Filed 10/11/12 P. v. Rael CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LOUIS ALAN RAEL, Defendant and Appellant.	B232796 (Los Angeles County Super. Ct. No. VA106907)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed as modified.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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In connection with the killing of Guillermo Ramirez, a jury convicted appellant Louis Alan Rael of second degree murder. (Pen. Code, § 187.)[1] The jury also found the gang enhancement alleged in connection with the murder to be true. (§ 186.22, subd. (b)(1).) Finally, the jury found the allegations that a principal in the commission of the crime personally used a handgun, personally discharged a handgun, and personally discharged a handgun causing death, to be not true. (§ 12022.53, subds. (b), (c), (d) & (e).) The trial court sentenced appellant to an indeterminate term of 15 years to life in prison for the second degree murder conviction. In connection with the gang enhancement found true, the court ordered that he not be considered for parole until he served at least 15 years in prison. (§ 186.22, subd. (b)(5).)

Appellant raises a number of issues on appeal, one of which we find to be meritorious. For the reasons that follow, we reverse the true finding with respect to the gang enhancement. We order it, and the minimum 15-year term before parole eligibility that *it* requires, stricken.[2] In all other respects, we affirm the judgment below.

BACKGROUND

Testimony presented at trial, and reasonable inferences drawn there from, established the following facts.

A. Motive: the Michael Sosa Murder

At about 3:30 p.m. on November 27, 2004, Michael Sosa and his girlfriend, Guadalupe Barragan, were at a taco stand in the City of South Gate. Sosa, who went by the moniker "Thumper," and Barragan, who went by the moniker "Vicious," were both members of the South Side Playerz criminal street gang.

While Sosa and Barragan were at the taco stand, a man walked through the parking lot, approached Sosa, pointed a pistol at him, and shot him seven or eight times. Sosa later died at the hospital from his gunshot wounds.

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] This does not affect the minimum term of 15 years otherwise imposed as part of the indeterminate term for appellant's second degree murder conviction.

Barragan was still at the taco stand when the police arrived a few minutes after the shooting. She spoke to officers but did not provide a description of the shooter. Later, she also spoke to the homicide detective assigned to the case. He offered to give her a ride home but she refused and walked away on her own.

B. The South Side Playerz Meeting in South Los Angeles

Melissa Mercado, a member of the South Side Playerz, learned of Sosa's shooting from Barragan's sister. Mercado went to the hospital. There, she learned that Sosa had died.

From the hospital, Mercado went to a South Side Playerz meeting at a house in South Central Los Angeles. A number of South Side Playerz members were at the meeting, including appellant, Carlos Munayco, and Joseph Medina. Munayco was a senior member of the gang, a "shot-caller" whom gang members would obey. Barragan arrived at the house about 45 minutes after Mercado.

While at the house, Mercado smoked marijuana and drank alcohol. At some point, someone asked her to come inside the house. Once inside, someone told Mercado that she was to go to a specific house, knock on the door, ask to buy "dope," and then return to the car that brought her. Mercado knew "something was up." Mercado got into appellant's car with Barragan and appellant drove them to a house in South Gate near the railroad tracks. Three other cars with South Side Playerz members followed them to the location. They arrived at about 11:00 p.m.

C. Payback: the Guillermo Ramirez Murder

At the location, Barragan got out of the car and Mercado followed her. They walked to the front door together. Mercado knocked on the door, lightly. No one answered, and Barragan began knocking on the door harder. Someone opened the interior door, but left the metal security screen closed. Mercado told the person she wanted a "a dime" of "glass," or $10 worth of methamphetamine. The person told them to hold on, and walked back into the house. Mercado did not wait for the person to return; she "speed-walked" back to the car.

Sofia O. was inside the house when Mercado and Barragan arrived. Her cousins Guillermo Ramirez and J.R., and her son Raul, were also in the house, along with various other relatives. Raul answered the door and, after speaking to the women, went to get J.R. Before J.R. got to the front door, Ramirez approached it. Sofia heard seven or eight gunshots and saw muzzle flash; Ramirez fell backwards onto the couch.

Mercado, who was already walking back to the car, heard the shots, turned and looked back towards the house. She saw Barragan standing at the front door firing a handgun. Mercado also saw Medina standing on the grass behind Barragan.

After the shooting, both Mercado and Barragan ran back towards appellant's car. Appellant started to drive away before Mercado got to the car. Mercado got inside but could not remember whether or not Barragan also got in. From the house, Sofia saw Mercado and Barragan running towards appellant's car, and also saw a man in the street holding a gun.

After the shooting, Mercado ended up at a house in Long Beach. Later, she stopped hanging around the South Side Playerz because she realized she "didn't want that kind of life." She was eventually arrested, and told the police what happened that night. She agreed to testify against the others involved in the shooting in exchange for a 21-year prison term.

Ramirez died from his gunshot wounds. He was shot seven times from a single gun, a .38 special or a .357 magnum.

J.R. was friends with Vincent Chavez, who was also called "Gizmo." Gizmo was from the Compton Varrio Tortilla Flats gang and would come by the house, even though he was not supposed to hang out there.

