Filed 3/28/12 P. v. Fuentes CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR N. FUENTES, Defendant and Appellant.	B231367 (Los Angeles County Super. Ct. No. NA082166)

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

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Victor N. Fuentes (defendant) was convicted of the murder of Jose Hernandez (Pen. Code, § 187, subd. (a)[1]). On appeal, defendant requests that we conduct an independent review of the in camera proceedings pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) to determine whether the trial court followed the appropriate procedure and properly exercised its discretion in concluding that the records did not contain any discoverable information. Because the materials reviewed by the trial court during the in camera proceedings were destroyed, and the trial court was unable to create an adequate record or settled statement, defendant contends he is deprived of a meaningful appellate review and therefore the judgment should be reversed. Defendant also contends that the trial court erred in denying his motion to represent himself, and that there was not substantial evidence to support the jury's finding that he committed the crime for the benefit of a gang. We affirm the judgment.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

Victoria Kavoulakos testified at trial that on May 1, 2009, she and her friends held a party at a house on Olive Avenue between Fifth and Sixth Streets in Long Beach. Defendant, aka Wacky, is an East Side Longo (ESL) gang member. Defendant and other ESL gang members attended the party, including Hernandez aka Obeck, Ezequiel Allende, aka Shady, and Kavoulakos's uncle, Jesse Ramirez, aka Hyper.

Kavoulakos testified that she saw Hernandez in the middle of Olive Avenue talking to the occupants of a silver car. The vehicle eventually drove toward Sixth Street.

---

[1] All statutory citations are to the Penal Code unless otherwise noted. Defendant was acquitted of attempted murder of Lester Archila.

Kavoulakos testified that the police arrived and broke up the party, and those who attended the party went outside, near the house, trying to decide where to go. Kavoulakos saw defendant walk from Sixth Street toward the house. Defendant appeared to be "pushing himself" along "like he had a purpose." Defendant dropped a gun and picked it up. Kavoulakos was about 12 feet from defendant when Kavoulakos saw defendant aim the gun at Hernandez and shoot him four times. Defendant paused, fired two more times, and ran. Ramirez, who was also outside the house, said "Fuck [defendant]," and Ramirez and Allende ran after defendant. Kavoulakos testified that Hernandez died in her arms.

Santos Briones and Leslie Gandarilla both testified that they had been to the party and were among those standing outside. Briones testified that he saw defendant walk south on Olive Street from Sixth Street, toward Briones and Gandarilla. Both Briones and Gandarilla testified that defendant passed them, dropped a gun, and picked it up. Briones and Gandarilla then saw defendant walk toward the group of people in front of the house. Shortly thereafter, in the amount of time it would have taken defendant to reach the house, Briones and Gandarilla heard gunshots.

Lester Archila testified that on May 1, 2009, at about 10:38 p.m., he was in the area of Olive Avenue and Fifth Street. When Archila heard gunshots, he ran to his car and a bullet struck him in the right shoulder.

City of Long Beach Police Department Detective Teryl Hubert testified that she and City of Long Beach Police Department Detective Russell Moss interviewed Allende during which interview Allende said the following: On May 1, 2009, Allende was at the party with several friends, including Ramirez. When Allende arrived at the party several people were outside the house and the party appeared to be breaking up. A beige colored 4-Runner or Nissan Pathfinder drove southbound on Olive Avenue, and the occupants of the vehicle called out to Hernandez. Hernandez approached the vehicle from the passenger side, and spoke briefly with the occupants. Hernandez then walked over to Allende and told Allende that Hernandez had a fight previously with one of the vehicle's occupants and that this person wanted to fight again. Hernandez asked Allende for a

knife, and Allende gave him one. Allende gave a detailed description of a 24-year-old Hispanic male walking southbound on Olive Avenue from Sixth Street, drop a gun, pick it up, and walk toward Hernandez. Hernandez asked the Hispanic male, "What are you going to do[,] shoot me?" The Hispanic male pointed the gun at Hernandez, shot him several times, and ran. Allende and Ramirez chased the shooter, and the shooter entered the rear passenger side of the 4Runner/Pathfinder that was parked around the corner on Fifth Street. The shooter pointed the gun at Allende and Ramirez and displayed several gang signs, and the vehicle drove westbound on Fifth Street.

