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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RANDELL COLEMAN, Defendant and Appellant.	B223207 (Los Angeles County Super. Ct. No. BA347333)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Assistant Attorney General, James William Bilderback II and Sonya Roth, Deputy Attorneys General for Plaintiff and Respondent.

Appellant Randell Coleman (defendant) appeals from his conviction of murder, attempted murder, and other crimes. Defendant contends that his conviction should be reversed due to improper impeachment with a prior conviction; violation of his constitutional right of confrontation; admission of improper expert testimony; insufficiency of the evidence to support a gang finding; erroneous jury instructions; cumulative error; and an unauthorized dual sentence as to count 6. We conclude that defendant's contentions are without merit, and we affirm the judgment.

BACKGROUND

1. Procedural background

Defendant was charged with six felony counts: count 1 alleged the murder of Leroy Smith (L. Smith) in violation of Penal Code section 187, subdivision (a)(1);[1] counts 2, 3, and 4 alleged the attempted willful, deliberate, and premeditated murder of Kevin Grisby (Grisby), Robert Moore (Moore), and Daishauna Smith (D. Smith), respectively, in violation of section 664/187, subdivision (a); count 5 alleged that defendant shot at an inhabited dwelling in violation of section 246; and count 6 alleged possession of a firearm by a felon in violation of section 12021, subdivision (a)(1).

The information specially alleged as to counts 1 through 5 that defendant personally and intentionally used and discharged a handgun within the meaning of section 12022.53, subdivisions (b) and (c), causing great bodily injury or death to the four victims within the meaning of section 12022.53, subdivision (d); and that a principal personally and intentionally used and discharged a handgun within the meaning of section 12022.53, subdivisions (b), (c) and (e), causing great bodily injury or death to L. Smith within the meaning of section 12022.53, subdivisions (d) and (e)(1).

The information further alleged pursuant to section 186.22, subdivision (b)(1) as to counts 1 through 5 and as to count 5 pursuant to section 186.22, subdivision (b)(4), that the offenses were committed for the benefit of, at the direction of, and in association

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

with a criminal street gang with the specific intent to promote, further and assist in criminal activity by gang members.

A jury found defendant guilty of all counts, found the murder to be in the first degree, and found true all special allegations. The trial court sentenced defendant to a total of 173 years to life in prison. The sentence included 25 years to life plus a consecutive term of 25 years on count 1, and 25 years to life plus a consecutive term of 15 years on each of counts 2, 3, and 4, all to run consecutively to the terms on all other counts. The trial court imposed the upper term of seven years as to count 5 and stayed execution of sentence pursuant to section 654. As to count 6, the court imposed the upper term of three years to run concurrently with all the other counts. Defendant was given 427 days of actual presentence custody credit, and ordered to provide DNA and fingerprints and to pay statutory fines and fees, as well as victim restitution. Defendant filed a timely notice of appeal.

2. Prosecution Evidence

On August 25, 2008, three automobiles, including a blue Jeep Cherokee, entered the residential neighborhood of West 70th and Main Streets at 5:30 p.m. The cars made a U-turn one after the other and came to a stop on 70th Street, near approximately 20 people who were outside, including D. Smith, her friend Cassandra Rankins (Rankins), Grisby, who had been walking in the neighborhood pushing his six-year-old brother Moore in a toy car, and L. Smith, Grisby's stepfather, who had been working on his car. Defendant emerged from one of the vehicles holding an M-11 semiautomatic rifle. Defendant looked around as though searching for someone, and then pointed the gun, holding it in both hands. D. Smith, Rankins, Grisby, Moore and others ran for cover. As she ran, D. Smith heard more than 20 gunshots fired in rapid succession. Rankins heard about 40 shots.

When the shooting ceased and the cars left the scene, D. Smith, Grisby, and Moore each had a bullet wound and L. Smith was dead from multiple gunshot wounds. D. Smith and Rankins both identified defendant's photograph in a photographic lineup for investigating officers, and identified defendant in court as the shooter. D. Smith also

noticed that the shooter had a tattoo on his arm. Defendant had a dollar sign tattoo on his arm. D. Smith was also shown a photograph of Derron Jones (Jones). She did not recognize him, but knew that he was not the shooter.

Firearms expert William Moore testified that the bullet casings recovered by the police at the scene suggested that two weapons had been fired that day, the M-11 rifle and a .40-caliber pistol.

