



## People v. Dorsett

2009 | Cited 0 times | California Court of Appeal | June 11, 2009

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### INTRODUCTION

Appellant Phillip Michael Dorsett appeals from the judgment entered following a jury trial in which he was convicted of second degree murder with gang and personal firearm-use findings. Appellant asserts claims of evidentiary error and insufficiency of evidence. We find no evidentiary error, but agree that the evidence was insufficient to support the gang enhancement finding, which we therefore reverse.

### FACTS

On June 17, 2005,<sup>1</sup> appellant fatally shot Jesse Fujino in the head at close range. Fujino, who was a member of the Evil Klan gang, approached appellant's van along with Abel Soto and Sergio Soto. Appellant had been sitting in the parked van talking and drinking with Manuel Corrales, Victor Torres, Justin Cortez, Mayra Hernandez, Jasmine Hermosillo (Jasmine), and her sister Karina Hermosillo (Karina).<sup>2</sup> With the exception of Karina, everyone in the van was a member of the Muertos gang. The van was parked on the street near Hernandez's apartment building. Fujino asked, "Where you guys from?" Appellant or all of the men replied, "Muertos" and asked Fujino where he was from. Fujino responded that he was "Mousey" from Evil Klan. Fujino and the Sotos walked away, but Fujino urinated on the back of appellant's van. Appellant confronted Fujino angrily, asking why he urinated on the van.

Everyone got out of the van, and most of them walked toward Hernandez's apartment. Appellant approached Fujino and they argued. Appellant pulled a gun from his pocket and pointed it at Fujino's head from no more than 30 inches away. Fujino's arms were straight down by his side with his palms facing his body. Appellant said, "This is Muertos," and fired. Fujino dropped to the ground. Hernandez denied that she saw the shooting, but Jasmine and Karina testified they saw it. Hernandez testified she heard a single shot, turned, and saw Fujino on the ground and appellant standing alone near Fujino's body. Jasmine heard only one shot, and Karina could not remember how many shots she heard.



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Appellant and Corrales ran to the van and drove away. The Sotos picked up Fujino, loaded him in a car, and drove him to a hospital. Police searched the Sotos, their car, and the hospital bags containing Fujino's clothing, but found no weapons. No weapons, bullets, or casings were found at the scene of the shooting. Fujino died from a single gunshot wound to the head. The presence of stippling indicated the muzzle of appellant's gun was about one foot from Fujino's head.

Detective Michael Valento testified that he interviewed Hernandez on June 23 and Jasmine and Karina the next day. They each told him they did not want to provide any information or testify in this case, as they feared the gang would harm them or their families. All three had moved out of the area by the time of trial. Jasmine and Karina testified they had moved four or five times since the shooting. Hernandez cried during her testimony and explained she feared for her family's safety.

Appellant was arrested on September 9. On September 14, a Muertos gang member named Steve Weitz summoned Hernandez and Jasmine to a motel. Weitz later sent another person to bring Karina to the motel. Corrales and Torres were also present in the motel room. Weitz asked who had spoken to the police about appellant. Hernandez said she had, but denied she had told the police anything. Jasmine denied talking to the police. Weitz placed a hot iron and a burning torch near Jasmine's face and threatened to kill her and her family if he found out she had spoken to the police. Weitz then told Corrales and Torres to "handle her." Weitz told the women they should not talk to the police and slapped Hernandez and Jasmine. He also threatened to kill or "get" Karina's and Jasmine's younger sister Bianca. Weitz also took Karina into the bathroom, pulled her close to him, and spread her legs. She shoved him and he let her go when someone else knocked on the door. Eventually, Weitz allowed Jasmine and Karina to leave, but he kept Hernandez at the motel overnight. Hernandez denied that anyone in the motel room threatened her, Jasmine, or Karina.

Appellant testified that he was no longer a member of the Muertos gang at the time of the shooting. He was living in Perris, but visited Los Angeles on June 17 to have the brakes on his car repaired. He borrowed his parents' van and gave Corrales, Torres, and Cortez a ride to Hernandez's apartment, where Hernandez, Jasmine, and Karina joined the men in the van. When Fujino asked where they were from, no one said anything. The third time Fujino asked the question, someone other than appellant replied, "Muertos." Fujino made his gang hand sign and walked toward his two friends. Appellant felt it was not safe in the van, so he told everyone to get out. Appellant placed his gun in his pocket before he got out because he believed Fujino had a gun. Appellant denied seeing Fujino urinate on the van. As everyone from the van walked toward Hernandez's apartment, Fujino twice asked appellant if he knew where he was. Appellant said he was not from the area. Fujino said that was not the question, and again asked appellant if he knew where he was. Appellant said, "Ain't this Crazy Riders?"<sup>3</sup> This enraged Fujino, who walked to within 15 inches of appellant and screamed that it was Evil Klan's territory. Appellant was scared. Fujino pulled a small revolver from his waistband, pointed it at appellant, and fired one or two shots from a distance of about 22 inches. Appellant backed up, pulled his own gun, and fired a single shot. Appellant denied saying "Muertos" before he fired. Appellant ran back to the van, dropped his gun in the gutter, and drove back to Perris. After



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three or four days, appellant went to Mexico because he was afraid Fujino's gang would retaliate against him. He returned once to get a passport so he could work in Mexico then returned to live in Perris shortly before he was arrested.