Detective Hubert testified that during the May 1, 2009, interview, Allende asked Detective Hubert to go out in the hallway with him because "he wanted to give me the real and he wanted to see justice." When Allende and Detective Hubert were in the hallway, Allende identified defendant as the shooter.

Allende denied telling Detective Hubert the statements Detective Hubert attributed to him. Allende testified that he did not want to testify at defendant's trial.

Detective Hubert testified that on September 8, 2009, she had another interview with Allende. A tape recording of an excerpt from the September 8, 2009, interview was played for the jury, during which Allende stated that he told Detective Hubert it was defendant who shot Hernandez. Allende also identified defendant in a photograph. Allende denied speaking to Detective Hubert about Hernandez on September 8, 2009, and does not remember that he identified defendant as Hernandez's shooter.

Ogbonna Chinwah, Los Angeles County Department of Coroner, Deputy Medical Examiner, opined that the cause of Hernandez's death was from multiple gunshot wounds consistent with a homicide. Hernandez was shot seven times, and four of them were fatal.

City of Long Beach Police Department Detective Chris Zamora testified as the prosecution's gang expert. Detective Zamora was assigned to the gang enforcement team. He was familiar with the ESL street gang having investigated and researched the gang since the beginning of his law enforcement career in 2001. He said that the ESL gang was primarily a Hispanic gang. It was one of the largest gangs in Long Beach, with

approximately 900 members. ESL was extremely territorial, and has held its territory for several decades through violence. ESL's primary criminal activities included assault with firearms, robbery, carjacking, attempted murder, murder, and sale of narcotics.

On February 14, 2008, Jose Roberto Ceja, an ESL gang member, was convicted of murder. Detective Zamora testified that the murder was gang related. Also, Jose Luis Rodriguez, an ESL gang member, was convicted of murder, attempted murder, assault with a firearm, and possession of a firearm by a felon. Detective Zamora testified that those crimes were also gang related.

Detective Zamora testified that ESL instilled fear in the community and its gang members, thereby preventing witnesses of a crime of gang violence from "snitching" or "ratting" to law enforcement because the witnesses knew that doing so usually resulted in a violent act being taken against them. If a witness did tell law enforcement what they saw regarding a crime, it was very common for the witness to recant what they reported at trial, particularly if the gang's members were in court.

2. Defendant's Evidence

Defendant did not testify or present any evidence.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with the murder of Hernandez in violation of section 187, subdivision (a) (count 1), and the attempted murder of Archila in violation of sections 664 and 187, subdivision (a) (count 2). The District Attorney alleged as to both counts that defendant personally used and personally and intentionally discharged a firearm causing death or great bodily injury to the victims in violation of section 12022.53, subdivisions (b)-(d), and defendant committed the offenses for the benefit of a criminal street gang in violation of section 186.22, subdivisions (b)(1)(C) and (b)(4).

Defendant filed a pretrial discovery motion pursuant to *Pitchess*, *supra*, 11 Cal.3d 531 and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), and the trial court, after

conducting an in camera review of documents, found there was nothing to turn over to defendant. The trial court also denied defendant's motion under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

Following a trial, the jury found defendant guilty of murder and not guilty of attempted murder. The jury found that the personal and intentional discharge of a firearm and the gang enhancement allegations were true. The trial court sentenced defendant to a state prison for a term of 50 years to life.

DISCUSSION

A. *Pitchess* Discovery

In his opening brief, defendant requests that we conduct an independent review of the July 7, 2010, in camera proceedings to determine whether the trial court followed the appropriate procedure and properly exercised its discretion in concluding that the records did not contain any discoverable information. In his supplemental opening brief, defendant contends that the destruction of the materials reviewed by the trial court during the July 7, 2010, in camera proceedings, combined with the trial court's inability to create an adequate record or settled statement, deprives him of meaningful appellate review and requires a reversal of the judgment. The trial court erred in failing to ensure a meaningful appellate review, but the error was not prejudicial.

