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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. RUBEN VELASQUEZ, Defendant and Appellant.	B232578 (Los Angeles County Super. Ct. No. NA 085707)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Tomson T. Ong, Judge. Affirmed.

J. Kahn, 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 E. Mercer and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

A jury convicted defendant Ruben Velasquez of first degree murder and found an accompanying firearm enhancement to be true. Defendant's only claim on appeal is that the trial court erred in admitting evidence that defendant was a gang member and that witnesses were afraid to testify because of defendant's status as a gang member, when no gang enhancement was charged. Defendant's contention has no merit and we affirm the judgment.

FACTS

On May 17, 2010, between 10:00 and 10:30 p.m., defendant shot and killed Brandon Hanson at a bar. The killing, and many of the events leading up to the killing, was captured on videotape. At defendant's trial, his counsel told the jury, before any evidence was presented, that defendant pulled out a gun and shot the victim, but that it was a case of manslaughter, not murder. Events unfolded as follows.

At about 6:00 p.m., Angela Chavez, who was defendant's sister or stepsister, arrived at the bar with the victim, who was her boyfriend and a "regular" at the bar. After drinking for a while with Chavez's stepcousin, A.L., Chavez left the bar, picked up two other men in her car (Salvador Melena and Christopher Castaneda) and returned to the bar with them. Still later, Chavez left the bar again and returned with the defendant.

The bar's videotape shows defendant and the victim shaking hands, apparently being introduced. Thereafter, the four-hour videotape shows no physical contact between the two until immediately before the shooting. After defendant came to the bar with Chavez, the victim sat in the back of the bar by himself, and "kept to himself." During this time, defendant and Chavez were drinking, dancing, taking photographs of each other, and "just hanging out." Defendant and Chavez were "bumping and grinding," "not really groping," but "rubbing against one another in a sexual manner . . . ." The victim was in the bar observing Chavez and defendant, but not getting involved. The bartender, J.G., thought the victim "seemed upset. Bothered, mostly," which J.G. thought was because of the way Chavez and defendant were dancing. But at no time does the videotape show the victim approaching or confronting defendant.

After the dancing, the videotape shows defendant taking off his sweatshirt and tank top. Defendant and Melena showed each other their gang tattoos, and defendant took his shirt completely off to do so. Defendant had tattoos that showed him to be a West Side Wilmas gang member, and Melena had been a member of the same gang. When he took his shirt off, defendant had nothing tucked in his waistband, front or rear.

After defendant put his sweatshirt back on, he turned around and walked out of the bar area. Almost immediately, the victim left his table and approached Chavez at the bar. As he left his table, a beer fell off the table. Shortly after the victim began to talk to Chavez, defendant reentered the bar and went directly to the victim and Chavez. The videotape shows the butt of a handgun sticking out from defendant's pants that was not visible before he left the bar area.

The videotape shows that the victim continued to talk with Chavez, defendant took a step closer, and then defendant and the victim exchanged words with each other. The victim had his hands turned inward toward his (the victim's) chest as he was talking, and Chavez appeared to try to push defendant back, as did Melena. Castaneda and A.L. were also in the immediate proximity of the two men. Defendant threw a punch at the victim while "the victim's hands were down to his side." The victim staggered back, trying to regain his balance, and defendant reached to his (defendant's) back, "in the direction where we saw the butt of the gun," and brought his hand upward. The victim was "backed up to the bar," where he could not back up any further.

The victim made a sweeping motion with his left hand as defendant's hand went up, and then there was a muzzle flash. The victim slumped down, and defendant fired again as the victim slumped over. Then, the victim fell to the ground without using his hands to break his fall, and lay there motionless. Defendant leaned closer, bent over, and fired again twice into the victim's buttocks. Defendant then kicked the victim's body twice, and stomped on his head. Castaneda, who had been observing what was going on, kicked his left foot toward the victim's head, and defendant then "stomp[ed] straight down on [the victim's] head," making "three stomping motions on top of his head." Castaneda then raised his beer up, motioning in A.L.'s direction in "some type of salute,"

and defendant left with Castaneda just behind him. They got into Chavez's car and Chavez drove them away.

The victim, who was shot five times, twice in the neck, bled out and died. A short time after the shooting, the police stopped Chavez's car. A police officer saw defendant, who was in the front seat, make a tossing motion toward the driver's seat floorboard, and found a revolver there with six live rounds and one spent casing in the cylinder. Four other spent casings were found in the car.

