Filed 12/20/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ANDRE LUIS ORTEGA, Defendant and Appellant.	C047487 (Super. Ct. No. SF086673A)

APPEAL from a judgment of the Superior Court of San Joaquin County, William J. Murray, Judge. Affirmed.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, Marcia A. Fay, Deputy Attorney General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rule 976.1, only the Introduction, Facts and Procedural Background, Part IV of the Discussion, and Disposition are certified for publication.

Introduction

Defendant, Andre Luis Ortega, murdered Walter Adams when defendant and Roque Bejarano were on a test drive of a vehicle Walter Adams had for sale. The test drive was merely a ruse to get to Walter Adams, whose son, Steve, was believed to have stolen jewelry and money from relatives of Robert Sisneros. Sisneros, Bejarano, and defendant were all part of the Norteños criminal street gang.

A jury convicted defendant of the first degree murder of Walter Adams. The jury also found true special circumstance allegations that the murder was committed by means of lying in wait, and that defendant killed Adams, or aided and abetted the killing while being an active participant in a criminal street gang. The jury found defendant had intentionally and personally discharged a firearm in the commission of the murder. The jury found the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang, and that defendant was guilty of actively participating in a criminal street gang. The trial court sentenced defendant to life in prison without the possibility of parole on the murder conviction, plus a consecutive 25-years-to-life term for personally and intentionally discharging a firearm in the commission of the murder. The trial court stayed a 10 year sentence for committing the murder in association with a criminal street gang, and stayed a two year sentence for street terrorism.

Defendant argues the trial court erred in allowing the prosecution to proceed on a theory of felony-murder based upon robbery because it was found at the preliminary hearing that there was insufficient evidence to hold defendant over on the special circumstance allegation that the murder was committed while defendant was engaged in the commission of a robbery. Defendant also argues the trial court improperly instructed the jury on the theory of murder by lying in wait, and improperly refused to instruct on manslaughter as a lesser included offense. Defendant claims the gang related count and findings should be reversed because of insufficiency of the evidence and because the court failed to require unanimity on which gang was involved. He also claims his motion to bifurcate these issues should have been granted. Defendant argues the prosecutor engaged in misconduct, and that the trial court erred in allowing the prosecutor's closing argument chart to be provided to the jury. Defendant additionally claims the trial court erred in failing to exclude certain unfavorable evidence. We find no error, and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Placer County Sheriff's Deputy Paul Long testified he responded to a report of a burglary in Newcastle, California on January 10, 2002. The address to which he reported was the residence and work address of Miller and Aggie Lee, husband and wife. Aggie ran a palm-reading business from that location.

The Lees reported that guns, coins, credit cards, and heirloom jewelry had been stolen.

Two days after the burglary report Miller Lee told Deputy Long they had received information that the burglar was Steve Adams from Stockton. Deputy Long investigated and discovered that Steve Adams's address in Stockton was a palm reading business, and that Gary, Walter, and Lucy Adams were also related to that address.

Some of the jewelry the Lees reported as stolen turned up in a pawn shop in Stockton. Miller Lee purchased some of the jewelry that had a sentimental value, but one piece, a diamond bracelet, was not recovered from the pawn shop. The Placer County Sheriff's Department received almost daily calls from Miller Lee asking for the status of the investigation into the burglary. Miller Lee called less frequently after sheriff's deputies informed him there was no evidence linking Steve Adams to the crime. The calls from Miller Lee ended sometime in February 2002.

Steve Adams's mother left Steve with Walter and Walter's sister Dolly when Steve was a baby.[1] Steve was referred to as Walter's adopted son. Dolly and her sisters worked at a palm reading business on East Harding Way in Stockton. The Adamses refer to themselves as gypsies or Yugoslavians. Dolly had heard

---

[1] Members of the Adams family will be referred to by their given names.

accusations from other gypsies that Steve was robbing gypsies from out of town.

Walter had a Ford Explorer he had been trying to sell for a while. On the morning of the murder, October 23, 2002, Dolly received a phone call asking whether they had a car for sale. When Dolly told the caller they did, he said he would come take a look at it. Dolly told the caller that the car was not there at the time, and he hung up. The man called again in the afternoon, saying he was coming from the Fresno area to take a look at the car, and bringing his aunt, who had the money to buy the car.

Two young Hispanic men arrived to look at the car. Walter left in the car with the two young men around 2:30 p.m. Walter was wearing a gold bracelet he had possessed for four or five years. Dolly became concerned after 30 or 40 minutes had passed and Walter had not come back. Dolly had a friend take her to the mall around 6:00 p.m. to see if Walter's car might be in the parking lot. They could not find it, and by the time they got back home Steve had called the police.

The next morning at around 9:00 a.m., Stockton police investigator David Anderson was dispatched to the west frontage road of Highway 99 when a report came in that a Ford Explorer had been found with Walter Adams's body inside. Walter's body was in the passenger seat. There were rope burns from his mouth to his ear lobes, several gunshot wounds to his right shoulder area, and a rope was draped around his chest. Three expended

shell casings from a .380 caliber semi-automatic handgun were in the driver's seat area, one was in the center console, one was on the right rear floorboard, and a sixth one was underneath the victim. The victim's wallet containing $11 was in his right rear pants pocket, but he was not wearing a bracelet.

Officer Anderson's observations led him to conclude someone had been sitting in the back seat of the vehicle when the victim was killed. His conclusion was based on the fact that the driver's seat was pushed completely forward as if someone had exited the vehicle on the driver's side from the back seat.[2] The vehicle could not have been driven with the seat in that position. The rope burns on the victim's mouth were unlikely to have been caused by a person in the front seat, because a person could not have exerted enough pressure from that position. Also, the ends of the rope, which was still draped over the victim, were pointed over his shoulders towards the back of the seat. The gunshot wounds came from a position directly above the victim into his right shoulder. There were no bullet holes indicating the victim was shot from the front, because those bullets would have exited the victim's body and gone into the seat. The location of the shell casings was consistent with someone in the back seat having fired the gun, although it was also possible from the casings that the shots could have come from the driver's seat area.

---

[2] The Explorer was a two-door vehicle.

The Explorer was processed for fingerprints. Bejarano's fingerprint was discovered on the exterior of the passenger window, his left palm print was on the interior of the driver's door, and his right palm print was on the exterior of the passenger door. Defendant's fingerprint was discovered on the exterior of the passenger door window frame.

Dr. Robert Lawrence performed Walter's autopsy. He determined Walter died as the result of massive hemorrhage and shock from multiple gunshot wounds. The gun muzzle had been either in contact with the victim's skin, or within less than an inch. Dr. Lawrence was also of the opinion that the shooter had been in the back seat behind the passenger. He opined the person in the back seat had been holding onto the rope with one hand and reaching around with the gun and firing downward. It was not likely that the shooter was either in the driver's seat or standing outside on the passenger side of the vehicle. Dr. Lawrence did not go to the crime scene, and did not know if there was any blood spatter inside the vehicle.

Noori Zamanian, who lived on the Highway 99 frontage road, called the Stockton Police Department the morning of October 25, 2002, after reading a newspaper article about the victim's body and truck having been found. Zamanian reported two Hispanic males had come to his house two days earlier and asked to use the phone. Police officers removed Zamanian's telephones and tested them for latent prints. Defendant's fingerprint was found on one of the telephones.

Defendant was the first of the three suspects to be arrested and interrogated. He told investigators that he, Bejarano, and Sisneros had gone to Stockton in Sisneros's vehicle to find someone that had committed a robbery, to scare the person, and to send him a message to stop robbing. They spent an hour or two looking for the person, and when they were unable to find him, decided to find the person's father and send the message to him instead. They knew the father had a vehicle for sale, so they called the number and pretended they wanted to test drive the vehicle in order to make contact with the father.

