Filed 4/20/17 P. v. Ambriz CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SAUL AMBRIZ et al., Defendants and Appellants.	B268685 (Los Angeles County Super. Ct. No. BA424985)

APPEALS from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant Saul Ambriz.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant Andoreni Lazaro Ocampo.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.

Saul Ambriz and Andoreni Lazaro Ocampo were convicted following a jury trial of second degree murder. On appeal Ocampo contends the evidence was insufficient to support his conviction and raises a number of other challenges to his conviction, including improper instructions, evidentiary error, juror misconduct and ineffective assistance of counsel. Ambriz argues only that the trial court improperly admitted gang expert testimony.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

On October 30, 2014 Ambriz and Ocampo were each charged by information with one count of murder (Pen. Code, § 187, subd. (a))[2] with a special allegation that Ambriz had used a knife during the commission of the offense (§ 12022, subd. (b)(1)). Ambriz was 16 years old at the time of the offense and was charged as an adult pursuant to former Welfare and Institutions Code section 707, subdivision (d)(1) and (d)(2)(A).[3]

---

[1] In his opening brief Ambriz sought correction of the trial court's award of presentence custody credits. Ambriz's reply brief acknowledges the trial court has now made the necessary correction. Accordingly, this issue is moot.

[2] Statutory references are to this code unless otherwise stated.

[3] Welfare and Institutions Code section 707 was amended by Proposition 57, The Public Safety and Rehabilitation Act of 2016, passed by voters on November 8, 2016.

2. *Evidence at Trial*

In 2014 Ambriz was a member of the "BUMS" tagging crew, and Ocampo was a member of the "H20" tagging crew. Joao Bonilla, a senior member of BUMS, and Josue Bernal, another BUMS member, testified generally regarding the crew's culture and explained BUMS members painted graffiti art ("tagging") around their neighborhood. In April 2014 there were approximately 15-20 members of BUMS. H20 was a separate tagging crew. Its members were friendly with BUMS members, and the two groups spent time together. Each tagging crew had its own territory and hand signs, and members of the groups often had nicknames or monikers by which they were known. The tagging crews also had rivals who had their own territories. When one crew encountered the graffiti art of a rival crew, its members would cross it out as a sign of disrespect and write the name of their own crew. Rival crews would retaliate in kind. Often when they went out tagging, members of the crews would bring bats or other weapons to protect themselves from rivals.

On the evening of April 25, 2014 Ambriz and Ocampo were together at Ocampo's house with approximately eight of their friends, smoking and drinking. Ambriz and at least three other individuals present that night were BUMS members, and Ocampo and at least two other individuals present were H20 members. Bonilla testified that Ocampo became agitated and upset and wanted to go out and drive around. Bonilla told Ocampo to calm down, and Ocampo turned his anger toward Bonilla. Ocampo lifted his shirt to show Bonilla a scar down the length of his abdomen, which was the result of a stabbing three months earlier by a member of a rival tagging crew. Referring to the scar Ocampo said, "Look what they did to me." As Ocampo

continued to be aggressive toward Bonilla, others at the gathering tried to calm him down, telling him to "relax." One individual told Ocampo, "[Bonilla]'s not the enemy, he's a homie." At that point Ocampo ceased being aggressive toward Bonilla, but the group was still "pumped up" and "emotional." Bonilla heard someone say they should go "lurking," which meant hunting for enemies.

In response to the lurking comment Ocampo said, "Let's go get an enemy." He and Giovanni Garcia got into a car driven by Giovanni's brother, Felix Garcia;[4] and drove away. A few moments later Bonilla, Ambriz and a third individual got into a car driven by Jesse Chavez. Before everyone left the house Ambriz and Giovanni told Bonilla they were carrying knives. Bonilla felt apprehensive about following Ocampo because he thought there might be a fight, and he asked Chavez to take him home. Instead Chavez followed the car in which Ocampo was riding.

Around 9:00 p.m. Felix, Giovanni and Ocampo arrived near the intersection of Vermont Avenue and 40th Place, a location within the territory of "UTF," a tagging crew that was a rival to both BUMS and H20. Ocampo and Giovanni got out of the car and walked down Vermont Avenue, where they encountered Osmin Cerna leaving a liquor store carrying a backpack and skateboard. Cerna identified himself as a member of UTF. The three men then began to fight.

Porshallett Burney and Jonathan A. testified regarding the fight. Burney was in the passenger seat of her husband's car

---

[4] Because Felix and Giovanni Garcia share the same surname, we refer to them by their first names for clarity and convenience.

waiting at a stop sign on 40th Place and Vermont Avenue. She saw two young Hispanic men, whom she later identified as Ocampo and Giovanni, walking toward a larger Hispanic man, later identified as Cerna. Ocampo and Giovanni attacked Cerna, causing him to drop his skateboard. Cerna put his hands up and said, "Why are you all attacking me?" The young men kept striking Cerna, and Cerna tried to retreat. Ocampo and Giovanni pursued him. Giovanni picked up the skateboard and swung it at Cerna. Cerna tried to defend himself and was able to knock down Ocampo, but Ocampo got up and kept fighting.

Jonathan had been in the same liquor store as Cerna. Upon leaving the store Jonathan saw two smaller men attack Cerna. One of the aggressors took Cerna's skateboard and hit him in the head with it. Cerna then began to back away from the two attackers. Jonathan did not see Cerna threaten, provoke or hit the other men.

Burney and Jonathan both testified a second car arrived several minutes after the fight began. Bonilla confirmed this was the car in which he, Ambriz and others were riding. Ambriz and another passenger got out of the car and ran to the fight. The attackers surrounded Cerna, who was on the ground, unable to get up and screaming, "Help! Stop!" After another few minutes the attackers returned to one of their cars and drove away.

Paramedics arrived and took Cerna to the hospital. He died that night. The medical examiner testified Cerna had been stabbed nine times during the fight, twice in the back, once to the buttocks, once to the chest, twice to the abdomen and twice to the face. The fatal wound was the chest wound, which had pierced the heart. One of the abdominal wounds might also have been fatal if not treated.

Bernal, who had not been present at Ocampo's house or at the scene of the murder, testified regarding conversations he had with Ambriz that night and the next day. Bernal called Ambriz on his cellular telephone between 9:00 p.m. and 10:00 p.m. on April 25. Ambriz answered and said, "We seen some enemies. I'll call you back later." Bernal spoke to Ambriz later that night, and Ambriz said they had "caught some enemies slippin'." Bernal understood that to mean they had "caught people walking down the street that we don't get along with." Around 3:00 a.m. the following morning, Bernal and Ambriz went tagging with some other friends. While in the car Bernal heard Ambriz say he had taken out his knife and stabbed Cerna during the fight. Bernal testified he had seen Ambriz carrying different types of knives on previous occasions.