1. Background

On June 3, 2010, defendant filed a pretrial discovery motion pursuant to *Pitchess, supra,* 11 Cal.3d 531 and *Brady*, *supra,* 373 U.S. 83, seeking the discovery of confidential personnel records for Detective Hubert. Defendant's motion sought the production of (1) contact information of all persons who filed complaints or who were interviewed by the City of Long Beach Police Department (complaining person), regarding any acts by Detective Hubert of falsifying police reports, lying, perjury, dishonesty, untruthfulness, or other acts of moral turpitude that reflects on Detective

Hubert's honesty or truthfulness (complaints); (2) verbatim copies of all statements made by any complaining person; (3) all investigative reports of the complaints; (4) all statements or opinions made by psychiatrists, psychologists, and Detective Hubert's superior and fellow officers, pertaining to the complaints; and (5) documents of all employment disciplinary actions or proceedings commenced or taken against Detective Hubert relating to the complaints.

Defendant's counsel submitted a declaration stating that following the shootings at issue in the case, Detective Hubert interviewed Allende, who was present at the party when Hernandez and Archila were shot. Allende told Detective Hubert that Allende could identify Hernandez's shooter but would not do so in the interview room because he feared the conversation was being recorded. Detective Hubert took Allende into the hallway and Allende identified defendant as Hernandez's shooter. Detective Hubert wrote a police report about the interview of Allende, and Detective Hubert testified at the preliminary hearing report that in the hallway Allende identified defendant as Hernandez's shooter. Allende also testified at the preliminary hearing and denied identifying defendant as the shooter to Detective Hubert. Defendant's counsel declared in support of the motion that defendant asserted that he did not shoot Hernandez, and defendant's counsel contended that the disclosure of past complaints against Detective Hubert for falsifying police reports, lying, perjury, dishonesty, untruthfulness, or other acts tending to show a lack of truthfulness was necessary for defendant to impeach Detective Hubert's credibility at trial.

The City of Long Beach Police Department opposed the motion. On July 7, 2010, the trial court held an in camera review of documents presented by the custodian of records in response to the motion, and found no discoverable information. On July 29, 2010, defendant moved to augment the record on appeal with copies of the personnel records produced at the July 7, 2010, hearing.

The sealed court reporter's transcript of the trial court's in camera review was included in the record on appeal. However, copies of the documents reviewed by the trial court were not included. After reviewing that transcript we concluded that the trial court

did not make an adequate record during the in camera hearing about the nature and substance of the records it reviewed. We, therefore, requested that the record be augmented to include copies of the materials reviewed by the trial court that were not disclosed to defendant, and if they could not be found, to describe their contents if possible. We appointed the trial court to act as referee to conduct record correction proceedings.

Pursuant to our appointment of the trial court to act as referee, on August 11, 2011, the trial court conducted a further in camera proceeding, and thereafter filed with this court the transcript of the August 11, 2011, hearing, along with a declaration from City of Long Beach Police Department and a memorandum from the City of Long Beach that were provided to the trial court in connection with the hearing. These documents state that Detective Hubert's personnel records reviewed by the trial court at the initial in camera hearing, consisting of Internal Affairs complaint number 05-0269, had been destroyed pursuant to Government Code section 34090 permitting the routine destruction of officer misconduct complaints five years after their creation. The documents also stated that the destruction of complaint number 05-0269 had nothing to do with defendant's case. The documents do not describe the contents of the complaint.[2]

2. General Principles

"Evidence Code sections 1043 through 1045 codify *Pitchess* [, *supra*,] 11 Cal.3d 531 . . . . 'The statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense.' (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53 [19 Cal.Rptr.2d 73, 850 P.2d 621].) The legislation achieves this balance primarily through a procedure of in camera review, set forth in section 1045, subdivision (b), whereby the trial court can determine whether a

[2] We ordered that the transcript of the August 11, 2011, hearing, and all papers filed with this court concerning the August 11, 2011 hearing be unsealed and made available to the parties.

police officer's personnel files contain any material relevant to the defense, with only a minimal breach in the confidentiality of that file." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220, abrogated on other grounds as stated in *McGee v. Kirkland* (2009) 726 F.Supp.2d 1073, 1080.)

"To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' . . . [¶] If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance. [Citations.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019; *People v. Gaines* (2009) 46 Cal.4th 172, 179 (*Gaines*).