The three agreed that defendant and Bejarano would go with the victim on the test drive, and Sisneros would follow them in his car. They were on the freeway when the victim said he had an appointment and needed to go back. Bejarano, who had been driving, pulled over to let the victim take the driver's seat. When Bejarano reached for the driver's door, defendant threw a rope over the victim's head. He intended to put the rope around the victim's neck, but it got caught on his mouth. By this time, Bejarano was standing outside the passenger door and saw the rope was caught in the victim's mouth. He told defendant, "[y]ou got to do it[,]" so defendant pulled out a gun and fired. He was sitting directly behind the victim when he shot him.

Defendant and Bejarano ran across the freeway to the other side of the frontage road, where they asked a resident if they could use his phone to call for a ride. Sisneros had not followed them, and they had no idea where he was. Defendant

first tried to call his cell phone, then called his home phone in Sacramento. He spoke with Marissa, Bejarano's girlfriend, and told her to contact Sisneros to come pick them up. Shortly after that, Sisneros picked them up and they went back to Sacramento.

Defendant admitted he had joined the Norteños when he was 10 or 11 years old. Defendant said there was no way to get out of the gang, but he did get away from the crowd and try to stick to himself.

Bejarano testified at trial pursuant to a plea agreement. He stated that on October 22, 2002, defendant asked him if he wanted to go somewhere the next day and make some money. It was Bejarano's understanding they were going to do a "lick," i.e., some criminal activity for the purpose of monetary gain. The next morning Bejarano agreed to do the lick. Sisneros picked up the two of them and they drove from Sacramento to Stockton. Sisneros said they were looking for someone, and they began driving around Stockton searching for that person.

Bejarano was aware defendant had a gun because he had seen it. While they were driving around, Sisneros made a lot of phone calls regarding the fact that they could not find the person for whom they were searching. Eventually, Sisneros made a phone call and told the person on the other end they could not find the target, but that they had seen the target's father. When Sisneros hung up, he said they were going to go look for the dad.

They went to a palm reading shop and Bejarano called the number from a “for sale” sign on an Explorer parked in front of the shop. A woman answered and told Bejarano the owner of the vehicle was not in, and that he should call back. Bejarano called back later and said he was coming from Fresno and wanted to test drive the vehicle. They waited another 30 to 40 minutes before going back to the palm reading business. During that time they talked about what was going to happen. While Bejarano drove the Explorer, defendant was going to sit in the back seat and strangle the man with a rope obtained from the back of Sisneros’s car. Defendant did not want to shoot the man because he did not want to leave shells behind at the scene. Sisneros told them the man was wearing a diamond bracelet and expensive diamond ring, and to be sure and get the jewelry. Bejarano did not know why the man was being killed, other than Sisneros said it was to send a message to the man’s family.

As Bejarano was driving the Explorer, he noticed Sisneros following them at first, but then noticed he was not there. He drove the car onto Highway 99. After he went past a couple of exits, the victim said he needed to get back for an appointment. Bejarano pulled over and told the victim he did not know the area and did not know which road to take. The victim said he would drive. Bejarano was out of the car, and the victim had opened the passenger door when defendant put a rope over the victim’s head. Bejarano ran around to the passenger side and told defendant the rope was in the man’s mouth. Bejarano shut

the door because he figured defendant was going to shoot the victim. Bejarano heard defendant shoot the victim five or six times.

Bejarano and defendant ran away from the vehicle. They ran over an overpass, went to a house, and knocked on the door. No one answered at the first house, but when they went to a second house a man came out from the side of the house. They told him their car had broken down on the freeway and they needed to use the phone. Defendant made the phone call. They waited outside, and Sisneros soon came and drove them back to Sacramento.

During the drive, Bejarano saw defendant holding the diamond bracelet the victim had been wearing. At one point during the drive Sisneros talked to someone on the phone to let them know the deed was done and to set up a meeting. They met that evening in a parking lot in the Sunrise area of Sacramento. Sisneros met the person in a parking lot. As they were driving away from the meeting Sisneros said he got $2,000 for the job. He gave defendant some of the money, and defendant gave Bejarano $200. Sisneros said he had shown the guy the bracelet to let him know the job was done.

Bejarano had performed a lick previously with defendant when defendant asked him to go to Willits, California and steal some marijuana plants. They did that lick with Raymond Royal and Raymond Rios. Bejarano thought Royal might have been associated with the Oak Park Bloods. When they took the marijuana plants, Bejarano and Royal went to the backyard while

defendant held the people in the house at gunpoint. At one point someone tried to grab some of the plants from Royal, and Royal shot him. Both defendant and Royal had guns for the Willits robbery. Defendant's gun was a .380 caliber automatic handgun, the same handgun he used to kill Walter Adams. When police were dispatched to the Willits robbery, they found a man with two gunshot wounds to his chest, a woman with a gunshot wound to her knee, and a man with blunt force trauma to the head.

Bejarano testified that defendant sported gang tattoos, and that he was once a member of the Norteño gang. Bejarano was not sure whether defendant considered himself a gang member at the time of the Adams murder. When police interviewed Bejarano in January 2003, he told them both defendant and Sisneros were members of the Norteño gang. He stated he "associated" with Norteños. Bejarano admitted he had entered into a plea agreement by which he would receive 18 years in prison in exchange for his truthful testimony.

Sisneros also admitted he entered into a plea agreement after being charged with the murder of Walter Adams. In exchange for his truthful testimony, he agreed to a 20 year prison sentence.

Sisneros testified he was related to gypsies Johnny Mitchell and Miller Lee. Sometime in 2002, Miller Lee approached him and defendant about some property that had been stolen from Lee, and asked if Sisneros would be interested in

trying to recover it. Lee said he wanted Sisneros to recover the property and scare the man who had stolen it. Sisneros said the gypsies treated him with respect because he had been incarcerated, and they assumed he was someone to fear.

Lee and Mitchell drove Sisneros to Stockton and took him by several houses where they believed Steve Adams might be living. One was a palm reading shop. Sisneros said they were just supposed to scare Adams, and Sisneros expected no compensation for it.

Sometime in October Sisneros called a couple of people to help him with the job. One of those people was defendant. Defendant and Sisneros were Norteños, were known to have guns, and defendant was not afraid to use a gun. Bejarano also went with them to do the job. Bejarano was also a Norteño.

On the day of the murder Sisneros kept in telephone contact with Lee and Mitchell. They discussed where Sisneros might be able to find Steve Adams. The plan was to scare Steve by beating him up. Sisneros, Bejarano and defendant went several places, but could not find Steve's car. Sisneros told Lee there was a red Ford Explorer in front of one house, and Lee told him he thought the Explorer belonged to Steve's father. Lee said that since the father was not taking responsibility for his son, they should send a message to the father. Lee told Sisneros the victim wore expensive jewelry, and that some of it might belong to Lee. He wanted Sisneros to retrieve the jewelry. Sisneros told defendant and Bejarano this.

There was a “for sale” sign in the back of the Explorer. Miller told Sisneros to call the number. Bejarano agreed to make the phone call. Bejarano and defendant went to test drive the vehicle, and Sisneros planned to follow them in his car and pick them up afterward. However, Sisneros got stopped by a train and lost contact with the Explorer. When Sisneros could not find them, he headed back to Sacramento. Within about 20 minutes, he got a call from one of the men’s girlfriends telling him defendant and Bejarano were stranded. Sisneros went to pick them up. He exited the freeway when he saw the Explorer on the side road, and soon saw Bejarano and defendant walking. After they got in the car, Bejarano showed Sisneros the bracelet he got from the victim. They discussed whether they could get any money for it. Defendant told Sisneros he emptied the gun into the victim, and Bejarano took off running.

