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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTWON BROWN, Defendant and Appellant.	B253052 (Los Angeles County Super. Ct. No. BA389319)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Antwon Brown raises multiple issues following his conviction of first degree murder, premeditated attempted murder, aggravated mayhem and carjacking, with firearm use and gang enhancements.

For the reasons discussed below, the judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution case.*

a. *Carjacking and shooting of Kevin Hayes.*

On July 21, 2011, Kevin Hayes was driving his girlfriend's white Mercedes Benz when he stopped at a gas station at the intersection of Century Boulevard and Van Ness Avenue. Defendant Brown approached the passenger side window of the Mercedes. Hayes had seen Brown around the neighborhood. Hayes had formerly been a member of the Rolling 90's gang and he knew Brown to be a member of the Hard Time Hustlers. In July 2011, the two gangs were allies. Hayes rolled down the car window and greeted Brown cordially. Brown asked Hayes to give him a ride and Hayes agreed. Brown got in and Hayes drove off.

After Hayes had driven no more than a few blocks, Brown pulled out a gun, pointed it at Hayes's face and said, "Make a left motherfucker and don't crash." At first Hayes thought Brown wanted his money, so he started to reach into his pocket as he continued driving. But then Hayes sensed "it really wasn't about that" and he decided to attempt an escape. Hayes opened the driver's door, intending to jump from the moving Mercedes, but before he could do so Brown shot him twice in the abdomen. Hayes fell from the Mercedes onto the ground, got up, and ran a short distance before collapsing. As a result of the shooting, Hayes sustained a lacerated liver and a damaged colon, and he lost one kidney.

b. *Killing of Carlos Martinez.*

Brown and Jeremey House were acquaintances.[1] House testified that although he did not currently belong to a gang, he had been a member of the Hard Time Hustlers in 2004. He knew Brown as a friend of a friend.

On July 22, 2011, Brown and House decided to visit a mutual acquaintance who lived near 52nd and Wall Street. Brown gave House a ride in a white Mercedes Benz. During the drive, Brown collided with another car on the Harbor Freeway. Brown did not stop, but continued driving and then parked near 52nd and Wall. House got out of the car and was walking toward their friend's house when he heard a commotion and gunshots behind him. House initially denied having looked back but, after being confronted with the record of his police interview, he acknowledged that he turned around and witnessed the shooting. He saw Brown, standing in the street and shooting into the driver's side of a sport utility vehicle that was parked behind the Mercedes. House ran away.

G.M. testified she was standing at the corner of 52nd and Main Street near an elementary school on July 22, 2011, at approximately 11:45 a.m. She saw a man in the driver's seat of a green jeep that was parked behind a white car. She also saw a man standing at the side of the jeep. This man pointed a gun at the jeep's driver, fired into the jeep, and then ran to the white car, which sped away. G.M. identified Brown as the gunman in a photo array and then at trial.

Carlos Martinez, the driver of the green jeep, was hit by four bullets and died of his wounds. Police found his jeep on 52nd Street, just east of Main. The driver's side window was shattered and there were four shell casings on the ground. Inside the jeep was a cell phone and a clipboard with notes written on it; these notes included the license plate number of the white Mercedes Benz that Brown had taken from Kevin Hayes.

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[1] House did not appear at trial; his preliminary hearing testimony was read to the jury.

According to phone records and GPS data, Martinez's cell phone on July 22, 2011, traveled south on the Harbor Freeway to 51st Street. At 11:45 a.m., a call from his phone lasting 15 seconds was made from the general area of 50th Street and Broadway to 6-1-1.[2]

c. *Gang evidence.*

Brown's case went to trial in April 2013. Los Angeles Police Department Officer Kevin Currie, a former gang enforcement officer, testified as an expert on criminal street gangs and on the Hard Time Hustlers gang in particular. He described the Hard Time Hustlers as a Crips gang with approximately 90 members, about 30 of whom were active. Currie described the parameters of the gang's claimed territory, and characterized the gang's primary activities as murder, robbery, burglary, gun possession, and vandalism. Members of the gang had recently been convicted of attempted murder and robbery.

Officer Currie opined that Brown was an active member of the Hard Time Hustlers. His opinion was based in part on two personal encounters during which Brown identified himself to Currie as a member of the gang and said his gang monikers were "Twon" and "Little J Rod." Currie also based his opinion on other factors: Brown's affiliation with other known gang members; information recorded by other law enforcement officers on field investigation cards; and the fact Brown's tattoos referred to the Hard Time Hustlers.

Currie testified he was personally familiar with Hayes and he knew that Hayes was a member of the Rolling 90's Neighborhood Crips. This gang had been friendly with the Hard Time Hustlers in July 2011, but later the two gangs became enemies.

Responding to a hypothetical question tracking the evidence presented in this case, Currie opined Brown's crimes both enhanced his status within the gang and

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[2] 6-1-1 is apparently a telephone company customer service number. The prosecution's theory was that Martinez witnessed the freeway collision, followed the Mercedes, and wrote down its license plate number.

benefited the gang itself by enhancing its reputation for viciousness, and by creating an atmosphere of fear and intimidation that would allow the gang to commit other crimes and make witnesses reluctant to come forward.

2. *Defense case.*

The defense presented no testimony at trial.

3. *Verdict and judgment.*

The jury convicted Brown of first degree murder, premeditated attempted murder, aggravated mayhem and carjacking, with firearm use and gang enhancements (Pen. Code, §§ 187, 664, 187, 205, 215, 12022.53, 186.22, subd. (b)).[3] The trial court sentenced him to an aggregate term of 91 years eight months to life, and Brown timely appealed the judgment.

CONTENTIONS

Brown contends: (1) the trial court erroneously deprived him of his right to self-representation; (2) the court erred by admitting House's preliminary hearing testimony; (3) the court erred by denying Brown's motion to bifurcate trial of the gang allegations from trial of the substantive crimes; (4) the trial court erred by admitting evidence about one of Brown's gang monikers; (5) the evidence was insufficient to support the true findings on the gang allegations; (6) the evidence was insufficient to support his conviction of aggravated mayhem; (7) the court erred by failing to stay punishment on the carjacking conviction; and, (8) there was cumulative error.