D. Admissions/Declarations Against Penal Interest

Cesar Martinez, another South Side Playerz gang member, testified at appellant's joint preliminary hearing with Barragan, Mercado, and Medina. Martinez was uncooperative at the preliminary hearing, and the prosecutor impeached him with an audiotape and transcript of his earlier interview by Los Angeles County Sheriff's

Department (LACSD) Homicide Detective Jimmie Gates. The audiotape and transcript were admitted into evidence at the preliminary hearing without objection.

At trial, the court found Martinez to be unavailable as a witness and admitted his preliminary hearing testimony as the former testimony of an unavailable witness. (Evid. Code, § 1291.) The trial court also admitted portions of Martinez's earlier taped statements to Detective Gates pursuant to section 1294 as prior statements inconsistent with the former testimony of an unavailable witness. (§ 1294.) The court limited Martinez's prior inconsistent statements to those that described admissions purportedly made to him by Barragan about her involvement in the shooting, admissions the court found to be declarations against Barragan's penal interest relevant to motive. (§ 1230.) The trial court excluded any statements made to Martinez by persons other than Barragan and any statements that referenced the involvement of persons other than Barragan.

As mentioned above, Martinez's statements to Detective Gates were contained in an audiotape of the interview admitted at the preliminary hearing. The prior inconsistent statements the trial court determined to be admissible, however, were intertwined with other statements the court had ruled inadmissible at trial. To overcome the difficulty of editing the audiotape for the purpose of playing it to the jury, the prosecution and defense instead agreed to allow Detective Gates to recount the interview in his testimony.

During the interview, Martinez told Detective Gates that Barragan was his home girl from South Side Playerz and that she had been Michael Sosa's girlfriend. He received a phone call on the day of Sosa's shooting telling him Sosa had been shot. Later, Barragan told him that she shot Ramirez for "revenge and payback." Her intended victim was "Gizmo" from Tortilla Flats. She told Martinez that she walked to the door of the house, knocked, and a boy answered. She asked to buy drugs, and when a guy came to the door, she pulled out her gun and shot him.

During his preliminary hearing testimony, Martinez denied that Barragan ever told him about the shooting. He claimed he was high on methamphetamine when he spoke to Detective Gates, and that he made up his statements based upon things he had heard from

fellow gang members. He believed that by talking to the police he could get a reduced sentence on a pending probation violation matter.

Carla B., Munayco's younger sister, knew appellant, Barragan, and Sosa. Sometime after Sosa's death, Barragan was at Carla's house, getting a memorial tattoo to Sosa. Carla overheard Barragan say that she saw Gizmo shoot Sosa. Barragan also said that she knew where Gizmo lived and that she had "shot him clean."

Carla also talked to appellant about Ramirez's murder. Appellant admitted that he drove Barragan and Mercado over to the house to "kill somebody." He told Carla that Barragan and Mercado got out of the car and that a little girl answered the door. Barragan asked the girl to call out her father. Barragan shot the man who came to the door, firing all the rounds in her gun.

On another occasion, Carla wore a recording device given to her by Detective Gates and recorded a conversation with appellant. During this conversation, appellant stated that Ramirez was killed "for Thumper." Appellant admitted that he was involved but that too many people went to the location. He said that "the bitches" knocked on the door, and that he "took them."

During the recorded conversation, appellant also admitted that at the meeting before the shooting, Munayco told them to "just go to the fuckin' door," because "that's the way shit is being taken care of today[.]"

E. Gang Evidence

South Gate Police Detective Derek O'Malley had been a police officer for over 15 years, and had been assigned to the department's gang unit from 2006 to 2009. In 2004, at the time of the shootings in this case, O'Malley was a patrol officer in training with the gang unit.

The South Side Playerz were rivals of the Compton Varrio Tortilla Flats criminal street gang. "Gizmo" was a Tortilla Flats gang member who was "hanging out" at the Ramirez house in November 2004.

When presented with a hypothetical that corresponded to the facts of this case, Detective O'Malley opined that the murder of Ramirez was committed for the benefit of,

in association with, and at the direction of a criminal street gang. He opined that a person in Barragan's position could also be acting for personal reasons, but that the conduct would still benefit the gang.

F. Defense Evidence

Appellant testified in his defense.

Appellant joined South Side Playerz between 1993 and 1995. Sosa's uncle told appellant about Sosa's shooting the day it occurred. That evening, appellant went to a house in South Central Los Angeles. A number of South Side Playerz members gathered there after Sosa's shooting.

As the gathering broke up, Barragan, Mercado, and a man called "Stalker" approached appellant. Barragan asked appellant to give them a ride to a house in South Gate so they could pick up some drugs. Appellant followed two other cars to the house. He did not know anyone was going to be shot. He did not see a gun in the car and no one talked about shooting anyone.

At the location, Barragan and Mercado got out of appellant's car and walked to the door. Appellant told Stalker to get out and "check" on the drug buy. He also asked Stalker to find out where they were going after they bought the drugs. Stalker got out of the car and disappeared.