Several people who lived in the vicinity of the shooting testified they heard more than one shot. Dennis Hernandez (Mayra's brother-in-law) testified he heard two or three shots. Chuckie Armstrong testified that he heard two that sounded different from one another. Jesus Escobar testified that he heard two "loud booms" that sounded like firecrackers. Monica Ruiz and Alyce Oliver heard three loud blasts or gunshots.

The jury convicted appellant of second degree murder. It found that appellant personally discharged a firearm in the commission of the crime, causing death (Pen. Code, § 12022.53, subds. (b)-(d))<sup>4</sup> and that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. The court sentenced appellant to a term of 40 years to life in prison.

### DISCUSSION

#### 1. Admission of Evidence of Threats and Witnesses' Fear

Appellant filed a motion in limine to, inter alia, exclude evidence that Weitz had threatened Hernandez, Jasmine and Karina; these witnesses feared testifying against appellant; and these witnesses had moved due to their fear. The court denied this aspect of the motion, saying, "[I]f the witnesses are fearful about testifying due to threats from someone else, the jury is entitled to know that. Furthermore, if fear motivated the initial lies to the police by these witnesses, then the jury is entitled to know that, too. [¶] The jury will be informed that the threats did not come from Mr. Dorsett or that there is any evidence that he had a role in them."

Appellant first complains that the trial court "issued its ruling without requiring or waiting for testimony from the witnesses." By filing his motion in limine asking the court to exclude such evidence, however, appellant literally asked the court to rule on the admissibility of the evidence before the witnesses testified. He cannot now complain that the court did what he asked. Moreover, the court's ruling did not preclude appellant from objecting to particular testimony at the time it was given.

Evidence a witness is afraid to testify or fears retaliation for testifying is relevant to his or her credibility and is therefore admissible. (People v. Gonzalez (2006) 38 Cal.4th 932, 946.) An explanation of the basis of the witness's fear is also admissible, in the court's discretion. (Ibid.) It is not necessary to show that the witness's fear is directly linked to the defendant for the evidence to be admissible. (People v. Guerra (2006) 37 Cal.4th 1067, 1142 (Guerra).)



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We review any ruling on the admissibility of evidence for abuse of discretion. (Guerra, supra, 37 Cal.4th at p. 1113.)

Appellant apparently concedes the admissibility of the evidence of the threats and the witnesses' fear, but contends that the trial court abused its discretion by permitting the prosecutor to use the threat evidence as evidence of appellant's guilt. In support of this argument, appellant cites numerous questions, answers, and statements occurring during trial that he argues were improper.

First, appellant argues the prosecutor "used" the testimony of the first prosecution witness, Detective Valento, to establish the timing of the threat with respect to appellant's arrest, thereby suggesting that appellant was responsible for the threat.

On direct examination, Detective Valento testified that in almost every gang case, witnesses fear that they will suffer physical harm if they provide information to the police. He then testified that Hernandez, Jasmine, and Karina each expressed fear that the gang would harm her or her family if she talked to the police or testified in this case. Valento did not mention a specific threat against the witnesses. On cross-examination, however, appellant asked about "threats made to" the three witnesses and whether appellant made those threats. Valento said, "Not to my knowledge." Appellant then elicited testimony that the threats occurred on September 14, and when Valento interviewed the three witnesses in June, none of them told him they had been threatened.

On re-direct, Valento again testified that the three witnesses told him they were fearful when he interviewed them in June, that appellant was arrested on September 9, and the witnesses were threatened five days later. Valento then testified that police reports were not available to a defendant before he was arrested and charged, but after counsel was appointed, the police reports would be given to counsel. Without objection, the prosecutor asked the following questions in sequence: "After that arrest date did they then obtain the police report?" and "And then after is when the girls were threatened?" On recross-examination, Valento admitted that he was just speculating that appellant obtained a police report prior to September 14.

The record thus reveals that appellant, not the prosecutor, was the party who introduced evidence that there had been specific threats made against the three witnesses, along with the timing of those threats. After appellant opened this door, the prosecutor asked additional questions about the timing of events. By failing to object, appellant forfeited any objection to the prosecutor's questions implying that the threats to the three witnesses were made after appellant obtained copies of the police report. (People v. Williams (1997) 16 Cal.4th 153, 208.) In any event, Valento admitted that his belief that appellant had obtained a copy of the police report prior to September 14 was merely speculation.

Appellant next argues that the use of the threat evidence as evidence of guilt was "reinforced" when "[t]he prosecutor had [Hernandez] testify that the threat was made by Psycho at a motel room where



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she, Jasmine and Karina were held against their will...." Hernandez actually denied that anyone threatened her at the motel.

Appellant also complains that the prosecutor asked Hernandez whether Weitz said "he was going to get more discovery from [appellant's] dad by Friday, and that if he found out that discovery proved that they had snitched, they would kill you guys?" The trial court sustained appellant's objection to this question, however, and the prosecutor dropped this line of inquiry. The jury was instructed that the attorneys' questions were not evidence, the jury must disregard any question to which the trial court sustained an objection, the jury must not speculate regarding the answer to such a question, and the jury must use "only the evidence that was presented in this courtroom" to decide what the facts were. (CALCRIM No. 222.)

Appellant further complains of the prosecutor's similar questions to Jasmine:

"Q: Did [Weitz] tell you that he was going to get more information about whether or not you guys talked to the police?

"A: He told me he knows people. I don't know. So he didn't tell me. He knows a lot of people. So I don't know to try to found [sic] out where I'm at or what to do with me.