[3] All further statutory references are to the Penal Code unless otherwise specified.

DISCUSSION

1. *Trial court properly terminated Brown's pro se status.*

Brown contends the trial court erred when, after initially granting his request to represent himself at trial under *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*), it subsequently revoked his pro se status. There is no merit to this claim.

a. *Procedural background.*

On September 5, 2012, Brown's counsel requested a trial continuance in order to locate a percipient witness. Brown, however, refused to waive his right to a speedy trial and announced that he wanted to represent himself. He argued the missing witness was really a witness for the prosecution, and that he did not agree with the way defense counsel had been representing him. The trial court (Hon. Frederick N. Wapner) on its own motion conducted a *Marsden* hearing[4] to determine whether defense counsel was providing adequate representation.

After the *Marsden* hearing, Brown told the trial court that if defense counsel was "not ready to take me to trial within my right to a speedy [trial]," then he wanted "to go pro per." When the court asked, "But are you doing this because you really want to represent yourself or just because you want to go to trial within the next five days?," Brown responded, "I would love for [defense counsel] to represent me for this trial in the next five days, your honor. But if I have to do it by myself, yes, I'm willing to do it all by myself."

Noting that the examining doctors who found Brown competent to stand trial also concluded he had attempted to manipulate them by feigning various medical problems, the trial court denied the request for self-representation as equivocal because Brown merely wanted to avoid a continuance. But the following day, September 6, 2012, fearing that an eventual conviction might be reversed on appeal, the prosecutor asked the trial court to give Brown another chance to make an unequivocal *Faretta*

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[4] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

request. Brown again told the court he wanted to represent himself and said he would be ready to begin trial the next day (on Friday, September 7, 2012) if he received certain outstanding discovery. This time the trial court granted Brown's *Faretta* request.

But on September 10, 2012, when the parties appeared before another judge (Hon. John S. Fisher), Brown announced that he was not prepared for trial because he had not been granted pro se status in jail over the weekend and, therefore, he had not been able to get the services he needed to prepare for trial. The trial court said Brown could either proceed to trial that day or he could announce he was not ready for trial, give up his pro se status, and allow his previously appointed counsel to resume representation.

After Brown said he was ready to proceed pro se, the court asked if he intended to call any witnesses. Brown said he wanted to call a person to whom Hayes had referred as a mutual friend, although Brown conceded he did not know the person's name or even if the person actually existed. When the court said Brown was not ready for trial because he needed further investigation, Brown agreed. Brown then said he wanted to subpoena an alibi witness and the gas station employees.

The trial court concluded Brown was not ready for trial and that his *Faretta* request was not unequivocal. The court therefore terminated Brown's self-representation on the morning of September 10, 2012, reappointed defense counsel, and returned the case to Judge Wapner. When the parties appeared before Judge Wapner that afternoon, he continued the matter to October 1, 2012, over Brown's objection.

On October 1, 2012, defense counsel announced he was not ready for trial because he had recently received 350 pages of medical records from the prosecution and needed to have a doctor review them. Brown again asked to represent himself and requested standby counsel and an investigator. After the trial court granted all three requests, Brown agreed to a continuance until October 29, 2012.

On October 29, 2012, Brown appeared in court wearing a paper toilet seat cover around his neck. He did not respond to the judge, did not look at the judge, and kept his eyes closed. Standby counsel said Brown had given him a note referring to mental health issues. The court declared a doubt concerning Brown's competency to stand trial, suspended the criminal proceedings, and appointed two doctors to conduct psychological examinations.

On November 27, 2012, the trial court conducted a competency hearing. The court noted that both doctors had found Brown competent to stand trial and also reported that he was malingering, intentionally refusing to participate in the psychological evaluations, and hanging his head during the interviews. The court observed that Brown was currently exhibiting some of the same behavior in the courtroom by hanging his head with his eyes closed. The court concluded Brown was competent to stand trial and reinstated the criminal proceedings. The court also concluded Brown was malingering and choosing not to participate, and that he had therefore forfeited his right of self-representation. The court therefore revoked Brown's pro se status, appointed standby counsel as defense counsel, and continued the matter to January 14, 2013.

On January 14, 2013, Brown again asked to represent himself. The trial court denied the request. Brown then requested a *Marsden* hearing, which the court conducted. The trial court subsequently denied Brown's renewed requests to represent himself on February 22, March 11, and March 27, 2013. At the March 11 hearing, the court reiterated that it had terminated Brown's self-representation because he was "malingering and trying to manipulate the system." The court conducted further *Marsden* hearings at Brown's request on February 22 and March 27, 2013.

b. *Governing law and standard of review.*

"A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. [Citations.] 'A trial court must grant a defendant's request for self-representation if the defendant knowingly and intelligently

makes an unequivocal and timely request after having been apprised of its dangers.' [Citation.] Erroneous denial of a *Faretta* motion is reversible per se. [Citation.] [¶] However, the right of self-representation is not absolute. '[The] government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.' [Citation.] 'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' [Citations.] 'Thus, a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation. The trial court possesses much discretion when it comes to terminating a defendant's right to self-representation and the exercise of that discretion "will not be disturbed in the absence of a strong showing of clear abuse." ' [Citation.]" (*People v. Williams* (2013) 58 Cal.4th 197, 252-253.)

A grant of pro se status may properly be revoked due to a defendant's improper conduct. "[*Faretta*] held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 173 [79 L.Ed.2d 122]; see also *Peters v. Gunn* (9th Cir. 1994) 33 F.3d 1190, 1192 ["A defendant's right to self-representation may be overridden if he demonstrates an inability or unwillingness 'to abide by rules of procedure and courtroom protocol.' "].) Thus, *People v. Clark* (1992) 3 Cal.4th 41, disapproved on other grounds in *People v. Pearson* (2013) 56 Cal.4th 393, 462, upheld a midtrial decision to revoke a defendant's pro se status on the ground the defendant had engaged in "a series of attempts to manipulate or coerce the trial court." (*Clark*, at p. 115.)

c. *Trial court properly revoked Brown's pro se status*.