Appellant heard gunshots. He started his car and began driving away but stopped when he heard pounding on the back of his car. Mercado and Stalker got back in the car, and appellant drove away because he "didn't want no part of no gunshots." He dropped off Mercado and Stalker somewhere and then went home. He later learned what happened at the location.

When appellant talked to Carla B., his statements were based on what he had heard from others, not his personal knowledge. He lied and exaggerated because he did not feel he could simply say he did not want to talk about the murder.

DISCUSSION

A. Response to Jury Question During Deliberations

Appellant first contends that the trial court improperly answered a jury question regarding the intent requirement for aiding and abetting. We disagree.

The trial court instructed the jury with CALJIC Nos. 3.00 and 3.01 regarding liability based upon aiding and abetting. No. 3.01 specifically defined an aider and abettor as someone who (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent to commit or encourage commission of the crime (3) by act or advice aids, promotes, encourages, or instigates commission of the crime.

In terms of the definition of murder, the trial court instructed the jury with CALJIC Nos. 8.10 and 8.11, which defined both murder and express and implied malice. The trial court also gave CALJIC No. 8.20, which defined willful, deliberate, and premeditated first degree murder; CALJIC No. 8.30, which defined express malice second degree murder; CALJIC No. 8.70, which told the jury it must determine the degree of the murder; and CALJIC No. 8.71, which told the jury that any reasonable doubt regarding the degree of the murder must be resolved in favor of second degree murder. The trial court did *not* give CALJIC No. 8.31, which essentially repeats the definition of implied malice contained in No. 8.11 and expressly characterizes implied malice murder as second degree murder.

During deliberations, the jury sent out a written question:

> "Regarding 'Aid & Abet' -- does knowledge of the unlawful purpose of the perpetrator mean any 'unlawful purpose' or the specific crime of the case (i.e. murder). For example, could any 'unlawful purpose' mean any crime?"

In response, the trial court declined the prosecutor's request to reinstruct and add the natural and probable consequences instruction for aiding and abetting. It also declined appellant's request that the jury be told the unlawful purpose must be express malice, or an intent to kill, only. Instead, the court told the jury that the unlawful purpose could *not* be any crime. It then referred to and re-read CALJIC No. 8.11, with specific emphasis on the two types of malice required for murder: express and implied.

Appellant contends that this response was error. The prosecutor, he argues, did not rely on second degree implied malice murder in her argument. Further, he argues, the court did not instruct on that theory since it did not give CALJIC No. 8.31. Thus, appellant contends, the jury convicted him on a theory of liability upon which the prosecutor did not rely and upon which the court did not instruct.

Appellant's contentions are wholly meritless. First, appellant provides no authority for his novel position that the prosecutor's failure to argue a theory, otherwise supported by the evidence, precludes the jury from basing a verdict upon that theory. It is therefore deemed waived. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Second, contrary to appellant's second assertion, the court did instruct on implied malice murder since it gave CALJIC No. 8.11, which "contains everything necessary" to instruct on implied malice murder. (*People v. Chun* (2009) 45 Cal.4th 1172, 1202.)

It is true that the jury was not expressly told, through CALJIC No. 8.31, that implied malice murder is, by definition, second degree murder. Any error in this regard, however, is harmless beyond a reasonable doubt since the jury convicted appellant of second degree murder in any event. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

B. Failure to Instruct on Heat of Passion Voluntary Manslaughter

Appellant next argues that the trial court erred when it failed to instruct on the lesser included offense of heat of passion voluntary manslaughter. This claim, too, is without merit.

A trial court is obliged to instruct on lesser included offenses so long as they are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Voluntary manslaughter is a lesser included offense to murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) The heat of passion required to reduce murder to manslaughter has both a subjective and objective component: the killer must not only subjectively kill under the heat of passion, but that heat of passion must be such as would be naturally

aroused in the mind of a reasonable person under the same circumstances. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.)

Appellant's contention fails for a number of reasons. First, whatever *Barragan's* argument might have been in terms of *her* "heat of passion," having witnessed, first hand, the killing of her boyfriend, that argument is not available to appellant. Appellant was prosecuted as an aider and abettor to Barragan. Appellant had no special relationship with Sosa and did not witness his killing. There was simply no evidence of any event that might have inflamed *him* to the objective or subjective heat of passion required for voluntary manslaughter. And, absent such evidence, appellant could still be properly convicted of murder even if Barragan was guilty only of some lesser offense based upon her mitigated state of mind. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1123 [aider and abettor may be guilty of crime greater than that of direct perpetrator; liability of aider and abettor depends upon his state of mind, not that of the perpetrator].)

Second, appellant's own testimony expressly contradicted the heat of passion defense. Appellant essentially testified that he went with Barragan and Mercado to the house to buy drugs and had no idea that a killing, or even an assault, was to occur. He did not testify that he went to the location to kill, but did so because of an event that provoked him and inflamed his passion. A manslaughter instruction is not required where no substantial evidence supports the theory and an appellant's own testimony directly contradicts it. (*People v. Moye* (2009) 47 Cal.4th 537, 554.)