3. Gang evidence

The shooting occurred in the territory claimed by the East Coast Crip gang (East Coast). Defendant was an active member of the Grape Street Crip gang (Grape Street). Several Los Angeles Police Department (LAPD) officers testified that defendant had admitted his membership in the gang to them. In 2005, defendant admitted to Officer Oscar Villarreal that he was a member of Grape Street and was known by the moniker "Goobie." In 2006, while he was in the company of Kejuan Bullard, the brother of the Grape Street leader Brandon Bullard (Bullard), defendant admitted his membership in Grape Street to Officer Daniel Pearce. In 2007, defendant admitted his gang membership to Officer Rafael Lomeli. In 2008, defendant admitted his gang membership to Officer Anthony Ares. When Los Angeles County Deputy Sheriff Robin Russell arrested defendant after stopping the blue Jeep Cherokee he was riding in, defendant admitted that he was a member of Grape Street. Finally, Officer Ivan McMillan testified that defendant had admitted to him that defendant was an active member of the gang.

Approximately eight months before the subject shooting, Bullard was shot to death. Bullard was a prominent member of Grape Street, a leader of a subset at one time, and greatly respected within the gang as well as by rival gangs. The investigating officer in that homicide, Detective Meghan Aguilar, testified that she identified an East Coast member as the suspected killer, but no charges had been filed.

LAPD Officer Samuel Marullo testified as a gang expert with experience investigating both East Coast and Grape Street. Officer Marullo had known Bullard for at least five years before his death. Officer Marullo had spoken to the officers who investigated Bullard's murder, including Detective Aguilar, from whom he learned that

the suspect in the Bullard murder was Steven Hammond (Hammond), a known member of East Coast. In Officer Marullo's expert opinion, Bullard's murder precipitated a feud between former allies East Coast and Grape Street. Since then, East Coast members had been convicted of shooting two Grape Street members, killing one. The feud was ongoing at the time of the subject shooting which Officer Marullo explained was because Bullard was a beloved leader and it would be disrespectful to settle the feud quickly.

Officer Justin Chi testified that on October 3, 2008, when he and his partner were patrolling in the Jordan Downs housing development, territory claimed by Grape Street, he saw Ricky Hanzy (Hanzy) on the sidewalk with a rifle in his hands. Hanzy ran, and when the officers pursued him, he threw the rifle under a parked car. Later Hanzy was identified as a Grape Street member, and the rifle as the same M-11 rifle used by defendant in this case.

The prosecution's other gang expert, Officer McMillan, testified that Grape Street is a criminal street gang with several subsets, a common symbol and color, and approximately 2,400 to 3,000 members. The primary activities of Grape Street are murder, attempted murder, drive-by shootings, robbery, assault with deadly weapons, illegal possession of firearms, narcotic sales and transfers, and burglary. Officer McMillan testified that a member who committed crimes for the gang would enhance both the gang's financial status and the member's own status within the gang. Gang members earned the respect and recognition of leaders, which enhanced their chances of being elevated within the gang, by committing crimes that instilled fear in the community. Officer McMillan explained that respect was "very, very, very important, probably the most important aspect of being a gang member." Respect was particularly important for the Grape Street gang. He testified that a gang war was ongoing between East Coast and Grape Street.

Given a hypothetical that tracked the facts of the West 70th Street shooting, Officer McMillan opined that the shooting was committed for the benefit of Grape Street, as it was clearly a retaliatory shooting for Bullard's murder. Shooting at people in an East Coast stronghold such as West 70th Street, benefitted Grape Street by promoting the

gang and instilling fear in the area. It did not matter whether the victims were gang members because the residents in that area would know that it was a retaliatory shooting. When committing such a crime, gang members might call out the name of their gang, but did so less nowadays, to avoid giving evidence to the police.

Officer McMillan testified that it was not unusual for gang members to ride in several cars to attend a shooting. Often the group includes a "shot-caller," crew chief, or captain, to verify that the particular soldier or young member committed the crime. Officer McMillan also testified that larger gangs kept what was known as a "hood gun" to pass from member to member as needed to commit a crime, because firearms were currently more difficult to obtain.

4. Defense evidence

Douglas Compton (Compton), a member of East Coast and who had been convicted of two felonies as well as recently charged with domestic violence against D. Smith, testified that he was present at the time of the shooting. He added that he saw the shooter and it was not defendant. He claimed that the shooter was a light-skinned, mixed-race African-American with long braided hair, whereas defendant was dark and not of mixed race. The shooter was slim, six foot one inch tall or shorter, and wore a white T-shirt.[2]

Compton acknowledged that a "snitch" was someone who reported a crime or testified against someone charged with a crime, which no East Coast member was permitted to do, regardless of the defendant. The East Coast "code of silence" extended to all gang members. Compton knew that snitches were beaten or stabbed in custody.

Defendant's mother, Tracy Coleman (Coleman), admitted to a prior grand theft conviction and testified that on August 25, 2008, she dropped defendant off between 11:30 a.m. and 12:00 p.m. at her nephew's birthday party at the home of defendant's girlfriend, Winesha Pitts (Pitts). She also saw defendant there on the front porch as she drove by around 5:00 or 5:15 p.m. She waved and blew her horn as she passed by, and

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[2] Defendant testified that he was 5 feet 11 inches tall, and that on August 25, 2008, he weighed 190 to 195 pounds.

did not see defendant again until 9:45 p.m. Coleman acknowledged that defendant was a member of Grape Street, as was her other son Treynel. She testified that they lived in Jordan Downs, which was Grape Street territory, and that Bullard was defendant's second cousin.

