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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOVAN IBARRA et al., Defendants and Appellants.	B233062 (Los Angeles County Super. Ct. No. TA110296)

APPEALS from judgments of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed.

Dan Mrotek, under appointment by the Court of Appeal, for Appellant Jovan Ibarra.

Paul Richard Peters for Appellant Eduardo Mercado.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar, Joseph P. Lee and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Jovan Ibarra and Eduardo Mercado appeal from the judgments entered after their conviction by a jury of the first degree murder of Anthony Huerta and the attempted willful, deliberate and premeditated murders of Jose Huerta, Jesse Huerta and Kiogi Harden with true findings on related firearm-use and criminal street gang enhancement allegations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Shooting*

In the early evening of July 30, 2009, brothers Anthony and Jesse and their cousin Jose[1] were gathered in the small front yard of their neighbor Harden's home on Lime Avenue in East Rancho Dominguez, smoking marijuana and talking. Jesse's girlfriend, Erika Palomino, was visiting the Huertas' grandmother two doors away. A few minutes before 9:00 p.m., Anthony and Jessie's younger brother Eddie called to them to watch out for a car cruising along Lime Avenue near Compton Boulevard. The men looked up but did not see the car and resumed talking.

Palomino, standing in front of the Huerta home, saw a gray or silver Chrysler 300 sedan pass, make a U-turn at the end of the block and head back toward the Harden home. She began walking toward the group but was still approximately 25 feet away when the car stopped at the curb in front of the Harden home, and a young Hispanic man came out of the right rear passenger door holding a gun. Pointing the gun at the Huertas and Harden, he asked where they were from. Palomino also saw a passenger in the front seat lean out of the car with his arm extended. Although Jesse yelled they did not "bang," the first gunman called out, "This is 70's, motherfuckers" and began shooting. Palomino saw someone struck by gunfire fall to the ground. She screamed and pounded on a nearby car in an attempt to distract the shooter.

As the shooting began, Harden dove off the porch and climbed over a fence to the backyard. Jose, who was sitting on a low wall along the driveway less than 10 feet from

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[1] Because the Huertas share the same last name, we refer to them by their first names for convenience and clarity. (See *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 424, fn. 1.)

the shooter, pushed backward over the wall and, as he fell, was struck by a bullet fragment in the buttock. He scrambled behind a van in the neighboring driveway. Although he could not see the person who had fallen on the ground, he saw the shooter walk toward the victim and heard an additional round fired before the hammer struck repeatedly on the empty chamber. Jose also saw a second man leaning from the front passenger seat of the car with a gun and heard shots from a second, louder gun. Large caliber bullet holes were found in the front wall of the house and a living room wall, and a spent bullet was found in a bedroom closet.

The shooters retreated to their car and drove past Palomino. The car slowed as it passed her, and she saw four occupants, two of whom, including the female driver, smiled at her. As the car continued past the Huerta home, Eddie threw a chair at the car, which bumped into a parked van before turning off Lime Avenue.

Anthony, who had been shot a second time at point blank distance while lying wounded on the ground, died at the hospital from a chest wound.

2. *The Investigation*

On the night of the murder all witnesses told deputies from the Los Angeles Sheriff's Department they could not identify the shooters, which Palomino and Jose later attributed to their fear of retaliation. However, they described the car used by the shooter as a gray or silver late-model Chrysler 300. Interviewed the following day by Deputy Howard Cooper, Jose described the shooter as Hispanic with a dark complexion and a shaved head, early-to-mid 20's, 5'10" to 5'11" and a medium build. The second person had been wearing a hooded sweatshirt but had a tattoo or other mark on his face. He was unable to make an identification from a photographic lineup (a "six-pack") shown to him by the investigating deputy.

Palomino identified Ibarra as the shooter from the photographic lineup shown to her by Deputy Cooper. She described the shooter as tall, thin, 18-19 years old, short hair (but not shaved) with a mustache trimmed to his chin, wearing a sleeveless tank top and black cutoff shorts. She did not see any tattoos. The front passenger had a facial tattoo, and the driver had blond streaks in her hair. Soon after, during a carwash to raise funds

for Anthony's burial, Palomino saw the driver, later identified as Kaylene Calderon, drive by and laugh at the volunteer holding a sign. Palomino saw her again the day of Anthony's funeral.