The trial court initially granted Brown's request for self-representation on September 6, 2012, and then terminated his self-representation on September 10, 2012. The court granted Brown's renewed request for self-representation on October 1, 2012, terminated his self-representation again on October 29, 2012, and then denied subsequent requests by Brown to regain pro se status. The trial court concluded Brown was malingering and manipulating the system, and the record supports this conclusion.

Brown initially sought self-representation in order to avoid a trial continuance, and he assured the court he would be ready for trial after receiving certain discovery. But Brown later said he needed more time in order to identify and subpoena witnesses. After his request for self-representation was granted a second time, Brown appeared to display signs of mental incompetency, wearing a toilet seat cover around his neck and hanging his head with his eyes closed. The doctors who examined him concluded he was competent to stand trial, but that he was malingering and intentionally refusing to participate in the psychological examinations. The trial court observed that Brown was hanging his head with his eyes closed in court as well. Brown's repeated requests for self-representation and multiple *Marsden* motions, his failure to proceed after being granted the right of self-representation, and his courtroom demeanor as reflected in the reporter's transcript all demonstrate that he was being disrespectful, disruptive, obstructionist and abusing the dignity of the court. Brown has not demonstrated the " 'strong showing of clear abuse' " necessary to overturn a trial court's discretionary decision to terminate his pro se status. (See *People v. Welch* (1999) 20 Cal.4th 701, 735.) "Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." (*Martinez v. Court of Appeal of California* (2000) 528 U.S. 152, 162 [145 L.Ed.2d 597].)

Brown argues that his case is on point with two cases holding defendants were improperly denied their right of self-representation under *Faretta*. We disagree. *People*

v. Dent (2003) 30 Cal.4th 213, 218, held it was improper for the trial court to deny the defendant pro se status simply because it was a death penalty case. *People v. Carlisle* (2001) 86 Cal.App.4th 1382, concluded that, although the defendant's initial *Faretta* request had been equivocal (because it was emotionally motivated), his subsequent "nearly four-month long repeated requests to proceed in pro se [cannot be equated with] a litigation decision resulting from 'temporary whim, or out of annoyance or frustration . . . .' [Citation.] Nor can we equate defendant's four-month-long self-representation quest to be one made 'in passing anger or frustration . . . .' [Citation.]" (*Id*. at p. 1390.) Here, on the other hand, after Brown was granted pro se status, he showed himself to be unwilling or unable to abide by courtroom protocol.

As our Supreme Court said in *People v. Clark*, *supra*, 3 Cal.4th at p. 115: "As *Faretta* itself made clear, a constitutional right of self-representation 'is not a license to abuse the dignity of the courtroom.' [Citation.] Thus, 'the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.' [Citation.]" "[*Faretta*] held generally that a defendant may represent himself. It did not establish a game in which defendant can engage in a series of machinations, with one misstep by the court resulting in reversal of an otherwise fair trial." (*Ibid*.)

The trial court did not abuse its discretion by revoking Brown's pro se status.

2. *Trial court properly admitted House's preliminary hearing testimony.*

Brown contends the admission of Jeremy House's preliminary hearing testimony violated the Sixth Amendment confrontation clause because the prosecution failed to demonstrate that House was an unavailable witness. The argument is meritless.

a. *Background.*

The trial court conducted an evidentiary hearing to determine whether the prosecution made sufficient efforts to secure House's presence at trial.

Detective Jose Calzadillas testified that when he first interviewed House in July 2011, House identified himself as "Bruce House," which turned out to be the name

of his deceased brother. When Calzadillas interviewed him again on September 26, 2011, House gave his correct name. House was reluctant to get involved and said he did not want to testify.

Near the time of the preliminary hearing in March 2012, Calzadillas learned that House had been taken into custody for having violated the terms of his California Youth Authority (C.Y.A.) parole. Although transportation had been arranged to secure House's testimony at the preliminary hearing, he refused to leave his jail cell, which forced the trial court to order the Sheriff's Department to extract House from the cell and bring him to court. Calzadillas testified that, at the preliminary hearing on March 5, 2012, House was a very reluctant witness and, during a break in the proceedings, he told Calzadillas and a deputy district attorney that "he didn't want to testify in the case because he was scared for his family and his safety." After testifying at the preliminary hearing, House was taken back to jail.

The prosecutor told the trial court[5] she had learned from a computer database that House's parole was scheduled to terminate on October 31, 2013. The prosecutor had also been in contact with Ada Heard, who was House's C.Y.A. parole agent. Heard told the prosecutor that House "was on active C.Y.A. parole" and "if [he] is needed in court [Heard] will assure that [he] comes to court since he's on parole and there would be no issues of him not wanting to come to court." The prosecutor said she had spoken to Heard three or four times and Heard never indicated "that she was going to have a problem producing him for trial. As a matter of fact, she said just call me. You don't even need to give me a subpoena because I would call him to my office and we'll come in together. He knows that I'm going to be coming into court with him." But then, at the end of January 2013 or the beginning of February 2013, the prosecutor learned that

[5] The prosecutor was not put under oath, but made the following representations at the evidentiary hearing in her capacity as an officer of the court.

House's parole had already been terminated on January 23 or 25, 2013.[6] "That's when I contacted the detectives. That's when they contacted parole and were told that C.Y.A. parole is now dissipated and no longer exists."

Detective Calzadillas testified he attempted to serve a subpoena on House at his residence in November 2012, but House was not home. When the detective returned the next morning, he saw House "sitting on the steps . . . drinking a cup of coffee." When Calzadillas approached him, House ran away. Calzadillas and his partner chased after him, but House eluded them. Calzadillas testified that he immediately spoke to one of House's family members, "advising them . . . that I was trying to serve him with a subpoena, he just ran from me, have him give me a call. . . . Later on that same day I was advised by [the] D.A.'s office that [House] had contacted his parole officer who . . . contacted the D.A.'s office."