On April 26, 2014, the day after the murder, someone called a BUMS meeting at Bernal's house. Bernal recalled at least seven individuals in attendance, including Bonilla and Ambriz. The discussion turned to the incident the previous night, and Ambriz stated he had stabbed Cerna twice. Bonilla also testified that Ambriz said he had stabbed Cerna and, at some point, Ocampo said he had a knife the night before, but dropped it during the fight.

Detective Armando Mendoza of the Los Angeles Police Department's criminal gang homicide division testified regarding his investigation into Cerna's death. According to Mendoza, during an interview in May 2014 Ambriz admitted he had stabbed Cerna once or twice but said he was trying to defend his friends. Mendoza also testified as an expert witness regarding tagging crew culture and behavior based on his training and extensive contacts with tagging crews. Mendoza's expert

testimony confirmed Bonilla's and Bernal's first hand descriptions—tagging crews engaged in graffiti art, formed alliances and rivalries, established known territories, retaliated against one another for disrespectful behavior and graffiti, and, on occasion, committed violence against rival crews.

Throughout the trial the jury was shown video surveillance footage depicting parts of the attack on Cerna. The video recording was admitted into evidence, and the jury was provided with a laptop computer to view the footage during its deliberations.

Neither Ambriz nor Ocampo testified or presented any witnesses in his defense.

3. *The Verdict*

After deliberating for slightly more than one day, the jury found Ambriz and Ocampo guilty of second degree murder and the weapons allegation as to Ambriz to be true. Ambriz's and Ocampo's attorneys declined individual polling of the jury members.

4. *Ocampo's Motion for New Trial*

Following the verdict Ocampo moved for a new trial. First, Ocampo asserted several of the jurors had committed misconduct by giving erroneous legal advice and bullying two fellow jurors into voting for guilty verdicts. Second, Ocampo argued the prosecutor had improperly introduced photographs of a memorial erected at the site of the attack on Cerna. Third, Ocampo alleged there was insufficient evidence to support a guilty verdict. Fourth, Ocampo renewed an earlier motion for a separate trial. Finally, Ocampo alleged part of Bernal's testimony should have been excluded as inadmissible hearsay. The People filed an

opposition. After hearing oral argument, the trial court denied the motion on all grounds.

5. *Sentencing*

On November 23, 2015 the trial court sentenced Ambriz to an indeterminate state prison term of 16 years to life: 15 years to life for second degree murder plus one year for the weapon enhancement. Ocampo was sentenced to an indeterminate state prison term of 15 years to life for second degree murder. The court also imposed statutory fees, fines and assessments.

DISCUSSION

1. *Substantial Evidence Supports Ocampo's Second Degree Murder Conviction*

a. *Standard of review*

In considering a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor

evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "'Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.'" (*People v. Clark* (2016) 63 Cal.4th 522, 626.)

b. *Governing law*

Murder is the unlawful killing of a human being "with malice aforethought." (§ 187, subd. (a).) "Malice may be either express or implied. [Citation.] Express malice is an intent to kill. [Citation.] . . . Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) "A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. [Citation.] 'Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.'" (*People v. Beltran* (2013) 56 Cal.4th 935, 942.)

"[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime." (*People v. McCoy* (2001)

25 Cal.4th 1111, 1117.) Second, under the natural and probable consequences theory, "a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 254; accord, *People v. Chiu* (2014) 59 Cal.4th 155, 164-166.) Thus, to be convicted of second degree murder under the natural and probable consequences theory, the defendant's intent to commit the nontarget homicide is immaterial. Liability is established if a reasonable person in the defendant's position should have known the nontarget offense (murder) was a reasonably foreseeable consequence of the act he or she aided and abetted. (*Chiu,* at pp. 164-165; see *People v. Medina* (2009) 46 Cal.4th 913, 922 [shooting of victim, though not intended, was a "reasonably foreseeable consequence of the gang assault in this case"].) "A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury." (*Medina*, at p. 920.)

c. *There was substantial evidence Ocampo committed the crime of second degree murder under a natural and probable consequences theory*

The prosecutor sought to prove second degree murder by establishing Ocampo committed the crime of assault (the target offense); during the assault a coparticipant in the target offense committed the crime of murder (the nontarget offense); and, under the circumstances, a reasonable person in Ocampo's position would have known the commission of murder was a

natural and probable consequence of the assault.[5] Ocampo contends there was not substantial evidence to support his conviction under this theory. Specifically, Ocampo argues there was "no evidence of . . . appellant himself assaulting the victim . . . . As close as the record comes is witness testimony that appellant was 'part of the group' that was attacking the victim." Ocampo further argues the victim's death was not a reasonably foreseeable consequence of the assault.

Ocampo misunderstands the scope of the natural and probable consequences theory, as well as the deferential standard that governs our review of the jury's findings. Reviewing the record in the light most favorable to the prosecution, ample evidence supports the finding Ocampo aided and abetted an assault for which murder was a natural and probable consequence. The evidence established that on the night of the murder Ocampo was upset about a stab wound he had previously received from a member of a rival tagging crew and, shortly before leaving his house, stated his intent to go "get" an enemy.

---

[5] Using CALCRIM No. 403 the court instructed the jury, "Under a natural and probable consequences theory to prove that the defendant is guilty of murder in the second degree, the People must prove that: [¶] 1. The defendant is guilty of assault; [¶] 2. During the commission of the assault a coparticipant in that assault committed the crime of murder; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault. [¶] . . . [¶] If you decide that the defendant aided and abetted in an assault, and that the murder was a natural and probable consequence of that crime, the defendant is guilty of murder."

Giovanni and Ocampo, who was carrying a knife, then attacked a rival crew member whom they encountered. They were quickly joined by their friends, who took part in the attack. Cerna was stabbed nine times. Ocampo argues there is no evidence he personally assaulted Cerna, but that was an argument for the jury. The jury heard testimony regarding Ocampo's presence at the scene and active participation in the attack. Further, the jury repeatedly viewed the surveillance video of the attack, from which they could evaluate Ocampo's actions. Based on this evidence, a reasonable trier of fact could find Ocampo actually participated in the assault on Cerna or, at the very least, aided and abetted the assault.

Moreover, there was substantial evidence from which the jury could conclude Cerna's death was a foreseeable consequence of the assault. First, the jury could reasonably infer Ocampo knew fights between rival tagging crews could lead to serious injuries because he had been seriously wounded only three months earlier in such a dispute. Second, it was reasonable for a jury to conclude Ocampo would have, or should have, known death could result from an attack on a lone victim by a larger group of individuals, especially when Ocampo himself was carrying a knife. (See *People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1177 [death was foreseeable consequence when "group of men challeng[ed] a single unarmed victim with an assortment of weapons available for their use"]; see also *People v. Fiu* (2008) 165 Cal.App.4th 360, 374 ["'[t]he precise consequence [of defendant's act] need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind that might result from his act'"].)