In October 2009, based on talk in the neighborhood, Palomino and Jose gave Deputy Cooper the street names of "Sweets" for the driver, "Spike" for the shooter, and "Pato" for a third person involved in the shooting, all members of the Compton Varios Setentas (the CV70's) gang. Reviewing the same photographic lineup he had been shown earlier, Jose identified Ibarra as Spike and told Cooper he remembered seeing Ibarra seven or eight times in the neighborhood before the date of the shooting. Shown a lineup of six women, including two with blond highlights, Jose and Palomino each identified a photograph of Calderon (with blond highlights) as the driver. Cooper then constructed a photographic lineup for the front seat passenger, using photographs of men with facial tattoos, including Mercado, who has a tattoo on his cheek and the word "Setentas" written in cursive letters on his forehead along the hairline. Palomino identified Mercado as the front seat passenger and told Cooper she had seen him in the same Chrysler since the shooting, but it now had bullet holes in the side. Jose was unable to identify Mercado. Jose and Palomino told Cooper they feared retribution from the gang and complained gang members were driving by the Huerta home on Lime Avenue.

3. *The Charges and Trial*

Ibarra, Mercado and Calderon were arrested in January 2010 and charged by information with the first degree murder of Anthony (Pen. Code, § 187, subd. (a))[2] and three counts of attempted willful, deliberate and premeditated murder (§§ 664; 187, subd. (a)). Each count also contained special firearm-use (§ 12022.53, subd. (d)) and criminal street gang (§ 186.22, subd. (b)) allegations.

Palomino, Harden and Jose testified at trial. Harden and Palomino identified a photograph of a silver Chrysler 300 registered to Mercado's mother as the car they saw

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[2] Statutory references are to the Penal Code unless otherwise indicated.

the night of the shooting. Palomino also identified Ibarra as the shooter, Mercado as the front seat passenger, and Calderon as the driver. Jose identified Ibarra and Mercado.

Los Angeles Sheriff Deputy Joseph Sumner testified as an expert on local criminal street gangs. According to Sumner, the CV70's is the second largest gang in Compton with a membership of approximately 350-400. Lime Avenue, where the shooting occurred, was claimed by Compton Vario Segundo, a rival of the CV70's. Sumner identified Hector Sandoval, whose moniker is "Pato," as a CV70's gang member previously convicted of possession of a concealed firearm. Sumner also testified he had known Ibarra, whose moniker is Spike, since late 2004. Ibarra had admitted on several occasions he was a member of the CV70's; Sumner's conversations with his colleagues, Ibarra's relatives and other gang members confirmed this fact. Sumner also identified Mercado as a gang member known as "Snoopy." In addition to his facial tattoos, Mercado bore a "7" and a "0" on his ears and wrists. Although Sumner had never encountered Mercado personally, he had found four field identification cards indicating contact between Mercado and the Sheriff's Department gang unit between November 2005 and October 2009. Sumner also testified Calderon was either a CV70's member or associate, who had two CV70's tattoos and had also had contact with the Department's gang unit. Based on hypothetical facts drawn from the circumstances of the shooting, Sumner opined it had been committed for the benefit of the CV70's criminal street gang.

None of the defendants testified at trial, but each offered an alibi for the time of the shooting. Ibarra's sister testified he had been at home caring for her children when the shooting occurred. Mercado's mother acknowledged owning the silver Chrysler 300 identified by Palomino, Jose and Harden as the car used in the shooting, but testified Mercado and a friend had driven the car to Las Vegas on July 27, 2009 and had not returned until August 19, 2009. Mercado's friend corroborated this testimony. With respect to Calderon, a manager of a hair salon who was a friend of Calderon's sister produced a receipt for a haircut at her salon and hair coloring notes she had recorded establishing Calderon had been at her salon at the time of the shooting and did not have blond streaks in her hair.

4. *Verdicts and Sentencing*

Ibarra and Mercado were convicted on all four counts, and the jury found true the firearm-use and criminal street gang special allegations. Calderon was acquitted on all counts.

Ibarra was sentenced to state prison for an aggregate term of 160 years to life, consisting of consecutive terms of 25 years to life, plus 25 years to life for the firearm-use enhancement (§ 12022.53, subd. (d)) on count 1; a consecutive term of seven years to life with 15 years minimum parole eligibility on the gang enhancement (§ 186.22, subd. (b)(5)), plus 25 years to life for the firearm-use enhancement (§ 12022.53, subd. (d)) on count 2; a consecutive term of seven years to life with 15 years minimum parole eligibility, plus 20 years for the firearm-use enhancement (§ 12022.53, subd. (c)) on count 3; and a consecutive term of seven years to life with 15 years minimum parole eligibility, plus 20 years for the firearm-use enhancement (§ 12022.53, subd. (c)) on count 4.

Mercado was sentenced to an aggregate state prison term of 70 years to life, consisting of 25 years to life on count 1 and 15 years to life on each of counts 2, 3 and 4, all to run consecutively.

CONTENTIONS

Ibarra contends his defense counsel provided ineffective assistance by failing to object to hearsay statements contained in the opinion testimony of Deputy Sumner, the People's gang expert, in violation of his Sixth Amendment confrontation rights. Ibarra also contends the trial court erred in failing to instruct the jury sua sponte with CALCRIM No. 358 relating to Ibarra's admission to Sumner of his gang membership.

Mercado joins these arguments and also contends there was insufficient evidence to support the jury's finding Anthony's murder was premeditated and the trial court abused its discretion in sentencing him to consecutive terms.

DISCUSSION

1. *Ibarra and Mercado Did Not Receive Ineffective Assistance of Counsel; the Expert's Testimony Did Not Violate Their Sixth Amendment Rights*

Ibarra and Mercado contend the admission of testimonial hearsay statements, in the guise of Deputy Sumner's expert opinion, violated their Sixth Amendment right to confront and cross-examine witnesses (see *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*)) and that, by failing to object to the admission of these statements, their counsel provided them with ineffective assistance. The premise for this claim is false: The admission of Sumner's opinion testimony did not violate the Sixth Amendment rights of Ibarra and Mercado, and their attorneys' failure to object could not constitute ineffective assistance of counsel. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 [failure to make a futile or unmeritorious motion or request is not ineffective assistance]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 934 [failure to object to evidence not ineffective assistance of counsel where objection would have been futile].)

In *Crawford, supra*, 541 U.S. 36, 53 to 54 the United States Supreme Court held the confrontation clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." "Under *Crawford*, the crucial determination about whether the admission of an out-of-court statement violates the confrontation clause is whether the out-of-court statement is testimonial or nontestimonial." (*People v. Geier* (2007) 41 Cal.4th 555, 597.) As the Supreme Court later explained, "Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224, 237]; see *Geier*, at p. 605 ["a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial"].)

Ibarra objects to Deputy Sumner's statement identifying him as a gang member based on Ibarra's own admissions, as well as statements from other CV70's gang members and Ibarra's family members. Other than his own admissions, Ibarra claims third party statements to Sumner were testimonial in nature and therefore barred under *Crawford.* Mercado echoes this objection, noting that Sumner's identification of him as a gang member was based on unspecified "information" he received from other investigators during the investigation of a shooting in Carson.[3]

Not every conversation between a gang member and a law enforcement officer with street gang duties constitutes "interrogation," nor does it necessarily result in testimonial evidence for confrontation clause purposes within the meaning of *Crawford* and its progeny when used as the basis for a gang expert's opinion. (See *Michigan v. Bryant* (2011) 562 U.S. ___, ___ [131 S.Ct. 1143, 1152-1153, 179 L.Ed.2d 93]; *People v. Blacksher* (2011) 52 Cal.4th 769, 811-812.) "[T]he touchstone questions are whether a statement is hearsay offered against a criminal defendant, whether the statement is otherwise admissible under a hearsay exception, and, if so, whether the statement is testimonial."[4] (*Blacksher*, at p. 813.) In general, an expert may base his or her opinion on any matter known to the expert, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. (Evid. Code, § 801, subd. (b); see

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[3] Mercado does not mention the fact he has multiple, visible tattoos proclaiming his membership in the gang.