Finally, even setting aside appellant's testimony, there was simply no evidence to support a manslaughter instruction. The evidence demonstrated that Sosa was killed at about 3:30 p.m. by someone the South Side Playerz believed to be a rival gang member. Barragan shot Ramirez at approximately 11:00 p.m., after a South Side Playerz meeting held in the aftermath of Sosa's murder. While we do not purport to define how an ordinarily reasonable person might react in all circumstances, we are willing to say under the circumstances present in this case that a seven-hour period of contemplation, as a matter of law, is a sufficient "cooling off period" such that any act of provocation is proof

of motive and not heat of passion. The trial court properly refused to give a manslaughter instruction.

C. Absence of Heat of Passion as an Element of Malice

Having failed to demonstrate substantial evidence in support of a voluntary manslaughter instruction, appellant next attempts to recast that argument and contend that the definition of malice should have included, as a component, the requirement that the prosecution prove the absence of heat of passion. This contention is likewise without merit.

First, appellant has forfeited this claim because he did not raise it below. An appellant may not complain of ambiguities in an instruction, otherwise correct in law and responsive to the evidence, unless he requested an appropriate clarifying instruction from the trial court. (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) This appellant did not do.

Second, the California Supreme Court has specifically rejected appellant's argument: unless the People's own evidence suggests that a killing may have been provoked in the heat of passion, it is the *defendant*'s burden to proffer some showing on this issue before the jury is instructed that the prosecution must prove absence of heat of passion as a component of malice. (*People v. Rios* (2000) 23 Cal.4th 450, 461-462; see *People v. Breverman*, *supra*, 19 Cal.4th at pp. 160, 162.)

Appellant attempts to get around this clear authority by citing *Mullaney v. Wilbur* (1975) 421 U.S. 684 (*Mullaney*). In *Mullaney*, the Supreme Court found that the Maine law of homicide violated principles of due process insofar as it conclusively presumed that an intentional and unlawful killing was committed with malice aforethought, and therefore murder, unless the *defendant* affirmatively proved heat of passion by a preponderance of the evidence. (*Id.* at pp. 686, 701.) The Court concluded that this rule impermissibly shifted the burden of proof to the defendant on an essential element of the crime. (*Id.* at p. 701.)

The simple response to appellant's argument is that the California law of homicide does no such thing. While California requires the defendant to present some substantial evidence of heat of passion (unless the prosecution's own case does so) to warrant a heat of passion instruction, once he does so the burden of disproving heat of passion beyond a reasonable doubt rests entirely with the prosecution. Thus, California law does not run afoul of due process by shifting the burden of proof as the law of Maine did in *Mullaney.* (See *People v. Rios, supra*, 23 Cal.4th at p. 462 [implicitly finding that California's procedure satisfies *Mullaney*].)

D. Sufficiency of the Evidence

Appellant next contends that the evidence is insufficient to support his conviction for second degree murder. Again, we disagree.

An appellate court reviewing a challenge based on sufficiency of the evidence at trial must review the entire record in the light most favorable to the People and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Put another way, the appellate court reviews the entire record in the light most favorable to the verdict and determines whether there is substantial evidence – evidence that is reasonable, credible, and of solid value – such that a reasonable juror could find the defendant guilty beyond a reasonable doubt. (*Ibid*.; see also *People v. Osband* (1996) 13 Cal.4th 622, 690.)

When making such an evaluation, the appellate court does not reevaluate witness credibility or resolve conflicts in the evidence. Such matters are exclusively issues for the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Further, the reviewing court must accept logical inferences that the jury might have drawn from any circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) While it is the jury's duty to acquit where circumstantial evidence is subject to two reasonable interpretations, one which points to guilt and one which points to innocence, it is the jury, not the appellate court, that must be convinced beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) Where circumstances reasonably justify a jury's findings of

fact, a reviewing court's conclusion that such circumstances might also reasonably be reconciled with contrary findings does not justify reversal. (*Id.* at p. 1054.)

In order to prove a defendant guilty based upon a theory of aiding and abetting, the prosecution must prove all of the following beyond a reasonable doubt: that (1) the perpetrator committed a crime; (2) the aider and abettor knew of the perpetrator's unlawful purpose; (3) the aider and abettor intended to assist the perpetrator in achieving his unlawful purpose; and (4) the aider and abettor, by his conduct, assisted in or facilitated commission of the crime. (*People v. Thompson* (2010) 49 Cal.4th 79, 116-117.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187.) Malice may be express or implied. (§ 188.) Express malice is an intent to kill while implied malice is the doing of an intentional act, the natural consequences of which are dangerous to human life, with knowledge of the danger to, and with conscious disregard for, human life. (*People v. Swain* (1996) 12 Cal.4th 593, 600-601.)

Murder which is willful, deliberate, and premeditated is murder of the first degree. (*People v. Swain*, *supra*, 12 Cal.4th at p. 601; see also § 188.) Second degree murder includes unpremeditated express malice murder as well as all implied malice murder. (*People v. Swain*, at p. 601; see also § 188.)