2. *The Trial Court Did Not Commit Instructional Error*

a. *Governing law and standard of review*

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, """"those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) A court may, however, "'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.'" (*People v. Burney* (2009) 47 Cal.4th 203, 246.) We review defendant's claims of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "In assessing a claim of instructional error, 'we must view a challenged portion "in the context of the instructions as a whole and the trial record" to determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.""" (*People v. Jablonski* (2006) 37 Cal.4th 774, 831.)

b. *The trial court properly instructed on causation*

Ocampo requested the trial court instruct the jury with CALCRIM No. 240 regarding causation.[6] The court declined,

---

[6] CALCRIM No. 240 states: "An act [or omission] causes (injury/ <insert other description>) if the (injury/ <insert other description>) is the direct, natural, and probable consequence of the act [or omission] and the (injury/ <insert other description>) would not have happened without the act [or omission]. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In

stating "I don't think causation is an issue in this case." Ocampo contends this ruling was in error, arguing the court should have given either CALCRIM No. 240 or a causation instruction similar to that in *People v. Brady* (2005) 129 Cal.App.4th 1314, 1327, which stated, "'An intervening act may be so disconnected and unforeseeable as to be a superseding cause that, in such a case, the defendant's act will be regarded at law as not being a cause of the injuries sustained.'" Without either instruction, Ocampo asserts, the jury was not informed it must find Ocampo not guilty if it determined an unforeseen intervening act was the cause of Cerna's death.

Ocampo's position ignores the trial court's instruction of the jury with CALCRIM No. 520, which contains identical language to CALCRIM No. 240.[7] In fact, the bench notes following CALCRIM No. 240 acknowledge this duplication and direct courts to give No. 240 only when other instructions do not contain causation language. (See Bench Notes, CALCRIM No. 240 ["committee has addressed causation in those instructions where the issue is most likely to arise. If the particular facts of the case raise a causation issue and other instructions do not adequately cover the point, give this instruction."].) Because these

---

deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence."

[7] As given CALCRIM No. 520 states, in part: "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence."

instructions are entirely duplicative there was no error in the court's failure to instruct with No. 240. (See *People v. Moon* (2005) 37 Cal.4th 1, 32 [failure to give requested instruction not error because "it was duplicative of the instructions the court gave the jury"].)

The instruction given in *Brady* would also have been duplicative of the causation language in CALCRIM No. 520. Both instructions focus the jury's attention on whether a superseding act caused the victim's death. CALCRIM No. 520 encompasses the concept of foreseeability by defining "natural and probable consequence" as "one that a reasonable person would know is likely to happen if nothing unusual intervenes." (See *People v. Fiu*, *supra*, 165 Cal.App.4th at p. 372 [instruction "requiring an injury or death to be a direct, natural and probable consequence of a defendant's act necessarily refers to consequences that are reasonably foreseeable"].) Accordingly giving both instructions would have been redundant. (See *People v. Moon*, *supra*, 37 Cal.4th at p. 32.)

c. *The trial court did not err in failing to instruct on unanimity*

A criminal defendant's right to a jury trial includes the right to a unanimous verdict, including unanimous agreement on the act constituting the offense charged. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When an accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act beyond a reasonable doubt. (*Russo*, at p. 1132.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the

danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'" (*Ibid.*; see *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1589 ["[t]he omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another"].) The trial court has a sua sponte duty to give a unanimity instruction when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

Ocampo argues a unanimity instruction was required in this case because jurors could have disagreed about whether he inflicted the fatal stab wound or aided and abetted the murder. Further, as to aiding and abetting, Ocampo argues some jurors could have found him guilty for assisting the direct perpetrator with the required mental state for murder while others believed he was guilty of murder only under the natural and probable consequences theory. Ocampo's argument again reveals his misunderstanding of applicable law.

As discussed, a unanimity instruction is generally required only when "the evidence suggests more than one discrete crime." (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132.) For example, in *People v. Diedrich* (1982) 31 Cal.3d 263, the Supreme Court held a unanimity instruction was required when the defendant was charged with only one count of bribery but the evidence revealed two separate occurrences of bribery. Under those circumstances, it was necessary the jury unanimously agree as to which act of bribery supported the verdict. Here, however, the evidence supports the commission of only one instance of second degree murder—the killing of Cerna. While the prosecution put forward

multiple theories under which Ocampo could be liable for the murder, each theory was directed to the same discrete crime. (*Russo*, at p. 1132 ["where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty"]; *People v. Santamaria* (1994) 8 Cal.4th 903, 908 ["[i]t is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of [a crime] as that offense is defined by statute, it need not decide unanimously by which theory he is guilty"]; see also *People v. Smith* (2014) 60 Cal.4th 603, 618 ["'[o]nce the discrete event is identified, for example, the killing of a particular human being, the theory each individual juror uses to conclude defendant is criminally responsible need not be the same and, indeed, may be contradictory'"]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1025.)

Ocampo attempts to avoid the implications of the Supreme Court's single-crime, multiple-theory limitation on the need for a unanimity instruction by arguing different facts underlie each potential theory of liability in this case: Either he had the requisite intent for murder, or he did not but committed an assault for which the natural and probable consequence was the victim's death. However, the Supreme Court has repeatedly held "'"the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator."'" (*People v. Smith*, *supra,* 60 Cal.4th at p. 618; accord, *People v. Jenkins*, *supra,* 22 Cal.4th at pp. 1025-1026 [no unanimity instruction required when jury could have convicted based on theory defendant aided and abetted murder from afar or was the

actual perpetrator]; *People v. Majors* (1998) 18 Cal.4th 385, 407-408 [same].) There was no requirement the jury agree on the theory of Ocampo's culpability, that is, whether he was the direct perpetrator or aided and abetted the murder or by which theory he may have aided and abetted. No unanimity instruction was required.[8]

3. *The Trial Court Did Not Abuse Its Discretion by Admitting Detective Mendoza's Expert Testimony*

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a); see *Brown v. Colm* (1974) 11 Cal.3d 639, 645 [expert is qualified if he or she "has sufficient skill or experience in the field so that his [or her] testimony would be likely to assist the jury in the search for the

---

[8] In his reply brief Ocampo cites *People v. Dellinger* (1984) 163 Cal.App.3d 284, which held a unanimity instruction was required when there was only one crime (murder) but alternative factual scenarios by which the crime had been committed (blunt force trauma or poisoning). (*Id.* at p. 300.) Ocampo argues *Dellinger* supports his argument that a unanimity instruction is necessary when there were multiple ways in which the murder may have been committed. Whatever the continued validity of the *Dellinger* holding in the somewhat unusual factual situation presented in that case, the Supreme Court has recently held *Dellinger* does not apply when, as here, the facts supporting the murder charge are not in dispute, but the jury may have disagreed on the theory by which a defendant is guilty. (*People v. Grimes* (2016) 1 Cal.5th 698, 728 ["*Dellinger's* holding does not extend to the situation in which the defendant, based on a single course of conduct, could have been convicted either as an aider and abettor to a murder or as the actual killer"].)

truth"].) "The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse." (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322; see *People v. Robinson* (2005) 37 Cal.4th 592, 630 ["trial court's determination to admit expert evidence will not be disturbed on appeal absent a showing that the court abused its discretion in a manner that resulted in a miscarriage of justice"].) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness ""*clearly lacks* qualification as an expert."""" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.) The degree of an expert's expertise goes to the weight of the expert's testimony, not its admissibility. (*Ibid.*)

Detective Mendoza testified regarding the behavior and culture of tagging crews. Specifically, he explained tagging crews had alliances, rivals, geographic areas they claimed to be within their control and used monikers to identify particular individuals. Mendoza also testified tagging crews would disrespect another crew by crossing out the rival crew's graffiti and writing their own signs over it. On occasion violence erupted between members of rival crews.