Defendant was charged by information with murder (Pen. Code, § 187, subd. (a)) and attendant firearm allegations (§ 12022.53, subds. (d), (c) & (b)), and prior convictions were also alleged. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i), 667.5, subd. (b), 667, subd. (a)(1).)

Before testimony began at the trial, defense counsel asked for the exclusion of "any reference to gangs" as irrelevant because it was not a gang killing. The prosecutor stated, "I do not take the position it's a gang-related crime." Later, the prosecutor clarified that he "did not intend to introduce evidence of gang affiliation for that purpose [to show a gang motivated crime]," but "[t]he problem is we have a number of witnesses here who are lying and denying. And a large part of the reason for that is because they believe the defendant to be with West Side Wilmas, a gang member. It needs to come out for that limited purpose because they have commented on that." The prosecutor explained: "Virtually the entire cast of characters are looking at what happened, then they later on say don't know, did not see, were in the back, just heard it themselves. [¶] . . . [¶] So in terms of recanting, it's not as though I can say we have a group of witnesses who truthfully laid out what happened. They said bits and pieces. Certainly when we see the video, you can see them watching what takes please [*sic*]. It helps explain fear and reluctance, and loyalty in [Castaneda's] case." Defense counsel objected, saying, "I don't think it is relevant. I think this is a classic example of trying to bootstrap the gang enhancement to get a conviction on the underlying charge. All the witnesses were there. From what I have seen, their stories are consistent."

The trial court ruled, "If they recant, that's the only way evidence can come in."

At trial, portions of the videotape were shown, along with still photographs from the tape. In addition to testimony from detectives and the medical examiner, the prosecution presented four percipient witnesses.

J.G. J.G. testified that after the shooting, she provided police with the videotape and told them what she had seen and heard. The videotape shows J.G., moments before the shooting, looking back toward the victim and defendant. She was holding a mop after cleaning up the beer that the victim had knocked over when he got up. She said she did not see the victim get shot. She saw defendant push the victim, and the victim "got up from getting pushed, charged towards him [defendant], and that's what I saw. I didn't see a gun get pulled. I didn't see anything." She identified defendant as the man with the gun in the videotape.

The prosecutor then asked J.G. if she had "any fear or reluctance to testify." J.G. replied that she was "just nervous," but when the prosecutor asked if she was "fearful of retaliation" she responded affirmatively, and when asked who she feared retaliation from, she said, "[f]amily members of his or just people in general." When asked "what people in general would have any interest in this," she replied, over defense objection, "Just, I guess, gang members in the area or fellow family members of his that might retaliate in general." The prosecutor then elicited J.G.'s testimony that the bar was in the area of the West Side Wilmas gang, and some of the gang members patronized the bar. Then:

> "Q Does that have to do with the reason you are not willing to say you saw what happened in the shooting that night?
>
> "A Not at all.
>
> "Q For the record, you are in tears right now?
>
> "A Yes, I am."

J.G. testified that she did not see the victim push defendant or show any kind of physical aggression against defendant. She said defendant and the victim "were arguing" but she could not hear any words, and it looked like "[t]hey were exchanging words equally," "going back and forth."

Salvador Melena. Melena (who came to the bar with Castaneda and showed his tattoos to defendant during the evening), was asked whether he met defendant (the man with the gun in the videotape) in the bar that night. He answered, "I think I did, but I'm not sure." The questioning continued:

"Q You are not sure?

"A I don't remember his name, and I don't remember which one.

"Q All right. Were you introduced to a man who you actually shook hands with that night who you later identified as shooting the victim . . . that night?

"A I don't recall his name because it was the first time that I met him also, so, you know, I don't remember his name or nothing else like that. [¶] . . . [¶]

"Q I'm not asking you for his name. I'm asking whether or not you were introduced to a man that night who later shot the victim, Brandon Hanson?

"A Yes.

"Q Do you see that man here in court now?

"A You know what, the face, I don't remember. I don't remember his face because in there, it was kind of like it was a little bit dark, not that much light.

"Q So you're telling us now, here in court, under oath, that you don't recognize the man who you met in the bar that night that you later told the police shot the victim?