Sisneros got a phone call from Lee, and he told Lee they had the victim’s bracelet. Lee said he wanted it. Lee told Sisneros to meet him in Sacramento. The three of them met Lee and Mitchell in a parking lot. Lee said he would get money to buy the bracelet. When Sisneros told Lee and Mitchell that Walter was dead, Mitchell said he got what he deserved.

After meeting with Lee and Mitchell, Sisneros dropped off defendant and Bejarano at a chicken place. He gave them $200 so they would have some money.

About a week later Sisneros met Lee again. He had given Lee the bracelet, and Lee paid him $3,500. He gave $100 to Bejarano.

Defendant testified at trial, and recounted a series of events that differed in several material respects from the statement he gave police shortly after the murder. He testified that Sisneros never told him why he wanted defendant to go out of town with him. He said he rode with Sisneros and Bejarano to Stockton, where they drove around to a couple of different locations, including a palm reading shop. Later, they were shopping when Sisneros and Bejarano told him Sisneros had contacted his cousin and the cousin told him where they could locate someone. Defendant did not know why they were trying to locate the person, and he was not curious about it. They went to the palm reading shop and Sisneros told him Bejarano was interested in buying a car. They got the number off of a "for sale" sign in the back window of a red Explorer. Defendant did not decide to go on the test drive with Bejarano until the last minute.

When Bejarano pulled the car over so that the victim could drive back to his house, Bejarano pulled a gun on him. The victim asked what was going on, and Bejarano told him his son had robbed Lee. Bejarano tossed a rope to defendant. The victim reached for Bejarano's gun and started fighting with Bejarano. Defendant panicked and threw the rope over the victim to get him to let go of the gun. Bejarano was standing outside

the driver side door when he shot the victim six times. The victim was leaning over the center console with his head over the driver's seat.

Later, Sisneros told him that if anyone questioned him he should take the blame for the killing because he was the youngest one and would be out in a couple of years. He said if defendant did not keep quiet he would suffer the consequences later. Defendant testified that even though he had a gang tattoo on his back, he was never a gang member. He did, however, hang out with a lot of gang members.

Defendant's version of events was supported by the testimony of Duane Lovaas, a Department of Justice criminalist. He theorized that the shooter was the driver or was in the driver's position. His opinion was based on the location of the cartridge casings and the blood spatter evidence.

Deputy Ronald Aurich testified as an expert in criminal street gangs. He explained that Norteño is a criminal street gang made up of 20 to 25 different subsets in the Sacramento area. The subsets also have neighborhood affiliations. Aurich opined that defendant was a Norteño, and specifically a Barrio North Side Norteño. Aurich's opinion was based on defendant's gang logo tattoos, involvement in gang-related crimes, and the fact that he kept company with validated gang members. Aurich testified he had reviewed documentation indicating defendant had admitted his gang membership to the juvenile county probation officer.

Aurich opined that Sisneros was also a gang member. His opinion was based upon the Norteño prison gang symbols tattooed on Sisneros's chest, his involvement in gang related crimes, the fact that he had been in prison, and that he kept company with other gang members. Aurich also opined Sisneros was a gang member with a certain status above a common gangster from the neighborhood.

Aurich opined that Bejarano was a Norteño gang member, based upon his association with other gang members, the crimes in which he was involved, the neighborhood in which he lived, and the people with whom he associated.

In Aurich's opinion Walter Adams's murder was gang related.

DISCUSSION

I

Collateral Estoppel

The amended complaint contained a robbery count and a special circumstance allegation that defendant committed the murder while engaged in the commission of a robbery pursuant to Penal Code section 190.2, subdivision (a)(17)(A).[3] At the preliminary hearing, the court found insufficient evidence to hold defendant over on these charges. The court found there was "insufficient evidence to establish that the murder was carried

---

[3] Undesignated section references are to the Penal Code unless otherwise noted.

out to advance the commission of a robbery, rather the evidence suggest[ed] that the robbery was incidental to the murder." The information filed thereafter did not include either the robbery special circumstance allegation or a robbery count.

Defendant filed a motion in limine arguing the prosecution was precluded from advancing a felony murder theory based on robbery or presenting any evidence that the homicide was committed during the course of a robbery. The court denied the motion, finding, "a particular theory of murder doesn't necessarily have to be proved at the preliminary hearing, as long as the defendant's on notice that that theory might be advanced at trial."

Thereafter, the trial court instructed the jury that the prosecution contended defendant was guilty of first degree murder on three theories: deliberation and premeditation, lying in wait, and felony murder. The felony murder theory was based on an unlawful killing occurring during the commission or attempted commission of the crime of robbery. The court instructed that the jurors were not required to unanimously agree on the particular theory of first degree murder as long as they unanimously agreed he was guilty of first degree murder under any of the theories.

Defendant argues the doctrine of collateral estoppel precluded the prosecution from trying the case on any theory of robbery. Collateral estoppel bars the relitigation of an issue decided in a previous proceeding if: (1) the issue was actually

and necessarily decided in the prior proceeding; (2) the prior proceeding resulted in a final adjudication on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior proceeding. (*People v. Davis* (1995) 10 Cal.4th 463, 514, fn. 10.)

However, the doctrine of collateral estoppel does not apply to orders dismissing criminal proceedings following a preliminary hearing. (*People v. Wallace* (2004) 33 Cal.4th 738, 749.) It is also questionable whether collateral estoppel even applies to further proceedings in the same litigation. (*People v. Memro* (1995) 11 Cal.4th 786, 821.)

In any event, the advancement of a felony murder theory was harmless beyond a reasonable doubt. The jury was instructed on three theories by which it could find defendant guilty of murder in the first degree: (1) premeditated murder, (2) felony murder (robbery), and (3) lying in wait murder. While the jury may have based its finding that defendant was guilty of first degree murder on one or all three theories advanced by the prosecutor, it necessarily found that defendant was guilty of lying in wait murder. This is so because the jury found true the special circumstance allegation that the murder was committed by means of lying in wait. The requirements for the lying in wait special circumstance are more stringent than those for lying in wait murder, and if the evidence supports the special circumstance, it necessarily supports the theory of first degree murder. (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

Defendant also claims he was denied due process because he was forced to defend against a charge of which he had no notice. This is simply incorrect. Defendant obviously had notice the prosecution intended to argue a felony murder theory, since he brought a motion in limine to prevent it.

II

Lying in Wait Instruction

The trial court instructed the jury with the language of CALJIC No. 8.25 regarding murder in the first degree by lying in wait. In pertinent part, the court instructed as follows.

> "Murder which is immediately preceded by lying in wait is murder of the first degree. [¶] The term lying in wait . . . is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. [¶] The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation [or[4]] deliberation."

---

[4] The trial court's oral instruction to the jury used the conjunctive. However, the written instructions used the disjunctive, "or." The Supreme Court has indicated that where the written instructions given to a jury to take into the deliberation room conflict with the court's oral instructions, the written instructions govern any conflict. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Here, the jury had the written instructions in the jury room. We therefore analyze defendant's argument in light of the trial court's written instruction.

Defendant argues that because the court did not instruct the jury it had to find both premeditation and deliberation, it was required to instruct that there had to exist a "substantial period" of watching and waiting. Otherwise, he argues, any premeditated murder would satisfy the requirement of murder by lying in wait. Defendant acknowledges that the Supreme Court has foreclosed any argument that the lying in wait murder instruction was incorrect for requiring premeditation or deliberation in the disjunctive. He argues instead that the lying in wait instructions were invalid because they instructed that premeditation alone was sufficient without requiring a "substantial" period of watchful waiting.