Prior to trial both Ambriz and Ocampo objected to the admission of any expert testimony regarding tagging crews based on relevance and undue prejudice. The trial court deferred ruling on the issue until hearing the proposed testimony at trial. Once Detective Mendoza began testifying, Ambriz and Ocampo objected there was no foundation for Mendoza's expertise regarding tagging crews. Although the court did not explicitly find Mendoza qualified as an expert, it allowed him to continue his expert testimony. On appeal Ambriz and Ocampo argue

Mendoza's testimony was improper because the detective, while potentially an expert on gang culture, was not an expert on tagging crews.

The trial court did not abuse its broad discretion in determining Detective Mendoza was qualified as an expert on tagging crews. Mendoza testified he had been an officer with the Los Angeles Police Department for 13 years and had been employed by the Los Angeles County Sheriff's Department for five years prior to that. At the time of trial he was assigned to the LAPD criminal gang homicide division, prior to which he had spent five years in plain clothes narcotics and three years in the gang enforcement detail. Mendoza testified that, in the course of his assignments, he had personally encountered members of tagging crews more than 1,000 times. During those contacts the tagging crew members discussed their behavior such as alliances, rivals and geographical areas. He stated he had seen a tendency in tagging crew culture for a crew's members to "stick together" and come to one another's aid. Mendoza further stated he had personally seen acts of violence between rival tagging crews. Mendoza also testified he had received specific training regarding tagging crew culture.

Mendoza's testimony demonstrated he possessed sufficient knowledge, training and experience to qualify as an expert regarding tagging crew behavior and culture. (See *People v. Brown* (2014) 59 Cal.4th 86, 100 [pathologist qualified based on training and experience to testify as expert regarding circumstances of victim's death]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 [witness qualified as expert on gangs when opinion "was based on his investigation of cases over several years, his interviews with gang members and others, and

his review of police reports"]; cf. *People v. Sanchez* (2016) 63 Cal.4th 665, 675 (*Sanchez*) ["experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc."].) Any concerns regarding the extent of Mendoza's expertise go to the weight of his testimony, not its admissibility, and are thus questions for the jury. (See *Brown,* at p. 100 ["'the question of the degree of the witness's knowledge goes to the weight of the evidence and not its admissibility'"]; *People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1080 [same].)

Ambriz argues in his reply brief that *Sanchez, supra*, 63 Cal.4th 665, decided after Ambriz and Ocampo filed their opening briefs, supports his argument concerning the inadmissibility of Mendoza's testimony because Mendoza testified to case-specific out-of-court statements regarding the precise territories of BUMS and H20, as well as the alliance between the two crews. Ambriz mischaracterizes Mendoza's testimony and, in doing so, misapprehends the import of *Sanchez*.

In *Sanchez* the Supreme Court held, "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) The confrontation clause problem identified in *Sanchez* was not present here. Although Mendoza gave his

opinions concerning the location of BUMS's and H20's territory and the willingness of the two crews to form an alliance, and it may well be that Mendoza's opinion was based on hearsay, he did not testify as to any case-specific out-of-court statements to support those opinions. The *Sanchez* Court did not hold an expert's opinion based on hearsay was inadmissible (if it was information of the type generally relied upon by experts). Rather, it held only that, while an expert could generally describe the type or source of the matters relied upon to support his or her opinion, the expert could not relate as true case-specific facts asserted in hearsay statements to support the opinion. (*Id.* at p. 686.) The gang expert in *Sanchez* did the latter; Detective Mendoza only the former.

4. *The Trial Court Did Not Abuse Its Discretion in Admitting Bonilla's Testimony Regarding Statements Made Prior to the Murder*

a. *Governing law and standard of review*

Evidence Code section 1200, subdivision (a), provides: "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Subject to certain exceptions, hearsay evidence is generally inadmissible. (Evid. Code, § 1201.) We review the trial court's decision to admit or exclude a hearsay statement for abuse of discretion (*People v. DeHoyos* (2013) 57 Cal.4th 79, 132) and evaluate the ruling, not the rationale: "The ruling must be upheld if the evidence was admissible under any hearsay exception." (*People v. Karis* (1988) 46 Cal.3d 612, 635.)

b. *Testimony repeating the statement "he's not an enemy" was admissible*

Bonilla testified that, prior to the attack on Cerna, Ocampo had been acting aggressively toward Bonilla until one of the other individuals present said, "He's not the enemy, he's a homie." Ocampo's attorney objected on hearsay grounds; the court overruled the objection. Ocampo argues the statement was inadmissible hearsay because it was offered for its truth.

The court's ruling was correct: The statement was not offered for the truth of the matter asserted, that Bonilla was not Ocampo's enemy. The truth or falsity of that description of their relationship was not relevant to any issue in the case. Instead, the statement was relevant to show its effect on Ocampo and to explain what happened next. After hearing it, Ocampo turned his attention elsewhere. "This is an example of "'one important category of nonhearsay evidence—evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.'"" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162; cf. *People v. Thornton* (2007) 41 Cal.4th 391, 447 [""'[w]henever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned'""].)

c. *Testimony repeating the statement "let's go lurking" was admissible*

Bonilla also testified that, after Ocampo ceased being aggressive toward him, someone in the group said, "Let's go lurking," which meant hunting for enemies. The trial court admitted the statement over the objection of Ocampo's counsel. Ocampo argues the ruling was error because the statement was offered for its truth, that is, to prove that the group acted in conformance with the statement and went hunting for enemies.