Here, the evidence amply supports appellant's conviction for second degree murder as an aider and abettor. The evidence was essentially uncontroverted that Barragan intentionally shot and killed Ramirez as payback for the earlier murder of her boyfriend, Sosa. Based upon the other evidence presented, the jury could rationally conclude that appellant knowingly and intentionally aided and abetted that killing: (1) appellant was a fellow South Side Playerz member and thus had motive to assist in the payback killing; (2) appellant attended the South Side Playerz meeting shortly after Sosa's killing and immediately prior to Ramirez's murder; (3) appellant's own admissions, to Carla B., of what occurred during that meeting establish that a payback killing was discussed and planned; and (4) appellant drove Barragan and Mercado to the

location, waited for them until the shooting occurred, and then drove Mercado and, possibly, Barragan, away from the scene.

Appellant contends that the jury's implicit "acquittal" of him of first degree murder and its finding of second degree murder only somehow undercuts the above reasoning. He argues that the above-recited facts by definition establish premeditation and deliberation, and the jury must have therefore rejected those facts since it found him guilty of second degree murder only. This argument is meritless: "'[a]ny verdict of guilty that is sufficiently certain is a valid verdict even though the jury's action in returning it was, in a legal sense, inconsistent with its action in returning another verdict of acquittal or guilt of a different offense.' [Citation.]" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405.) "An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict." (*People v. Lewis* (2001) 25 Cal.4th 610, 656; accord, *People v. Miranda, supra,* at p. 406.) Appellant cannot complain that he was convicted of second degree murder when the evidence amply supported a conviction for first degree murder. (See *People v. Lee* (1999) 20 Cal.4th 47, 61 [a defendant may not complain on appeal that he has been convicted of a lesser offense than that warranted by the evidence indisputably accepted by the jury].)

Appellant raises a number of other contentions in connection with his sufficiency of the evidence argument. None are meritorious but we need not address them further in light of our reasoning discussed above.

E. Barragan's Unavailability

The trial court admitted various statements made by Barragan to Mercado, Martinez, and Carla B. as declarations against penal interest. (Evid. Code, § 1230.) Appellant contends that the court erred in this regard since it never made a formal finding, based on competent evidence, that Barragan was unavailable, a requirement of section 1230. We reject this contention as forfeited by the failure to object below and, in any event, harmless.

At the time of appellant's trial, Barragan had already been convicted of first degree murder in connection with the Ramirez shooting and sentenced to 50 years to life in prison. Her appeal was pending.[3] Notwithstanding her conviction, she was still being housed in local custody and available to be brought to court.

The court and counsel discussed the admissibility of Barragan's statements as declarations against penal interest. Defense counsel objected on general hearsay grounds, and also asserted admission of the statements would violate of *Aranda-Bruton*.[4] Defense counsel did not specifically argue that the declaration against penal interest exception was inapplicable because the People had not established unavailability. When defense counsel later raised this issue in appellant's motion for new trial, the trial court rejected it:

> "First of all, I don't think there's any question of a failure on the part of [defense counsel] to raise this issue. I think it was rather because [it] was so obvious.
>
> "We were all aware of the fact that Ms. Barragan was pending appeal. I'm sure there have been discussions with her, although I cannot say this with certainty, between counsel and her attorneys. And I don't think anyone had any doubts as to the fact that she would certainly take the Fifth if called to testify, in view of the peril that she was placing herself in as far as sentencing is concerned, and with her case on appeal.
>
> "Nonetheless, as [the prosecutor] point[s] out, had the objection been made it could easily have been countered, and under any circumstance, under any eventuality, Ms. Barragan's statement would have come in."

Evidence Code section 353, subdivision (a), provides that a verdict shall not be set aside on the ground of erroneous admission of evidence unless "[t]here appears of record an objection to . . . the evidence that was timely made and *so stated as to make clear the specific ground of the objection*." (Italics added.) The rationale for this rule is obvious: a contrary rule would deprive the proffering party of an opportunity to cure any defect

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3 We take judicial notice of our own file in Barragan's case, No. B227931, to establish these facts. (Evid. Code, § 452, subd. (d).)

4 *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

and allow the nonproffering party to gamble that any error would provide valid grounds for reversal on appeal. (*People v. Coleman* (1988) 46 Cal.3d 749, 777.)

Application of this rule compels a finding of forfeiture, especially upon the facts of this case. As the trial court noted, it was obvious to all involved that Barragan had a Fifth Amendment right not to testify that would likely be invoked upon the advice of any competent counsel. Most importantly, a timely and specific objection would have allowed the prosecution to cure any defect: Barragan could have been transported to court and allowed to invoke, formally, on the record. As the trial court observed, her statements would have come in regardless of the outcome: had Barragan not invoked and agreed, for some reason, to testify, she could have been asked about what occurred, and if she denied the shooting she could have then been impeached with her earlier admissions.

In any event, any error was harmless under any applicable standard. Barragan's declarations against penal interest incriminated herself only; any references to the others involved were omitted in front of the jury. Her involvement in the shooting and motivation for it were essentially undisputed at trial. Indeed, appellant's own trial testimony essentially established that Barragan shot and killed Ramirez, by inference as payback for Sosa's killing. Appellant cannot seriously complain that the erroneous admission of testimony completely consistent with his own trial testimony prejudiced him in any way.