In *People v. Moon, supra,* 37 Cal.4th at page 23, the defendant argued there was insufficient evidence to show he was watching and waiting for a "substantial period of time." The Supreme Court answered the argument by pointing out that while the court had held that the period of watchful waiting must be substantial, it had never placed a fixed time limit on the requirement, and had held that the precise period of time was not critical. (*Ibid*.) The court stated it had approved CALJIC No. 8.25 in *People v. Edwards* (1991) 54 Cal.3d 787, 823 (*Edwards*). (*Ibid*.) *Edwards* specifically upheld a first degree murder by lying in wait instruction that did not require a "substantial period" of lying in wait, stating, "the jury was told that the lying in wait must be of sufficient duration to establish the elements of waiting, watching and concealment or

other secret design to take the victim unawares and by surprise, and that a murder done suddenly without such waiting, watching and concealment is not murder by lying in wait. These requirements necessarily include a substantial temporal element. We have never required a certain minimum period of time, only a period not insubstantial. The instructions sufficiently convey this meaning." (*Id*. at p. 823.)

Here, too, the jury was told that "lying in wait" meant the defendant was watching for an opportune time to act together with the defendant's concealment by ambush or some other secret design to take the victim by surprise. It was clear from these instructions that the concept of lying in wait did not include "a killing that was the result of a rash impulse[.]"

The Supreme Court has repeatedly approved the language of CALJIC No. 8.25 against arguments that premeditation and deliberation should have been set forth in the conjunctive (*People v. Ruiz* (1988) 44 Cal.3d 589, 615; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1021; *People v. Stanley* (1995) 10 Cal.4th 764, 794), and that the instruction should have required a substantial period of watchful waiting. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 823 [construing the special circumstance instruction]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139-1140.) We are bound by those decisions.

Moreover, we conclude that even if the trial court had instructed the jury that a substantial period of watchful waiting was required, the outcome of the trial would have been

the same, making any error in failing to so instruct harmless under any standard. Bejarano testified the reason he and defendant took the victim's car for a test drive was so that defendant could sit in the back seat and strangle the victim with a rope. Before the victim was killed, Bejarano had driven through the neighborhood behind the palm reading shop, then taken the car onto the freeway. During the drive, defendant told the victim he liked the car. Bejarano was supposed to look for a secluded area where they could kill the victim.

Defendant's statement to the police corroborated the fact that the victim was killed after defendant, Bejarano, and the victim had been driving on the freeway, and that defendant had planned to strangle the victim. Even though defendant gave a different story when he testified at trial, the jury necessarily did not believe defendant's version of events, in which Bejarano was the shooter, because the jury found true the allegation that defendant personally discharged a firearm in the commission of the murder. The evidence was more than sufficient for the jury to have found that the lying in wait was "of sufficient duration to establish the elements of waiting, watching and concealment or other secret design to take the victim unawares and by surprise[.]" (*Edwards, supra*, 54 Cal.3d at p. 823.)

We conclude that the jury in the present case was properly instructed on the elements of lying-in-wait.

III

Lesser Included Offense Instruction

Defendant argues the trial court erred when it refused his request that the jury be instructed on the lesser included offenses of voluntary and involuntary manslaughter. A trial court errs if it fails to instruct on any lesser included offense that is substantially supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) However, "the existence of '*any* evidence, no matter how weak[,]'" does not compel the giving of a lesser included offense instruction. A trial court is not obliged to instruct on a lesser included offense unless the evidence is "'substantial enough to merit consideration' by the jury." (*Ibid*.) The evidence was not substantial enough in this case to warrant a manslaughter instruction.

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) Voluntary manslaughter applies in two expressly defined and limited circumstances: where the defendant acts in a sudden quarrel or heat of passion, or where the defendant kills in the unreasonable but good faith belief in the need for self defense. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.)[5] Manslaughter through provocation involves

---

[5] At trial, defense counsel relied on defendant's testimony there was a confrontation between Bejarano and the victim in the front seat of the Explorer, and that defendant intervened by placing a rope around the victim's head in order to pull him

killing under such heat of passion as would naturally arouse the mind of an ordinarily reasonable person under the circumstances. (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1244.) There must be objectively sufficient provocation to incite the defendant to homicidal conduct, and such provocation must be caused by the victim, or the defendant must reasonably believe the victim is engaged in the conduct. (*Ibid*.) However, the predictable conduct of a resisting victim is not the sort of provocation sufficient to reduce a murder charge to one of voluntary manslaughter. (*People v. Jackson* (1980) 28 Cal.3d 264, 306, overruled on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889, 898.)

There was insufficient evidence introduced in this case to require an instruction on heat of passion voluntary manslaughter because the victim's only provocative conduct was his predictable resistance to being strangled and shot.

Nor was any evidence presented from which a reasonable jury could have concluded that defendant killed the victim as a result of the actual but unreasonable fear of imminent danger to his life or of great bodily injury. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) The victim was unarmed and faced with two attackers. Defendant never indicated he thought there was any danger his friend Bejarano would shoot him. The trial court did

---

away from Bejarano. Under the version of events to which defendant testified at trial, Bejarano fired the fatal shots, so it is not clear how this version would support a voluntary manslaughter defense as to defendant.

not err when it refused to give the jury voluntary manslaughter instructions.

We need not decide whether the trial court erred in failing to instruct on the lesser included offense of involuntary manslaughter, because any such error was harmless beyond a reasonable doubt. "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

The request for involuntary manslaughter instructions was based upon a theory of a misdemeanor act committed without due caution and circumspection. The misdemeanor act was defendant's act of putting a rope around the victim to get him to let go of the gun. Although defendant testified to this version of events at trial, the jury decided, based upon proper instruction, that the defendant personally used a weapon to kill Walter Adams. Since the jury clearly did not believe defendant's version of events, he cannot have been prejudiced by any failure to instruct on involuntary manslaughter.

IV

Gang Related Counts and Findings

The jury found true the special circumstance allegation that while defendant was an active participant in a criminal street gang, he intentionally killed the victim to further the activities of the criminal street gang. (§ 190.2, subd.

(a)(22).)[6] It found true the allegation that defendant committed the offense for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) The jury also found defendant guilty of violating section 186.22, subdivision (a), actively participating in a criminal street gang. The existence of a criminal street gang is an element of all three allegations.

A criminal street gang is defined as, "an ongoing association of three or more persons with a common name or common identifying sign or symbol [that] has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute[,] and . . . includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. [Citation.]" (*People v. Gardely* (1996) 14 Cal.4th 605, 617; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466-467.)

Defendant contends there was insufficient evidence to sustain a finding of the existence of a criminal street gang because the gang to which the prosecution's expert testified was the Norteño gang, and the term "Norteño" is merely the geographical identity of a number of local gangs with similar

---

[6] As stated in the unpublished portion of this opinion, undesignated section references are to the Penal Code.

characteristics, but is not itself an entity. Defendant's contention is not supported by the evidence.