Again, the court's ruling was correct. The statement "Let's go lurking" does not assert the truth of any fact. It merely makes a request or a directive. (See *People v. Jurado* (2006) 38 Cal.4th 72, 117 ["[b]ecause a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated"]; *People v. Garcia* (2008) 168 Cal.App.4th 261, 288 ["[r]equests and words of direction generally do not constitute hearsay"].) Ocampo's suggestion the statement constituted implied hearsay of the "truth" that the group in fact went hunting for enemies (see *Garcia*, at p. 289) also fails. The statement was properly admitted for its nonhearsay purpose and was relevant not because it was true or false, expressly or impliedly, but to show Ocampo's reaction to it: Shortly after hearing the statement, Ocampo left the house. That was circumstantial evidence of Ocampo's own intent and state of mind that night. (See *People v. Livingston*, *supra,* 53 Cal.4th at p. 1162.)

d. *Testimony regarding Ocampo's statements was admissible*

On direct examination the prosecutor asked Bonilla, "When you spoke to Detective Mendoza [in July 2014], did you tell him

someone said, "'Man, you want to go see the enemies? I'll take you, whoop de woo.'" Bonilla responded, "Yes." Asked why he had said that to Mendoza, Bonilla replied, "Because I heard it." However, when Bonilla was then asked if he had told Mendoza that people were saying, "Let's go get the enemies," he said he did not remember. Later during the direct examination, after Bonilla explained he was uncomfortable following Ocampo because he feared there might be a fight, the prosecutor asked, "Is that because the crowd was pumped up?" Bonilla answered, "Yes." The prosecutor continued, "Is that because you heard somebody say something to the effect of 'Let's go hunting?'" Again, Bonilla answered, "Yes." The prosecutor then asked, "Is that because somebody said something about going to find the enemies?" Bonilla replied, "I don't remember." Later during that examination, however, the prosecutor asked Bonilla if he told Mendoza that Ocampo had said, "Let's go get the enemies." This time Bonilla replied, "Yes."

Ocampo contends Bonilla's statement to Mendoza was inadmissible hearsay, unfairly prejudicial and highly unreliable. Ocampo acknowledges his counsel failed to object to the testimony and, therefore, frames the issue in terms of ineffective assistance of counsel.

"'In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 2064-2065, 80 L.Ed.2d 674].) Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Majors*, *supra*, 18 Cal.4th at p. 403.)

When "there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance." (*People v. Cudjo* (1993) 6 Cal.4th 585, 616.) "And, even when there was a basis for objection, '"[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." [Citation.] "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission."'" (*People v. Majors*, *supra*, 18 Cal.4th at p. 403.)

To support his contention the court should have excluded Bonilla's testimony that he told Detective Mendoza that Ocampo had said "Let's go get the enemies," Ocampo states only, "The court and all counsel were aware that the evidence was inadmissible and were aware of its prejudice to the defense." Even if this conclusory and unsupported argument were not forfeited on appeal (see *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546 [appellant's brief must contain a legal argument with citation of authorities on the points made; if none is furnished, the court may pass on the contention without further consideration]), Ocampo has failed to show failure to object to Bonilla's statement constituted ineffective assistance of counsel.

Any objection to the statement based on hearsay would likely have been overruled. The statement as made contained two levels of hearsay—Ocampo's out-of-court statement to Bonilla and Bonilla's out-of-court statement to Detective Mendoza repeating Ocampo's statement.[9] The portion of the testimony containing Ocampo's statement "Let's go get the enemies" constitutes a party admission, a broad exception to the hearsay rule. (Evid. Code, § 1220 ["[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ."].)

As for the second portion of the testimony—Bonilla's statement to Detective Mendoza—the decision not to object appears to be a reasonable tactical decision by Ocampo's counsel. Although the prosecutor's mode of questioning was somewhat inartful, faced with an objection, it would have been a simple task for her to have restructured her questions to elicit Bonilla's report he had heard Ocampo make the statement without raising any hearsay problem. Bonilla had already confirmed he told Detective Mendoza what had been said at Ocampo's house on the night of the murder "because I heard it." After initially not remembering if someone had said "Let's go get the enemies," and not just "you want to go see the enemies," the prosecutor properly used leading questions to refresh Bonilla's recollection. (See *People v. Collins* (2010) 49 Cal.4th 175, 215 [when witness stated he did not remember statements to prosecutor and police, prosecution was entitled to refresh recollection by asking "'Did

---

[9] See *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1205 ("[w]hen multiple hearsay is offered, an exception for *each* level of hearsay must be found in order for the evidence to be admissible"); Evidence Code section 1201.

you tell us the guy was going to get something to eat . . . ?'" and "'Do you remember telling us that he then grabbed him . . . ?'"].) Once the prosecutor successfully refreshed Ocampo's memory regarding the night of the murder, it was a reasonable tactical decision for Ocampo's lawyer to conclude Bonilla would be able to testify he heard that statement on the night in question, not simply that he told Mendoza that he had, thereby eliminating any hearsay problem. Objecting would only have heightened the significance of the testimony.

Ocampo's arguments the testimony was inadmissible due to prejudice or reliability also fail. To be sure, Ocampo's statement may have been damaging to his defense, but it was not prejudicial in the sense contemplated by Evidence Code, section 352. "'"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues."'" (*People v. Garceau* (1993) 6 Cal.4th 140, 178.) "'In applying section 352, "prejudicial" is not synonymous with "damaging."'" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) Ocampo's statement of his own intent and state of mind on the night of the murder is highly probative and, while potentially damaging, is not unduly prejudicial. Similarly, Ocampo's argument the testimony was unreliable because Bonilla may have lied to Mendoza to cast blame away from himself is without merit. Bonilla was present at trial, and Ocampo's counsel had the opportunity to cross-examine and impeach his testimony on this precise basis. Any objection on such grounds would have been properly overruled.

For these reasons it was not reasonably probable the trial court would have excluded Bonilla's testimony. Because any

objection would have been unwarranted, or at least the failure to object did not result in prejudice, there was no ineffective assistance of counsel. (*See People v. Thomas* (1992) 2 Cal.4th 489, 531 [failure to make meritless objection does not constitute ineffective assistance of counsel]; see also *People v. Majors*, *supra*, 18 Cal.4th at p. 403; *People v. Cudjo*, *supra,* 6 Cal.4th at p. 616.)

5. *The Court Did Not Abuse Its Discretion in Denying Ocampo's Severance Motion; Ocampo Has Forfeited His Sixth Amendment Claim by Failing To Object at Trial*

a. *Relevant proceedings*

Prior to trial Ocampo twice moved to sever his trial from Ambriz's. The first motion cited a statement by Ambriz to police that Ocampo had a black knife on the night of the murder. Ocampo argued this statement incriminated him and, if admitted at trial, would violate his Sixth Amendment right to confrontation and cross-examination under the *Aranda/Bruton* rule.[10] It does not appear from the record that the trial court ever ruled on this motion, and the cited testimony was not introduced at trial.

---

[10] *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] recognize that a defendant is deprived of his or her Sixth Amendment right to confront witnesses when a facially incriminating statement of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the statement only against the declarant. To protect the nondeclarant defendant under those circumstances, the trial court must grant separate trials, exclude the statement or excise all references to the nondeclarant defendant. (*Aranda*, at pp. 530-531; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045.)

Ocampo filed a second pretrial motion to sever his trial after retaining new counsel. This motion cited different statements Ambriz had made to police, including that on the night of the murder Ocampo was drunk, was looking for a fight and said he wanted to "catch somebody slipping" and "go do damage." Again Ocampo argued those statements incriminated him and violated his constitutional rights under the *Aranda/Bruton* rule. At the hearing on the motion the prosecutor informed the trial court that she did not intend to introduce Ambriz's statements to police at trial. The court responded that it appeared a ruling on the motion was not necessary. Ocampo's counsel agreed, stating, "I believe a lot of that is moot . . . ." However, Ocampo's counsel reserved his objection on the issue.