At the in camera hearing to review the documents, "the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself. ([*City of*] *Santa Cruz* [*v. Municipal Court* (1989)] 49 Cal.3d [74,] 84.) A law enforcement officer's personnel record will commonly contain many documents that would, in the normal case, be irrelevant to a *Pitchess* motion, including those describing marital status and identifying family members, employment applications, letters of recommendation, promotion records, and health records. (See § 832.8.) Documents clearly irrelevant to a defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise of Evidence Code sections 1043 and 1045 that the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records. The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record. (See *People v. Jackson, supra,* 13 Cal.4th at p. 1221, fn. 10 [explaining that this court 'reviewed the

sealed record of the in camera proceeding'].)" (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229 (*Mooc*)

"The trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed. (Fn. omitted.) (See *People v. Samayoa* (1997) 15 Cal.4th 795, 825 [64 Cal.Rptr.2d 400, 938 P.2d 2] [after ruling on the *Pitchess* motion, '[t]he magistrate ordered that all remaining materials be copied and sealed'].)" (*Mooc*, *supra*, 26 Cal.4th at pp. 1229-1230.) We review the trial court's ruling on the *Pitchess* motion for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1286; see also *People v. Hughes* (2002) 27 Cal.4th 287, 330 ["A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion"].)

3. Discussion

Once the trail court finds good cause to review confidential personnel records pursuant to *Pitchess*, it is required to make a record of the materials it reviewed for purposes of appellate review. (*Mooc*, *supra*, 26 Cal.4th at pp. 1229-1230*; People v. Guevara* (2007) 148 Cal.App.4th 62, 69.) On appeal, this court is required to review the "record of the documents examined by the trial court" and determine whether the trial court abused its discretion in refusing to disclose the contents of the officer's personnel

records. (*Mooc, supra,* 26 Cal.4th at p. 1229; *People v. Hughes*, *supra*, 27 Cal.4th at p. 330.)

Mooc, *supra*, 26 Cal.4th 1216 requires that the trial court preserve the record for "meaningful appellate review" by retaining "copies of the documents it examined before ruling on the *Pitchess* motion, [making] a log of the documents it reviewed in camera, or just [stating] for the record what documents it examined (such transcript, of course, to be sealed) . . . ." (*Mooc, supra,* 26 Cal.4th at p. 1228.) In this case, however, the record of the July 7, 2010, confidential in camera hearing shows that the trial court recited very limited information about the confidential files it reviewed. Copies of the documents reviewed by the trial court were not included in the record, and there is nothing in the record to indicate that the confidential files were too voluminous for copying.

As stated *ante*, "Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent." (*Mooc*, *supra*, 26 Cal.4th at p. 1229.) The trial court erred by failing to comply with *Mooc* and not preserve the record for "meaningful appellate review." (*Id*. at p. 1228.)

Defendant contends that the destruction of confidential files reviewed by the trial court at the in camera proceeding violated his right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, competent counsel on appeal guaranteed by the Sixth and Fourteenth Amendments, and equal protection guaranteed by the Fourteenth Amendment. We disagree.

Plaintiff does not cite any authority to support his contention that the destruction of confidential files here violated his constitutional rights. Indeed, the California Supreme Court has held that "routine record destruction after five years" does not deny a defendant's due process rights. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 12.) "Unless there is bad faith by the law enforcement agency, the destruction of records does not implicate a defendant's constitutional right to a fair trial; routine destruction by a law enforcement agency 'acting . . . "in accord with [its] normal practice"' tends to indicate '"good faith"' [citations]." (*Ibid*.) "[D]ue process does not

prohibit a law enforcement agency from destroying records of citizen complaints that are more than five years old and whose exculpatory value to a specific case is not readily apparent . . . ." (*Ibid*.) Such destruction "violates a defendant's right to due process only when the complaint's exculpatory value to a particular criminal case is readily apparent before its destruction. [Citation.] The mere 'possibility' that the complaint might be exculpatory in some future case is insufficient. [Citation.]" (*Id*. at pp. 11-12; see also *People v. Jackson*, *supra,* 13 Cal.4th at p. 1221, fn. 10 [no due process violation for routine destruction of complaints in accordance with existing departmental policies].)