Pitts, defendant's girlfriend and mother of his child, testified that defendant attended the birthday party she gave for defendant's cousin on August 25, 2008. Defendant arrived sometime between 11:00 a.m. and 12:00 p.m., and left around 10:00 p.m. Pitts did not see him leave for a significant period of time that day, but did not watch him the entire time. Pitts saw defendant's mother drive by during the day around 2:00 or 3:00 p.m., and saw her pick defendant up that evening at approximately 10:00 or 11:00 p.m. Pitts denied that defendant was a gang member.

Defendant's cousin, Michael Hawkins (Hawkins) testified that he arrived for his birthday party at 5:00 or 5:30 p.m. and left at 10:00 p.m. During that time, he and defendant left the party around 8:00 p.m. to get marijuana, but were gone for only 5 to 10 minutes. Hawkins was with defendant on the front porch when Coleman passed by and waved. Hawkins testified that defendant was affiliated with Grape Street as were most of the younger residents of Jordan Downs. The majority of those who were not members were affiliated as otherwise it was a dangerous place to live. Hawkins also testified, "I don't know if he's affiliated or not." At the preliminary hearing, Hawkins had testified that defendant was not a member of Grape Street.

Shavona Miller (Miller), who lived next door to Pitts and knew defendant, testified that she saw defendant at the birthday party on Pitts's porch at approximately 5:30 p.m., and saw him leave when his mother picked him up at the end of the evening. She also saw defendant's mother pass by, and although Miller was not sure of the time, defendant's mother's usual time to pass by on her way to play bingo was 5:20 or 5:30 p.m.

D. Smith was called as a defense witness and questioned about inconsistent statements she gave the police regarding her estimate of the shooter's height and weight and the presence of Douglas Taylor at the scene of the shooting. D. Smith did not

remember what her estimate was, and denied telling the police that she had been with Taylor that day.

Defendant testified that he had lived in Jordan Downs since 1999, with his parents, siblings and Uncle Charles, who recently died. Defendant denied that he was a member of Grape Street, the only gang in the neighborhood, although it was advisable for anyone growing up in Jordan Downs to be a member of the gang. He admitted that he was affiliated with Grape Street, however, and that its members considered him a friend.

Defendant claimed that he was not at the scene of the shooing on August 25, 2008. He arrived at the party around 11:00 a.m. or 12:00 p.m., and did not leave until his mother picked him up at 9:00 or 10:00 p.m., other than a short walk of two or three blocks to the store to buy marijuana. Defendant claimed that the trip to the store took no more than a few minutes.

Defendant acknowledged that he asked for a lineup but refused to participate when he saw the other people chosen for the lineup. He refused because they looked nothing like him and he was promised that they would put together another lineup. A senior officer later refused a second lineup.

Defendant denied telling police he was a member of the gang, but admitted that he was associated with its members, knowing they committed violent crimes such as murder, attempted murder, and robbery. Defendant admitted being in the blue Jeep on the day of his arrest, but claimed that he just happened to get a ride that day and had never seen the car before. He testified that he was walking by himself toward a restaurant, when he was approached by three men in the Jeep. Defendant identified the Jeep in a photograph previously identified by witnesses in the trial. It was driven by Jones, whom defendant claimed never to have met before that day. Defendant's long-time friend Terrell, a Grape Street member whose last name he did not know, was one of the two passengers. Terrell offered defendant a ride, and Jones drove to the restaurant. Defendant testified that they parked, Terrell went into the restaurant, and as they waited, defendant prepared marijuana for smoking. After they had been in the parking lot a few minutes, the police came and he was arrested.

Defendant admitted that in 2007, he sustained a prior felony conviction for possession of a firearm by a felon.

DISCUSSION

I. Impeachment

Defendant contends that the trial court erred by allowing the prosecution to impeach him with a crime erroneously called "possession of a firearm by a felon." Under the same heading, defendant also contends: that a juvenile cannot be a felon, and thus his juvenile offense was not a proper basis for him to be "a felon in possession of a firearm"; that the trial court abused its discretion in failing to "sanitize" the prior conviction so that its similarity to the current charge (count 6) would not be revealed to the jury; and that a violation of subdivision (d) of section 12021 does not meet the test of a crime of moral turpitude, as enunciated in *People v. Castro* (1985) 38 Cal.3d 301.