Calzadillas attempted to locate House again in January 2013. He contacted House's parole officer, but was told that House had been discharged from parole. The detective checked other areas where House had previous ties and searched for other contacts with law enforcement, to no avail.

On April 3, 2013, Calzadillas's partner and another detective attempted to serve House at the same location from which he had fled in November. They spotted House, but he again fled on foot. A forthwith subpoena was issued, a flier was distributed to all

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[6] Apparently this early termination was a result of California's recent Realignment Legislation. The prosecutor told the trial court that detectives who "contacted parole . . . were told that C.Y.A. parole is now dissipated and no longer exists." The prosecutor said her "understanding from speaking to a number of county parole [employees] is that it's not that people were discharged, it was that C.Y.A. parole . . . no longer exists." (See *In re J.S.* (2015) 237 Cal.App.4th 452, 458 ["In October 2010, the California Legislature passed Realignment, which addressed numerous issues, including the transfer of jurisdiction and supervision of juveniles from DJJ [Division of Juvenile Justice] to local juvenile courts. [Citations.] After passage of Realignment, once a youth completes his commitment at DJJ, he is released to the juvenile court for supervision while on probation. The goal of Realignment was to eliminate DJJ parole by July 2014 and shift this population to county supervision."].)

patrol officers in the area notifying them that House was wanted as a material witness, and surveillance units watched two different locations House was known to frequent. Detective Calzadillas also alerted other law enforcement agencies through a nationwide database that House was wanted and should be detained.

Regarding defense counsel's complaint that the People failed to keep a close watch on House although they knew he was a reluctant witness, the prosecutor advised the trial court: "Yes, we knew Mr. House was a reluctant witness, but welcome to hardcore. Any case we prosecute in hardcore gangs, I'm yet to see a witness who wants to be here and who wants to testify." The prosecutor continued, "[T]his case was put over and over. Mr. Brown went pro per, then revoked, then went pro per, got revoked. We couldn't have subpoenaed everybody on every occasion to come to court." The trial court asked if the prosecutor had considered requesting a material witness order under section 1332[7] when House was in custody at the time of the preliminary hearing. The

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[7] Section 1332 provides, in pertinent part: "(a) . . . [W]hen the court is satisfied, by proof on oath, that there is good cause to believe that any material witness for the prosecution or defense, whether the witness is an adult or a minor, will not appear and testify unless security is required, at any proceeding in connection with any criminal prosecution . . . the court may order the witness to enter into a written undertaking to the effect that he or she will appear and testify at the time and place ordered by the court or that he or she will forfeit an amount the court deems proper.

"(b) If the witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the court may commit the witness, if an adult, to the custody of the sheriff, and if a minor, to the custody of the probation officer or other appropriate agency, until the witness complies or is legally discharged.

"(c) When a person is committed pursuant to this section, he or she is entitled to an automatic review of the order requiring a written undertaking and the order committing the person, by a judge or magistrate having jurisdiction over the offense other than the one who issued the order. This review shall be held not later than two days from the time of the original order of commitment.

"(d) If it is determined that the witness must remain in custody, the witness is entitled to a review of that order after 10 days."

prosecutor said such a request would have been futile because just having House say that he feared for his family "wasn't going to be sufficient. . . . And I've actually had personal experiences where I would ask the court for a 1332 based on that testimony and the judge would tell me that's not enough." The prosecutor argued: "At that stage in the proceedings, the judge will say . . . I'm not going to keep a material witness in custody for a year because you want to secure his attendance. And that would have been every judge in this building, including Your Honor . . . ."

The prosecutor also argued that in September 2012, there were not yet proper grounds for requesting a material witness order: "[A]t that point between September of 2012 and finding out that Mr. House was off C.Y.A., I would have no foundation, no proper basis to come to any judge in this building and ask for 1332, because the judge would have looked at me and said what is the problem. You have a parole agent who says they will . . . bring him to court, and he's on active parole, and you know where he's at. And we had the address, which is still a viable address as far as his residence is concerned. We have a viable phone number . . . ."

Thomas Snook, an investigator for the district attorney, testified that he visited three locations in early April 2013 and was told that House occasionally resided at one of them. Snook obtained a subpoena and attempted to serve House at that location, but did not find him there. Snook contacted the sheriff's department to determine if House had been arrested, checked for his arrest in neighboring counties, and contacted Los Angeles County U.S.C. Medical Center.

When the trial court asked defense counsel if he thought the prosecution should have sought a section 1332 material witness order at the time of the preliminary hearing, defense counsel said no: "I mean, they could try, but I don't think, as [the prosecutor] stated, I don't think a judge would do that." The trial court remarked, "That's probably accurate." Defense counsel did argue, however, that the prosecution knew by the time of the preliminary hearing that House was unreliable and, therefore, should have arranged for C.Y.A. not to release House from parole without notifying the prosecution.

Defense counsel argued the prosecutor was remiss for relying on the parole officer's assurances.

The trial court concluded the prosecution had exercised due diligence in trying to secure House's presence at trial: "It seems to me that the D.A. did everything that they could to reasonably ensure the presence of this witness consistent with that witness's liberty rights. Had they applied for a [section] 1332 [order] early on and kept that witness in jail during the pendency of this trial, that person would have had a right [to a hearing] two days after the original hold and then 10 days thereafter suggesting that perhaps a reviewing judge may not have kept the witness in for that period of time. [¶] Everything that I've got here leads me to believe that . . . although it's close and defense counsel makes a strong argument, but everything that they did to secure him in fact led to the near securing of that witness. Twice they went to the viable location, twice he evaded them. [Defense] counsel represents that the People have an obligation to prevent the witness from becoming absent. I believe they tried to do this . . . consistent with 1332 and . . . the witness's . . . liberty rights, but it seems to me that the People here have satisfied the court that due diligence was made."

The trial court therefore allowed House's preliminary hearing testimony to be presented at trial.

b. *Legal principles.*

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) The right of confrontation 'seeks "to ensure that the defendant is able to conduct a 'personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' " (*People v. Louis* (1986) 42 Cal.3d 969, 982 [232 Cal.Rptr. 110,

728 P.2d 180], quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-243 [39 L.Ed. 409, 15 S.Ct. 337,].) To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling "into question the ultimate ' "integrity of the fact-finding process." ' " (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [35 L.Ed.2d 297, 93 S.Ct. 1038].)' (*People v. Cromer* (2001) 24 Cal.4th 889, 896-897 [103 Cal.Rptr.2d 23] (*Cromer*).)

"Although important, the constitutional right of confrontation is not absolute. (*Chambers v. Mississippi, supra,* 410 U.S. at p. 295; *Cromer, supra,* 24 Cal.4th at p. 897.) 'Traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination. . . . " (*Barber v. Page* [(1968) 390 U.S. 719,] 722 [20 L.Ed.2d 255, 88 S.Ct. 1318].)' (*Cromer, supra,* 24 Cal.4th at p. 897.) Pursuant to this exception, the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's confrontation right. (*People v. Seijas* (2005) 36 Cal.4th 291, 303 [30 Cal.Rptr.3d 493, 114 P.3d 742].)

"This traditional exception is codified in the California Evidence Code. [Citation.] Section 1291, subdivision (a)(2), provides that 'former testimony,' such as preliminary hearing testimony, is not made inadmissible by the hearsay rule if 'the declarant is unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' Thus, when the requirements of section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation. [Citation.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 620-621, fns. omitted.)

Under Evidence Code section 240, subdivision (a)(5), a witness is unavailable when he or she is "[a]bsent from the hearing and the proponent of his or her statement

has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) " 'What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. It has been said that the word "diligence" connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available [citation], whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised [citation].' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

However, a court cannot "properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." (*People v. Hovey* (1988) 44 Cal.3d 543, 564; see also *People v. Horn* (1964) 225 Cal.App.2d 1, 7 ["trial court believed from the evidence that Johnson was probably in hiding and deliberately evading service; this was a factual element which the court was entitled to weigh"].) "That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [there was due diligence] . . . . It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.)

"[A]ppellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial."

(*People v. Cromer*, *supra*, 24 Cal.4th at p. 901.) "We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*People v. Herrera*, *supra*, 49 Cal.4th at p. 623.)

c. *Discussion*.

Brown's contention centers not on the flurry of activity that occurred in March and April of 2013, just before trial started, when extensive but futile efforts were made to find House after he had been released from parole. Rather, Brown claims the prosecution did not exercise due diligence because it failed to take action earlier, during what Brown keeps referring to as the period in which House was "in custody." However, we only know for certain that House was in custody at the time he testified at the preliminary hearing in March 2012. He obviously was no longer in custody when Detective Calzadillas chased him outside his residence in late November 2012. The record does not disclose when that custody terminated or precisely when his C.Y.A. parole terminated.

Brown relies on *People v. Roldan* (2012) 205 Cal.App.4th 969, but there the prosecution *knew* the federal government intended to deport a key witness immediately after the preliminary hearing, yet not only failed to attempt any of the state or federal remedies that might have secured the witness's presence at trial, but did not even notify defense counsel of the impending deportation. In these circumstances *Roldan* concluded the prosecution failed to satisfy its burden to prove the due diligence necessary to establish the witness's unavailability so as to justify presenting his preliminary hearing testimony at trial. (*Id.* at pp. 984-985.) *Roldan* is inapposite because here the prosecutor reasonably believed House would still be reporting to a parole officer in November 2012, and relied on the parole officer's promise that she would deliver House to court. Brown offers neither case authority nor reasoned argument to support his claim that the prosecutor's reliance on the parole officer's assurances was unreasonable.

Brown also argues "the prosecutor was especially derelict . . . because she *admitted* that she should have sought a [section] 1332 [material witness] order in September 2012 when the case was 'getting close to trial' and House was still in custody and at risk of absconding; yet, she did not attempt to obtain 'a 1332 hold' until she knew he was out of custody." But the prosecutor admitted no such thing. Rather, the prosecutor said she did not believe she could make a sufficient showing in September 2012 to justify a section 1332 order because Brown was still on parole at that time and his parole officer had promised to ensure he would get to court.[8]

The record demonstrates that both the investigating detectives and the prosecutor were in contact with House's C.Y.A. parole officer, who gave assurances that House would testify. It was not unreasonable for the People to have relied on those assurances. When it was discovered that House was no longer on parole, police officers tried the standard methods of locating a witness and twice came close to apprehending House. The trial court did not err by finding the prosecution used due diligence in attempting to secure House's appearance at trial.

3. *Trial court did not err by denying Brown's motion to bifurcate the gang enhancement allegation.*

Brown contends the trial court improperly denied his motion to bifurcate his trial on the substantive offenses from his trial on the gang enhancement allegations (§ 186.22, subd. (b)). We disagree.