After trial Ocampo moved for a new trial pursuant to section 1181 alleging, in part, the joint trial was prejudicial because it made him appear guilty based solely on his association with Ambriz. (See *People v. Massie* (1967) 66 Cal.2d 899, 917 [severance may be appropriate "in the face of . . . prejudicial association with codefendants"].) The motion for a new trial was denied.

b. *Governing law and standard of review*

There is a statutory preference for joint trials of jointly charged defendants. (§ 1098 ["[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials"]; *People v. Montes* (2014) 58 Cal.4th 809, 834 ["[s]ection 1098 expresses a legislative preference for joint trials"]; *People v. Alvarez* (1996) 14 Cal.4th 155, 190 [same].) Joint trials are favored because they promote efficiency and avoid

the potential for inconsistent verdicts. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378-379; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) The "'"'classic' case for joint trial is presented when defendants are charged with common crimes involving common events and victims."'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 725.)

As Ocampo argued, separate trials may be necessary when, for example, one defendant has confessed and, in doing so, implicated another defendant. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 726; *People v. Jackson* (1996) 13 Cal.4th 1164, 1207.) In that case, receipt into evidence of the statement by the declarant defendant may deprive the incriminated nondeclarant codefendant of the right of confrontation and cross-examination. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045.) Separate trials also may be necessary when there is a risk one defendant will suffer prejudice based on his or her association with a codefendant. (See *People v. Massie, supra,* 66 Cal.2d at p. 917; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 43 [severance may be warranted when "marginally involved defendant might have suffered prejudice from joinder with a codefendant who participated much more actively" or when "a strong case against one defendant was joined with a weak case against a codefendant"].)

We review the trial court's denial of a severance motion for abuse of discretion based on the facts known to the court at the time the ruling was made. (*People v. Montes*, *supra*, 58 Cal.4th at p. 834; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 40-41.) If the ruling was correct when made, we will reverse it only if a defendant shows that joinder actually resulted in

"gross unfairness" amounting to a denial of due process. (*Montes*, at p. 835; *People v. Avila* (2006) 38 Cal.4th 491, 575.)

c. *Ocampo's challenge to the joint trial based on Aranda/Bruton and the Sixth Amendment fails*

Ocampo contends the trial court erred in denying his pretrial severance motion. However, he does not explain how the court's initial ruling, made in reliance on the prosecution's representation it would not introduce the contested statements, was erroneous at the time it was made. Moreover, Ocampo did not renew his severance motion during trial. On appeal Ocampo argues *Aranda/Bruton* error resulted from Bernal's testimony Ambriz told him "we seen some enemies, we caught some enemies." It is not apparent this statement on its face incriminated Ocampo so as to implicate the *Aranda/Bruton* rule. Even if it did, Ocampo failed to object to the testimony at trial. He thus forfeited any *Aranda/Bruton* challenge to the testimony. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1044 ["[a]bsent a timely and specific objection on the [*Aranda/Bruton*] ground defendant now asserts on appeal, his contention is deemed waived"].) To the extent Ocampo's claim the joint trial violated his right to due process is based on his assertion of *Aranda/Bruton* error, that claim necessarily fails as well.

d. *Ocampo's challenge to the joint trial based on prejudicial association fails*

Ocampo also argues the trial court erred in denying his motion for a new trial based on alleged prejudice resulting from his association with Ambriz and joinder of the "factually weak" case against him with the "factually strong" case against Ambriz. Specifically, Ocampo cites testimony Ambriz confessed to the stabbing, which Ocampo argues made him appear guilty by

association. Ocampo also argues those statements, as well as the autopsy photographs, would not have been admissible in a trial against him alone. Ocampo failed to object to the admission of any of this evidence and testimony during trial on the grounds he now articulates. Accordingly, he has forfeited his constitutional challenge to this evidence. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1044.) In addition, the jury was instructed pursuant to CALCRIM No. 203 that it must separately consider the evidence as it applies to each defendant and must decide each charge for each defendant separately. We presume, as we must, the jury was capable of following that instruction. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury'"]; *People v. Holt* (1997) 15 Cal.4th 619, 662 ["[j]urors are presumed to understand and follow the court's instructions"].) Moreover, although there may have been stronger evidence of Ambriz's guilt, the evidence was not so one-sided the jury would convict Ocampo based solely on evidence against Ambriz. As discussed, this was a classic case for a joint trial: Ambriz and Ocampo were charged with the same crime arising from the same events. Ocampo has failed to show the requisite prejudice.

6. *The Trial Court Did Not Abuse Its Discretion in Admitting Autopsy and Crime Scene Photographs into Evidence*

Ocampo contends the trial court erred in admitting several autopsy photographs of Cerna's body and photographs of the crime scene taken more than a year after the murder. In overruling Ocampo's Evidence Code section 352 objection, the

court stated the autopsy photographs were not "so awful . . . [i]t's really not a gory photo case . . . ." The court admitted photographs that showed Cerna's wounds, but excluded a photograph of the victim's heart after it had been removed from his body, a photograph of an incision made by the medical examiner and a photograph of the victim's stomach with the intestine coming out. The court stated those photographs were unnecessarily graphic and/or cumulative. As for the crime scene photographs, Ocampo's counsel argued they were prejudicial because they showed a memorial to the victim that had been erected at the site. The court ruled the photographs were relevant to show the witnesses' points of view because "the defense has certainly put into issue all of the distances, angles." Despite the presence of the memorial, the court stated the photographs were "much more relevant than prejudicial." Nevertheless, the court excluded three photographs that showed only the memorial.

The Supreme Court has upheld the use of autopsy photos, "including images of dissected tissue and excised organs," over a defendant's Evidence Code section 352 objection when the evidence is relevant to establishing an element of the crime or to corroborating testimony. (*People v. Stitely* (2005) 35 Cal.4th 514, 545; *People v. Medina* (1995) 11 Cal.4th 694, 754-755.) Likewise, the Court has recognized photographs of the crime scene "are always relevant to prove how the charged crime occurred, and the prosecution is 'not obliged to prove these details solely from the testimony of live witnesses.'" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170.) A trial court's discretionary decision to admit photographs under Evidence Code section 352 will be upheld unless the prejudicial effect of the photographs so clearly

outweighs their probative value that their admission resulted in a miscarriage of justice. (*People v. Gurule* (2002) 28 Cal.4th 557, 624; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1118 [trial court's Evid. Code, § 352 rulings reviewed for abuse of discretion]; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [trial court's Evid. Code, § 352 ruling "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner than resulted in a manifest miscarriage of justice"].)