Defendant has failed to preserve these issues for review. The relevant facts must be clarified. Defendant was found to have committed a firearm offense as a juvenile in 2004, and another as an adult in 2007. In 2004, defendant was adjudicated a ward of the juvenile court after he violated former section 12101, subdivision (a), minor in possession of a concealable firearm without consent. In 2007, defendant was convicted as an adult under section 12021, subdivision (d), which prohibits the possession of a firearm in violation of a condition of probation. He was not convicted under section 12021, subdivision (a) or (c), which prohibits felons from possessing a firearm.[3] The prosecutor sought to impeach defendant's credibility by asking, "Now, in 2007 did you sustain a prior felony conviction for possession of a firearm by a felon?" Thus, the prosecutor used the adult offense, not the juvenile offense.

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[3] A felon in possession of a firearm may be convicted under section 12021, subdivision (a) or (b), and certain misdemeanants may be convicted under subdivision (c). However, subdivision (d) provides: "Any person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm and who owns, purchases, receives, or has in his or her possession or under his or her custody or control, any firearm but who is not subject to subdivision (a) or (c) is guilty of a public offense . . . ." (§ 12021, subd. (d)(1).)

Defendant did not object to the question on any of the grounds now furthered on appeal. Prior to cross-examining defendant at trial, the prosecutor informed the court that he intended to impeach defendant with his prior conviction, describing it as felon in possession of a firearm. During a hearing on the issue, defendant's trial counsel objected under Evidence Code section 352, arguing that the prejudicial effect of the conviction outweighed its probative value, because the underlying crime, robbery, was a juvenile adjudication, not an adult felony.[4] The prosecutor argued that there was no reason to "sanitize" the prior conviction, explaining that he intended only to show that defendant was convicted of "possession of a firearm by a felon" and did not intend to show that the crime underlying the conviction was a robbery. The trial court found that illegal possession of a weapon was a crime of moral turpitude, ruled that the prosecution could use the conviction as impeachment, and stated that the prosecutor was "just going to indicate what kind of crime this is . . . possession of a firearm by a felon." Defense counsel made no other objection, and no mention of the robbery was made when defendant was asked to admit that he had sustained a prior felony conviction for possession of a firearm by a felon.

Notably, defendant did not object to the characterization of the crime as felon in possession of a firearm, nor did defendant mention subdivision (d) of section 12021. Finally, he also did not object on the ground that a violation of subdivision (d) was not a crime of moral turpitude.

A challenge to the admissibility of evidence is generally not cognizable on appeal in the absence of a specific and timely objection in the trial court on the ground urged on appeal. (Evid. Code, § 353.) An objection on one ground does not preserve a challenge based upon a different ground. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435 (*Partida*).) "[A] 'contrary rule would deprive the People of the opportunity to cure the

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[4] In 2002, when defendant was 14 years old, the juvenile court sustained a dependency petition after finding that defendant committed a robbery in violation of section 211. The prosecutor represented to the court that defendant's conviction of violating section 12021 was based upon that robbery adjudication.

defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal."' [Citation.]" (*Id*. at p. 434.) Thus, "the objection [must] fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. . . . A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*Id*. at p. 435.)

Regardless, we agree with respondent that defendant cannot show prejudice. The erroneous admission of evidence is not reversible unless it has resulted in a miscarriage of justice, measured under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Partida*, *supra*, 37 Cal.4th at p. 439; see Evid. Code, § 353; Cal. Const., art. VI, § 13.) Under that test, "[t]he reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*Partida*, *supra*, at p. 439.)

As respondent notes, the evidence of defendant's guilt was overwhelming. Two witnesses identified defendant as the shooter, selecting his photograph from a photographic lineup and identifying him in court. In addition, the shooter's vehicle arrived with other vehicles, including a blue Jeep Cherokee, similar to the vehicle in which defendant was a passenger at the time of his arrest. D. Smith testified that Jones, the driver of the Jeep at the time of defendant's arrest, was not the shooter. Defendant refused to participate in the live lineup that his attorney had arranged, evincing a consciousness of guilt. (See *People v. Alexander* (2010) 49 Cal.4th 846, 905-906.)

Further, defendant had more than one motive to commit the crime: a family relationship and his gang affiliation. Defendant was an active member of Grape Street who had admitted his membership to several officers between 2005 and 2009. Bullard, defendant's second cousin and Grape Street's leader was murdered by one suspected to be an East Coast member, precipitating a feud between East Coast and Grape Street. The shooting took place in East Coast territory with an East Coast member present. Jones, the

driver of the blue Jeep, was known to police to be a member of Grape Street. The gun used in the shooting was found 100 yards from defendant's residence after Hanzy, a Grape Street member known by defendant for more than 10 years, discarded it in view of police officers.