The record evidences that the confidential personnel records reviewed by the trial court at the initial in camera hearing had been routinely destroyed, pursuant to Government Code section 34090, five years after the records were created. The record also evidences that the destruction of the confidential personnel records had nothing to do with defendant's case. There is no evidence that the personnel information was destroyed in bad faith, the exculpatory value of the records to defendant's case was readily apparent, or the City of Long Beach's retention policy was suddenly enacted to enable the destruction of these specific reports. The routine destruction of the confidential files did not violate defendant's constitutional rights. (*City of Los Angeles v. Superior Court*, *supra*, 29 Cal.4th at p. 12; *People v. Memro* (1995) 11 Cal.4th 786, 831-832, abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

Although, as stated *ante,* the trial court erred by failing to adequately preserve the record regarding the documents it reviewed in camera, the error was harmless. If we had access to all confidential documents reviewed by the trial court, and we determined the court improperly denied disclosure of one or more files, the trial court's error would have been subject to review pursuant to the prejudicial error under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Samuels* (2005) 36 Cal.4th 96, 110; *Gaines*, *supra,* 46 Cal.4th at pp. 182-183; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) That is, there must be "a reasonable probability of a different outcome had the evidence been disclosed. [Citations.]" (*Gaines*, *supra*, 46 Cal.4th at pp. 182-183.) "The reasonable-probability standard of prejudice we have applied in *Pitchess* cases is the

same standard we have applied generally to claims that the prosecution improperly withheld exculpatory evidence in violation of a defendant's right to due process" under *Brady*, *supra*, 373 U.S. 83. (*Gaines*, *supra*, 46 Cal.4th at p. 183.)

Defendant's *Pitchess* motion sought documents to impeach Detective Hubert because defendant contended that Allende did not tell Detective Hubert on May 1, 2009, defendant had shot Hernandez, as Detective Hubert reported and testified. Even if documents existed and should have been produced to defendant pursuant to his *Pitchess* motion that could have been used to impeach Detective Hubert when he testified that Allende told him in the hallway that defendant had shot Hernandez, there was substantial evidence that defendant was the shooter. A tape recording of an excerpt of an interview with Allende on September 8, 2009, was played for the jury during which Allende stated that he told Detective Hubert defendant was the shooter, and Allende identified defendant in a photograph. In addition, Kavoulakos testified that she saw defendant drop a gun as he walked on Olive Avenue, pick up it up, walk over to Hernandez, and shoot Hernandez several times. Both Briones and Gandarilla testified that defendant dropped a gun and picked it up, and shortly thereafter they heard gunshots. The trial court's error was harmless because there is not a reasonable probability of a different outcome had the evidence been disclosed pursuant to defendant's *Pitchess* motion.

B. *Faretta* Motion

Defendant contends that the trial court erred in denying his motion under *Faretta*, *supra*, 422 U.S. 806. We disagree.

1. Relevant Proceedings

On August 10, 2010, defendant's counsel declared "a conflict," and the trial court relieved him and appointed James Slevin as defendant's new counsel. Slevin thereafter appeared before the trial court and represented defendant at four pretrial conferences, including on January 10, 2011, at which the trial court scheduled trial to commence on January 31, 2011.

On January 31, 2011, the jury was selected and sworn, and on February 1, 2011, the trial court instructed the jury. On February 1, 2011, immediately after the prosecutor gave his opening statement, Slevin told the trial court that defendant, "indicated in a somewhat confusing matter [*sic*] he may want to go pro per and/or . . . have a *Marsden* hearing."[3] The trial court confirmed that Slevin was not going to make an opening statement. The trial court then conducted a closed hearing with defendant and Slevin, and sealed the transcript of the proceedings.[4] The trial court asked defendant whether he wanted to have Slevin replaced by another attorney, and defendant responded, "What I ask is that I could go pro per. I'm needing some time."