F. Unavailability of Martinez

As mentioned earlier, the trial court found Cesar Martinez to be unavailable and allowed introduction of his preliminary hearing testimony and the statements used to impeach him during his preliminary hearing testimony. In its finding that Martinez was unavailable at trial, the court determined that the prosecution had exercised due diligence in its unsuccessful effort to secure his attendance at trial. Appellant contends this finding was error. Again, we disagree.

1. Facts Relevant to the Due Diligence Finding

Appellant's trial was set for January 18, 2011. On January 6, 2011, the prosecutor appeared ex parte before the trial court and sought a material witness order

pursuant to section 1332. The order, signed by the court, ordered Martinez brought to court and held in custody until he posted a $100,000 bond.

Subsequently, the People made efforts to execute the material witness subpoena. LACSD Deputy Carlos Nuques, along with other members of the Major Crimes Surveillance Apprehension team, attempted to locate Martinez on both January 17 and 18. Initially, they surveilled a house on Eucalyptus Street in Bellflower that departmental resources showed to be the residence of Cesar Martinez, but they later determined that person to be a different Cesar Martinez. Simultaneously, other members of the team surveilled Martinez's last known place of employment in Santa Fe Springs, but could not locate Martinez there either.

Members of the team attempted to generate more information about Martinez's whereabouts. They obtained possible addresses for Martinez on Otis Avenue in South Gate and on Imperial Highway in Lynwood. Deputies went to both locations and determined that Martinez did not live at the Otis Avenue location and, though he had lived at the Imperial Highway location with his mother, neither he nor she lived there currently. The deputies also obtained a P.O. box to which Martinez forwarded mail. They spoke to a postal supervisor at the location of the postal box who provided them with an address on Tweedy Boulevard in South Gate. That address turned out to be a closed insurance agency.

The deputies then returned to Martinez's last place of employment in Santa Fe Springs and spoke to the owner, Roman T. Roman told the deputies that he had fired Martinez in July 2010. Though asked, Roman could provide no additional information about Martinez's current whereabouts.

LACSD Homicide Detective Steven Blagg also attempted to locate Martinez. In 2010, Blagg had served Martinez with a subpoena at Martinez's then place of employment in Santa Fe Springs. When served, Martinez had stated he was not coming to court and Blagg later arrested him, pursuant to an another material witness warrant, at

Martinez's probation officer's office in the Compton courthouse.[5] In January 2011, Blagg again attempted to locate Martinez. He reviewed law enforcement data bases, including Department of Motor Vehicles records and "raps and booking data." The information he obtained was identical to that he had obtained when he located Martinez in May 2010, except that Martinez was no longer on probation. Blagg also ran the license plate number of Martinez's car and determined that it had been in the area of the Crescenta Valley substation but could not get a precise location.

After presenting the above evidence at the due diligence hearing, the prosecutor asked the court to take judicial notice of the court file and the various minute orders documenting the difficulty the People had in obtaining Martinez's appearance at the earlier trial of Barragan. The prosecutor also commented on Martinez's obvious reluctance during his earlier testimony in front of the Barragan jury.

2. Applicable Law

In order to demonstrate that a witness is unavailable, the proponent of the hearsay testimony must establish he has "'exercised reasonable diligence but has been unable to procure [the witness's] attendance by the court's process.' [Citation.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) Factors relevant to the due diligence inquiry include the timeliness of the search, the importance of the testimony, and whether any leads to the witness's whereabouts were competently investigated. (*Id.* at p. 622.) Other factors include whether the proponent had reason to believe the witness would appear willingly before beginning to serve him and whether the witness would have been produced had additional efforts been made. (*People v. Linder* (1971) 5 Cal.3d 342, 347.) There is no requirement that a prosecutor "keep periodic tabs on every material witness in a criminal case." (*People v. Friend* (2009) 47 Cal.4th 1, 68.)

Due diligence may be shown even where the proponent begins looking for a witness immediately prior to trial. (See, e.g., *People v. Saucedo* (1995) 33 Cal.App.4th

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[5] The record in Barragan's case shows that Martinez was arrested on the material witness warrant, posted a $25,000 bond, and later appeared and testified at Barragan's trial. After Martinez testified, the court exonerated his bond. (See fn. 3, *ante*.)

1230, 1236 [attempted service one week prior to trial], disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Smith* (1971) 22 Cal.App.3d 25, 31 [same]; *People v. Rodriguez* (1971) 18 Cal.App.3d 793, 796 [same].)

An appellate court reviews factual determinations related to the issue of due diligence under the substantial evidence standard. (*People v. Herrera*, *supra*, 49 Cal.4th at p. 623.) It independently reviews whether the facts establish due diligence. (*Ibid.*)

3. Analysis

The trial court did not err in its finding of due diligence. First, the prosecution had been able to locate and serve Martinez prior to both the preliminary hearing and the trial of Barragan. Moreover, although reluctant and uncooperative, Martinez did appear at both the preliminary hearing and Barragan's trial, albeit while on a $25,000 material witness bond insofar as Barragan's trial was concerned. Thus, though Martinez was reluctant, the prosecution had some basis to conclude that when "push came to shove," they would be able to locate and secure Martinez's attendance at appellant's trial.