"A Maybe he looks different, I'm not sure, but, you know, there was facial hair and stuff. I'm not sure. It doesn't look like him, but it could be. I'm not sure.

"Q You said he doesn't look like him. Are you referring to someone in court?

"A Right."

After Melena pointed out the defendant, the questioning continued:

"Q By [the prosecutor]: You are saying that you don't recognize the defendant as the shooter?

"A Maybe because he looks different, I'm not sure. I couldn't say because the guy that I seen there was different, he looked different to me."

The prosecutor then elicited the testimony that Melena and defendant were showing each other their gang tattoos that night and that Melena's tattoos showed he "used to be a member" of the West Side Wilmas and he and defendant "were sharing that common bond . . . ." Melena testified that he told the police what he observed that night, and made an identification of the shooter from a photographic lineup. Then:

"Q You are reluctant to identify him here in court today; is that right?

"A Right.

"Q Why?

"A I feel maybe he looks different. I don't know. I just –

"Q You're telling us it has nothing to do with gang affiliation, loyalty or intimidation?

"A This is not about gang affiliation.

"Q You were part of the same gang that the defendant or shooter showed you tattoos, right?

"A Correct."

On redirect examination, the prosecutor elicited Melena's testimony that he was "freaked out" after the shooting and fled from the bar. He did not come forward to the police, and when they tracked him down, he told them he did not want to testify:

"A I was kind of scared, yes.

"Q What were you scared of?

"A Retaliation. [¶] . . . [¶]

"Q Do you fear retaliation from the gang or something from law enforcement?

"A It could be either/or – gang."

Melena told the police that he "[didn't] want nothing to happen to me because of something I witnessed," and also told police that a couple of people had "jumped" him "a few months back," but he had not reported it to the police. "The guys that jumped" Melena "thought [he] was snitching or something," and beat him.

"Q . . . But even though fear of retaliation is not an issue for you, what you are telling us is you didn't report it that night?

"A Correct.

"Q You didn't wait for the police then?

"A No, I didn't.

"Q You didn't make yourself available to testify?

"A Correct.

"Q And then when you finally did talk to the detective, you didn't tell him what happened before, did you?

"A No, I didn't tell him.

"Q And now you are not identifying the defendant here in court even after you picked him out of a photo lineup?

"A Right.

"Q It's not because of fear or reluctance because of gang retaliation?

"A It could be. It could be."

Christopher Castaneda. Castaneda testified that he saw defendant in the bar that night, and saw the shooting. (When the police found him after the shooting, he initially told them he did not see the shooting.) He fled from the bar in Chavez's car with Chavez and defendant. Castaneda testified that he was a member of the West Side Wilmas, as was defendant, but he only knew defendant "by what people used to call him, Zombie," not by his real name. The prosecutor then asked Castaneda if he was "extremely reluctant to testify," and he said, "I just don't want to be here, period."

"Q Because you don't want to testify against a fellow Wilmas gang member, correct?

"A It's not even that.

"Q What is it then?

"A Because I got a family, that's why.

"Q What does your having a family have to do with your reluctance to testify here?

"A Just because I'm basically kind of getting blamed for something I did not do."

Castaneda said he had not been threatened in this case, and was concerned about going to jail for something he did not do.

"Q Okay. You are telling us that your reluctance is not because of your fear of retaliation from the West Side, is that what you are saying?

"A I guess I don't know. [¶] . . . [¶]

"Q Is it that you simply don't want to say in front of this courtroom and this jury I fear payback from a gang, you just don't want to say that; isn't that true?

"A Yeah.

"Q Okay. You are here because you were served with a subpoena and you knew you would be arrested if you didn't appear; is that correct?

"A Yeah.

"Q Is it fair to say when you talked to the police initially it was not because you came forward, it was because they found you and brought you in, correct?

"A Yeah.

"Q And you were just as reluctant to talk to them then as you are to talk in front of this jury now?

"A Yes, it is."

Castaneda then testified that he saw defendant shoot the victim that night, and after he saw defendant shoot, kick and stomp on the victim, he (Castaneda) ran away with defendant, and added one last kick to the victim himself. Castaneda did not know why he kicked the victim, but said it was not because of his affiliation with defendant's gang.

A.L. A.L. testified about coming to the bar, and that Chavez had left the bar and brought back a person Chavez said was her brother.

"Q Is that someone you see in court here now?

"A No. I don't remember what he looked like."