Having confirmed that defendant did not want Slevin replaced by another attorney, the trial court reopened the hearing with all parties present. The following exchange occurred at the hearing: "[Trial court:] [Defendant], you are asking to go pro per; am I right? [¶] [Defendant:] Yes. [¶] [Trial court:] Before I give you the *Ferretta* [*sic*] form, let me ask you if you were to go pro per, are you able to proceed right now and try this case? [¶] [Defendant:] I'm going to need some time so I could study everything in discovery. That's what I would need. [¶] [Trial court:] All right. Let me ask Mr. Slevin. Mr. Slevin, you are ready to proceed, right? [¶] [Slevin:] I am. [¶] [Trial court:] Anything else you want to tell me before I give you the pro per form? [¶] [Defendant:] Am I going to have time? Are you going to give me time to study? [¶] [Trial court:] I'm not asking you questions. Other than what you've told me which means you need more time in order to be able to go pro per, is there anything else that you want to tell me as a reason for pro per? [¶] [Defendant:] No sir. [¶] [Trial court:] All right. Thank you. Submitted, Mr. Slevin. [¶] [Slevin:] Submitted. [¶] [Trial court:] Thank you. This court finds that the request for going pro per is not timely.

---

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

[4] Defendant filed a notice advising us that the sealed transcript did not contain issues relating to *People v. Marsden*, *supra*, 2 Cal.3d 118, and he does not oppose the release of the transcript to the Attorney General. Defendant cited to the transcript in his opening brief. We, therefore, released the transcript to the Attorney General.

Counsel is ready to proceed. The quality of counsel's representation is outstanding. Letting [defendant] go pro per would be destruction or delay, considering that jeopardy had already attached to this particular case and the jury has been empaneled, [*sic*] opening statement has already been made. There's no reason for the request at this point in time. I will cite *People v. Rogers*, 37 Cal.App.4th, 1053 (1995). Appellate court case says a pro per request says after the jury is sworn in, just opening statements were to begin is untimely. [¶] In this particular case, opening statements are completed. It is this court's opinion based therein that the whole basis for the request for pro per is to derail or to delay the case and let jeopardy be attached so the case can be dismissed. It's a tactical decision which the court finds disheartening. [¶] Your request is respectfully denied."

2. Discussion

A defendant has a federal constitutional right to represent himself if he voluntarily and intelligently elects to do so and makes the request within a reasonable time before trial commences. (*Faretta*, *supra*, 422 U.S. 806; *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*).) The California Supreme Court has held, "[I]n order to invoke the right he must assert it within a reasonable time before the commencement of trial." (*People v. Marshall* (1996) 13 Cal.4th 799, 827; *People v. Clark* (1992) 3 Cal.4th 41, 98; *People v. Burton* (1989) 48 Cal.3d 843, 852; see also *People v. Rudd* (1998) 63 Cal.App.4th 620, 625.) Motions made just before the start of trial are untimely. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1205; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [*Faretta* motion made after the jury was sworn and just as opening statements were to begin was untimely]; *People v. Hill* (1983) 148 Cal.App.3d 744, 757 [*Faretta* motion made five days before trial was untimely]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 790-791 [*Faretta* motion made six days before trial was untimely].)

Here, defendant made his motion to represent himself after the trial commenced. The jury had been sworn[5] and instructed by the trial court, and opening statements had been concluded. The trial court deemed the motion untimely, and it had the discretion to deny it. (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397.)

An untimely motion for self-representation is addressed to the trial court's sound discretion. (*Windham*, *supra*, 19 Cal.3d at p. 128 & fn. 5.) In exercising its discretion as to whether or not to deny an untimely *Faretta* motion, the trial court shall inquire "*sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request." (*Windham*, *supra*, 19 Cal.3d at pp. 128-129.) Even if the trial court does not make the sua sponte inquiry into the specific factors underlying defendant's request for self-representation, a trial court's exercise of discretion will nonetheless be upheld on appeal if the record reveals a sufficient reason for the denial of the request. (*People v. Perez* (1992) 4 Cal.App.4th 893, 904; see *People v. Scott*, *supra*, 91 Cal.App.4th at p. 1206 [even if the trial court did not explicitly consider each of the *Windham* factors, "there were sufficient reasons on the record to constitute an implicit consideration of these factors"]; *People v. Dent* (2003) 30 Cal.4th 213, 218 [trial court's denial of a *Faretta* motion for an improper reason will be upheld on appeal "if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds"].)