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[8] Brown's trial ultimately took place in April 2013, which means that under Brown's theory, House would have had to be detained for many months. In a case involving two minors who were detained as material witnesses under section 1332 for periods of eight and ten weeks, respectively, the Court of Appeal stated: "It is true that a '[d]etention is not unreasonable . . . merely because it may be prolonged.' [Citation.] However, the longer the expected detention, the greater the showing required by the state to justify it. The duration of the detentions in the instant case are substantial, and require an equally substantial justification." (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1077.)

a. *Procedural background.*

Brown made a pretrial motion to bifurcate trial of the gang allegations from trial of the underlying crimes. He argued that any mention of "gangs" would undermine the presumption of innocence and be unduly prejudicial. The prosecutor argued the gang allegations were intertwined with the facts of the case, were probative of Brown's motive, and served to demonstrate why Hayes and House were familiar with Brown. The trial court denied bifurcation, reasoning that the gang allegations were probative because they were intertwined with the charged crimes and, because the charged crimes were so violent, the gang evidence was not likely to be prejudicial.

b. *Legal principles.*

The criminal street gang enhancement, section 186.22, subdivision (b)(1), establishes an additional prison term for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . . " (*Ibid.*) A trial court may bifurcate trial of a gang allegation from trial of the underlying crime if the gang evidence is unduly prejudicial on the issue of guilt of the underlying crime and its probative value of such guilt is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) A trial court may deny bifurcation of a gang allegation even if some of the gang evidence would be inadmissible in a trial of the charged crime. (*Id*. at p. 1050.) Because of the efficiency of a unitary trial, a court's discretion to deny bifurcation of a gang allegation is broader than its discretion to admit gang evidence in a case with no gang allegation. (*Ibid.*) We review the court's denial of bifurcation for abuse of discretion. (*Ibid.*)

The admission of gang evidence always carries a risk of prejudice. "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, "evidence of gang membership is

often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049; see also *People v. Avitia* (2005) 127 Cal.App.4th 185, 192 ["Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative."]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 ["[e]vidence of gang activity and affiliation is admissible where it is relevant to issues of motive and intent"].)

Gang evidence can also be relevant to the evaluation of a witness' credibility. " ' "Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible. [Citation.]" [Citation.]' " (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450.)

c. *Discussion*.

Hayes's testimony that he had formerly been a member of the Rolling 90's gang, and that he knew Brown to be a member of the Hard Time Hustlers, was relevant to establishing Brown's identity as the person who carjacked Hayes and then shot him. This evidence was also relevant to explain how those crimes came about because it demonstrated why Hayes so readily agreed to give Brown a ride in the Mercedes, and why Brown tried to murder someone from an allied gang. The gang expert's testimony that the location of the carjacking was inside Hard Time Hustlers's territory went to demonstrate Brown's motive for robbing and shooting Hayes.

In light of the gang expert's testimony that violent crimes serve to enhance the perpetrator's reputation within the gang, evidence that House had formerly been a member of the Hard Time Hustlers helped explain Brown's decision to essentially execute Martinez in order to impress House, rather than just drive away. The same evidence also explained House's reluctance to testify against Brown and the equivocation in his preliminary hearing testimony.

We conclude the evidence of Brown's gang membership and the other gang evidence was relevant to the charged crimes and was not unduly prejudicial. Brown has not demonstrated the trial court abused its discretion when it denied his bifurcation motion.

4. *Trial court did not err by admitting evidence about Brown's gang monikers*.

Brown contends the trial court violated the confrontation clause by admitting testimony from the prosecution gang expert that Brown claimed to have a number of different gang monikers, including "Hennessy," based on information taken from field information (F.I.) cards. Specifically, Brown argues the trial court was required to exclude information from the F.I. cards because Brown did not have the opportunity to cross-examine the authors of the cards. There is no merit to this claim.

Crawford v. Washington (2004) 541 U.S. 36 [158 L.Ed.2d 177], established a new confrontation clause test focusing "on the 'testimonial or nontestimonial nature' of the out-of-court statement. *Crawford* held that '[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.' [Citation.] Thus, out-of-court *testimonial* statements are admissible only when the witness is unavailable and there has been a prior opportunity for cross-examination of that witness." (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 172.) Extra-judicial statements that are not offered for the truth of the matter asserted are not testimonial. (See *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224, fn. omitted ["As non-hearsay, and therefore non-

testimonial evidence, a great portion of the police dispatch tape is not subject to the analysis in *Crawford*."].)

Kevin House testified he knew Brown as a member of the Hard Time Hustlers gang whose moniker was "Spook." Officer Currie testified he had personally contacted Brown on two occasions, during which Brown acknowledged his membership in the Hard Time Hustlers and said he was known as "Twon" and "Little J Rod." Currie also testified that when he searched a computerized databank he discovered Brown had told other police officers his moniker was "Hennessy."[9]

After confirming with the prosecutor that, if asked, Currie would testify he had no information that Brown's moniker was "Spook," thus suggesting that the gang expert did not know Brown's actual moniker, defense counsel objected to Currie's testimony that Brown told other officers his moniker was "Hennessy" based on confrontation clause grounds. Defense counsel's objection was overruled after the prosecutor told the trial court the evidence was not being admitted for its truth: "[T]his goes to show that there were field identification cards on particular dates where he gave a different moniker. We're not proving that that was in fact his moniker, we are just going to explain that that was the information given to the officer."

On appeal, Brown contends this testimony about his monikers violated *Crawford*. But, as our Supreme Court has pointed out, "there are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay* purposes. As *Crawford* confirmed, '[t]he [Confrontation] Clause does not bar the use of [out-of-court] statements for purposes other than establishing the truth of the matter asserted.' " (*People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6.) Evidence that Brown had told officers other than Currie that his gang moniker was Hennessy was not hearsay because the prosecution was not trying to prove Brown's moniker really was

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[9] Although this moniker was given various spellings in the reporter's transcript, the prosecutor described it as the same as Hennessy cognac.

"Hennessy," but only that Brown had claimed a variety of nicknames and this was one of the names he gave when police stopped him on the street.

There was no confrontation clause error in admitting this testimony.

5. *There was substantial evidence to sustain the gang enhancement.*

Brown contends there was insufficient evidence to sustain the jury's true finding on the gang enhancement allegations. He argues "the prosecution presented no solid evidence the crimes were committed 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " There is no merit to this claim.

a. *Legal principles.*

"[T]he [Street Terrorism Enforcement and Prevention] Act prescribes increased punishment for a felony if it was related to a criminal street gang. (§ 186.22, subd. (b)(1).) '[T]o subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1). . . .) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. (§ 186.22, subds. (e) and (f).)' [Citation.]" (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1047, fn. omitted.)