A.L. said she had never seen Chavez's brother before that night. A.L. talked to the police the next morning about what happened, and told them the person who did the shooting was Chavez's brother. She testified she saw Chavez's brother kissing her on the lips.

"Q But as you sit here in court, you don't recognize that person?

"A No."

A.L. testified that when she talked to the police, she identified Chavez's brother from a photographic lineup as the person she had seen Chavez kissing and dancing with and as the person who shot the victim. She said she talked to the shooter when Chavez introduced her, and she told police the shooter said he was from the West Side Wilmas. She saw the shooter showing off his gang tattoos in the bar that night. She did not see the shooter approach the victim and start a confrontation, but she did see them speaking to one another. She could not hear what was said. She did not remember seeing the shooter throw a punch at the victim, or push or shove the victim. When asked if she saw the victim get shot, A.L. said, "I remember seeing the flashes from the gun, and I remember running."

A.L. was shown a still photograph from the videotape showing her with Chavez looking at the shooter with the gun out facing the victim.

"Q So you were three or four feet away when the shooting takes place?

"A Yes.

"Q With an unimpeded view of it in a light bar, correct?

"A Yes.

"Q And you are telling us now that all you saw were the muzzle flashes from the gun?

"A Yes, that's what I remember.

"Q Well, did your memory somehow black out everything that you saw?

"A I was pretty drunk. I was there for a while, and this is something that I don't wish to keep in my memory. I understand how serious this is, but I don't, you know."

A.L. admitted that she told the police the next day that she saw Chavez's brother shoot the victim:

"Q That wasn't because you came forward, they found you?

"A Yes.

"Q You were just as reluctant to tell them then as you are to come to court now; isn't that true?

"A Yes. [¶] . . . [¶]

"Q Does the fact that you knew [Chavez's] brother to be a West Side Wilma gang member have anything to do with your unwillingness to identify him in court today?

"A No. I'm, of course, scared for my life and for my family, but –

"Q What is it you're afraid of for yourself and your family?

"A Retaliation.

"Q From this gang?

"A Yes.

"Q That you know the defendant to be a member of?

"A Yes.

"Q So you are saying that failure of memory is completely separate from that fear, though?

"A No.

"Q I'm sorry?

"A No. I honestly—what I said is what I remember.

"Q So you told the police the truth when they first interviewed you?

"A Yes. [¶] . . . [¶]

"Q And since that time, despite these fears, you have forgotten what you saw; is that what you are telling us?

"A I'm telling you what I remember, yes.

"Q But you forgot the actual seeing the man shoot the victim?

"A Yes.

"Q And even though you admitted to us you fear retaliation from the gang, you are saying that loss of memory has nothing to do with that fear?

"A Yes. I was also drunk that night."

Defendant testified to his version of events. He met the victim at the bar. Chavez told him that the victim was not her boyfriend, but just a friend. Defendant had been drinking earlier, and at the bar he drank three or four beers and at least four shots of tequila and was intoxicated. He went to the bathroom and when he came back, the victim was yelling at Chavez. Defendant told the victim, "[W]hat's going on? Look at the beer you dropped." Defendant and the victim got into an argument, and the victim said, "That's how you dance with your sister?" The victim said he was with Chavez, and was "pretty angry." The victim said, "I'll fuck you up," and was "way bigger than [defendant]." (The evidence showed the victim was six feet one inch tall and weighed 260 pounds.) Defendant "just reacted" and swung at the victim. "And after that, I was in fear for my life because I don't know him, if he had a gun, I don't know, I mean what he knows how to do. You know what I mean? I was like, man, this guy is going—if he gets a hold of me, it's over." Defendant thought the victim was going to kill him. Defendant

felt threatened and pulled out the gun, which he "had . . . on [him] the whole time," and "I just shot." Defendant was drunk and scared, and did not know what he was doing, but "just reacted." His explanation for shooting the victim in the buttocks as he was lying face down on the ground was, "I don't know. Like I said, it happened so fast, I was drunk." Defendant did not recall with whom he left the scene, and did not remember ejecting shell casings or reloading the gun in the car.