The trial court did not abuse its discretion in denying defendant's motion for self-representation. The trial court was aware of the *Windham* factors. In denying

---

[5] "For double jeopardy purposes, trial commences when the jury is sworn. [Citation.]" (*People v. Rogers*, *supra*, 37 Cal.App.4th at p. 1057, fn. 3.)

defendant's motion the trial court cited *People v. Rogers*, *supra*, 37 Cal.App.4th 1053. The court in *Rogers* discussed the *Windham* factors. (*Id*. at p. 1057-1058.)

Here, the trial court stated, "[t]he quality of counsel's representation is outstanding." Counsel appeared before the trial court representing defendant at four pretrial conferences and at the commencement of trial, from the time he was appointed to the time of defendant's motion.

The trial court also asked defendant the reason for his request to represent himself. Defendant merely advised the trial court that he wanted to represent himself and he would need additional time to do so, and defendant said "no sir" to the trial court's inquiry of whether there is "anything else [he] want[s] to tell [the trial court]" as the reason for his request.

This matter was at the final stage of the proceedings. The trial had been commenced, the jury was empanelled, and opening statements had been concluded. In addition, defendant's counsel was prepared to proceed with the trial, and defendant repeatedly advised the trial court that delay would be expected to follow if the trial court granted his motion. During the closed hearing, defendant stated, "What I ask is that I could go pro per. I'm needing some time." Moments later, during the open hearing with all parties present, defendant said he was "going to need some time [to] study everything in discovery." Defendant also inquired of the trial court, "Am I going to have time? Are you going to give me time to study?" Granting defendant's request to represent himself would have resulted in disruption or delay of the trial. The trial court did not abuse its discretion in denying defendant's motion to represent himself.

C. Gang Enhancement

Defendant contends that there was not substantial evidence to support the jury's finding that defendant committed the crime for the benefit of a gang. We disagree.

1. Background Facts

The prosecutor asked Detective Zamora to assume, hypothetically, facts closely tracking the shooting of Hernandez, and based thereon whether he had an opinion as to whether the crime would be committed for the benefit of, in association with, or at the direction of the ESL gang. Detective Zamora opined that, "I believe that crime was committed for the benefit of, in association with, or at the direction of the E.S.L. criminal street gang based on the following facts: [¶] First off, E.S.L. gang party. It was an E.S.L. Longo event in E.S.L. gang territory. [There] was a prior dispute between two E.S.L. gang members. On E.S.L. gang member goes, commits a violent act related to that dispute. It's very clear it's a gang-related shooting by coming up there and upping the ante by there being some sort of a disagreement and now coming in and bringing a gun and shooting someone in front of a lot of people, in front of fellow gang members, as well as the community is making a statement. [¶] Being gang related, this is what you do when you have a conflict with gang members. You answer back with some sort of violent act that benefits the gang as a whole. Even though it's on the same gang, it benefits the gang because it instills that fear within the community, instills that fear that the gang could commit this type of violent act. [¶] . . . [¶] The way you control your territory is by fear. The way you make money in your territory is by first off having that fear instilled, then you are able to do other criminal activity such as narcotic sales conducted on the streets, conducted on the sidewalks of the city of Long Beach. That's where they make a big bulk of their money. If you do a narcotics business, you have to control the territory. First, you have to establish your location. First you have to have your location because if you instill fear within the community, you're not getting the constant people calling in saying people selling drugs. The community is scared of you. They won't want to report you to the police. The community won't come in here and be a witness to the crime. They are scared. That's how it benefits the whole gang entirely. Also, specifically to the gang, it is showing its individual members are willing to go out and doing something. [¶] This almost seems like a personal issue between two E.S.L.

gang members. There's a bigger purpose and point to this. That's why the violence is there. That's why violence is so high, other issues at play here."

2. Standard of Review

Defendant's contention that insufficient evidence supported the jury's findings on the gang enhancement is reviewed under a substantial evidence standard. "'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "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."' ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269 . . . .) We apply an identical standard under the California Constitution. (*Ibid.*) 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738].)" (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) In reviewing the sufficiency of the evidence, "a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*Id.* at p. 1181.) We will reverse for insufficient evidence only if '"'"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."'"' (*People v. Manriquez* (2005) 37 Cal.4th 547, 577.) This standard of review applies to gang enhancement findings. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