Additionally, although Martinez was a material witness, his testimony, insofar as it was impeached by his earlier taped interview, was cumulative to testimony provided by Carla B. Carla, like Martinez, overheard statements from Barragan admitting to the killing and the motive for the killing. Additionally, Carla obtained a surreptitiously recorded statement from appellant himself which corroborated the same facts. Thus, the prosecution could rely on Carla to offset any omission that might occur if Martinez failed to appear at trial.

Next, any leads the prosecution had as to Martinez's whereabouts were competently investigated, as testified to by the deputies engaged in the search. Our review of the record indicates that they reasonably acted upon the information that they had. For all of the above reasons, we conclude that the trial court did not err in finding due diligence.

Finally, even if we were to find error, which we do not, any error was harmless by any applicable appellate standard. The matters recounted in Martinez's preliminary hearing testimony or in the taped interview used to impeach him were otherwise

established by Carla B. or admitted to by appellant himself during his testimony. Thus, any error was harmless.

G. Admission of Martinez's Prior Inconsistent Interview

Once the trial court determined Martinez to be unavailable and therefore permitted his preliminary hearing testimony to be read to the jury, it also determined that Martinez's prior taped interview by Detective Gates, admitted at the preliminary hearing, would also be admitted as a prior inconsistent statement pursuant to Evidence Code section 1294. As mentioned above, because the audiotape of the interview intertwined admissible and inadmissible statements by Martinez, the prosecution and the defense agreed that Detective Gates could testify about the content of the interview rather than play the tape.

Appellant contends that admission of portions of Martinez's prior interview by Detective Gates was error for two reasons: (1) section 1294 requires that the prior inconsistent statements be contained in a *videotape* admitted at the preliminary hearing, while in this case the admitted statements were contained only in an *audiotape*; and (2) in any event, the court allowed Detective Gates to testify to the content of the interview and did not require the prosecutor to play the audiotape to the jury. We reject both contentions.

When the preliminary hearing testimony of an unavailable witness is admitted at trial as former testimony pursuant to Evidence Code section 1291, section 1294, subdivision (a), allows admission of prior inconsistent statements of that witness that are (1) contained in a videotape properly admitted at the preliminary hearing or (2) contained in the transcript of the preliminary hearing itself. Insofar as appellant contends that section 1294 is not applicable in this case because the prior interview was only audio recorded rather than video recorded, he has forfeited that point by not raising that specific objection in the court below. (§ 353; *People v. Coleman*, *supra*, 46 Cal.3d at p. 777.) Insofar as appellant further contends that Detective Gates's testimony describing what Martinez said during the interview violates section 1294 and *People v. Martinez* (2003) 113 Cal.App.4th 400, 409, he has waived that point since his trial counsel expressly

stipulated to that procedure in order to simplify deletion of inadmissible portions of the interview. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

Finally, to the extent we were to reach the merits of appellant's contention and find that there was error, again, any error was harmless under any applicable appellate standard of review. The matters presented to the jury through Martinez's preliminary hearing testimony and the prior inconsistent interview were not largely disputed, and established by other testimony, including that of appellant.

H. Sufficiency of the Evidence: the Gang Enhancement

Appellant next contends that the jury's finding of true with respect to the gang enhancement must be reversed for insufficiency of the evidence. We agree: the evidence was insufficient to support a finding of true on the gang enhancement as the instruction for that enhancement defined it to the jury. Accordingly, we reverse the jury's finding of true and strike the enhancement.

1. Applicable Law

Section 186.22, subdivision (b) provides various enhancements for felonies committed for the benefit of, at the direction of, or in association with any criminal street gang. Where the felony committed carries an indeterminate term, section 186.22, subdivision (b)(5) requires the defendant serve a minimum of 15 years before becoming eligible for parole.

The definition of a criminal street gang under section 186.22, subdivision (b) requires proof of three elements: (1) an ongoing association of three or more members with a common name or symbol; (2) whose "primary activities" include commission of one or more of the crimes listed in section 186.22, subdivision (e); and (3) whose members either individually or collectively engage or have engaged in "a pattern of criminal gang activity." (§ 186.22, subd. (f); *People v. Vy* (2004) 122 Cal.App.4th 1209, 1222.)

For purposes of this appeal, "a pattern of criminal gang activity" is further defined as the commission of two or more of the crimes enumerated in section 186.22, subdivision (e), on either separate occasions or by two or more persons on a single

occasion. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) The charged crime may itself be used to establish the "pattern of criminal gang activity." (*People v. Gardeley* (1996) 14 Cal.4th 605, 625.) The crimes used to define "a pattern of criminal gang activity" are often described as "predicate offenses." (*Id*. at p. 610, fn. 1.)