"Q: "Did he tell you he was going to get more discovery from [appellant's] dad?"

"A: Well, if he did that, yeah. He told me that if he found more stuff about me or anything, he was going to do something.

"Q: Did he tell that [sic] if the discovery proved that you snitched, he would kill you?

"A: Yeah."

Appellant did not object to any of the questions or ask to have the answers stricken. He thereby forfeited any claim based upon any of these questions or Jasmine's responses.

The next day, appellant argued to the trial court that the questions implicating defense counsel and appellant's father were very prejudicial and risked creating a trial within a trial on the issue of how Weitz obtained his information. He therefore asked "that the prosecutor be ordered not to ask any more questions about alleged discovery that [Weitz] was to receive from" counsel or appellant's father. Appellant also asked the court to "give a limiting instruction now telling the jurors that any evidence of alleged threats is not brought or offered to prove the defendant's guilt or to implicate the conduct of the defendant's father, family or lawyers, but simply... to help evaluate the testimony of the -- and credibility of the witnesses, that's all." The court agreed to give the limiting instruction appellant requested. Despite the prosecutor's concern, the court agreed with appellant's request to



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tell the jury there was no competent evidence that appellant's father provided any discovery.

Accordingly, the court addressed the jury: "Before we get started with resuming the testimony of Jasmine Hermosillo, I just want to go over something with you that was elicited from the stand yesterday. [¶] If you recall Jasmine Hermosillo -- there was testimony about Jasmine Hermosillo -- that's the witness on the stand now -- she had reported to the detective that when she was in the motel room that [Weitz] made a statement that he expected to get some additional discovery from the defendant's father, and there was some implication that if Jasmine or the other two girls in the room had provided information that they would be killed. Do you remember that? Does everybody remember that? [¶] Some of you might not know what discovery is. In the legal profession discovery are [sic] reports, in criminal law it's police reports. So another way he could have said it is the father's going to provide -- I'm expecting -- [Weitz] could have said, I'm expecting to get some more police reports, and that term is used interchangeably with discovery. [¶] Now, having said that, I want you to know that there is no competent evidence whatsoever that Mr. Dorsett's father provided any discovery or police reports to anybody including [Weitz] or anybody else. Does everybody understand that? [¶] Also, I want you to know that [defense counsel] weren't even on the case when those threats occurred. So they didn't do it either. It would have been absolutely impossible for them to do it. So I don't want anybody to think that either [defense counsel] had any role in providing any police reports to [Weitz] or any other member of the gang. [¶] Is everybody clear with that?" The court reporter indicated all jurors answered "in the affirmative."

After defense counsel asked Jasmine three questions, the court stated, "Before we go on there's something else I forgot to mention. The threats that you heard about, that is -- they were not presented to you or they're not admitted for the purpose of it showing that Mr. Dorsett is guilty of anything. [¶] The reason that those threats -- you were allowed to know about these threats is to assist you in evaluating the credibility of the female witnesses, that would be Jasmine and Mayra yesterday."

Appellant complains that the court's "intended curative instruction actually reinforced and exacerbated the prejudice" by drawing attention to the "prejudicial testimony," explaining the meaning of "discovery," and creating the appearance that appellant "was the only person who could be the source of [Weitz's] information." The court instructed the jury on all of the points appellant requested. Appellant did not object to anything the court said or ask to approach. The court did not err by defining "discovery" for the jury. Although the court's introductory statements reminding the jury of the portion of Jasmine's testimony about discovery called attention to the testimony, the effectiveness of the requested limiting instruction implicitly required that the jury recall the testimony to which it pertained. The court expressly informed the jury of the permissible use of the threat testimony and that it was not admitted as evidence of appellant's guilt.<sup>5</sup> The court reinforced this in the jury charge by instructing that "certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (CALCRIM No. 303.) We presume jurors follow the trial court's limiting instructions. (People v. Waidla (2000) 22 Cal.4th 690,



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725.)

Appellant next complains that the prosecutor "reminded the jury of this point and elaborated on it further, in her rebuttal case" when she "called one of the officers, reminded the officer of the threat at the motel, and [Weitz's] reference to paperwork that he was going to be provided in a few days." The prosecutor did not present a rebuttal. The testimony appellant cites was actually given on cross-examination of defense witness Detective David Carver. The prosecutor asked Carver whether he was familiar with the incident in which Weitz threatened Hernandez, Jasmine, and Karina in a motel room. Carver said he was. The prosecutor noted "there was some discussion about paperwork that was going to be provided by you a few days after this incident in the motel room, to the -- to someone that was representing the defendant at that time, not these attorneys." Appellant objected: "It's 352. It's cumulative." The trial court overruled the objection. Carver acknowledged he understood what the prosecutor was talking about. The prosecutor then asked Carver whether appellant was scheduled to appear in a court a few days after the threats at the motel. Carver responded, "There was actually -- I was ordered to turn over paperwork to the defense ordered by the judge, to turn over discovery, which is normal. But I was ordered to do it on a certain date. And it is within 48 hours of this one court date. And the day I was supposed to turn over the paperwork, corresponded to the date that the girls were told that this person would get the paperwork. And if, when that paperwork was given, if they were found to be rats, bad things would happen to them." Appellant did not object to the question or response, nor did he object when Carver said the "paperwork" he would be "turning over" was "their statements."

Evidence Code section 352 provides that the court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. In this context, unduly prejudicial evidence is evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Appellant forfeited any claim regarding Carver's testimony about the relative timing of the discovery and the motel incident. The court's rejection of appellant's "cumulative" and "352" objections to the prosecutor's earlier statement, did not render any subsequent well-founded objection futile. In light of appellant's prior complaint that introducing evidence that someone provided Weitz with police reports would require a "trial within a trial," appellant's "cumulative" and "352" objections appeared to argue that the probative value of the evidence was outweighed by the consumption of time. Nothing indicates the court would not have entertained a timely objection on the ground that the risk of undue prejudice substantially outweighed the probative value of Carver's lengthy response. In any event, any emotional bias evoked by the evidence was necessarily a bias against Weitz, principally, and Corrales and Torres, to a lesser extent, because they were the ones frightening and threatening the witnesses. Moreover, the trial court specifically instructed the jury to consider the threat evidence only as reflecting upon the credibility of the threatened witnesses, not as evidence



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showing appellant's guilt.

Appellant next complains that the prosecutor showed he had a close relationship with [Weitz] by asking three police officers to identify [Weitz] in photographs seized from appellant's house. After Detective Valento identified photographs of appellant, Corrales, Torres, and Cortez he used in various six-pack photographic arrays, the prosecutor asked him whether he recognized anyone in two photographs Detective Mark Marbach had found on a website. Valento pointed out appellant, Torres, Corrales, and Cortez in one of the photos and appellant and Weitz in the other. The prosecutor subsequently introduced ten photographs the police seized during a search of appellant's home. Valento identified appellant, his brother Jared, Weitz, Corrales, and "Grumpy" in various photographs. Weitz appeared in two photographs (People's Ex. 41 and 42), as did Corrales (People's Ex. 43 and 44). Detective Tripp testified about his familiarity with appellant, his brother, Corrales, Torres, Cortez, Hernandez, Jasmine, and Weitz. Tripp identified Weitz in People's Exhibits 20 and 42.

Appellant did not object to any of the photographs or the testimony of Valento or Tripp regarding the photographs. He has therefore forfeited any claim based upon their admission. Moreover, the prosecution's questioning did not unduly focus on Weitz or emphasize his particular relationship with appellant as opposed to the relationship of appellant to many of his fellow Muertos gang members. Appellant has not suggested any ground upon which the evidence might properly have been excluded.

Appellant also claims that during her cross-examination of appellant, the prosecutor improperly and prejudicially implied that appellant discussed the possibility of blaming his mother for the motel incident. The prosecutor asked appellant whether he discussed "with anyone what happened in the hotel?" Appellant said he had not. The prosecutor asked, "Did you discuss with your mother that you were gonna blame what happened on her?" Appellant denied doing so. The prosecutor continued, "Because she was a bad mother?" Appellant denied this and branded the question "ludicrous." Appellant did not object to any of the prosecutor's questions, and therefore forfeited any claim based upon them.

Appellant also claims that testimony by Detective Carver regarding a recorded telephone conversation from jail "turned the third-party threat into consciousness of guilt evidence." Carver testified appellant's telephone conversations while he was in jail were recorded, and Carver reviewed an October 2 conversation between appellant and an unknown man. The prosecutor asked Carver to tell the jury about appellant's conversation. Appellant asserted "[a] discovery related objection" that the court summarily overruled. Carver testified, "The conversation was that -- the gentleman that was calling him was saying that they wanted to help him out, but they had gotten into some trouble. And then later in the conversation they're talking about -- I don't know exact words but -- something about the two females. And at the beginning of the conversation, Mr. Dorsett says that he's just `chillin like a villain from Muertos. Muertos being the street gang. So the conversation had to do with people getting in trouble, I think, over the hotel room. Carver also testified that appellant told



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the other person not to say anything more because the phone might be recorded. Appellant did not object to this testimony on any ground other than a discovery violation, and therefore forfeited his consciousness of guilt claim. Appellant has not cited any portion of the record to demonstrate any discovery violation.

Appellant further contends the court abused its discretion by admitting evidence of the details of Weitz's threat, which he argues created a substantial risk of undue prejudice outweighing their probative value.

The circumstances under which the threats were made to Hernandez, Jasmine, and Karina were relevant to the witnesses' credibility, in that the circumstances conveyed a substantial degree of menace and gravity that would naturally tend to make the witnesses take the threats seriously. The fact that these witnesses testified, despite the serious threats against them, tended to support their credibility. Moreover, any emotional bias evoked by the evidence was necessarily a bias against Weitz, principally, and Corrales and Torres, to a lesser extent, because they were the ones frightening and threatening the witnesses. Moreover, the trial court specifically instructed the jury to consider the threat evidence only as reflecting upon the credibility of the threatened witnesses, not as evidence showing appellant's guilt. We therefore cannot conclude the trial court abused its discretion by concluding that the probative value of the threat evidence was not substantially outweighed by the probability of undue prejudice against appellant, as opposed to Weitz.

Appellant further contends the trial court's ruling on his motion in limine permitted the prosecutor to preemptively rehabilitate its witnesses before they testified or were impeached. As previously noted, appellant was the party that introduced the evidence of the threats against the three witnesses before they testified. Given the prosecutor's failure to question Valento about the threats during direct examination, it is reasonable to conclude that the prosecutor was going to wait until the first of the threatened witnesses testified, at the earliest, to inquire about the threats. After appellant cross-examined Valento about the threats, the prosecutor was also entitled to address the topic.

To the extent appellant's contention challenges the early introduction by the prosecutor of evidence that the witnesses feared talking to the police or testifying, as opposed to evidence of the threats at the motel, appellant forfeited this contention by failing to object on this ground during trial. He successfully objected to one of the prosecutor's questions regarding Hernandez's expression of fear on the ground it was leading. He further objected on the ground of hearsay when the prosecutor asked why Hernandez was concerned for her family and herself. Appellant posed no further objections to any of the testimony that Hernandez, Jasmine, and Karina feared the gang would retaliate for their cooperation with the police or their testimony. The ruling on the motion in limine simply addressed the admissibility of the fear and threat evidence, not its timing. Accordingly, it was far from futile for appellant to object to the timing of the prosecutor's introduction of this evidence.

Moreover, relevant evidence includes evidence bearing on witness credibility. (Evid. Code, § 210.)



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Evidence Code section 780 enumerates factors bearing on the credibility of a witness, including "(a) His demeanor while testifying and the manner in which he testifies," "(f) The existence or nonexistence of a bias, interest, or other motive," and "(j) His attitude toward the action in which he testifies or toward the giving of testimony." "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (People v. Burgener (2003) 29 Cal.4th 833, 869.) "A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat.... [¶] Regardless of its source, the jury would be entitled to evaluate the witness' testimony knowing it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear." (People v. Olguin (1994) 31 Cal.App.4th 1355, 1368- 1369.)

It is apparent from the record that the prosecutor, defense counsel, and the court were all aware -- before Valento testified -- that an attack upon the credibility of Hernandez, Jasmine, and Karina was going to be a central plank of the defense case. At the preliminary hearing, appellant cross-examined all three of these witnesses about their prior inconsistent and false statements to the police and inconsistencies in their testimony. He also questioned Hernandez about her reluctance to come forward and speak with the police. Appellant's motion in limine raised the matter of Hernandez admitting at the preliminary hearing that she initially lied to the police and the prosecution's opposition to that motion told the court that Hernandez, Jasmine, and Karina all testified at the preliminary hearing that they lied to the police because of their fear of the gang. In ruling upon appellant's motion in limine, the trial court expressly noted that if fear motivated these witnesses' lies to the police, the jury was entitled to know that. Appellant followed through with the expected strategy during the trial by cross-examining Hernandez, Jasmine, and Karina about their prior inconsistent statements to the police and at the preliminary hearing. In addition, he cross-examined Hernandez about her failure to come forward and speak to the police and her admission in prior testimony that she lied to the police. Appellant also elicited testimony from Detective Carver about statements Hernandez, Jasmine, and Karina made in police interviews that were inconsistent with their trial testimony.

Accordingly, even if the prosecutor should have waited to introduce the gang fear evidence until the credibility of the first of the witnesses was challenged during her own testimony, the end result would be indistinguishable from what actually occurred at trial. Appellant essentially argues that he was prejudiced because the jury heard about the witnesses' fear before they were impeached, not after. This argument is not persuasive, especially in light of Valento's unchallenged testimony that witnesses to gang crimes are almost always reluctant to speak to the police, combined with the jury's knowledge that the murder was allegedly gang-related.



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Even assuming the trial court erred in any way regarding the threat and fear evidence, it was clearly harmless in light of the court's limiting instructions and the strong evidence against appellant. Despite several mostly insignificant inconsistencies<sup>6</sup> in the statements and testimony of Hernandez, Jasmine, and Karina, the three witnesses presented a largely consistent account showing that Fujino challenged the group of people seated inside appellant's van regarding their gang affiliation, appellant and Fujino engaged in heated words pertaining both to their differing gang affiliations and Fujino's act of urinating on appellant's van, and appellant then shot Fujino in the head at fairly close range while Fujino's arms remained down at his side. The coroner's testimony corroborated the location of Fujino's gunshot wound and supported Karina's testimony that appellant was very close to Fujino when he fired. No guns or casings were recovered at the scene or from Fujino's clothing, his friends, or the car in which his friends drove him to the hospital. Finally, appellant fled the country immediately after the shooting. In the face of this evidence, and despite appellant's self-defense testimony and testimony from people in the neighborhood that they heard multiple gunshots, it is not reasonably probable appellant would have obtained a more favorable result if the court had not admitted the fear and threat evidence. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

### 2. Exclusion of Evidence of Decedent's Character for Violence

"[I]n a prosecution for a homicide or an assaultive crime where self defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor." (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446.) Evidence of specific instances of conduct, opinion, or reputation may be introduced for this purpose. (Evid. Code, § 1103, subd. (a)(1).)

Appellant's motion in limine asked the court to admit evidence of a prior incident involving Fujino to show Fujino's violent character. The motion indicated the incident "occurred on March 7, 2001, when Fujino acted as a 'lookout' in a gang retaliation drive-by shooting. Fujino admitted to Detective Aguilera that he acted as a lookout, while his accomplice fired several shots at certain individuals. Fujino also admitted that his mother's car was used in the shooting. The defense intends to call Detective Aguilera as a witness to testify to the fact that Fujino admitted to him that he participated in the aforementioned drive-by shooting."

The prosecution opposed the motion on several grounds, including inadmissibility under Evidence Code section 1103 because the prior incident was not an instance of aggressive or violent conduct by Fujino, who did not fire the gun but "simply watched others participate in violent behavior." The prosecution also argued the evidence should be excluded under Evidence Code section 352 because it would confuse the jury and "waste court time."

The court denied the motion on the ground that Fujino "was not personally violent" in the prior incident, and his liability for the prior shooting as an aider and abettor who provided a car and acted as a lookout was an insufficient basis to admit the incident under Evidence Code section 1103. The



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court also ruled that "whatever minimal probative value this has is outweighed by the prejudicial effect that the evidence would have along with it. And also the undue consumption of time, because once it's presented that he was -- he gave a statement, the people are going to be allowed to introduce additional evidence to rebut that. So based on a 352 analysis, I believe that it should be excluded and it will be excluded."

Appellant sought reconsideration of the court's ruling during trial. He informed the court that in proceedings in an unrelated case, the district attorney's office introduced evidence that Fujino had a sustained juvenile petition for attempted murder based upon the 2001 incident. The evidence was apparently introduced to prove a pattern of criminal activity by the Evil Klan gang. The court declined to reconsider its ruling, saying, "[H]e wasn't a shooter. He was more a facilitator. He was a -- the driver, and that is not violent conduct."

Appellant contends the trial court erred by excluding the evidence. He cites a copy of the supplemental police report attached to one of his motions for new trial for the proposition that Fujino was the shooter in the prior incident. Although appellant states that this supplemental report was submitted in support of the motion in limine, the record is unclear on this point. In ruling upon the motion in limine, the trial court stated it had read the police report containing the victim's statement. The victim's statement was contained in the original police report. In ruling upon the motion for new trial, however, the court stated that "during the trial" it had read "the police report" that appellant had lodged that day. Assuming that the lodged report was the same as that attached to the motion for new trial, it included the supplemental report. For the sake of argument, we will assume that appellant submitted the supplemental report to the court in conjunction with his motion in limine and thereby preserved his claim based upon the contents of the supplemental police report.

Appellant's showing regarding the prior incident established, at most, that Fujino aided and abetted a shooting by asking his fellow gang members to retaliate for a confrontation with rival gang members, providing the car, and acting as a lookout while one of his companions shot the victim. The evidence reflected a single incident in which Fujino himself did not commit the violent act. It was, at best, extremely weak evidence of Fujino's character trait for committing violent acts, and the trial court did not act in an arbitrary, capricious, or patently absurd manner by concluding that its probative value was substantially outweighed by the risks of undue prejudice and undue consumption of time.

Appellant relies upon a statement in the supplemental report of Detective Aguilar regarding the 2001 incident that Aguilar "advis[ed]... Fujino that I had received information that he was the shooter in this case...." This is multi-level hearsay that may well reflect nothing more than Aguilar's interrogation technique. Even if the trial court agreed to admit evidence of the 2001 incident under Evidence Code section 1103, subdivision (a), appellant would nonetheless have been required to prove that incident through admissible testimony, not multi-level hearsay. Appellant made no offer of proof of what Aguilar would say, much less that he would say Fujino was the shooter and then set



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forth his basis for that belief. It is noteworthy that later in the supplemental report, Aguilar noted that another participant in the crime, Guiltron, admitted he drove the car, but told him that Deandre and Juan ran back to the car and "told him they shot at `Flash.'" Therefore, even considering the police reports attached to the new trial motion, appellant failed to show that Fujino was the actual shooter, and not just the instigator and look-out.

Moreover, even assuming that the trial court erred by excluding the evidence of the prior incident, the error was harmless. Given the very strong evidence against appellant -- including testimony by Karina and Jasmine that Fujino's arms were down by his sides at the time appellant shot him, the absence of any physical evidence supporting appellant's testimony that Fujino fired a gun, and the jury's apparent rejection of both appellant's self-defense testimony and the testimony of numerous neighbors that they heard multiple shots, it is not reasonably probable that appellant would have obtained a more favorable result if the jury heard about Fujino's conduct in instigating and acting as lookout in the 2001 incident.

### 3. Sufficiency of Evidence Supporting Gang Enhancement Allegation

Appellant contends that the evidence was insufficient to support the gang enhancement allegation, in that the prosecution proved neither the primary activities element nor the pattern of criminal gang activity element.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Penal Code section 186.22, subdivision (b), provides a sentence enhancement for anyone convicted of a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Subdivision (f) of section 186.22 defines "criminal street gang" as an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in... subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Subdivision (e) lists numerous crimes, including homicide, assault with a deadly weapon, and the sale of controlled substances.

"The phrase `primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's `chief' or `principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*)). Both past conduct and the circumstances of the charged offense are relevant to establish this. (*Ibid.*) "Sufficient



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proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed" one or more of the enumerated crimes. (Id. at p. 324.)

Detective Kerry Tripp testified that he had been a police officer for 21 years, and had been with the Inglewood Police Department for 19 years. Since 2000 or 2001 he had been part of the department's gang unit. He assisted with all of the city's gang-related crimes and processed all field identification cards for the city. He was familiar with the Muertos gang, which originated in Inglewood as a primarily Latino gang but now had "members of all races." It was an ongoing criminal street gang with a common name and symbols that Tripp described. In 2005 it had at least 40 or 50 members. Tripp identified the territory in Inglewood claimed by the Muertos gang, but noted that the gang was "a lot more transient... than most gangs are," in that it congregated where ever its members lived. There were, for example, a lot of Muertos members in Palos Verdes, and the Inglewood Police Department received calls from the Sheriff's Department and Palos Verdes Police regarding Muertos graffiti and members in Palos Verdes.

The prosecutor asked Tripp, "[W]hat types of activities do the Muertos street gang engage in?" Tripp responded, "They rob people, they shoot people, stab people, they write graffiti, they challenge other people as to their gang status, they cause nuisance to people in the area which they claim [as] their territory." Tripp testified he was familiar with a Muertos gang member named Aray Singh who was convicted on April 19, 2005 of selling methamphetamine. Tripp was also familiar with Aneesh Avi Mehta, who was convicted of assault with a firearm on October 21, 2003. Mehta was also a Muertos gang member. Tripp also knew that a Muertos gang member named Jason Thomas was convicted of burglary on October 5, 2005.

Tripp was familiar with appellant and his brother and knew they were both members of the Muertos gang. Tripp also knew Weitz and knew that he was a member of the Muertos gang. Tripp recognized Corrales, Cortez, and Torres by name, and knew they were members of the Muertos gang. Tripp testified that Hernandez and either Jasmine or Karina were listed in the Cal Gangs database as members of the Muertos gang.

Appellant argues Tripp merely established that three of the 40 or 50 Muertos members committed three different crimes over the period of two years, i.e., an occasional commission of crimes, not a consistent and repeated commission of one or more enumerated crimes. He also notes that neither the prosecutor nor Tripp addressed the group's "primary activities," and Tripp "instead made a conclusory assertion as to the 'type of activities' the members of Muerto [sic] engage in, with no specifics as to number of such acts, their frequency or the time period over which they occurred or the source of his information." Appellant further argues the predicate offenses also fail to prove the primary activities element because there was no showing that the defendants in those cases were gang members at the time they committed the offenses.

The prosecutor did not ask Tripp what the primary activities of the Muertos gang were. She simply



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asked Tripp "what types of activities" the Muertos gang engaged in. Nor did Tripp indicate in his response that the activities he listed were the primary, main, principal, or chief activities of the gang. This was insufficient to show that "one or more of the statutorily enumerated crimes [was] one of the group's 'chief' or 'principal' occupations" (Sengpadychith, *supra*, 26 Cal.4th at p. 323), in the sense that they "consistently and repeatedly" committed such crimes. At most, Tripp's statement showed that Muertos members had at some point prior to Tripp's testimony committed three crimes enumerated within section 186.22, subdivision (e): a robbery, a shooting, and a stabbing. His testimony did not show that Muertos members committed these offenses consistently and repeatedly. Moreover, causing nuisance and challenging others regarding gang status are not offenses enumerated in section 186.22, subdivision (e). Writing graffiti might constitute felony vandalism, which is included in section 186.22, subdivision (e)(20), but Tripp's testimony was too general to conclude that the graffiti to which he referred would amount to felony vandalism.

Respondent argues the evidence of Singh's and Mehta's convictions and appellant's murder conviction in this case should also be considered in assessing the sufficiency of the evidence of the primary activities element. At most, however, evidence of these three crimes established that three Muertos members each committed one statutorily enumerated crime. This showed only the occasional commission of qualifying crimes by a few members of the gang. It did not demonstrate that members of the gang have consistently and repeatedly committed one or more of the crimes enumerated in section 186.22, subdivision (e). Moreover, Tripp was not asked, and did not testify, that Singh and Mehta were members of the Muertos gang when they committed these crimes. The questions regarding Singh's and Mehta's membership in the Muertos gang were phrased in the present tense, indicating membership at the time of Tripp's testimony. This did not establish that they were members of the gang when the crimes were committed, which was necessarily sometime prior to their April 19, 2005 (Singh) and October 21, 2003 (Mehta) conviction dates. The commission of a crime by a person who is not a member of the gang has no tendency to prove that the crime committed was a primary activity of the gang, even if the person who committed the crime later joined the gang. The failure of proof was especially glaring with respect to Mehta, as his crime was necessarily committed almost four years before Tripp testified on July 2, 2007. Although respondent does not rely upon Thomas's conviction, we note that Tripp's testimony regarding that conviction suffered from the same defect.<sup>7</sup> Moreover, even if appellant's crime, and the convictions of Singh, Mehta, and Thomas were added to the list of activities Tripp described, the proof would merely show seven qualifying offenses committed at some point by seven Muertos gang members, without demonstrating consistent and repeated commission of qualifying offenses or that such offenses were a chief or principal activity of the gang.

Accordingly, we conclude that the prosecution failed to introduce sufficient evidence to prove the primary activities element, and therefore failed to prove that Muertos was a criminal street gang within the scope of section 186.22, subdivision (f). We therefore need not address appellant's contention that there was also insufficient evidence that Muertos members had engaged in a pattern of criminal gang activity.



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We further conclude the gang allegations may not be retried. In *People v. Seel* (2004) 34 Cal.4th 535 (Seel), the California Supreme Court determined that when a sentence enhancement "` is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.'" (Id. at pp. 546-547, quoting from *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19 [120 S.Ct. 2348].) Relying on *Apprendi*, the Seel court barred retrial of a premeditation finding supported by insufficient evidence because premeditation is an element of the crime of attempted murder and not a mere sentencing enhancement. (Seel, supra, 34 Cal.4th at p. 550.)

A defendant is entitled to a jury trial on the elements of an enhancement statute such as Penal Code section 186.22. (Sengpadychith, supra, 26 Cal.4th at p. 327.) By parity of reasoning with Seel, supra, 34 Cal.4th 535, further adjudication on the gang allegation is therefore barred under the doctrine of double jeopardy, and on remand the allegation must be dismissed.

As appellant notes, reversal of the gang enhancement finding does not affect the length of appellant's prison term because the court sentenced him to 15 years to life for second degree murder plus 25 years to life for the section 12022.53, subdivision (b) firearm use enhancement, which was based upon appellant personally firing the gun, causing Fujino's death. The court imposed a 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5), but this is of no practical consequence given appellant's 40-years-to-life term. Nonetheless, the 15-year minimum parole eligibility period imposed under section 186.22, subdivision (b)(5) must be stricken, given the reversal of the gang enhancement finding.

The trial court also required appellant to register as a gang member, presumably because the jury had found true the enhancement allegation under section 186.22, subdivision (b). (§ 186.30, subd. (b)(2).) Although section 186.30, subdivision (b)(3) permits the court to premise such a registration requirement upon its own finding, at the time of sentencing, that the crime was "gang-related," this has been deemed to require proof that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, as defined in section 186.22, subdivision (f). (*People v. Martinez* (2004) 116 Cal.App.4th 753, 761-762.) Given the insufficiency of the evidence to establish that the Muertos gang met section 186.22, subdivision (f)'s definition of a criminal street gang, the gang registration requirement imposed upon appellant cannot be deemed supported by the gang overtones of the case. Accordingly, the gang registration requirement must be stricken.

### DISPOSITION

The gang enhancement finding is reversed. The cause is remanded with directions to eliminate the 15-year minimum parole eligibility period imposed under section 186.22, subdivision (b)(5) and to strike the section 186.30 gang registration requirement. In all other respects, the judgment is affirmed.



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I concur:

ROTHSCHILD, J. MALLANO, P. J., Dissenting.

I dissent from part 2 of the majority opinion. After Gilbert Zazueta threw a wrench at the car Jesse Fujino was driving on March 7, 2001, Fujino reacted by soliciting the assistance of three friends, one of whom he knew owned a gun, in shooting Zazueta. He took his friends to Zazueta's home and acted as the lookout as two of his friends approached Zazueta's home and shot at him. Evidence of this incident demonstrated Fujino's character for violence and should have been admitted under Evidence Code section 1103, subdivision (a)(1). Fujino was not simply a passive onlooker. He instigated and actively participated in the violent retaliation. He shared equal criminal liability with the shooter and the other two accomplices. (Pen. Code, § 31; *People v. Beeman* (1984) 35 Cal.3d 547, 554-555.) Accordingly, the trial court erred by excluding evidence of the March 7, 2001 incident.

Under the circumstances, this error was prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The three principal prosecution witnesses - Mayra Hernandez, Jasmine Hermosillo, and Karina Hermosillo - were each thoroughly impeached with their prior inconsistent statements to the police and their prior inconsistent testimony. Five independent witnesses who lived in the neighborhood testified they heard two or three shots, contradicting Mayra Hernandez and Jasmine Hermosillo, who testified they heard only one shot. (Karina Hermosillo could not remember how many shots she heard.) The number of shots heard is significant because appellant testified Fujino first fired a shot and appellant shot once in self-defense. Fujino initiated the fatal series of events by issuing a gang challenge to appellant and the other occupants of the van. Fujino then urinated on the van, which was a further act of disrespect and certain to escalate the conflict. In light of the March 7, 2001 incident and Fujino's unprovoked hostile conduct on the night of the charged crime, it would be reasonable to infer that Fujino would further escalate the level of conflict by brandishing and firing a gun if it were known that he had a character for violence. Under the circumstances, it is reasonably probable the jury would have found appellant's self-defense claim to be credible if it learned of Fujino's prior efforts to shoot a person who angered him. I would reverse.

MALLANO, P. J.

1. Unless otherwise noted, all further unspecified date references pertain to 2005.
2. To distinguish between the sisters, we use their first names.
3. Valento testified that the Evil Klan and Crazy Riders gangs were enemies at the time of Fujino's death.
4. Unless otherwise noted, all further unspecified statutory references pertain to the Penal Code.
5. Apart from its instruction on flight, the court did not instruct the jury on any consciousness of guilt inferences.



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6. Appellant's statement of facts in his opening brief sets forth the inconsistencies in detail. The most significant inconsistencies were Karina's vague and contradictory testimony at the preliminary hearing about whether she saw a gun in appellant's hand, as opposed to seeing his hand raised as if he had a gun, just before she heard the shot, and Jasmine's vague and contradictory testimony regarding whether she actually saw appellant shoot Fujino. They pertained to matters such as who in the van was drinking, where Fujino's group came from when they approached the van, which of the men in the van responded to Fujino's gang identification inquiry, the precise words spoken, whether Fujino or one of the Sotos urinated on the van, and whether appellant was the first or last person out of the van.

7. Moreover, nothing in the record demonstrates that Thomas committed his burglary before June 17, 2005, the date of Fujino's murder. Thomas was charged with the crime on September 21, 2005. Offenses committed after the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458; *People v. Godinez* (1993) 17 Cal.App.4th 1363, 1365, 1368- 1370.) Given the due process concern underlying this rule, it should be equally applicable to the primary activities element.

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