[4] As the People point out, Deputy Sumner did not repeat out-of-court statements made by others during his testimony; rather, he testified he had concluded Ibarra and Mercado were gang members based upon his own observations and information gleaned from his investigation of crimes committed by CV70's members.

People v. Montiel (1993) 5 Cal.4th 877, 918-919; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618 (*Gardeley*).) As *Gardeley* explained, expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*Gardeley*, at p. 618.) So long as the material is reliable, "even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*Ibid.*, italics omitted.) Specifically, when opining that an individual is a member of a particular gang, the expert may rely, at least in part, on the reports of others more familiar with the individual. (See, e.g., *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331 [expert's opinion that defendant was member of King Kobras properly based on report from detective who interviewed defendant, review of booking photographs that showed defendant's "VKKR" and "KK" tattoos and fact that crime allegedly committed was a primary activity of King Kobras and defendant's companion was member of King Kobras]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1205-1206, 1210 [expert properly based opinion that defendant was member of EYC gang on conversations with other EYC members, conversations with rival gang members, defendant's tattoos and defendant's association with known EYC members]; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463, 1464 ["an individual's membership in a criminal street gang is a proper subject for expert testimony"; "a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies"].)

As explained in *People v. Thomas, supra,* 130 Cal.App.4th 1202, "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the material on which the expert bases his or her opinions are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter

asserted.'" (*Thomas,* at p. 1210, quoting *Crawford, supra,* 541 U.S. at p. 59.) Thus, "admission of expert testimony based on hearsay will typically not offend [C]onfrontation [C]lause protections . . . ." (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 154.) To date, a number of appellate courts have held *Crawford* does not preclude the use of hearsay that forms the basis of an expert's opinion, reasoning that hearsay in support of an expert opinion is not the sort of testimonial hearsay barred by that decision (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427) or that hearsay relied on by experts in formulating their opinions is not testimonial because not offered for the truth of the facts stated. (See *People v. Cooper* (2007) 148 Cal.App.4th 731, 747; *Thomas,* at p. 1210; see generally *Sisneros,* pp. 153-154 [discussing cases].)

We agree with the analysis of these courts. *Crawford* is not implicated by Deputy Sumner's expert testimony. His opinions concerning Ibarra's and Mercado's membership in the CV70's gang were based on both his personal knowledge and relevant information developed during investigations of multiple crimes committed by the CV70's in the area. (See *Gardeley, supra,* 14 Cal.4th at p. 620 [opinion properly based on expert's "personal investigations of hundreds of crimes committed by gang members," together with information from colleagues in law enforcement]; accord, *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9 [citing cases].) This testimony was entirely proper, and any objection by defense counsel, had one been made, would have been rejected by the trial court without error. Accordingly, the failure of defense counsel to object to the testimony under *Crawford* did not constitute ineffective assistance.

2. *The Omission of CALCRIM No. 358 Was Not Prejudicial Error*

"It is well established that the trial court must instruct the jury on its own motion that evidence of a defendant's unrecorded, out-of-court oral admissions should be viewed with caution." (*People v. McKinnon* (2011) 52 Cal.4th 610, 679 (*McKinnon*); see also

Bench Notes to CALCRIM No. 358, p. 133.)[5] This cautionary instruction "applies broadly," given that its purpose is to assist the jury in determining if the statement was in fact made. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393 ["[t]his purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime"]; accord, *McKinnon*, at p. 679.)

"In determining whether the failure to instruct requires reversal, '[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' [Citations.] '"Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]"' [Citations.] This court has held to be harmless the erroneous omission of the cautionary language when, in the absence of such conflict, a defendant simply denies that he made the statements. [Citation.] Further, when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution." (*McKinnon, supra*, 52 Cal.4th at pp. 679-680.)