We review the sufficiency of the evidence in support of an enhancement by applying the same standard of review, discussed earlier in this opinion, applicable to substantive offenses. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

2. Evidence and Instruction in the Trial Court

In the trial court, Detective O'Malley testified that the primary activities of the South Side Playerz included vandalism, robbery, murder, and drug sales. In response to the prosecutor's follow up question, "What about gun possession?" O'Malley responded, "Yes. And a lot of weapons possessions."[6]

In order to establish a "pattern of criminal gang activity," the prosecutor, through Detective O'Malley, introduced certified court records documenting the conviction of South Side Playerz member Trenton Saraficio for possession of a "sawed off" shotgun.

With respect to the gang enhancement, the trial court instructed the jury with CALJIC No. 17.42.2. The instruction, as read and provided to the jury defined "criminal street gang" as follows:

> "'Criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal;
>
> "One, having as one of its primary activities the commission of one or more of the following criminal acts, including unlawful possession of firearms;
>
> "Two, having a common name or common identifying sign or symbol;
>
> "And three, whose members individually or collectively engage or have engaged in a pattern of criminal gang activity.

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[6] Vandalism, robbery, murder, drug sales, and various firearms violations are all included as potential predicate offenses in section 186.22, subdivision (e).

> "A pattern of criminal gang activity means the commission of two or more of the following crimes[:] namely, unlawful possession of firearms . . . and the crimes were committed on separate occasions on by -- or by two or more persons.
>
> "The phrase 'primary activities' as used in this allegation means that the commission of one or more of the crimes identified in the allegation be one of the group's chief or principal occupations. This would of necessity exclude the occasional commission of identified crimes by the group's members.
>
> "In determining this issue you should consider any expert opinion evidence offered, as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crime charged in this proceeding."

Thus, although the instruction told the jury that it could consider the crime charged in the immediate case in determining whether the allegation was proved or not proved, it also instructed the jury that "a pattern of criminal gang activity" included the commission of only one type of offense: "unlawful possession of firearms."

3. Analysis

Appellant contends that the instruction limited the so-called predicate offenses used to define "a pattern of criminal gang activity" to the crime of unlawful gun possession, that evidence of only one such crime committed by one person was introduced, and therefore that the evidence is insufficient as a matter of law to support a true finding with respect to the gang enhancement.

The People concede that the instruction limited the predicate offenses to unlawful gun possession. The People make, however, the following argument against reversal: (1) this issue is "analogous" to defense challenges to instructions which omit an element; (2) the evidence overwhelmingly establishes that a South Side Playerz member, Barragan, murdered Ramirez; (3) murder is a predicate offense listed in section 186.22, subdivision (e); (4) had the jury been properly instructed to include murder in the list of predicate offenses, they would have inevitably found the enhancement true anyway based upon the additional predicate proven by the current offense; and (5) any error, therefore, is harmless beyond a reasonable doubt. This argument effectively shifts the analysis

from whether the evidence is sufficient to support a true finding on the enhancement *as defined to appellant's jury* to whether the evidence is sufficient to support a true finding had the additional predicate offense of murder been included in the instruction.

The problem with the People's argument is that there was no improper instruction given in this case. The instruction given to the jury without objection by the People, insofar as it defined a criminal street gang and the subordinate element of "a pattern of criminal gang activity," was an absolutely correct statement of the law. It failed to include an additional predicate offense *established by the proof presented at trial*, but in and of itself as a legal matter omitted nothing. We find this situation analogous to the situation where a defendant fails to object to an instruction, correct in the law, but ambiguous or incomplete based on the proof adduced at trial: "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested an appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

At trial, the People allowed this instruction to be given to the jury. Appellant was not obligated to alert the People or the trial court that this instruction, *based on the record of his case*, omitted a potential predicate offense necessary to a true finding on the gang enhancement alleged against him. The People allowed this legally correct definition of "a pattern of criminal gang activity" to be given to the jury. They are now bound by it. The evidence presented shows only one conviction for a firearms violation by a single South Side Playerz member. As such, it is insufficient as a matter of law to prove "a pattern of criminal gang activity" as defined to appellant's jury. The finding of true on the gang enhancement is reversed and the allegation is stricken.[7]

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[7] We acknowledge, as a legal matter, that the evidence shows Barragan to have committed firearms crimes within the scope of section 186.22, subdivision (e)(32) and (e)(33), immediately prior to the murder of Ramirez. The legal elements of these violations, however, were never given to the jury so the jury necessarily could not have determined Barragan to have committed them.

Since we reverse the finding of true with respect to the gang enhancement on this ground, we need not address the other contention made by appellant in connection with this allegation.

I. Cumulative Error

Appellant finally contends that the various errors raised on appeal considered cumulatively require reversal even if considered individually they do not. We disagree. The only error found above affected the gang enhancement, which we reverse and strike. The error in no way affected the fairness of appellant's trial on the substantive charge of murder, nor did it diminish the overwhelming evidence of his guilt with respect to that charge. (See *People v. Mincey* (1992) 2 Cal.4th 408, 454 ["A defendant is entitled to a fair trial, not a perfect one"].)

DISPOSITION

The jury's finding of true with respect to the gang enhancement is reversed and that allegation is stricken. The minimum term prior to parole eligibility of 15 years that the enhancement requires is also stricken. In all other respects, the judgment below is affirmed.

SORTINO, J.*

We concur:

BIGELOW, P. J.

FLIER, J.

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