3. Discussion

Section 186.22, subdivisions (b)(1) and (b)(4) provide for a sentence enhancement 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 . . . ." A gang expert properly may testify about gang affiliation and activity where such evidence is relevant to an issue of motive or intent. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657 (*Killebrew*).) A gang expert properly may testify about "whether and how a crime was committed to benefit or promote a gang." (*Killebrew*, *supra*, 103 Cal.App.4th at p. 657.) Similarly, a gang expert may testify about whether a defendant acted for the benefit of a gang, even though the question is an ultimate factual issue in the case, if such matters are beyond the jury's common experience. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506-509; *Killebrew*, *supra*, 103 Cal.App.4th at p. 651, citing Evid. Code, § 805 ["Otherwise admissible expert opinion testimony which embraces the ultimate issue to be decided by the trier of fact is admissible"].) "'Expert opinion that particular criminal conduct benefited a gang' . . . can be sufficient to support the . . . gang enhancement. (*People v. Albillar* [(2010)] 51 Cal.4th [47,] 63.)" (*People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*).)

A gang expert, however, may not opine on whether a "specific individual had specific knowledge or possessed a specific intent." (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658 [gang expert opinion that vehicle occupants knew there were guns in the car, and that the occupants jointly possessed the guns for their mutual protection was an improper opinion on the ultimate issue and should have been excluded]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550-1551.)

There was substantial evidence to support the gang enhancement. There is substantial evidence that defendant was an ESL gang member. The record also reflects that defendant displayed several gang signs as he fled following the shooting of Hernandez. In addition, in response to the prosecutor's hypothetical question based on facts closely tracking the shooting of Hernandez, Detective Zamora opined that the crime was committed for the benefit of, in association with, or at the direction of the ESL criminal street gang. Detective Zamora explained that a shooting, which occurs in front of several people—as it was here, is blatant and instills fear within the community and

fellow gang members, thereby facilitating the control of the gang's territory. The gang illicitly makes money as a result of controlling its territory. Fear of the gang member's propensity to commit violent acts, even against fellow gang members, also inhibits witnesses to the gang's crimes from reporting or testifying about them.

Defendant contends that Detective Zamora's opinion testimony was in response to the prosecutor's question based on hypothetical facts drawn from the evidence adduced at trial, and therefore it violated *Killebrew*, *supra*, 103 Cal.App.4th 644, and related cases, that prohibit an expert from opining on a defendant's subjective intent. We disagree.

In *Vang*, *supra*, 52 Cal.4th 1038, the defendants' appeal raised the identical issue presented here. They argued the trial court abused its discretion when it allowed the gang detective to testify, in response to a hypothetical question that closely mirrored the facts of the case, that the crime was committed for the benefit of the gang and gang motivated. (*Id*. at p. 1044.) The Court of Appeal found that the trial court erred, although it found the error was harmless. (*Ibid*.)

The Supreme Court stated, "The Court of Appeal erred in condemning the hypothetical questions because they tracked the evidence in a manner that was only 'thinly disguised.' 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.]' [Citation.]" (*Vang*, *supra*, 52 Cal.4th at p. 1045.) The court concluded the expert "could not testify directly whether [the defendants] committed the assault for gang purposes. But he properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Id*. at p. 1048.)

The court in *Vang*, *supra*, 52 Cal.4th 1038, disapproved of *Killebrew*, *supra*, 103 Cal.App.4th 644 to the extent that *Killebrew* is read "as barring, or even limiting, the use of hypothetical questions. " (*Vang*, *supra*, 52 Cal.4th at p. 1047, fn. 3, citing *People v. Gonzalez* (2006) 38 Cal.4th 932.) The Supreme Court stated, "Even if expert testimony regarding the defendants themselves is improper, the use of hypothetical questions is proper." (*Ibid*; see also *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 946, fn. 3 ["It would

be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons"].) "[T]he prosecutor's hypothetical questions had to be based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Vang*, *supra*, 52 Cal.4th at p. 1046.)

Detective Zamora did not testify that defendant had any specific intent or that he was guilty of any specific crime. Instead, Detective Zamora testified that the hypothetical acts were committed for the benefit of, in association with, and in furtherance of a criminal street gang. Such testimony was proper. (*Vang*, *supra*, 52 Cal.4th 1038; *People v. Gonzalez*, *supra*, 126 Cal.App.4th 932.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.