Ibarra and Mercado argue the trial court's failure to instruct the jury under CALCRIM No. 358, compounded by the failure of their counsel to object to testimonial hearsay statements made by unidentified witnesses, prejudiced either Ibarra or Mercado requiring reversal of their convictions. We agree the court erred in failing to instruct

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[5] CALCRIM No. 358 provides: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

under CALCRIM No. 358 but are not convinced this omission prejudiced either Ibarra or Mercado. Three different witnesses (Harden, Palomino and Jose) testified the shooter shouted an epithet identifying the attackers as members of the CV70's gang, and Palomino and Jose identified Ibarra as the shooter who made that statement. The other "statements" challenged here relate to Ibarra's and Mercado's identification as gang members. Ibarra's own statements to Deputy Sumner constituted an admission of his gang affiliation, evidence that was undisputed. The other challenged statements were not presented at trial for their truth but instead, as discussed above, were one aspect of the information relied on for Sumner's conclusion Ibarra and Mercado were CV70's members, information that also included Mercado's facial tattoos.

The jury here also was fully instructed on how to evaluate the testimony of witnesses, including Deputy Sumner's opinion testimony. (See CALCRIM Nos. 226, 301, 302, 318, and 332.) Thus, much as in *People v. Dickey* (2005) 35 Cal.4th 884, distinguished on other grounds in *People v. Sanchez* (2011) 53 Cal.4th 80, 91, "[t]he jury was instructed on the significance of prior consistent or inconsistent statements of witnesses, discrepancies in a witness's testimony or between his [or her] . . . testimony and that of others, witnesses who were willfully false in one material part of their testimony being distrusted in other parts, weighing conflicting testimony, evidence of the character of a witness for honesty and truthfulness to be considered in determining the witness's believability, and was given a general instruction on witness credibility that listed other factors to consider, including a witness's bias, interest or other motive, ability to remember the matter in question, and admissions of untruthfulness." (*Dickey*, at p. 906.) The jury was also instructed to "carefully review all the evidence" before concluding that the testimony of any one witness proved any fact (CALCRIM No. 301); "You have heard evidence of [a] statement[s] that a witness made before the trial. *If you decide that the witness made* (*that/those*) statement[s], you may use (that/those) statements . . . [¶] . . . [t]o evaluate whether the witness's testimony in court is believable. . ." (CALCRIM No. 318, italics added); and "[i]n evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally

. . . [and] consider the expert's knowledge, skill, experience, training, and education, the reasons [given] for any opinion . . . [and] whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." (CALCRIM No. 332.)[6]

In short, under these circumstances it is not reasonably probable a result more favorable to Ibarra and Mercado would have been reached if the court had instructed with CALCRIM No. 358. The omission of that instruction, therefore, was harmless error. (See *People v. Mower* (2002) 28 Cal.4th 457, 484 ["if a trial court's instructional error violates only California law, the [harmless error] standard is that stated in *People v. Watson* (1956) 46 Cal.2d 818, 836, which permits the People to avoid reversal unless 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error'"].)

3. *Substantial Evidence Supported Mercado's First Degree Murder Conviction*

To assess 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

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[6] Mercado argues the phrase "whether information on which the expert relied was true and accurate" buttresses his argument under *Crawford* that Deputy Sumner's reliance on testimonial statements made by others should have been excluded. Mercado confuses, however, the distinction between out-of-court testimonial statements offered for their truth and information developed during the course of an investigation that has, as its ultimate goal, an opinion filtered by the investigator's training and experience.

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.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*) the Supreme Court articulated "guidelines to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*).) The guidelines are descriptive, not normative (see *People v. Thomas* (1992) 2 Cal.4th 489, 516-517) and "are not a *sine qua non* to finding first degree premeditated murder, nor are they exclusive." (*Perez*, at p. 1125.) "'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ."'" (*People v. Lee* (2011) 51 Cal.4th 620, 636; accord, *People v. Hughes* (2002) 27 Cal.4th 287, 370-371; *People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

From the cases surveyed in *Anderson*, the Court identified three categories of evidence pertinent to the determination of premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the

jury can reasonably infer from facts of type (1) or (2)." (*Anderson, supra,* 70 Cal.2d at pp. 26-27.) Regarding these categories the *Anderson* Court stated, "Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Id.* at p. 27.)

