [or] unusual punishment. First, courts examine the nature of the offense and the offender, 'with particular regard to the degree of danger both present to society.' Second, a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions. [Citations.] In undertaking this three-part analysis, we consider the 'totality of the circumstances' surrounding the commission of the offense. [Citations.]" [Citation.]' [Citations.]" (*Rhodes, supra,* 126 Cal.App.4th at p. 1389.)

The prohibition against cruel and unusual punishment under the federal Constitution is applicable in noncapital cases only in exceedingly rare or extreme cases involving sentences that are grossly disproportionate to the offense, described as a "narrow proportionality principle." (*Ewing v. California* (2003) 538 U.S. 11, 20-21.)

" 'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.' [Citations.]" (*Rhodes, supra,* 126 Cal.App.4th at p. 1390.)

In rejecting appellant's contention that the LWOP sentence amounted to cruel and unusual punishment the trial court stated: "There are some mitigating factors for [appellant]: His age, his limited prior criminal history. [¶] But the extreme seriousness of the offense negates the claim of cruel and unusual punishment. [Appellant] opened fire with an AK-47 assault rifle, firing at least 12 times with extremely lethal bullets. It was an unprovoked shooting. [Appellant] acted completely on his own, without encouragement, assistance, or pressure from anyone else. And the impact of that horrifying cascade of bullets was the death of one officer and the injury of another. [¶] [Appellant] has made no showing that a life without parole sentence is far in excess of that imposed in California for more serious crimes or in excess of that imposed for the

same offenses in other states. [¶] . . . [¶] Under the vicious and brutal circumstances of this case, the penalty of life without parole is not disproportionate to the gravity of the offense and [appellant]'s degree of culpability. In the final analysis, punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. That is not the case here. The constitutional challenge to the sentence of life without parole is denied. . . . In this case, it is the crime itself, not the punishment, that shocks our conscience and offends our fundamental notions of human dignity."

Appellant argues that in considering the "nature of the offense" factor, the court improperly took into consideration his conviction for the attempted murder of Parker, and erroneously stated that he fired 12 times at Espinoza. He also argues that the court's finding that the shooting was unprovoked cannot be reconciled with the jury's implicit rejection that the murder of Espinoza was deliberate and premeditated.

Appellant asserts that in considering the "nature of the offender" factor, the court did not consider that he "effectively surrendered" by turning himself in to the medical center 14 hours after the shooting; he was partially under the influence of marijuana at the time of the shooting, which slows down one's ability to perceive and react to visual and aural stimuli; the shooting was a spontaneous and unpremeditated response to a situation appellant perceived as threatening; and he suffered numerous "traumatic and violent" experiences growing up in the "war zone" of the Bayview.

Finally, appellant argues that the court did not consider that in California, the more serious offense of first degree murder of a peace officer is subject to the same LWOP sentence imposed on him for committing second degree murder of a peace officer with a firearm.

Based on the totality of the circumstances of this case, we conclude that appellant's LWOP sentence is not so disproportionate to the gravity of the offense and his degree of culpability as to constitute cruel and unusual punishment. While appellant's prior criminal record may have included only two sustained juvenile petitions, he was an admitted gang member who chose to arm himself with an AK-47 assault rifle on the night

of the shooting as he walked in the Bayview. Substantial evidence was presented from which the jury could conclude appellant recognized Espinoza and Parker as police officers, and appellant fired numerous times at Espinoza when Espinoza approached, with his gun holstered, to detain him. Appellant's claim that his being partially under the influence of marijuana was a mitigating factor borders on frivolous. Moreover, the fact that the jury apparently found the shooting was not deliberate and premeditated does not establish that the shooting was provoked. The jury could have concluded that, knowing Espinoza was a peace officer, appellant intended to kill Espinoza or fired an assault rifle at Espinoza with knowledge that the act was dangerous to human life and with conscious disregard for human life. Finally, appellant makes no showing that his LWOP sentence is far in excess of the sentence imposed for the same offense in other jurisdictions. His claim that the more serious offense of first degree murder of a peace officer is subject to the same LWOP sentence imposed on him for committing second degree murder of a peace officer with a firearm is merely an attempt to reargue the equal protection contention we rejected above.

Appellant committed an egregious, unprovoked murder of a peace officer. Given the gravity of this offense, we cannot conclude the LWOP penalty is grossly disproportionate to the offense, or that it shocks the conscience and offends fundamental notions of human dignity. We thus reject appellant's claims of cruel and unusual punishment under the United States and the California Constitutions.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

Superior Court of the City and County of San Francisco, No. 196842, Carol Yaggy, Judge.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, René A. Chacón and Bruce Ortega, Deputy Attorneys General, for Plaintiff and Respondent.