The trial court gave the jury a limiting instruction: "The fact that witnesses may have testified that defendant has either been a member of Wilmas or have a nickname of 'Zombie' is not evidence of guilt and must not be considered by you as any evidence that he is more likely to be guilty than not guilty. This evidence is admitted for the limited purposes of establishing the defendant's identity. This evidence is also admitted for the limited purpose of establishing believability of the witness testifying about said matter and the weight to be given the testimony of that particular witness. [¶] Do not consider this evidence for any purpose except the limited purpose for which it has been admitted."

In his summation, the prosecutor said:

> "As the court has already pointed out to you, the evidence that you heard about gang affiliation, moniker of Zombie, is not being given to you to suggested [*sic*] by the People that that makes the defendant more likely to have committed the offense. But as you can tell, from having listened to the witnesses in this case, the civilian witnesses in that bar, and seeing what actually happened, the fear, the locality in some cases to the gang, those affect what people have to say ultimately when they come into the courtroom and sit in front of family members and testify."

Defense counsel reminded the jury that he had told them in his opening statement that defendant shot and killed the victim, and they saw the videotape. He told the jury to ask themselves why the four percipient witnesses were brought in by the prosecutor to testify, when "all that stuff is totally irrelevant because we said in our opening statement [defendant] did this." Counsel's answer was that the prosecutor did so "to scare you, to bring in this gang stuff when it has absolutely nothing to do with this case. . . . He didn't have to put any of those witnesses on. All he had to do was push play." Arguing the

facts showed manslaughter, not murder, defense counsel asked, if defendant planned to shoot the victim, "Why didn't he just come straight up to [the victim] and smoke him, blow him away?"

In rebuttal, the prosecutor argued the gang issue was relevant:

> "We have people who are fearful of telling the truth, the whole truth. And they were restrained and held back. Also, it affects the case factually. [¶] One of the last things . . . we heard from [defense] counsel, he [defendant] didn't go up and kill [the victim] immediately as though that's the way to commit a murder. And there are any number of ways or reasons for people doing what they do. In this case, it's important, given who the defendant is, it's important to him as a gang member to intimidate, get the power and the feeling that intimidation gives him. And that's what he does when he initially approaches [the victim]."

After describing how the victim did not "get[] physical" when he was approached by defendant and did not respond or throw a punch but instead backed away, the prosecutor continued:

> "Counsel says this is very important, that it takes place this way, or we are bringing up the gang aspect. He is right, it is important. It's important to note as a gang member, intimidation is something that he revels in. He gains power. He gains prestige from it. [¶] He doesn't want to just go up, do it Mafia style, one in the back of the head. He wants to revel in the intimidation. And he does it for the same reason he shoots him twice in the buttocks, to intimidate and humiliate and get what he can from the entire experience."

Later, the prosecutor argued:

> "[W]e are not trying to scare you with any notion of this being something about gang motivation. There is no charge of the gang enhancement to this thing. We are not suggesting that that was the motivation. This is over a woman. Essentially as old as time. It's happened a million times before. It happened here. But the gang aspect of it permeates his goals. That's how the defendant conducts himself. He revels in the intimidation."

The jury found defendant guilty of murder in the first degree, and found true the allegation that defendant personally and intentionally discharged a firearm which

proximately caused great bodily injury or death. Defendant admitted serious felony and prison prior allegations, and the court found them true. The court denied defendant's motion to dismiss the prior strike allegation, sentenced defendant to a total term of 81 years to life, and made other orders not at issue on this appeal. Defendant's sentence consisted of 25 years to life for the murder, doubled for the strike (Pen. Code, § 1170.12, subds. (a)-(d)), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), an additional five years for his prior serious felony conviction (§ 667, subd. (a)(1)), and an additional one year for having served a prior prison term. (§ 667.5, subd. (b).).

Defendant filed a timely appeal.

DISCUSSION

We find no merit in defendant's only contention on appeal: that admission of the gang evidence in this case was prejudicial constitutional error.

The applicable principles are settled. "Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192 (*Avitia*).) But gang evidence is inadmissible "if introduced only to 'show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]' [Citations.]" (*Ibid.*) Where a gang enhancement is not involved, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Gang membership evidence is admissible "on a number of issues in a criminal trial," including when it is "relevant on possible threats to prosecution witnesses, resulting in obvious bias during testimony." (*People v. Harris* (1985) 175 Cal.App.3d 944, 957.) Even when gang evidence is relevant, "it may have a highly inflammatory impact on the jury" and trial courts should scrutinize it carefully before admitting it. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) The trial court's admission of gang evidence is reviewed for abuse of discretion, and its ruling "will not be disturbed in the absence of a showing it exercised its discretion

in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Avitia*, *supra*, at p. 193.)

We see no abuse of the trial court's discretion in admitting the gang evidence in this case. The percipient witnesses, all of whom witnessed the shooting, all demonstrated a reluctance to testify. We have described their testimony at length *ante*, and can find no fault in the trial court's admission of the testimony. J.G., who was pictured looking back toward the victim and defendant moments before the shooting, "didn't see a gun get pulled," and "didn't see anything" (although she did identify defendant in court as the man with the gun). Melena could not remember defendant's face, even though the two men had shown each other their tattoos; asked whether he recognized defendant as the shooter, he said, "I couldn't say because the guy that I seen there was different, he looked different to me." Castaneda identified the defendant, but was a reluctant witness; the trial court, when it overruled a defense objection that the prosecutor was leading the witness, described Castaneda as "a reluctant and hostile witness." And A.L. did not recognize defendant as the person Chavez introduced as her brother, did not see the shooter approach the victim or start a confrontation, and only saw "the flashes from the gun," though she was three or four feet away with an unimpeded view. Under these circumstances, the gang evidence was logically relevant to a material issue—the credibility of the four percipient witnesses—and was neither cumulative nor more prejudicial than probative. (*Avitia*, *supra*, 127 Cal.App.4th at p. 192.)

Defendant relies on *People v. Cardenas* (1982) 31 Cal.3d 897 (*Cardenas*), where the court found an abuse of discretion in the admission of gang evidence that was offered to establish the bias of the defense witnesses. (*Id.* at p. 904.) But in *Cardenas*, the facts the prosecution sought to prove—that the defendant and the witnesses were neighborhood friends—had already been "amply established by other testimony before the prosecutor began his inquiries into the witnesses' gang affiliations." (*Ibid.*) Thus, the fact they were all members of the same gang "was cumulative and added little to further the prosecution's objective of showing that the witnesses were biased because of their

close association" with the defendant. (*Ibid.*) Here, the waffling by the witnesses entitled the prosecutor to present evidence explaining their reluctance to testify.

Defendant also relies on *Avitia* and on *People v. Perez* (1981) 114 Cal.App.3d 470, 478 (*Perez*). In *Avitia*, the court found that evidence of gang graffiti in the defendant's room "was completely irrelevant to any issue at trial." (*Avitia, supra,* 127 Cal.App.4th at p. 193.) In *Perez*, the Court of Appeal concluded the gang membership evidence had no tendency in reason to prove the disputed fact of the identity of the perpetrator and therefore was not relevant (*Perez, supra,* at p. 477), and evidence of an uncharged shooting incident as the defendant drove by the house of a rival gang member (*id.* at p. 473) was of "slight probative value, if any." (*Id.* at p. 478.) Further, the record did not show "that the trial court did in fact discharge its duty . . . by weighing the evidence for prejudice against its probative value." (*Ibid.*)

This case is entirely different from *Cardenas*, *Avitia* and *Perez*. Here, the evidence was relevant to the credibility of the witnesses, and that issue was not, as defendant claims, "tangential." Defendant asserts that if the prosecutor was in fact proffering the evidence to show the witnesses were "lying and denying," he would not have argued, as he did, that the evidence showed defendant "revels in the intimidation" and that the "gang aspect . . . permeates [defendant's] goals." But the prosecutor made that argument in response to the defense's argument that, if the shooting had been planned, defendant would have gone up to the victim and shot him immediately. Moreover, there was no objection made to the prosecutor's argument.

In short, we cannot say the trial court exercised its discretion in an "arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Avitia, supra,* 127 Cal.App.4th at p. 193.) And, if error could be found, it would be harmless beyond a reasonable doubt. The evidence showed that defendant had no gun in his waistband before the confrontation, left the bar and returned seconds later with a gun, approached and talked with the victim (who at no time approached or confronted defendant), punched the victim, then shot him as he was backed up against the bar, shot him in the buttocks after he was lying face down on the ground, and kicked and stomped

on his head. Against this evidence is defendant's testimony that the victim was bigger than he was, and after he punched the victim, he feared for his life. Contrary to defendant's assertions, the case for murder, rather than voluntary manslaughter, was overwhelming.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.