When a gang member fires multiple shots at close range into a group of people in rival gang territory, it is a reasonable inference the perpetrator, with premeditation and deliberation, intended to inflict death. (*People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192; see *People v. Sanchez* (2001) 26 Cal.4th 834, 849 ["[a] studied hatred and enmity, including a *preplanned*, purposeful resolve to shoot anyone in a certain neighborhood wearing a certain color, evidences the most cold-blooded, most calculated, most culpable, kind of premeditation and deliberation"].) Even if we assume Mercado fired no shots during the attack (Jose testified a second, larger gun had been fired but did not see Mercado shoot), vicarious liability for the shooter's premeditation and deliberation may arise when an aider and abettor shares the intent to kill. (See *People v. Concha* (2009) 47 Cal.4th 653, 665.) Based on the evidence at trial—the car was registered to Mercado's mother; the attackers (all associated with the CV70's) cruised past the victims in rival gang territory before stopping in front of them; Ibarra announced "This is 70's, motherfuckers" before shooting; Mercado leaned out of the passenger door (or actually got out of the car) and extended his right arm in coordination with Ibarra's shots; and, when the shooting stopped, they all fled in the car—the jury could reasonably determine Mercado had jointly planned and executed the attack. This was sufficient evidence to support liability for first degree murder on an aiding and abetting theory. (See *People v. Maury* (2003) 30 Cal.4th 342, 396 ["[a]n appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence"]; see also *People v. Reilly* (1970) 3 Cal.3d 421, 425 [""'[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment"'"].)

4. *The Trial Court Did Not Abuse Its Discretion By Imposing Consecutive, Rather Than Concurrent, Sentences on Mercado*

The trial court has "broad discretion . . . in choosing whether to impose concurrent or consecutive terms." (*People v. Monge* (1997) 16 Cal.4th 826, 850-851.) California Rules of Court, rule 4.425 sets forth specific criteria affecting the decision, including the presence of any circumstances in aggravation or mitigation.[7] The trial court must generally state its reasons for choosing to impose consecutive sentences (rule 4.406(b)(5)), but "there is no requirement that, in order to justify the imposition of consecutive terms, the court find that an aggravating circumstance exists."[8] (*People v. Black* (2007) 41 Cal.4th 799, 822, citing § 669; rule 4.425(a), (b).) "In imposing an upper term, the court must set forth on the record 'facts and reasons' [citation], including the 'ultimate facts that the court deemed to be circumstances in aggravation.' [Citation.] But it need only cite 'reasons' for other sentencing choices (§ 1170, subd. (c)), and the reasons given for imposing a consecutive sentence need only refer to the 'primary factor or factors' that support the decision to impose such a sentence. (Cal. Rules of Court,

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[7] California Rules of Court, rule 4.425 provides, "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) Criteria relating to crimes [¶] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) Other criteria and limitations: [¶] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences."

References to rule or rules are to the California Rules of Court.

[8] Rule 4.421(b) identifies aggravating factors relating to the defendant including "[t]he defendant has engaged in violent conduct that indicates a serious danger to society" (rule 4.421(b)(1)); "[t]he defendant's prior convictions as an adult . . . are numerous or of increasing seriousness" (rule 4.421(b)(2)); "[t]he defendant was on probation or parole when the crime was committed" (rule 4.421(b)(4)).

rule 4.406(a), (b); § 1170, subd. (c); see *People v. Tran* (1996) 47 Cal.App.4th 759, 774.)" (*Black*, at p. 822.)

Mercado requests we remand his case for resentencing because the trial court adopted reasons stated in the People's sentencing memorandum and the probation report without verifying their factual accuracy[9] and without considering potentially mitigating evidence discovered by his counsel after the verdict. However, Mercado failed to object at sentencing to the imposition of consecutive sentences. He has thus forfeited his contention the trial court erred in failing to put on the record an adequate basis for the sentence. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [forfeiture rule applies to "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" including its failure "to state any reasons or give a sufficient number of valid reasons"]; accord, *People v. Morales* (2008) 168 Cal.App.4th 1075, 1084.) In any event, we have reviewed the underlying reports and conclude the trial court's summarization of the bases for its imposition of consecutive sentences was adequate. There was no abuse of discretion.

DISPOSITION

The judgments are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J. ZELON, J.

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[9] The People's sentencing memorandum refers generally to the multiple victims of the attack; the probation report recounted a history of sustained juvenile petitions for crimes including burglary, robbery, grand theft, vandalism and possession of a firearm, as well as two adult misdemeanor convictions for driving with a suspended license for one of which Mercado was on probation at the time of the shooting.