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable,

credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

"A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) A gang expert may testify on the ultimate question of whether the defendant was acting for the benefit of a gang. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509 [where participants were diverse group affiliated with various gangs, trial court did not abuse its discretion by letting gang expert testify "the participants acted for the benefit of each and every gang represented by the caravan"].) "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang' within the meaning of section 186.22(b)(1). (See, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347 . . . [relying on expert opinion that the murder of a nongang member benefited the gang because 'violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents who are, as a result, 'fearful to come forward, assist law enforcement, testify in court, or even report crimes that they're victims of for fear that they may be the gang's next victim or at least retaliated on by that gang" ']; *People v. Romero* (2006) 140 Cal.App.4th 15, 19 . . . [relying on expert opinion that 'a shooting of any African-American men would elevate the status of the shooters and their entire [Latino] gang'].)" (*People v. Albillar, supra,* 51 Cal.4th at p. 63.)

b. *Discussion*.

Officer Currie testified that Brown was a member of the Hard Time Hustlers. He testified that the gang's primary activities included murder, attempted murder, robbery and other crimes. The carjacking was initiated within the gang's claimed territory. The murder of Martinez occurred outside the gang's claimed territory, but in the presence of House, a former member of the Hard Time Hustlers. The location of the murder was significant because "[i]t's . . . more brazen. The farther out or if you're in rival territory, it's more daring. So you get more respect for that type of violent crime." The murder "benefits the gang by, again, a violent act that's committed. [Brown] gets credit within his gang because of the violent act. That person that's there with him can verify the violence that's put in."

Currie explained how the Hayes carjacking and attempted murder benefited the Hard Time Hustlers: "The fact that this individual from the gang committing this violent act, even if it's on another gang member, it boosts his reputation within the gang because he's putting in work, committing crime. People hear about it on the street . . . his gang gets credit for it. So the Hard Time Hustlers get credit for the reputation that's built because of the violent acts that this gang does. So it allows them to create that atmosphere of fear which allows them to . . . continue to do other criminal acts where witnesses and victims are many times reluctant to come forward." Currie also testified, "By taking that car, that car could be used as a tool to commit other acts, it could be used to commit robberies or other shootings because it's . . . an unknown vehicle . . . ."

Brown relies on two cases in his attempt to demonstrate that the gang enhancement evidence was insufficient: *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*), and *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*). These cases are distinguishable. *Frank S.* held there was insufficient evidence of the defendant's specific intent to promote, further, or assist in criminal conduct by gang members, as required under section 186.22, subdivision (b)(1). (*In re Frank S.*, at p. 1199.) *Frank S.* stated that the only evidence supporting the gang allegation was an

expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue under the statute. There was no evidence that the defendant was in gang territory at the time of the incident or was accompanied by gang members and no other evidence that the crime – carrying a concealed dirk or dagger – was gang-related. (*Id.* at p. 1199.) The only evidence of the defendant's gang affiliation in that case was his statement that he had several friends in a particular group of gangs. (*Id*. at p. 1195.) Here, in contrast, in addition to the gang expert testimony, the prosecutor presented evidence that the crimes were either committed within the gang's claimed territory or in the presence of a former member of the same gang in which Brown was a self-admitted member.

In *Albarran*, the defendant and a companion fired shots at a house where a party was going on, but there was no evidence the gunmen made themselves known by gang signs, announcements or graffiti, and the gang expert "conceded he did not know the reason for the shooting." (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 227.) Here, on the other hand, Currie testified the crimes were committed for the gang's benefit.

Brown also cites *People v. Ramon* (2009) 175 Cal.App.4th 843, where two fellow gang members were stopped in a recently stolen car inside their own territory with an unregistered firearm. The Court of Appeal held this evidence was not sufficient to sustain a gang enhancement: "There were no facts from which the expert could discern whether Ramon and Martinez were acting on their own behalf the night they were arrested or were acting on behalf of the Colonia Bakers [gang]. While it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation." (*Id*. at p. 851.) But the Court of Appeal also said, "The analysis might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang. That did not occur and we will not speculate." (*Id*. at p. 853.) Here, Currie testified that the primary activities of the Hard Time Hustlers gang included robbery and murder.

There was also sufficient evidence to establish that Brown committed the shooting with the specific intent to promote, further, or assist in criminal conduct by gang members. This element of the gang enhancement is satisfied even if the only gang member whose criminal conduct was furthered happened to be the defendant himself in his commission of the underlying offense. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774 ["There is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense the defendant commits. To the contrary, the specific intent required by the statute is 'to promote, further, or assist in *any* criminal conduct by gang members.' (Pen. Code, § 186.22, subd. (b), italics added.) Therefore, defendant's own criminal threat qualified as the gang-related criminal activity. No further evidence on this element was necessary."].)

In sum, there was sufficient evidence to sustain the gang enhancement findings.

6. *Substantial evidence supports Brown's conviction of aggravated mayhem.*

Brown contends his conviction of aggravated mayhem must be reversed because there was insufficient evidence to prove the specific intent element of this offense. There is no merit to this claim.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, 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.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]

The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[ ] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

Aggravated mayhem is defined by section 205, which provides: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human

being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole."