Defendant relies on *People v. Valdez* (1997) 58 Cal.App.4th 494 (*Valdez*), noting that in *Valdez* the Sixth District Court of Appeal stated, "Norteño and Sureño are not the names of gangs." (*Id.* at p. 508.) However, in *Valdez*, the issue was whether the trial court had abused its discretion in allowing the prosecution's gang expert to testify that the defendant had acted for the benefit of a gang, the defendant arguing the issue was one of fact for the jury. (*Id*. at p. 507.) The pertinent facts were that "a group of individuals from a number of different Norteño cliques or gangs in San Jose came together one day and formed a caravan to attack Sureños." (*In re Jose P., supra,* 106 Cal.App.4th at p. 467.) The court stated that if the evidence had been that most or all of the participants in the caravan were from the same Norteño gang, then the jury might have been able to determine the "'for the benefit etc.'" element as easily as an expert. (*Valdez, supra*, at p. 508.) "However," the court stated, "the facts of the case were not so simple. The participants in the caravan were a diverse group, with affiliations to different gangs. They united for one day to attack Sureños. At the time it assembled, the caravan was not a 'criminal street gang' within the meaning of the enhancement allegation. Moreover, their common identification as Norteños did not establish them as a street gang, for, as Officer Piscitello testified, Norteño and Sureño are not the names of

gangs." (*Ibid*.) The court concluded the particular facts of the case were such that the jury could not determine whether a crime had occurred without the assistance of an expert. (*Ibid.*) Even assuming *Valdez* was correctly decided, a subsequent decision by the Sixth District reiterated that, "*Valdez* does not hold that there is no criminal street gang called Norteño." (*In re Jose P., supra*, 106 Cal.App.4th at p. 467.)

Detective Aurich, the prosecution's gang expert, testified there were thousands of documented Norteño gang members in Sacramento. He testified some of their commonly used symbols are the letter "N," the Roman numeral "IV," "catorce" (Spanish for 14), and the color red. He testified some of their primary activities are the commission of murder, assault, witness intimidation, car-jacking, robbery, extortion, and dope dealing. Detective Aurich also testified regarding the facts of two crime reports of offenses committed by Norteños. One involved a shooting into a crowd of rival gangsters. The other involved a Norteño gang member shooting someone at a gas station who was wearing Sureño colors.

Evidence was thus presented, through the prosecution's gang expert, to establish every element of the existence of the Norteños as a criminal street gang. Unlike *Valdez*, there was no expert testimony in this case that Norteño is not the name of a gang, and, as the Sixth District Court of Appeal recognized in a later case, "the expert testimony in *Valdez* was evidence in that

case, not this one." (*In re Jose P., supra*, 106 Cal.App.4th at p. 467.)

Detective Aurich testified there were thousands of Norteño gang members in the Sacramento area, and 20 to 25 subsets of Norteños. We reject defendant's assertion that the prosecution had to prove precisely which subset was involved in the present case. No evidence indicated the goals and activities of a particular subset were not shared by the others. There was sufficient evidence that Norteño was a criminal street gang, that the murder was related to activity of that gang, and defendant actively participated in that gang. There is no further requirement that the prosecution prove which particular subset was involved here. As stated in *Valdez, supra*, 58 Cal.App.4th at pages 506-507, "gangs are not public and open organizations or associations like the YMCA or State Bar Association, which have a clearly defined and ascertainable membership. Rather, gangs are more secretive, loosely defined associations of people, whose involvement runs the gamut from 'wannabes' to leaders. Moreover, determining whether someone is involved and the level of involvement is not a simple matter and requires the accumulation of a wide variety of evidence over time and its evaluation by those familiar with gang arcana in light of pertinent criteria." (Fn. omitted.) In this case there was testimony that it was not uncommon for members of different gangs to work in concert to commit a crime. In light of the nature of gang structure and the apparent willingness of

members to work with other gangs to commit crimes, requiring the prosecution to prove the specific subset of a larger gang in which a defendant operated would be an impossible, and ultimately meaningless task.

Defendant also argues a unanimity instruction was required as to which gang was involved. A unanimity instruction would not have been appropriate to this situation, thus was not required.

In *People v. Gunn* (1987) 197 Cal.App.3d 408, 412, we explained the circumstances that required a trial court to give a unanimity instruction.

> "When an accusatory pleading charges a single criminal act, and the evidence shows more than one unlawful act, there is the possibility of a conviction even though the jurors are not in agreement as to the act upon which the conviction is based. [Citations.] It is the general rule in such cases that the prosecution either 'must select the specific act relied on to prove the charge *or* the jury must be instructed in the words of CALJIC No. 17.01 . . . that it must unanimously agree beyond a reasonable doubt that defendant committed the same criminal act. [Citations.]"

The name of a gang is not a criminal act. There was no evidence that defendant belonged to any gang other than the Norteño gang, thus there was no possibility the jury was in disagreement about the gang with which defendant associated. There was no need for a unanimity instruction.

V

Personal Use of Firearm Enhancement

The trial court gave two instructions regarding the use of a firearm in the commission of the murder. The first instruction was for the allegation that the defendant intentionally and personally used a firearm in the commission of the murder. The second was for the allegation that a principal intentionally and personally discharged a firearm in the commission of the murder. The jury signed the verdict form finding true the allegation that the defendant intentionally and personally discharged a firearm in the commission of the murder. The jury did not sign the verdict form for the intentional discharge of a firearm by a principal.

Defendant argues the jury's true finding on the personal use enhancement should be reversed because the jury likely found Bejarano was the most likely to have personally discharged the gun. Defendant contends the jury did not need to decide who actually fired the gun, as long as it was a principal. Therefore, defendant contends, that is the determination the jury likely made. We disagree.

It is not reasonably possible the jury determined Bejarano was the one who fired the gun. The court's instruction on the personal use of a firearm informed the jury that "intentionally and personally discharged a firearm" meant that "the defendant himself must have intentionally discharged it." By contrast, the instruction for discharge of a firearm by a principal

informed the jury that “intentionally and personally discharged a firearm” for the purposes of that instruction meant merely that “the principal” intentionally discharged the firearm.

Moreover, the prosecutor told the jury, “If you believe the defendant was the one that, in fact, pulled the trigger, then you find personal use of a firearm.” “If,” the prosecutor continued, “you believe that Roque Bejarano was the person that pulled the trigger, you find personal use to be not true, and you find that use of a firearm by a principal is in fact the one. . . . If you believe the defendant, in fact, pulled the trigger, then you find that -- findings that is, in fact, true that he personally used a firearm. If you, in fact, believe that Roque Bejarano was the one who did it, you sign 91 [the page number of the instruction on use of a firearm by a principal].”

The instructions were appropriately specific about requiring a finding that defendant himself pulled the trigger. The prosecutor’s argument reiterated the instruction. There is no reasonable possibility the jury did not believe defendant was the shooter.

VI

Conduct of the Prosecutor

a. Questions on Defendant’s Postarrest Silence

Defendant argues the prosecutor’s repeated questioning about what defendant told others regarding the incident was

misconduct. We shall determine any harm was cured by the court's instruction.

After defendant testified on direct examination that Bejarano had been the shooter and that defendant had been unaware of the true purpose of the test drive, the prosecutor asked defendant on cross-examination if it was fair to say he had never told such a story in the past. The prosecutor then established that the police had advised defendant of his *Miranda*[7] rights before questioning him, that defendant knew the interview was being videotaped, and that defendant understood he could stop the interview at any time. The prosecutor then asked defendant without objection whether he had told the police about the robbery in Willits when he was questioned about Walter Adams's murder.

The prosecutor asked if defendant's testimony in front of the jury was the first time he had ever told anyone that the plan was to meet Johnny Boy (Johnny Mitchell). Defendant objected, and an unreported bench conference was held. During the bench conference, defense counsel argued the prosecutor's line of questioning violated the attorney-client privilege. The trial court ordered the prosecutor to preface his questions to exclude the communications between defendant and his counsel.

When questioning resumed, the prosecutor asked defendant if he understood that he did not have to discuss anything he told

---

[7] *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

his attorney or investigator because it was privileged. The trial court sustained an objection from defense counsel and another unreported bench conference was held. Next, the prosecutor instructed defendant to disregard anything he may have told his attorney or investigator, and asked whether, prior to his testimony, he had told anyone else of his involvement in the Willits robbery. The prosecutor continued to ask about what defendant might have previously told others about details of the Willits robbery.