We conclude from the evidence that there was no reasonable probability that the verdict would have been more favorable to defendant absent his impeachment with an erroneously described crime. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Further, when a prior conviction has not been shown to be a crime of moral turpitude, its use will be deemed harmless where the prosecution's case is strong and defendant's testimony implausible. (*People v. Lang* (1989) 49 Cal.3d 991, 1011-1012.) We have already concluded that the prosecution's case was strong, and conclude that defendant's testimony was not credible. Defendant denied telling officers he was a member of Grape Street but admitted that he was associated with its members, knowing that they committed violent crimes such as murder, attempted murder, and robbery. Defendant claimed that at the time of his arrest he just happened to be offered a ride in the blue Jeep, that he had never seen the Jeep before, and that he did not know the last name of his long-time friend Terrell, who was a passenger in the Jeep. Defendant also claimed that he had never met Jones or the other Jeep passenger before, although Officer McMillan had identified Jones as a member of Grape Street.

We conclude that any error in the use of the misnamed prior conviction to impeach defendant's credibility was harmless.

II. Hearsay and *Crawford*[5]

Defendant contends that the trial court violated his right to confrontation guaranteed by the Sixth Amendment to the United States Constitution, by admitting hearsay testimony given by Detective Aguilar regarding the identity of the suspect in the Bullard murder.

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5 See *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

Detective Aguilar testified that she and her partner, Detective Arcinega, were the investigating officers in the Bullard murder. As a result of their investigation they identified Hammond as a suspect, but no charges were filed against him. The detectives also learned that Hammond was a member of East Coast. Detective Aguilar acknowledged that she based her identification of the suspect and his gang affiliation upon her conversations with witnesses. Defendant contends that the admission of Detective Aguilar's testimony was hearsay.

Defendant objected as hearsay and moved to strike all Detective Aguilar's testimony "with respect to who shot Mr. Bullard."[6] Although defendant did not object on Sixth Amendment grounds in the trial court, he now relies on *Crawford* in which the United States Supreme Court held that the Sixth Amendment bars the "admission of testimonial statements of a [declarant] who [does] not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at pp. 53-54, 68.) A failure to raise a confrontation clause claim in the trial court forfeits the issue on appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028.) In particular, a hearsay objection does not preserve a confrontation clause claim. (*People v. Redd* (2010) 48 Cal.4th 691, 730.)

Citing *Partida*, *supra*, 37 Cal.4th at pp. 433-439, defendant contends that he has preserved the issue because a confrontation challenge rests on the "same factual and legal issues" as those raised by a hearsay objection. He is mistaken. A *Crawford* claim presents additional factual and legal issues beyond those presented by simple hearsay: whether the hearsay statement was testimonial, and whether there was a prior opportunity for cross-examination. (*People v. Chaney* (2007) 148 Cal.App.4th 772, 779 (*Chaney*); see *Crawford*, *supra*, 541 U.S. at pp. 53-54, 68.) Further, "*Partida* has not 'broadened' the general rule requiring a timely and specific objection to evidence. [Citation.]"

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6 Defendant also appears to be challenging the expert opinion of Officer Marullo to the extent he relied upon hearsay testimony given by Detective Aguilar. However, defendant did not object to Officer Marullo's testimony and has thus not preserved that issue for review. (See Evid. Code, § 353.)

(*Chaney*, *supra*, at p. 778.) *Partida* merely held that a defendant could "argue that the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process," although he had not objected on constitutional grounds in the trial court. (*Partida*, *supra*, at p. 435; see also *Chaney*, *supra*, at p. 778.) Thus, as that rule applies here, defendant must first show that the trial court erroneously overruled his hearsay objection, and only then may he raise the issue on appeal by showing that the ruling had the consequence of violating his federal confrontation right.

The trial court did not overrule the objection. In fact, the court agreed that the testimony was hearsay, but denied defendant's motion to strike it unless it turned out to be irrelevant to the gang expert's opinion when that testimony was presented. The trial court then explained to the jury that Detective Aguilar's testimony regarding the Bullard shooting was hearsay because she was not there. The court admonished the jury that the testimony was not to be considered for the truth of what Detective Aguilar stated, but only for the basis of the gang expert's opinion when and if the expert testified. The court explained that if it later appeared the gang officer did not rely on the Bullard shooting in forming his expert opinion, Detective Aguilar's testimony would be stricken as irrelevant.[7]

Gang expert Officer Marullo then testified that he relied in part on the identity and gang affiliation of the suspect in the Bullard murder to form the opinion that East Coast and Grape Street were feuding, and that the shooting in this case was done in retaliation for the Bullard murder. Officer Marullo had spoken many times with Detectives Aguilar and Arcinega about their investigation and their suspicion that Bullard was killed by Hammond, a member of the Six-Nine East Coast Crips, a subset of East Coast.

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[7] Defendant contends that the prosecution "blind-sided" the court, giving it "no choice" but to allow Detective Aguilar's testimony. We cannot agree with defendant's characterization. Although the trial judge was surprised by the testimony, he was clearly in control of the proceedings and carefully considered the motion to strike.