"Aggravated mayhem is a specific intent crime which requires proof the defendant specifically intended to cause the maiming injury, i.e., the permanent disability or disfigurement. . . . [E]vidence of a 'controlled and directed' attack or an attack of 'focused or limited scope' may provide substantial evidence of such specific intent. [Citation.] However, where the evidence shows no more than an 'indiscriminate' or 'random' attack, or an 'explosion of violence' upon the victim, it is insufficient to prove a specific intent to maim. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) "Aggravated mayhem requires proof the defendant specifically intended to maim – to cause a permanent disability or disfigurement. [Citation.] A jury may not find specific intent 'solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately.' [Citation.] 'A jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.' [Citation.] '[E]vidence of a "controlled and directed" attack or an attack of "focused or limited scope" may provide substantial evidence of' a specific intent to maim. [Citation.]" (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831.)

b. *Discussion.*

In this case, the specific intent element of aggravated mayhem can be inferred from the way the shooting was carried out. Brown pulled out a gun, pointed it at Hayes's head, and then shot him twice in the abdomen from such a close distance that the jury could reasonably infer that Brown focused his attack on Hayes's abdomen rather than just firing indiscriminately. For example, *People v. Ferrell* (1990) 218 Cal.App.3d 828, found substantial evidence of specific intent to commit aggravated

mayhem where the defendant shot the victim in the neck from two feet away, reasoning "[i]t takes no special expertise to know that a shot in the neck from close range, if not fatal, is highly likely to disable permanently." (*Id.* at p. 835; see also *People v. Manibusan* (2013) 58 Cal.4th 40, 66 [that gunman shot victim "from very close range – only five to 10 feet – hitting her once in the face . . . and once in the upper arm, near her face. . . . reasonably supports the inference that [the gunman] . . . focused his attack on [victim's] head," thus proving "intent to cause permanent disability or disfigurement"]; *People v. Santana* (2013) 56 Cal.4th 999, 1012 ["defendant stood at close range and fired three shots with a .38-caliber revolver into the leg and buttock area of Vallejo, who lay unresisting on the ground . . . [which] strongly supports a finding that defendant intended to inflict a disabling injury"].)

In addition, shooting Hayes in the abdomen was highly likely to result in a maiming injury or even death. (See *People v. Moore* (2002) 96 Cal.App.4th 1105, 1114, italics added ["Defendant argues there is no evidence of a specific intent to kill, highlighting his testimony he intended to stab but not to kill the victim. However, defendant stabbed the victim not in the arm or leg, but in *the abdomen, an extremely vulnerable area of the body*."]; *People v. Dick* (1968) 260 Cal.App.2d 369, 371, italics added ["We also conclude that the circumstantial evidence that defendant intended to kill Collins when he fired the shot is not only sufficient but compelling. Defendant shot Collins in *the stomach, a highly vulnerable area* . . . ."].)

Relying on Justice Werdegar's dissenting opinion in *People v. Manibusan, supra*, 58 Cal.4th 40, Brown asserts "the mental component of aggravated mayhem must be 'the intent to inflict a grievous injury *but allow the victim to live*.' " This assertion, however, directly conflicts with the majority opinion in *Manibusan*, which concluded that " '[a] defendant may intend both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful,' and evidence that is sufficient to establish a defendant's intent to kill the victim can also be 'sufficient to establish the intent to permanently disable or disfigure that victim.' [Citations.]" (*Id.* at

p. 89, fn. omitted.) By the rule of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we must follow the majority opinion.

Brown argues the Hayes shooting was a sudden and indiscriminate attack born out of Brown's frustration over "an 'ineffectual' robbery attempt" because the evidence demonstrated he simply reacted and began shooting "when it appeared Hayes might not relinquish his Mercedes." The argument is unsupported by the record. Rather, the evidence demonstrated Brown only began shooting when Hayes opened the car door in his attempt to jump out,[10] an act that, if anything, would have left the Mercedes in Brown's possession. Because Brown shot Hayes as he was in the very act of relinquishing the car, there was nothing "ineffectual" about the robbery attempt.

Substantial evidence supports the finding that Brown acted with the specific intent required for aggravated mayhem.

7. *Trial court properly declined to stay sentencing on the carjacking conviction.*

Brown contends that, because the attempted murder and the carjacking were committed with the same intent and objective, the trial court erred under section 654 by declining to stay sentencing on the carjacking conviction. There is no merit to this claim.

a. *Legal principles.*

Section 654 prohibits multiple punishment for crimes based on the same act or omission.[11] "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and

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[10] Hayes testified that after considering but rejecting the idea of "go[ing] into my pocket," he "opened the door and tried to get out and that's when he shot me." Hayes specifically testified Brown "shot me when I opened the door."

[11] Section 654, subdivision (a) states, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334.) " '[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." ' [Citation.] 'It is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.' [Citation.] ' "The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced." ' [Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 886, fn. omitted.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" [Citation.] ' " (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court's finding, whether explicit or implicit, may not be reversed if supported by substantial evidence].)

b. *Discussion.*

Brown argues: "The fact that appellant shot Hayes as he was reaching into his pockets suggested that appellant believed Hayes might be reaching for a weapon and shot Hayes to secure the car appellant intended to steal. Moreover, since the shooting was committed *before* appellant had full and sole control of Hayes' car [the shooting and the taking were part of a single course of conduct]." But Brown did not need to have "sole control" of the Mercedes in order to be guilty of carjacking. (See *People v. Duran* (2001) 88 Cal.App.4th 1371, 1374-77 [defendant committed carjacking when he

entered victim's car at gunpoint, ordered victim to drive, and victim drove]; see *People v. Lopez* (2003) 31 Cal.4th 1051, 1062 [citing *Duran* for principle that "a completed carjacking occurs whether the perpetrator drives off with the carjacking victim in the car or forcibly removes the victim from the car *before* driving off"].)

Hence, the evidence demonstrated that Brown did not shoot Hayes until *after* Brown had already committed carjacking by directing Hayes, at gunpoint, where to drive. Indeed, the evidence demonstrated that the shooting occurred only *after* Hayes opened the car door preparatory to make his escape by jumping from the Mercedes. Viewing the evidence in the light most favorable to the trial court's ruling, we conclude that substantial evidence supports the finding that Brown had separate objectives for the carjacking and the attempted murder and was appropriately punished for both crimes. (See *In re Chapman* (1954) 43 Cal.2d 385, 388-389 [section 654 did not bar punishing defendant for both robbery and aggravated assault where victim handed over wallet at gunpoint, and then tried to flee but was hit on head with a gun].)

8. *There was no cumulative error.*

Brown contends that, even if harmless individually, the cumulative effect of these claimed trial errors mandates reversal of his convictions. Because we have found no error, his claim of cumulative error necessarily fails. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

KITCHING, J.

ALDRICH, J.