Here, the autopsy photographs admitted into evidence depicted the stab wounds and other injuries on Cerna's body and face. Those photographs corroborated the medical examiner's testimony, provided evidence of the extent of Cerna's injuries and cause of death, and supported the prosecution's argument Cerna was attacked by multiple people. The trial court weighed the relevance of the photographs against their prejudicial effect and found, other than the three it excluded, they were not substantially more prejudicial than probative. We have examined the photographs at issue and considered the trial court's rationale; the court's determination was well within its broad discretion. (See *People v. Booker* (2011) 51 Cal.4th 141, 170 ["photographs of murder victims are relevant to help prove how the charged crime occurred"]; *People v. Martinez* (2003) 31 Cal.4th 673, 692 [no abuse of discretion in admitting autopsy photographs depicting victim's face and fatal wound when there was at least arguably proper purpose for each].)[11]

---

[11] On appeal Ocampo argues the autopsy photographs had no probative value as to the aiding and abetting charge against him and would not have been admissible had he been tried separately because he "had no part in the actual stabbing which the

The crime scene photographs showed the murder site and allowed the jury to see where the witnesses were positioned and where the attack took place. The trial court reviewed the challenged photographs and considered their probative value and the potential prejudicial effect of the makeshift memorial for Cerna that was visible. The court did not abuse its discretion in excluding some, while ruling that other photographs were admissible to corroborate witness testimony and explain how the attack occurred. (See *People v. Pollock*, *supra,* 32 Cal.4th at p. 1170.)

7. *The Trial Court Did Not Abuse Its Discretion by Denying the Motion for a New Trial Based on Alleged Juror Misconduct*

a. *Ocampo's claims of juror misconduct and the trial court's ruling*

In his motion for a new trial Ocampo argued several jurors committed misconduct by bullying another juror into voting for a guilty verdict and by providing erroneous legal advice to the jury. In support of these contentions Ocampo submitted the declaration of his trial counsel stating he had been approached in the hallway after the jury was discharged by two jurors, Mary Ann M. and Gabriela M., who were "furious" about the verdict. Ocampo also submitted the declaration of Mary Ann in which she declared she and Gabriela were "bullied . . . into abandoning our

---

photographs were admitted to illustrate." Ocampo's argument borders the frivolous. The prosecution had to prove Ocampo's role in causing Cerna's death, and the manner of that death was necessarily relevant to the People's case against him. Even in a separate trial the prosecution would have been entitled to introduce the autopsy photographs in aid of that proof.

beliefs during jury deliberations" by four other jurors, including the jury foreman. Specifically, Mary Ann stated those four jurors made her "feel like everything Gabriela and I said was wrong." "The other jurors were laughing at me. They were making fun of me. When I tried to make a point the others would say that I did not make sense, belittle me and make Gabriela and me feel stupid." When Mary Ann and Gabriela expressed doubt about the evidence, the other jurors told her they were "outnumbered." In addition, the jurors told Mary Ann that "[t]he jury had to be split 6-6 for there to be a 'hung jury,' so any disagreement by Gabriela and me was pointless. Based on their education and their claimed prior experience, I considered [their] statements legal advice. They told me they had been jurors before and knew how the system worked." Finally, Mary Ann stated she would have voted to acquit Ocampo and was so upset about the experience that she cried most of the evening after the verdict was reached.[12] The People opposed Ocampo's motion, arguing the declaration was not admissible under Evidence Code section 1150 and, even if it were, the statements described did not amount to misconduct.

The trial court denied Ocampo's motion for a new trial based on juror misconduct. The court found insufficient evidence of misconduct due to inconsistencies and ambiguities in Mary Ann's declaration and the absence of declarations or evidence from any other jurors. The court refused to give any weight to

---

[12] Ocampo's trial counsel told the court he was not able to submit a declaration from Gabriela because his investigator had been unable to reach her. None of the parties petitioned the court for release of contact information for any other juror as permitted by Code of Civil Procedure section 237.

Mary Ann's statements regarding Gabriela's experience because those statements were hearsay. Further, the court stated any pressure that may have been felt by Mary Ann was mitigated by the court's instruction that no juror should change his or her mind about the case simply because other jurors disagree.[13]

b. *Governing law and standard of review*

Every criminal defendant has a right to a trial by an unbiased, impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) A criminal defendant may move for a new trial on specified grounds, including juror misconduct. (§ 1181, subds. (2)-(4);[14] *People v. Ault* (2004) 33 Cal.4th 1250, 1260.) When a defendant seeks a new trial based on jury misconduct, the court undertakes a three-step inquiry. First, the court must determine whether the declarations offered in support of the

---

[13] The trial court instructed the jury with CALCRIM No. 3550, which provides in part, "Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you."

[14] Section 1181 provides, "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property; [¶] 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; [¶] 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors . . . ."

motion are admissible under Evidence Code section 1150.[15] If they are, the court must next consider whether the facts establish misconduct. Finally, assuming misconduct is found, the court must determine whether it was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113; *People v. Hord* (1993) 15 Cal.App.4th 711, 724.)

Generally, "'[w]e review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] "'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.'" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) This standard applies to the first and second prong of the three-part test. If misconduct is established, the question "[w]hether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582; accord, *People v. Ault, supra,* 33 Cal.4th at pp. 1261-1262.)

---

[15] Evidence Code 1150, subdivision (a), provides, "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

c. *The majority of statements in Mary Ann's declaration are not admissible to show jury misconduct*

As discussed, Evidence Code section 1150 prohibits the use of evidence of statements or conduct by jurors to show the effect of those statements or conduct "either in influencing [a juror] to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Only evidence of "'objective facts'" is admissible to prove juror misconduct. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397.) Evidence regarding how such objective facts might have influenced jurors' subjective thought processes is inadmissible to impeach a verdict. (*Ibid.*)[16] "Thus, jurors may testify to 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration'—but may not testify to 'the subjective reasoning processes of the individual juror . . . .'" (*Id.* at p. 398; accord, *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116; see *People v. Hedgecock* (1990) 51 Cal.3d 395, 419 ["when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes"].) In other

---

[16] Ocampo fails to address the admissibility of Mary Ann's declaration and attempts to deflect this deficiency by arguing the Attorney General's challenge to admissibility "attacks arguments neither raised nor argued by appellant on appeal." Instead, Ocampo argues, the relevant inquiry is whether Ocampo "made a prima facie showing at trial of juror misconduct . . . ." Ocampo fundamentally misapprehends the applicable law. While Ocampo is correct the court must assess whether misconduct occurred, the court must first determine the admissibility of the proffered evidence. (See *People v. Duran*, *supra*, 50 Cal.App.4th at pp. 112-113; *People v. Hord, supra*, 15 Cal.App.4th at p. 724.)

words, ""[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror 'felt' or how he understood the trial court's instructions is not competent."" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.) "'This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent.'" (*Ibid.*; see generally *Pena-Rodriguez v. Colorado* (Mar. 6, 2017, No. 15-606) __ U.S. __ [2017 U.S. Lexis 1574, at *20] [rule limiting admissibility of juror testimony "promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations . . . . The rule gives stability and finality to verdicts."].)