An expert may base an opinion on inadmissible hearsay so long as the information is reliable. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*); Evid. Code, § 801, subd. (b).) Indeed, "a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies. [Citations.]" (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1122 (*Hill*); see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 949.)

Here, the information was reliable: Officer Marullo had consulted the investigating officers in the Bullard murder many times; he had several years' experience investigating both gangs; he had known Bullard for at least five years, and also knew the second victim in the Bullard shooting. In addition, Officer Marullo had investigated another murder that appeared to be in retaliation for the Bullard murder, and in the course of that investigation, listened to more than 50 hours of recorded jailhouse conversations between East Coast members about the gang war with Grape Street that began after the Bullard murder. Further, independent evidence supported Officer Marullo's opinion that an ongoing feud between Grape Street and East Coast was a factor in the shooting: Compton, an admitted East Coast member who was present at the time of the shooting in this case, testified that his gang had an ongoing feud with Grape Street.

Defendant acknowledges that an expert may base an opinion on inadmissible hearsay, but argues that the hearsay regarding Bullard went too far by including details of Detective Aguilar's investigation, creating a danger that the jury would consider the information as independent proof of the facts upon which the expert relied. In fact, Detective Aguilar gave few details of her investigation, giving only a brief description of the crime scene and stating the name of a second victim, whom Officer Marullo later identified as a Grape Street member. Moreover, the trial court avoided any such danger by admonishing the jury not to consider the information for its truth. (See *People v.*

Montiel (1993) 5 Cal.4th 877, 919.)[8] We conclude that defendant has not made the threshold showing that the trial court erred in admitting hearsay, and has thus not preserved a *Crawford* challenge. (See *Chaney*, *supra*, 148 Cal.App.4th at pp. 778-779.)

Furthermore defendant's challenge has no merit. Officer Marullo's explanation of the information and sources upon which he based his opinion included the same facts to which Detective Aguilar had testified. The prosecution's other gang expert, Officer McMillan, also gave similar testimony. As respondent points out, not only may an expert base his opinion on hearsay information and sources (*Gardeley*, *supra*, 14 Cal.4th at p. 618), he may explain the hearsay information on which he relied, and may do so without violating the confrontation clause. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209 (*Thomas*).) Thus, Detective Aguilar's testimony was, at most, cumulative of the testimony properly given by Officers Marullo and McMillan.

Defendant suggests that *Gardeley* is obsolete in light of *Crawford*, and asks that we decline to follow *Thomas* as wrongly decided. The *Hill* court rejected a similar confrontation clause challenge, explaining: "Though we disagree with *Thomas*'s analysis of this important issue, *Thomas* appropriately relies on relevant Supreme Court precedent, principally *Gardeley*, *supra*, 14 Cal.4th 605, that we are required to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Consequently, we may not find erroneous the trial court's conclusion that the challenged statements were not admitted for their truth. . . ." (*Hill*, *supra*, 191 Cal.App.4th at pp. 1127-1128.) We reject defendant's challenge for the same reason.

Moreover, had it been error under *Crawford* to admit Detective Aguilar's identification of the suspect in Bullard's murder, any such error would have been harmless beyond a reasonable doubt under the test of *Chapman v. California* (1967) 386

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8 Defendant argues that the trial court's admonishment to the jury not to consider Detective Aguilar's testimony for the truth was ineffectual, and that the court should have exercised its discretion under Evidence Code section 352 to determine that the testimony was more prejudicial than probative. However, as defendant did not ask the court to make that determination, he did not preserve that issue for review. (See Evid. Code, § 353.)

U.S. 18, 24 (*Chapman*). Notably the court admonished the jury that the information regarding the Bullard murder was not to be considered for its truth. Such an admonishment usually dispels any prejudice. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 919.) As respondent notes, jurors are presumed to have followed the court's instructions. (*People v. Hinton* (2006) 37 Cal.4th 839, 871.)

In addition, we agree with respondent that the evidence of a gang motive was overwhelming. Two eyewitnesses identified defendant as the shooter. Officer McMillan testified that murder and attempted murder were among the gang's primary criminal activity. The feud between Grape Street and East Coast was independently established with Compton's testimony. The shooting took place in East Coast territory. There was significant evidence of defendant's active membership in Grape Street as he had admitted his membership to six of the law enforcement officers who testified at trial. Though defendant denied that he was a Grape Street member, he admitted that he was affiliated with the gang. The gun defendant used was recovered near defendant's home in the possession of Hanzy, a fellow Grape Street member; and when defendant was arrested in the company of other Grape Street members, he was riding in a Jeep similar to the Jeep involved in the shooting.

In view of such evidence, the precise reason for the ongoing feud between the two gangs was unnecessary to the expert's opinion that the motive for the shooting was gang related. We thus conclude that there is no reasonable possibility that identifying a particular suspect in the Bullard murder contributed to the verdicts.