The prosecutor then began asking questions about defendant's direct testimony, and whether he had previously revealed certain details. When two of the prosecutor's questions were not prefaced by an exclusion of defendant's attorney or investigator, defendant replied that he had told certain details to his attorney. The court asked the attorneys to approach, and the discussion was not reported. At the unreported bench conference, the court ordered the prosecutor not to ask any questions about what defendant said or did not say to anyone after his initial arraignment.

After the unreported bench conference, the prosecutor prefaced the next question, and several thereafter, with some variant of, "[b]efore you were appointed an attorney, have you ever told anybody . . . ."

Shortly thereafter, the prosecutor started the question, "Prior to your testimony here today in front of this jury . . ." when he was interrupted by the trial court, and a reported

conference ensued. The trial court stated that defense counsel had originally asserted that the questions about what defendant may or may not have said at a certain point in time implicated the attorney-client privilege. The court said it agreed with that concern, but had others as well. The court noted it had originally agreed to let the prosecutor ask the defendant what he had told others up to the time he was appointed an attorney. The court indicated it no longer thought those questions were appropriate, and would give a limiting instruction. Defendant's counsel then asked for a mistrial on three grounds. He claimed the questions violated defendant's privilege against self incrimination, that the questions implied defendant and his attorney collaborated to fabricate defendant's testimony on the witness stand, and that the questions implicated attorney-client privilege.

At the request of the defense, and with the prosecutor's stipulation, the court gave a limiting instruction. The court denied the motion for mistrial, and instructed the jury as follows:

> "Questions have been asked concerning what Mr. Ortega told anyone prior to his testimony today. Do not infer from these questions and answers that his attorney has told him what to say in his testimony. [¶] Also, do not consider as evidence defendant's silence concerning any events underlying the charges, that silence having taken place after his first arraignment or first appearance in court, which was his arraignment on November 5th, 2002. [¶] When the defendant was arraigned at his

> first appearance in court, he was informed by the Court that he had a constitutional right not to say anything about the events underlying the charges. And his silence was an invocation of those rights. [¶] Also, at his first appearance in court, the defendant was advised by counsel not to say anything to anyone concerning the events underlying the charges. Therefore, you must not draw any inference from his silence after his arraignment. [¶] Further, you must not discuss it, nor permit it to enter into your deliberations in any way."

After the verdict, defendant moved for a new trial on the basis of prosecutorial misconduct. The trial court denied the motion, stating the curative instruction given remedied any violation.

Defendant argues the prosecutor committed *Doyle*[8] error in cross-examining him about his postarrest silence. The defendants in *Doyle* made no postarrest statement after being given their *Miranda* warnings. At trial, they contended for the first time that they had been framed by a government informant. (*Doyle, supra*, 426 U.S. at pp. 612-613 [49 L.Ed.2d at p. 95].) The prosecutor attempted to impeach their testimony by asking why they had not told their story of a frame-up before trial. (*Id.* at pp. 613-614 [at pp. 95-96].) The United States Supreme Court reversed the convictions, holding that *Miranda* prohibited such questions as a means of impeachment. (*Id.* at p. 617 [at p. 97].)

---

[8] *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (*Doyle*).

Subsequently, the United States Supreme Court clarified that, "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." (*Anderson v. Charles* (1980) 447 U.S. 404, 408 [65 L.Ed.2d 222, 226].)

In *People v. Belmontes* (1988) 45 Cal.3d 744, the California Supreme Court indicated that while it is permissible to question a defendant about inconsistencies between extrajudicial statements and trial testimony, questions that elicit a defendant's testimony that he made no statements about the crime after being appointed an attorney, but before trial, run afoul of *Doyle*. (*Id.* at pp. 785-786.) *Belmontes* held that the questions in that case had the potential to ripen into *Doyle* error because, although they may have been meant to point out the differences between the defendant's extrajudicial statements and his trial testimony, they could have been interpreted to highlight the defendant's silence between his last jailhouse statement (after which he was appointed an attorney) and trial. (*Id*. at p. 786.) The *Belmontes* court held the questions in the case before it did not ripen into *Doyle* error because of the trial court's admonishment. (*Id*. at pp. 786-787.)

In this case, most of the prosecutor's questions regarding what defendant did or did not say were also an attempt to highlight the difference between defendant's statement to police

and his trial testimony. The prosecutor asked numerous questions about defendant's trial version of certain details of the crime, and whether defendant had previously told anyone the trial version. After asking numerous questions in this vein, the prosecutor emphasized by his questions that defendant had spent three hours talking to the police about "each and every one of these things," and yet he chose to tell a story he claimed at trial was a lie. As in *Belmontes*, the prosecutor's questions here could have been interpreted to highlight defendant's silence after he was appointed an attorney, instead of the differences between defendant's two versions of the crime. For this reason, the prosecutor's emphasis on whether defendant had ever made certain statements before trial, rather than on the discrepancies between defendant's pretrial and trial statements, was ill-advised. However, also as in *Belmontes*, the questions did not ripen into *Doyle* error because the trial court admonished the jury not to draw any inference from defendant's silence after he was appointed an attorney.

There was no *Doyle* error with regard to the questions the prosecutor asked about the Willits robbery. The reasoning of *Doyle* is that a person arrested for a crime has the right to remain silent, and that after being informed of that right, he should not be penalized for exercising it. (*Doyle, supra*, 426 U.S. at p. 619 [49 L.Ed.2d at p. 98].) Defendant was not arrested for the Willits robbery, nor was he charged with the Willits robbery. By emphasizing his silence on the Willits

robbery, the prosecutor was not punishing defendant for exercising his *Miranda* rights in this case.

We also find no prejudicial violation of defendant's attorney-client privilege. After defense counsel objected to the prosecutor's questions on this ground, the prosecutor told defendant anything he may have told his attorney or investigator was privileged and that he did not have to discuss it. Even though every question may not have been prefaced with that disclaimer, it was clear from the context that the prosecutor was not attempting to elicit attorney-client confidences.

In any event, we conclude any error as a result of the prosecutor's questions was not prejudicial. Error in this circumstance is prejudicial if the evidence against defendant is less than overwhelming and if the improper questioning touched a live nerve in the defense. (*People v. Lindsey* (1988) 205 Cal.App.3d 112, 117.) However, the prejudicial impact may be ameliorated by a strong curative instruction. (*People v. Galloway* (1979) 100 Cal.App.3d 551, 560.)

This case differs from *People v. Galloway, supra*, because here there was a strong curative instruction, the evidence of guilt was overwhelming, and the prosecutor did not emphasize defendant's silence in closing argument so as to touch a "live nerve." The evidence was overwhelming because no less than three people gave statements naming defendant as the shooter: Bejarano, Sisneros, and defendant himself. These stories were completely consistent with the physical evidence. Defendant's

testimony that he did not shoot the victim was not his sole defense, and the prosecutor did not bring up defendant's silence in his closing argument. The prosecutor could legitimately emphasize defendant's prior statement, the inconsistencies, and the likelihood that the trial testimony was the false testimony. Finally, the trial court gave a strong curative instruction, and we must presume the jury understood and followed this instruction. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336.) We conclude that had the prosecutor phrased his questions so as to emphasize defendant's changed story rather than defendant's silence, it would have had no effect on the verdict. Any error was therefore harmless.

b. Reference to Polygraphs

The plea agreements for Bejarano and Sisneros were admitted into evidence without objection, and defense counsel cross-examined Bejarano and Sisneros extensively regarding the agreements. In closing argument, defense counsel argued Bejarano and Sisneros knew what information the prosecution wanted and acted in their own self interest by giving the prosecution the information it wanted. Defense counsel told the jury to be skeptical of the contracts and to "scrutinize" them.

In rebuttal, the prosecutor argued the plea deals were not actually that good for Bejarano and Sisneros, and that the plea agreements meant that both of them would be serving more time than if they had been convicted of second degree murder, and almost as much time as if they had been convicted of first

degree murder. The prosecutor went on to explain that by entering into the plea agreements they did not have the benefit of a determination, "based upon judges, courtrooms, anything else like this. The second page of both of these contracts explains that they have to have a polygraph, a polygraph examination, that would be submitted at any time. So we don't have to come in here. We don't have to have a jury determine this. We don't have to hear closing arguments. If they fail a polygraph, all bets are off. They return to their original positions, face the rest of their lives in prison."

At the next court recess, defense counsel informed the court: "I know there's language about polygraphs in the contracts. I certainly don't have any objection to it being referenced, however, the insinuation to the jury that polygraphs were done in this case, obviously that would create the inference that if the polygraphs passed [*sic*] would certainly be absolutely false." The prosecutor and the court assured defense counsel that no such insinuation had been made, and defense counsel raised no objection.

Defendant claims the prosecutor's reference to polygraph tests violated Evidence Code section 351.1, and constituted misconduct. We disagree.

Evidence Code section 351.1, subdivision (a) states:

> "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination,

> shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results."

This section prohibits references to polygraphs from being admitted into evidence. Of course, the arguments of counsel are not evidence, so any mention of a polygraph in the prosecutor's closing argument did not violate Evidence Code section 351.1. Although defendant does not raise the argument, the admission of the plea agreements also did not violate the section. The plea agreements did not contain the results of a polygraph examination, the opinion of a polygraph examiner, or any offer to take or refusal to take a polygraph. The agreements merely stated that a polygraph could be required at any time.

c. Mischaracterization of Evidence

During closing argument the prosecutor, referring to defendant's statement to the police, made the following argument to the jury:

> "You saw just on Friday the manner in which the police officers asked him [the caliber of the weapon used]. There was no suggestion [in the question that would have prompted the correct answer]. He knew the caliber, not because he read the little shell casings that were there in the car. He knew the caliber that was used because he's the one that had the gun. He also knew the number of shots fired because he's the one that fired the gun. When you have that loud number of shots like Duane Lovaas [defendant's expert witness] is describing in a small vehicle, when you have this type

> of echo that is going off, it's impossible for anyone to tell the number of shots between three and ten or whatever, especially going off in . . . [an objection was interposed] when it's going off in rapid succession over a brief amount of time. He knows how many shots are in there because -- he knows how many shots were in the gun because he loaded the gun, because he was the person who, in fact, pulled the trigger."

Defendant argues that since Lovaas did not testify it was impossible to tell the number of gunshots going off, it was misconduct for the prosecutor to argue such a fact.

While a prosecutor may not mischaracterize the evidence in his or her closing argument, fair comment on the evidence is allowed. (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) Fair comment includes reasonable deductions or inferences drawn from the evidence. (*Ibid*.) In this case, Lovaas testified the victim was shot six times from the same gun, that the noise would have been very loud, especially since it was in a closed vehicle, that the bullet wounds were consistent with the victim being in the same position for all six shots, and that the type of gun used would have made it possible to fire all six shots in a matter of seconds. The prosecution's expert also testified the victim's wounds were consistent with the shots having occurred very close in time. It was reasonable to infer from this evidence, that a person hearing the shots would not necessarily know exactly how many times the victim was shot, and that the only reason defendant knew how many times the victim was shot was because he was the shooter. The argument was a

fair comment on the evidence, not a mischaracterization of the evidence.

VII

Motion to Bifurcate Gang Charges

Defendant argues the trial court erred when it denied his pretrial motion to bifurcate the trial of the gang offense, the gang special circumstance allegation, and the gang enhancement allegation. We review the trial court's denial of the motion to bifurcate for abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) The trial court does not abuse its discretion unless the gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id.* at p. 1049.)

Evidence of gang affiliation is admissible to prove the charged offense where it is relevant to prove, "identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Hernandez, supra*, 33 Cal.4th at p. 1049.) "To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Ibid*.) Less need for bifurcation exists in a case such as this than in a prior conviction case because a gang enhancement is attached to the charged offense and is "inextricably intertwined with that offense." (*Id*. at p. 1048.)

In this case the evidence used to prove the gang enhancement, charge, and special circumstance allegations was relevant to prove motive, intent, and to impeach defendant's story that he was an innocent bystander in the entire affair. The gang-related evidence was "inextricably intertwined" with the charged offense of murder, and the trial court did not abuse its discretion in denying the motion to bifurcate.

VIII

Other Crimes Evidence

Defendant argues the trial court erred in denying his motion to exclude evidence of other crimes. Specifically, he objects to the introduction of the Willits robbery and of a drive-by shooting in Stockton.[9] Defendant made a pretrial motion pursuant to Evidence Code section 1101, subdivision (a) to exclude this evidence, arguing it had no relevance and was prejudicial.

In denying the motion to exclude evidence of the two incidents, the trial court held they were relevant to a "pattern of criminal gang activity" which the prosecution was required to prove to obtain a conviction for violation of section 186.22, subdivision (a), participation in a criminal street gang. The

---

[9] Bejarano testified that when they were in Stockton on the day of the murder and about an hour before the murder, defendant and Sisneros were talking about another shooting they did in Stockton. They said defendant, who was inside Sisneros's vehicle at the time, shot a man who was sitting in his car.

trial court also found the evidence was admissible under Evidence Code section 1101, subdivision (b) because it was relevant to show motive, lack of accident, and aiding and abetting. Evidence Code section 1101 states in relevant part that evidence of a person's character, including specific instances of conduct, is inadmissible to prove that person's conduct on a specified occasion, unless the evidence is relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Two of the disputed issues at trial were whether the incident was gang-related and whether defendant was the shooter. Defendant claimed at trial he thought the test drive of the victim's vehicle was legitimate, and he had no idea there was a plan to harm the victim. He also claimed he hung out with gang members, but he had never done any crimes for the gang. Both of the prior incidents at issue were relevant to show motive, knowledge, and absence of mistake or accident. They showed defendant had committed prior gang-related crimes with the two other gang members involved in the instant case, and that defendant had been armed in each instance. Together with the testimony of the gang expert that gang crimes are often committed to harm rivals and to make money, the prior incidents tended to show defendant had those motives in past gang crimes, and likely had those motives in this crime. The prior incidents also tended to show defendant was an active participant in gang

crimes, making it unlikely his involvement in Walter Adams's murder was accidental.

The evidence was properly admitted pursuant to Evidence Code section 1101, subdivision (b). Nevertheless, defendant contends the trial court abused its discretion in allowing the evidence because it was unduly prejudicial, uncorroborated, cumulative, devoid of detail, and dissimilar to the crime at issue. We will reverse the trial court's exercise of discretion only if the ruling was "'arbitrary, whimsical, or capricious as a matter of law. [Citation.]'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Evidence Code section 352 provides that the trial court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the likelihood that it will necessitate undue consumption of time or create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. The factors to be considered in determining whether to exclude uncharged offenses sought to be admitted under Evidence Code section 1101, subdivision (b) are: "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*People v. Branch, supra,* 91 Cal.App.4th at p. 282.)

In this case neither of the prior incidents was as inflammatory as the charged offense of murder, both prior

incidents appeared to have been fairly recent,[10] there was no possibility of confusion of the issues, and the amount of time spent on the prior incidents was minor in comparison to the voluminous testimony presented in this trial.