However, the prohibition on consideration of juror statements does not apply when "the very making of the statement sought to be admitted would itself constitute misconduct. Such an act is as much an objective fact as a juror's reading of a novel during the taking of testimony [citation] or a juror's consultation with an outside attorney for advice on the law applicable to the case." (*In re Stankewitz, supra,* 40 Cal.3d at p. 398; *People v. Hedgecock, supra,* 51 Cal.3d at p. 419 ["[i]n rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible"].)

Under this standard most of the statements on which Ocampo relies to show juror misconduct were inadmissible. Specifically, Mary Ann's statements she felt "bullied into abandoning her beliefs" and was made to feel stupid and that everything she said was wrong constitute inadmissible reflections

of her mental or subjective reasoning processes. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1128 [juror's statement "'she felt intimidated by [another juror's] comments to her'" was inadmissible]; *People v. Orchard* (1971) 17 Cal.App.3d 568, 572, 574 [juror's statement she had "feelings of embarrassment, humiliation and a desire to leave as soon as possible" was inadmissible].) In addition, Mary Ann's statement in her declaration she understood other jurors' statements to be legal advice and believed a hung jury could occur only when the jury was split evenly and any suggestion she changed her vote based on the statements of other jurors were likewise inadmissible statements of her subjective reasoning. (See *Bell*, at p. 1128 [juror statement "she 'changed her vote to side with the majority and break the deadlocked jury'" was inadmissible]; *People v. Steele, supra*, 27 Cal.4th at p. 1261 [jurors' statements they misunderstood law and would have voted differently if they had correct understanding were inadmissible]; *People v. Stevenson* (1970) 4 Cal.App.3d 443, 444 [juror statement it was his "understanding that we had to come back with a unanimous verdict one way or the other. . . I felt that it was useless to persist in my convictions and, therefore, voted for a guilty verdict" was inadmissible].)

d. *The admissible statements in Mary Ann's declaration fail to establish juror misconduct*

Generally juror statements will be considered misconduct when "the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares

improper information with other jurors . . . ." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) The objective overt events described in Mary Ann's declaration consisted of allegations jurors laughed at her, told her she did not make sense and stated she was "outnumbered." Mary Ann's statements about the jurors' behavior are admissible. However, that behavior, assuming it occurred, does not constitute misconduct. During the course of deliberations "'jurors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means.'" (*People v. Thompson*, *supra*, 49 Cal.4th at p. 141.) The type of general persuasive tactics and expressions of disagreement recounted by Mary Ann, while perhaps unbecoming and unprincipled, appear to be nothing more than the type of heated expressions of disagreement to be expected in the jury room. (See *id.* at pp. 139, 141 [jury foreman's "personal attacks" on fellow juror, including asking, "How can you be so dumb?," did not "rise[] to the level of misconduct"].)

The only other admissible statement in Mary Ann's declaration is the allegation that four jurors asserted the jury "had to be split 6-6 for there to be a 'hung jury.'" Ocampo characterizes this statement as "the receipt of external information . . . in the form of outside legal authority . . ." and likens it to the information received in *In re Stankewitz, supra*, 40 Cal.3d 391, in which the Supreme Court held a juror's misstatement of the law constituted misconduct.

The defendant in *Stankewitz* was on trial for robbery based on an incident in which he demanded to see two individuals' wallets at gunpoint but returned the wallets without removing anything. The jury was instructed on the elements of robbery,

"including the requirement that the perpetrator have a specific intent to *permanently* deprive the victim of his property." (*In re Stankewitz*, *supra,* 40 Cal.3d at p. 399.) In a petition for habeas corpus Stankewitz alleged juror misconduct based on declarations from two jurors stating a fellow juror had "advised the other jurors that he had been a police officer for over 20 years; that as a police officer he knew the law; that the law provides a robbery takes place as soon as a person forcibly takes personal property from another person, whether or not he intends to keep it . . . ." (*Id.* at p. 396.)

The Supreme Court held the juror had "committed overt misconduct" by "'consult[ing]' his own outside experience as a police officer on a question of law. Worse, the legal advice he gave himself was totally wrong. Had he merely kept his erroneous advice to himself, his conduct might be the type of subjective reasoning that is immaterial for purposes of impeaching a verdict. But he did not keep his erroneous advice to himself; rather, vouching for its correctness on the strength of his long service as a police officer . . . ." (*In re Stankewitz*, *supra*, 40 Cal.3d at pp. 399-400.) Accordingly the Court found juror misconduct had occurred.

The purported statement in this case that a hung jury must be split evenly is quite different from the juror's statement in *Stankewitz*. In *Stankewitz* the juror made a pronouncement about a dispositive element of the substantive law in the case. Here, in contrast, the jurors' statement concerned only a procedural aspect of deliberations and could not have influenced Mary Ann's understanding of the applicable substantive law. The only practical effect of the statement would have been to pressure Mary Ann to change her vote, a consideration that, as

discussed, is not admissible. Further the juror in *Stankewitz* presented his opinion as an expert based on his 20-year service as a police officer; the jurors in this case offered only the vague assertion they had experience serving on juries, not any specialized expertise, training or education. Finally, the alleged statement that a jury must be evenly split in order to prompt a mistrial is directly contradicted by the court's instruction pursuant to CALCRIM No. 3550 that the verdict must be unanimous.[17] We presume, as we must, the jury was capable of following that instruction rather than adhering to a vague statement made by fellow jurors. (See *People v. Yeoman*, *supra,* 31 Cal.4th at p. 139; *People v. Holt*, *supra,* 15 Cal.4th at p. 662.)

Fairly appraised, the statement concerned "general matters of law and fact that find their source in everyday life and experience" and, as such, was not misconduct. (*People v. Riel, supra*, 22 Cal.4th at p. 1219 [holding juror's erroneous statement regarding potential sentence not misconduct].) Instead the statement here was "merely the kind of comment that is probably unavoidable when 12 persons of widely varied backgrounds, experiences, and life views join in the give-and-take of deliberations. Not all comments by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such comments cannot impeach a unanimous verdict; a jury verdict is not so fragile." (*Ibid.*; see also *Pena-Rodriguez v. Colorado, supra,* 2017 U.S. Lexis 1574, at *28 ["To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. 'It is not at all clear . . . that the jury system could

---

[17] CALCRIM No. 3550 states, "Your verdict must be unanimous. This means that, to return a verdict, all of you must agree to it."

survive such efforts to perfect it.'"]; *In re Carpenter* (1995) 9 Cal.4th 634, 654-655 ["the criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. [Citation.] Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic."].)

8. *Ocampo Has Failed To Demonstrate Cumulative Error Compelling Reversal*

Ocampo contends the errors he described, at least when considered cumulatively, compel reversal. For the reasons we have explained, none of the errors he alleges deprived Ocampo of a fair trial. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].)

DISPOSITION

The judgment is affirmed.

PERLUSS, P.J.

We concur:

ZELON, J. SMALL, J.*

---

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