III. Sufficiency of the gang evidence

The jury found true the allegations pursuant to section 186.22, subdivisions (b)(1) and (b)(4), which impose specified penalties upon "any person who is 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 . . . ."

Defendant contends that the jury's true finding as to the gang enhancement was unsupported by substantial evidence for the sole reason that no independent evidence of

the identity of Bullard's killer supported the expert's opinion that the shooting in this case was committed in retaliation for the Bullard murder. Defendant concludes that without such independent evidence, the expert's opinion amounted to no more than an opinion as to the specific intent element of section 186.22. Defendant's contentions have no merit.

As defendant acknowledges, the prosecution may prove the elements of the gang enhancement through expert testimony about criminal street gangs, and the expert may render an opinion as to whether a crime is committed for the benefit of, at the direction of or in association with a criminal street gang, based on the facts of a hypothetical question, so long as the hypothetical is "rooted in facts shown by the evidence." (*Gardeley*, *supra*, 14 Cal.4th at pp. 617-620.) Indeed, expert testimony is permitted even though it encompasses an ultimate issue in the case, including specific intent if the opinion is given pursuant to a properly worded hypothetical question. (*People v. Vang* (2011) 52 Cal.4th 1038, 1049; Evid. Code, § 805.)

Defendant does not identify the hypothetical question that elicited the opinion at issue; nor does he make any attempt to show that the hypothetical question was not rooted in the facts shown by the evidence. Instead, defendant challenges only the opinion that the shooting was committed in retaliation for the murder of Bullard. Without citation to authority, defendant contends: "Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of fact on direct examination." Contrary to the suggestion in defendant's argument, the hearsay information obtained from other officers was not presented as independent proof of the identification of Bullard's killer. Indeed, the trial court admonished the jury not to consider Detective Aguilar's testimony for its truth, but only as the basis of the expert's opinion.

We also reject the suggestion in defendant's argument that in reviewing the record for substantial evidence, this court must disregard any expert opinion based in whole or in part upon hearsay, unless the prosecution independently proved the truth of the hearsay. As authority for this proposition, defendant cites *People v. Ramon* (2009) 175 Cal.App.4th 843, 850, which holds no such thing and did not involve hearsay. An expert

may rely on inadmissible information so long as it is of the type reasonably relied on by experts in the particular field and is reliable. (*Gardeley*, *supra*, 14 Cal.4th at pp. 617-618.)

In any event, the evidence set forth in the previous section -- defendant's gang membership, his gang's recent conflict with a rival gang, and the commission of Grape Street's primary crimes in gang territory -- was more than adequate to support the expert's opinion that the crime was committed in association with the gang or benefitted the gang. (See *People v. Carr* (2010) 190 Cal.App.4th 475, 488-490.)

IV. No instructional error

Defendant contends that the trial court erred in instructing the jury with CALJIC Nos. 3.00 and 3.01, and that the court should have instructed the jury that it could find defendant guilty of a lesser offense as an aider and abettor. The trial court read CALJIC No. 3.00 as follows: "Persons who are involved in committing a crime or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include those who directly and actively commit or attempt to commit the act constituting the crime, or those who aid and abet the commission or attempted commission of the crime."[9]

Relying on *People v. McCoy* (2001) 25 Cal.4th 1111, *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), *People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*), and *People v. Woods* (1992) 8 Cal.App.4th 1570, defendant contends that the "equally guilty" language of CALJIC No. 3.00 is erroneous because it required the jury to find him guilty of the same degree of murder as the perpetrator, whereas it is possible for an aider and abettor to have a mental state different from the perpetrator's.

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9 The court read CALJIC No. 3.01 as follows: A person aids and abets the commission or attempted commission of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and by act or advice aids, promotes, encourages, or instigates the commission of the crime. Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting."

He argues that if the jury had been permitted to find that he had a different mental state, it might have found him guilty of a different or lesser degree of homicide than the perpetrator.

The "equally guilty" language may be misleading in some cases, and thus subject to modification or clarification upon request. (*Nero, supra*, 181 Cal.App.4th at p. 518; *Samaniego, supra*, 172 Cal.App.4th at p. 1163.) But defendant failed to make such a request in the trial court, and he has thus forfeited this contention. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) *Nero* does not, as defendant contends, change the rule of forfeiture in the case of CALJIC No. 3.00. In *Nero*, the court found no forfeiture under the circumstances of that case because the jurors sent out several questions during deliberations regarding the issue. (See *Nero, supra*, 181 Cal.App.4th at pp. 517-518 & fn. 13.) The error reached by the appellate court in *Nero* was the trial court's incorrect answer to the jurors' question whether a defendant could aid and abet a lesser offense than the perpetrator. (*Ibid*.) That is not the issue in this case.