Defendant argues the trial court erred in admitting Bejarano's testimony regarding the prior drive-by shooting in Stockton because it was based on the uncorroborated evidence of an accomplice. Although Penal Code section 1111 requires that accomplice testimony be corroborated to support a conviction, the statute relates to the sufficiency, not the admissibility of the evidence. (*People v. Riel* (2000) 22 Cal.4th 1153, 1190.)

To the extent defendant argues the trial court erred in admitting Bejarano's testimony regarding the prior Stockton shooting because there was no proof of the corpus delicti of the shooting, any such claim is forfeited for failure to object on that ground at trial. (*People v. Martinez* (1996) 51 Cal.App.4th 537, 544.) Moreover, the corpus delicti rule has never been applied to other crimes evidence. (*Id.* at p. 545.)

Defendant also argues it violated his right to due process to admit evidence that was offered only to prove his propensity to commit crimes. We have determined the evidence was properly admitted for reasons other than to establish a propensity to commit crimes, thus there was no due process violation.

---

[10] The Willits incident occurred in October 2002. Bejarano testified he thought the prior Stockton shooting had occurred within the year.

IX

Tattoo Evidence

Defendant argues the trial court erred in not sustaining an objection to a prosecution question asking whether one of defendant's tattoos showed a propensity for violence. We shall conclude the issue was not preserved for appeal because defense counsel was not specific as to the ground for the objection, and that any error in failing to sustain the objection was harmless because no improper propensity evidence was presented.

Evidence Code section 353 precludes reversal of a judgment because of the erroneous admission of evidence unless there was a timely objection making clear the specific ground for the objection. Defendant's trial counsel did not specify any ground for objecting, thus the issue was not preserved for appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 431.)

In any case, no objectionable propensity evidence was presented. The objection occurred when the prosecutor was questioning Aurich, the gang expert, about defendant's tattoos. The prosecutor asked whether a certain tattoo indicated gang involvement. The expert responded the tattoo was more an indication of gang mentality or characteristic. The prosecutor then asked: "Now when you have this tattoo . . . this creature with a hat, maybe it's a clown with a hat, and the two firearms, both double barreled or two firearms, is that bragging about your propensity for violence?" The trial court overruled defense counsel's objection, and the witness replied, "I think

it promotes what the mentality of that person in that the lifestyle he chooses by showing that his use of guns -- are in favor of guns is not -- is well within his realm. Again, these tattoos are a way of sort of gangsters because they are more visible. Intimidating people and intimidating or projecting the sense of status by tattooing."

Aurich then testified that the five-pointed star in the tattoo was a symbol for the Norteño gang. Based on defendant's tattoos, as well as other factors, Aurich opined that defendant was an active participant in Norteños, a criminal street gang.

Defendant was charged with a gang special circumstances allegation, a substantive gang charge, and a gang enhancement. The gang charge in particular requires the prosecution to prove defendant was an active participant in the gang. Evidence of the significance of defendant's tattoos was relevant to show his active participation. Aurich did not testify that the tattoo showed a propensity to violence, but that it was a visible signal of gang membership designed to intimidate and project a sense of status in the gang. Such evidence of gang culture and habits was admissible. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

X

Prosecutor's Chart

Before closing argument, the prosecutor submitted a chart he proposed to use for closing argument, and which he wanted to let the jury take into the jury room. Defense counsel objected

on the grounds the instructions were “more than sufficient.” The trial court asked defense counsel whether the chart contained any legal inaccuracies. Defense counsel replied that the chart did not appear to be intentionally deceptive, but that it did not spell out the rules completely. Defense counsel was particularly concerned about information provided under an asterisk. The trial court allowed the prosecutor to put the chart on the wall and to give the jury copies to hold during closing argument, but deferred ruling on whether it could go to the deliberation room.

During closing argument, the prosecutor gave copies of the chart to the jury. He explained that the chart was a kind of road map to work through the case. He explained that the chart showed two different charges -- murder and being an active participant in a criminal street gang. He told the jury they would have to determine guilty or not guilty as to the two charges. He then explained that the jury would have to decide whether the murder was first or second degree. He said that if the jury found the murder to be first degree, it would have to determine whether there were special circumstances, but that if the jury found the murder to be second degree, there need be no special circumstances findings.

As to the asterisk, the prosecutor said it referred to the different theories for a finding of murder, and told the jury it did not have to agree as to which one of the theories applied as long as the finding of murder or murder in the first degree was

unanimous. Prior to the defense counsel's closing argument, the court told the prosecutor to take off the district attorney's label and delete the asterisks and footnotes. The court stated it would let the chart go to the jury room as a supplement to the written instructions. Thereafter, defense counsel used the chart to argue Roque Bejarano was guilty of first degree murder, lying in wait and felony murder.

The chart that was sent to the jury lists in chart form the crimes for which defendant was being tried, the possible degrees, the special circumstance allegations, and the enhancements.[11] The trial court instructed the jury that the chart would be included as page 114 of their instructions as a supplement to the instructions. "It's not intended to be a detailed explanation of all the elements required for everything that's depicted on the chart. That explanation is within the written instructions that you have there in your binder. If you perceive a conflict between the chart and any of the written instructions, follow the written instructions, okay?"

The chart does not contain any error of law or fact, nor does defendant argue it contains any such error. Instead, he argues the chart implied the prosecution's analysis of the case was the correct one.

Section 1137 provides that the jury may take to the deliberation room documentary evidence, written instructions

---

[11] A copy of the chart is attached as an appendix.

given, and notes they have taken on the testimony. While the trial court's decision to make the chart a supplement to the written instructions is certainly irregular, defendant has shown no prejudice. The chart sent to the jury does nothing more than set forth the allegations of the complaint in graphic form. The task of the jury was to analyze the evidence within the framework of the crimes charged. The chart was merely an aid to that end, and did not favor one side over the other. No prejudice can be implied where defendant does not make any showing that the chart contained information not contained in the instructions, that the jury actually used the chart in its deliberations, or that the jury obtained an improper impression from the chart. (See *People v. Herrera* (1917) 32 Cal.App. 610, 615 [defendant not prejudiced by fact that jury took non-documentary evidence into jury room in the absence of showing that jury used such evidence in its deliberation or received any improper impression therefrom].)

Defendant argues the trial court erred in telling the jurors to follow the written instructions if there was a conflict between the instructions and the chart. He argues the jury may have relied on the chart entirely if they did not perceive any discrepancy with the instructions. It is not possible that the jury relied entirely on the chart. As the trial court instructed, it was not intended as a detailed explanation, which could be found only in the instructions. The chart itself contains only the names, and none of the elements

of the various crimes, enhancements, and special circumstances alleged. The jury could not have relied on the chart for any information other than as an impartial flow chart that directed the mechanics of coming to a decision, but not the result itself. There was no error.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

SIMS, J.

BUTZ, J.

APPENDIX

PEOPLE OF THE STATE OF CALIFORNIA V. ANDRE ORTEGA **San Joaquin County Case Number SF086673 A**				
#	**Crimes**	**Degree**	**Specials**	**Allegations**
1	**MURDER** • Unlawful Killing • with Malice Aforethought **or** • During Robbery or Attempt	**1°** • Deliberate and Premeditated, **or** • Lying in Wait, **or** • Felony Murder	• Lying in Wait • Intentional Killing by Active Participant in a Criminal Street Gang	• Use of Firearm/ Personal Use • Use of Firearm/ Use by Principal • Gang Related Crime
		2°	None	
	Actual Killer **or** Aider and Abettor **or** Aider & Abettor with Natural and Probable Consequences of Battery, Assault with Force Likely to Cause Great Bodily Injury **or** Robbery			
2	**ACTIVE PARTICIPANT** **IN A CRIMINAL STREET GANG**			