Defendant asks that we nevertheless exercise our discretion to reach the merits of his contention in order to forestall a claim of ineffective assistance of counsel. (See *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151.) We need not do so as defendant has no such claim, in that he was not prejudiced by his trial counsel's failure to request clarification. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

"Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions. [Citations.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086.) Here, the trial court defined the elements of second degree murder as a lesser included offense of first degree murder. The trial court also defined express and implied malice, as well as premeditation and deliberation. The court instructed the jury that to find first degree murder or deliberate, premeditated attempted murder, it must find that defendant's acts were "preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill which was the result of

deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation . . . ." By convicting defendant of first degree murder and deliberate, premeditated attempted murder, the jury necessarily rejected any lesser degree of guilt under such instructions, eliminating any prejudice.

V. No cumulative error

As we have found no error, we reject defendant's claim that cumulative error requires reversal.

VI. No prohibited dual punishment

Defendant was convicted in count 6 of possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). The trial court imposed the upper term of three years to run concurrently with all the other counts. Defendant contends that the trial court was required by section 654 to stay the sentence imposed as to count 6, rather than to run it concurrently.[10]

Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) A course of criminal conduct is indivisible where all the offenses are incident to one objective. (*Neal v. State of California* (1961) 55 Cal.2d 11, 18.) The trial court's finding that a defendant had more than one objective will be upheld on appeal if supported by substantial evidence. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

"[W]here the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense,

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[10] "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The court is required to *impose* the sentence and then stay it. (*People v. Duff* (2010) 50 Cal.4th 787, 796.) A concurrent sentence does not satisfy the statutory prohibition. (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1312.)

then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' [Citation.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 22 (*Bradford*), quoting *People v. Venegas* (1970) 10 Cal.App.3d 814, 821 (*Venegas*).)

Defendant argues that the facts of this case are indistinguishable from *Bradford* and *Venegas*. We disagree. In *Bradford*, the defendant acquired the firearm nearly simultaneously with his crime by wresting it from a Highway Patrol officer during a traffic stop and then using it to shoot the officer. (See *Bradford*, *supra*, 17 Cal.3d at p. 13.) In *Venegas*, witnesses saw a gun in the defendant's hand only after shots were fired, and defense evidence suggested that defendant had obtained the gun in a struggle with the victim. (*Venegas*, *supra*, 10 Cal.App.3d at pp. 818-819.) Thus, in both cases, the acquisition of the firearm and the shooting were simultaneous. Here, the testimony of several witnesses showed that when defendant emerged from one of the vehicles, he was already holding an M-11 semiautomatic rifle.

As respondent notes, "section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1145 (*Jones*); see also *People v. Ratcliffe* (1990) 223 Cal.App.3d 1401, 1413 (*Ratcliffe*).)

Defendant contends that *Jones* and *Ratcliffe* are inapplicable here, because there was no evidence regarding when defendant acquired the gun; thus it was not established that defendant had possession of the weapon "at all times antecedent" or that he transported it to the scene. Defendant concludes that he may have been "handed the weapon by its owner just prior to emerging."

Neither *Jones* nor *Ratcliffe* required proof of when the firearm was obtained or required possession for a certain time prior to the crime. Rather, both cases held that section 654 would be applicable *only* where the evidence showed that the firearm came into the defendant's possession *fortuitously* "at the instant of committing another offense." (*Ratcliff, supra*, 223 Cal.App.3d at p. 1412; *Jones, supra*, 103 Cal.App.4th at p. 1144.) "A violation of section 12021, subdivision (a) is a relatively simple crime to commit: an ex-felon who owns, possesses, or has custody or control of a firearm

commits a felony. *Implicitly, the crime is committed the instant the felon in any way has a firearm within his control*." (*Ratcliff*, *supra*, at p. 1410, fn. omitted; *Jones*, *supra*, 103 Cal.App.4th at pp. 1145-1146.) Thus, if defendant obtained the weapon from one of his companions just before emerging from the vehicle as defendant posits, the evidence would still be sufficient to establish that he was in possession of the firearm prior to committing his crimes making section 654 inapplicable.

Defendant contends that despite such evidence, dual punishment was prohibited because the prosecutor did not elect to proceed on the theory that defendant possessed the weapon prior to its use. Referring to the prosecutor's argument to the jury that defendant was guilty "because he possessed the weapon during the shooting," defendant suggests that the prosecutor elected a theory of guilt based upon a simultaneous possession. The prosecutor's argument bore no relation to section 654 or dual punishment, but was an argument advocating conviction. Defendant has apparently confused section 654 with the judicially created exception to section 954, prohibiting dual convictions of necessarily included lesser offenses. (See generally, *People v. Sloan* (2007) 42 Cal.4th 110, 116.) That rule is inapplicable here.

We conclude that the trial court's imposition of dual punishment was proper.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST