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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD ORTEGA,

Defendant and Appellant.

B231422

(Los Angeles County
Super. Ct. No. VA113572)

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS RIVERA FLORES,

Defendant and Appellant.

B234019

(Los Angeles County
Super. Ct. No. VA113572)

APPEALS from judgments of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Edward Ortega.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant Dennis Rivera Flores.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Taylor Nguyen, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a joint jury trial, defendants Edward Ortega (Ortega) and Dennis Rivera Flores (Flores)¹ were each convicted of the first degree murder of Erick Roche, Jr. (Pen. Code, § 187, subd. (a)),² and the jury found true the criminal street gang allegation (§ 186.22, subd. (b)(1)(C)).

Ortega's jury found true the allegations that a principal personally used a handgun (§ 12022.53, subds. (b) & (e)) and that a principal personally and intentionally discharged a handgun (§ 12022.53, subds. (d) & (e)(1)). Ortega was sentenced to a term of 50 years to life in prison, consisting of 25 years to life for the murder and 25 years to life on the firearm use enhancement. The remaining sentence enhancements were stayed under section 654.

Flores' jury found not true the allegation that he personally used and discharged a firearm and caused great bodily injury and death in the commission of the murder, but it found true the allegation that a principal personally used and discharged a firearm and

¹ Defendants were tried simultaneously with dual juries. Ortega's severance motion was made on the ground that Flores' confession implicating Ortega was inadmissible in a joint trial. Ortega's jury did not hear Flores' confession.

² Unless otherwise indicated, all further statutory references are to the Penal Code.

caused great bodily injury and death in the commission of the murder (§ 12022.53, subds. (b)-(e)(1)). Flores was also convicted of possession of a firearm by a felon under section 12021, subdivision (a)(1). He was sentenced to prison for 50 years to life, consisting of 25 years to life for the murder and 25 years to life on the firearm use enhancement. The criminal street gang enhancement was stayed under section 654, and a two-year sentence for possession of a firearm by a felon was ordered to run concurrent to the sentence for the murder.

On appeal, Flores contends that there was sufficient evidence to disprove his pretrial statement to the police that Ortega was the shooter and Flores had no intent to shoot the victim. Ortega raises various claims, including that absent accomplice testimony, there was insufficient evidence to support his conviction; the trial court erred by failing to instruct the jury sua sponte on accomplices; the trial court erred in not bifurcating the trial of gang enhancements; prosecutorial misconduct; and imposing a 25-years-to-life firearm enhancement for vicarious use based on the gang finding violated equal protection and due process. We disagree and affirm.

FACTS

Ortega and Flores were driving through a rival gang's territory. They got out of the car after seeing 17-year-old Erick Roche, Jr. (Roche) walking down a street. Flores gave a gun to Ortega, and Ortega chased Roche into an alley, fired two bullets into Roche's head and then fled the scene with Flores. Roche died of his gunshot wounds.

A. Prosecution Evidence

1. Evidence Concerning the Crime

On the evening of November 19, 2009, Felicia Cleaver (Cleaver) and Guadalupe Adame (Adame) drove to Flores' house to pick him up. Flores directed Cleaver to pick up Ortega at his girlfriend's house in Pico Rivera. Cleaver and Adame did not know Ortega.

While on the way to pick up Ortega, Flores used Cleaver's cell phone to make a call. On the way to pick up Ortega, they saw Roche walking. Adame knew Roche as "Drips," and that he was in a "tagging crew" called "A.T.D." Adame had known Roche for nine or ten years and she had no ill will toward him. Flores asked Adame where Roche was from, meaning what was his gang affiliation. Adame responded that Roche was from A.T.D., and she did not know if he had gotten into the Pico Nuevo gang.

After picking up Ortega, Cleaver turned onto Rosemead Boulevard with the intention of taking Flores and Ortega back to Flores' home. While traveling, Adame again saw Roche walking on Rosemead Boulevard, but Cleaver did not see him. Ortega and Flores "started to get excited" and talked between themselves. Ortega or Flores told Cleaver to make a U-turn. Cleaver saw that they were "pumped up, jumping up and down." Ortega or Flores told Cleaver to stop the car on a side street and come back in about ten minutes. Ortega or Flores said, "Let's hit him up. We're going to hit him up." Cleaver understood "hitting up" to mean "to see where [someone is] from." Cleaver did not see Roche in the area and did not know who was going to be hit up. She did not want them to hit up anyone and did not know "what was going to happen away from [her] car."

Ortega and Flores got out of the car. Adame looked in the passenger sideview mirror and saw Roche "a ways back" from the car. When Roche saw Flores and Ortega, he ran away. Flores and Ortega chased Roche into an alley. Adame did not see a gun in either Flores' or Ortega's possession. Shortly afterward, Adame heard two gunshots. Flores and Ortega returned to the car. Flores said they had "hit up" Roche, who "said that he wasn't from nowhere."

After the shooting, Flores or Ortega asked Cleaver for a cloth or napkin. When she turned around, she saw Flores holding a revolver in his lap. Until that moment, she had not seen anyone with a weapon. Adame never saw anyone with a gun that evening. Cleaver drove to Flores' house and dropped off the men.

Cleaver did not call the police because she did not see or hear anything and "had no idea what had happened." She learned about the murder about a week later. She still did not report the incident to the police because she was afraid she would be implicated in

the crime. When Cleaver finally spoke to the police, she initially said that she did not know anything about the shooting. She lied to them about what happened because she feared for her and her family's safety. After she saw pictures of Roche, she told the police "everything."

Cleaver's cell phone records showed several calls to and from Ortega's girlfriend's phone number on the night of Roche's killing. Cleaver and Ortega's girlfriend did not know each other, and they had never called each other. Flores was using Cleaver's phone and Ortega was using his girlfriend's phone on the night of the shooting.

Steven Hernandez, who lived near the alley, heard two men arguing followed by two gunshots and then the sound of people running away. He did not see the shooting. Victor Chapa also heard two gunshots. When he looked out his window, he saw two young men running away from the alley and entering a compact car.

Roche died from gunshot wounds to the head. Bullets recovered from Roche's body were so damaged that they could not be positively matched to a .22-caliber revolver belonging to Flores. The bullets bore "the same rifling characteristics" as Flores' gun and the gun could have been "a candidate as having fired" the bullets.

2. Evidence Admitted Against Flores Only

Detective Steven Blagg interviewed Flores on December 10, 2009, and Flores made several audio-taped admissions. Flores admitted he saw Ortega shoot Roche. On that night, Cleaver and Adame picked him up in Cleaver's car after he called Cleaver seeking a ride. He was armed with a loaded .22-caliber Ruger revolver. As they were driving to pick up Ortega, they saw Roche on the street. Adame said that Roche was a "Peanut" from "P.N." They continued to drive to pick up Ortega. At the residence, Flores telephoned Ortega and said: "There's a Peanut, fool, so hurry up and come out."

After Ortega entered Cleaver's car, Flores told Ortega that they had seen a Peanut and suggested that they "go get him." Ortega agreed. Ortega asked for Flores' gun and Flores replied, "Nah. Are you sure?" Flores said he did not want to give his gun to

Ortega because Flores was unsure whether Roche was a Peanut. Ortega insisted that Roche was a Peanut, and he demanded the use of Flores' gun.

When they drove past the alley, Flores and Ortega told Cleaver to stop the car. Flores and Ortega got out of the car and walked back toward the alley. Ortega told Flores, "I'm not gonna shoot him. I'm not gonna touch him—beat him up." Flores and Ortega went into the alley. Ortega told Flores to alert him when Roche approached the alley. Flores observed that Ortega had pulled back the gun's firing hammer. When Roche got closer, Flores told Ortega that Roche was coming.

Flores asked Roche where he was from. Roche was facing Flores and Ortega. Roche replied that he was from nowhere. Ortega called Roche a liar and a Peanut. Flores or Ortega said: "This is Rivera gang dog." When Roche saw Ortega holding the gun, Roche turned and ran into the alley. Flores claimed that he only intended to chase Roche, but Ortega shot him. When Roche fell down, Ortega walked over and fired a second bullet into Roche's head. After the shooting, Flores and Ortega ran back to Cleaver's car and fled.

3. Gang Evidence

Los Angeles County Deputy Sheriff John Clark testified as a gang expert. Deputy Clark explained that Rivera 13 and Pico Nuevo are two rival gangs operating in Pico Rivera.

Deputy Clark opined that Flores was a Rivera 13 gang member based on his gang tattoos and his admission to Deputy Clark. Flores had a tattoo on his upper lip that said "Fuck Peanuts." Peanuts was a derogatory term for Pico Nuevo. Flores also had a tattoo on his chin that said "Rivera." Deputy Clark opined that Ortega was an associate of the Rivera 13 gang.

The area where the shooting occurred was in territory claimed by the Pico Nuevo gang. Deputy Clark was aware of numerous instances of violence between Rivera 13 gang members and Pico Nuevo gang members. Three members of the Rivera 13 gang were either convicted of murder or awaiting trial on murder charges. Based on the

circumstances surrounding Roche's murder, including the fact that it occurred in Pico Nuevo territory, Deputy Clark opined that the offense was gang-related.

B. Defense Evidence

Ortega's girlfriend and her mother provided Ortega with an alibi. They testified that Ortega was with them all day and night on November 19, 2009.

C. Rebuttal Evidence

When Ortega's girlfriend was interviewed in February 2010, she did not recount his alibi. She contacted the detectives in January 2011 to tell them that Ortega was with her on the night of the shooting.

DISCUSSION

A. Sufficiency of Evidence to Disprove Flores' Pretrial Statement that He Had No Intent to Shoot Roche and Ortega was the Shooter

Flores contends that his conviction of murder must be reversed because the People presented insufficient evidence to disprove his pretrial claim that Ortega was the shooter and he only expected to intimidate, challenge and chase Roche, but not to shoot him. We disagree.

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable

suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.] [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, italics omitted.)

Flores relies primarily on the case of *People v. Collins* (1961) 189 Cal.App.2d 575 to support his contention. In *Collins*, the court held that “[t]he prosecution, having presented as a part of its case the statement of [the] defendant as to how the killing occurred, is bound by that evidence in the absence of proof to the contrary.” (*Id.* at p. 591.) However, the court in *Collins* also noted, “The proof of the prosecution showed a case of justification and there is nothing in any of the other evidence which in anywise tends to contradict or dispute defendant’s version of the affair. There was no evidence disproving the claim of self- defense. On the contrary, the only other evidence harmonizes with defendant’s version.” (*Id.* at pp. 590-591.) Thus, after stating that the prosecution was bound by the defendant’s statement, the court added that if there was “any well-established circumstance which may be reasonably regarded as incompatible with the [defendant’s] theory that the killing was justifiable, the trier of fact, from a consideration of all the evidence, is warranted in finding that the act amounted to an unlawful homicide.” (*Id.* at p. 591.)

Consistent with the principles set forth in *Collins*, the court in *People v. Salaz* (1924) 66 Cal.App. 173 noted that “it does not necessarily follow that [the defendant’s] account of the killing, though uncontradicted by direct evidence, should control the jury.” (*Id.* at p. 181.) If any well-established circumstances contradict the defendant’s claim of justifiable self-defense, “then the jury, from a consideration of all the evidence, was warranted in finding that the act amounted to an unlawful homicide.” (*Ibid.*)

The case of *People v. Jacobs* (1952) 111 Cal.App.2d 281 is illustrative. In *Jacobs*, the court found that the evidence supported the defendant’s conviction of murder despite

the prosecution's presentation of her exculpatory statement at trial, because the evidence that the defendant said she did not mean to kill the victim was incompatible with her statement that she did not even remember killing the victim. (*Id.* at pp. 282-284.) The court found that the defendant's inconsistent statement constituted a significantly incompatible circumstance that warranted upholding the defendant's conviction. (*Id.* at p. 284.)

In the instant case, there was substantial evidence to contradict Flores' statement that he intended only to intimidate, challenge, and chase Roche, but not to shoot him. Clearly, Flores' pretrial statements were not all uncontradicted evidence in favor of his rendition of the facts. There was evidence from which the jury reasonably could find that Flores was the shooter or that he intended that Ortega shoot Roche.

The jury heard testimony that Flores knew Cleaver and that Cleaver often "gave Rivera gang members rides." Flores told police he called Cleaver seeking a ride in her "tinted window" car, he entered the car with a loaded .22-caliber Ruger revolver, and he asked Cleaver to pick up his homeboy, Ortega.

The gang expert testified that Flores' gang moniker was "Gunner" and that a gang member "had to work at a certain level of violence to acquire such a moniker." The jury saw for themselves that Flores had "Fuck Peanuts" tattooed on his upper lip and "Rivera" tattooed on his chin. Roche was shot in Pico Nuevo territory, and Rivera 13 gang's primary activities included gun possession and committing murder. Flores himself admitted that after Ortega joined him in Cleaver's car, he told Ortega: "Hey, fool, . . . there's a Peanut" and "Let's go get him there, fool[.]" The jury also heard that Ortega requested Flores' loaded gun; Flores was reluctant because he wanted to get Roche. When Ortega repeatedly stated that he wanted to shoot Roche because Roche was a Peanut, Flores ultimately handed him the gun.

Flores also admitted that he saw Ortega pull the hammer back on his loaded gun. The evidence indicated that Flores' hands were empty when he entered Cleaver's car and a reasonable inference was that he was concealing the loaded gun. Cleaver did not see

Flores or Ortega holding a gun when they exited her car. After the shooting, Flores or Ortega confessed in an excited voice: “We got him.”

Ortega instructed Flores to pretend to talk on a cell phone on the sidewalk as a ploy to alert Ortega when Roche arrived. When Roche arrived, Flores uttered the common gang challenge by asking him where he was from. On the night of the shooting, Ortega was using his girlfriend’s cell phone and Flores borrowed a cell phone from Cleaver. The cell phone records indicated numerous calls on the night of the shooting.

The prosecution presented substantial evidence that the jury reasonably could have used to rebut all or part of Flores’ pretrial statement that Ortega was the shooter and Flores had only expected to intimidate, challenge, and chase Roche. There was sufficient evidence to support the jury’s verdict.

B. Whether Cleaver and Adame were Accomplices, Requiring Independent Evidence to Support Murder Conviction and an Accomplice Instruction

Ortega contends the trial court erred in finding that Cleaver and Adame were not accomplices to Roche’s murder. He submits that since they were accomplices and there was no independent evidence to corroborate their testimony, there was insufficient evidence to support his murder conviction. We disagree.

When the evidence shows that a prosecution witness may be an accomplice, the trial court has a sua sponte duty to instruct the jury on the principles of law governing accomplice testimony, including the need for corroboration. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) “Section 1111 provides: ‘A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.’” (*Ibid.*) This statutory provision defines an accomplice “as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (*Ibid.*; accord, *People v. Sully* (1991) 53 Cal.3d 1195, 1227.) An accomplice, thus, is a person who may attempt to minimize

his or her own culpability by shifting the blame to the defendant. (*Tobias, supra*, at p. 331.)

In determining that Cleaver and Adame were not accomplices as a matter of law, the trial court reviewed the transcript from the preliminary hearing and the transcript of their interviews by the police. The trial court explained:

“[Cleaver and Adame] picked up Mr. Flores, who was known to them only as Gunner, and, as they were driving in the vehicle, the two ladies with Mr. Flores, they saw the victim, [Roche], walking along the street. And Mr. Flores asked, ‘Who is he?’ I believe it was [Adame] that said, ‘That’s Drips.’

“Mr. Flores then asked if he was from, quote, ‘P.N.,’ end of quote. And, again, I believe it was [Adame] that said, ‘Not sure, usually A.T.D.,’ in quotes. ‘Not sure, usually A.T.D.’

“Flores then asked to use [Cleaver’s] cell phone, and he calls someone; obviously, not knowing who it was that he called, but she heard him saying on the cell phone, quote, ‘I caught some fool from P.N.,’ end of quote.

“Then, later on, they picked up Mr. Ortega, and Flores had told [Cleaver] to drive around, and they pass Mr. Roche. Mr. Flores points out — this is according, of course, to [Adame] in her statement of 12-18. Flores then told [Cleaver] to drive around, and they pass Mr. Roche. When they pass Mr. Roche, according to [Adame], Flores points out Roche to Mr. Ortega, who, according to [Adame] Mr. Ortega says, quote, ‘Oh, yeah, that’s a nut. That’s Drips, a Peanut,’ end of quote.

“Flores then told [Cleaver] to park and wait while Roche walked by, and, as Roche gets closer, [Adame] said, ‘They told us to let them out in the alley,’ and they got out, and then the girls went and parked at another place.

“Now, when they got out of the vehicle, Mr. Flores and Mr. Ortega, up to that point in time, according to the statement given by [Adame] on 12-18, she had never seen a gun, there had been no discussion of a gun either on or with Mr. Flores or Mr. Ortega. She gave a statement that she had no idea that they were going to do anything other than, quote, ‘Jump him or something,’ and she heard no statements by either Mr. Flores or

Mr. Ortega as to what they were going to do. Then after the incident, Mr. Flores and Mr. Ortega get back in the vehicle, and Mr. Flores makes some incriminating statements.

“Going to the statement of [Cleaver] on 12-14-09 to the authorities. Up to the time when Mr. Flores and Mr. Ortega got out of the vehicle, her statement was basically the same as Ms. Adame, but, again, she indicated that she saw no gun on either Mr. Flores or Mr. Ortega before they exited the car, and that neither had stated anything to them of what they planned to do once they got out of the car; heard nothing about a gun or a weapon; and then, of course, when they got back in the car, there were some statements made and some action taken by Mr. Flores that’s not pertinent to my issue of being an aider and abettor because that took place after — after, not prior to the shooting.

“Looking at the preliminary testimony of Ms. Cleaver on June 9, 2010, she testified basically as to her statement given to the authorities, and, again, up to that point in time, she had seen no weapon on either Mr. Flores or Mr. Ortega. She knew of no weapon on Mr. Flores or Mr. Ortega. And, as I say, consistent with her testimony or statement. Given to the authorities, up to that time she was ordered to stop, let the two gentlemen out, and she claims that she heard no shots, but the two gentlemen came running back, got in the car, and then, of course, they left.

“She also went on to say in her preliminary hearing testimony that, before Mr. Flores told her to stop and let them off before the shooting, she had heard a male voice in the car, not able to identify which male voice, say, quote, ‘Let’s hit him up,’ end of quote. And that meant to her, according to her testimony, ‘Where you from?’ That is, ‘Let’s hit him up,’ she interpreted that to mean they were going to ask or someone was going to ask, ‘Where are you from,’ meaning Mr. Roche.

“Later, after the incident and she heard of the shooting over the news and whatnot, the question was asked why she didn’t call the police, and she said she didn’t call the police because she did not actually know what had happened on November 19th. That was the substance of her testimony at the preliminary hearing that was in any way different from her statement given to the authorities.

“Going to the preliminary testimony of Ms. Adame, again, it was consistent with the statements given to the authorities. Again, she saw no weapon or heard of no weapon up to the time when Mr. Flores and Mr. Ortega left the car. She, contrary to [Cleaver], she heard two shots after — after Mr. Flores and Mr. Ortega got out of the vehicle. She claims that when they came back in the vehicle, as distinguished from [Cleaver] she saw no weapon. Again, there was no indication that she heard of any threats or any statements made by either Mr. Flores or Mr. Ortega as to what they were going to do when they exited the vehicle.”

The trial court did indicate that if evidence at trial warranted an accomplice instruction, it would instruct the jury accordingly. Counsel for Flores and Ortega did request an instruction that Cleaver and Adame were accomplices as a matter of law. The trial court denied this request. The prosecutor did submit and the court instructed the jury with CALJIC No. 3.19 with regard to Cleaver.³ The prosecutor did not include Adame in the instruction because “there’s no evidence that she did any sort of aiding and abetting, accomplice other than just being in the car.”

Ortega submits that various facts warranted the trial court finding, as a matter of law, that Cleaver and Adame were accomplices. Some of the facts included the following:

1. Cleaver

Cleaver told homicide detectives that she and Adame saw Roche walking after they picked up Flores and both women said “hi” to him. After picking up Ortega, they returned to the area. Flores said, “That’s him,” and told Cleaver to make a U-turn and stop. When Flores and Ortega returned to the car, Cleaver saw Flores with a gun. She told the detectives, “I didn’t know he had a gun on him, or anything. I knew they were

³ CALJIC No. 3.19 provides in part, “You must determine whether the witness [Cleaver] was an accomplice as I have defined that term. [¶] The defendant has the burden of proving by a preponderance of the evidence that [Cleaver] was an accomplice”

going to fight. . . . I knew something was going to happen. You gotta be dumb just to go okay, I'm gonna go around the corner[.] And stay around the corner for 10 minutes. I'm not that dumb. I knew something was gonna happen." Cleaver heard Flores using her cell phone telling someone, "I caught some fool from P.N."

Cleaver testified at the preliminary hearing that after she and Adame picked up Flores, she saw Roche walking on the street and recognized him from high school. Flores used Cleaver's cell phone while they were on the way to pick up Ortega. When Roche was spotted, one of the defendants said, "Let's hit him up." Flores and Ortega got out of the car. Cleaver parked and turned off the engine and headlights. The defendants returned to the car less than ten minutes later. Flores stated, "We did it, we got him," and Flores was holding a gun. Cleaver believed Flores and Ortega were gang members.

At trial, Cleaver admitted lying to homicide investigators who previously interviewed her. She gave rides to gang members. She heard Flores and Ortega in the back seat of the car talking about hitting him up. She understood that "hit[ting] someone up" meant "to see where they're from, obviously, not nicely" She denied that Adame or Flores said anything to her after seeing Roche walking.

2. Adame

Adame told homicide investigators she knew Roche as "Drips." She saw him walking when she and Cleaver were on their way to pick up Ortega. She commented that she did not get along with Roche's sister.

After picking up Ortega, they returned to the area and saw Roche again. Flores asked if he was from P.N., and Adame said she was not sure. After picking up Ortega, Flores told Cleaver to "go back around." They saw Roche again, and Flores pointed him out to Ortega, who said, "That's Drips, a Peanut." Adame knew "Peanut" referred to the Pico Nueva gang. Cleaver parked the car and when Roche got closer, "they told us to let them out in the alley, and . . . to go park" When Flores and Ortega returned, Flores stated that he had shot Roche.

Adame testified at the preliminary hearing that while driving with Cleaver and Flores, she saw Roche walking and recognized him from high school. She said, “That’s Drips,” and that he was a member of the A.T.D., a tagging crew. Flores asked if he was from P.N., and Adame said she wasn’t sure.

Cleaver picked Ortega up a short distance from where they had seen Roche walking. She drove back to the area where Roche was still walking. Flores told Cleaver to stop the car, and both defendants got out of the car. Adame denied hearing them say anything before they got out of the car. Adame heard two gunshots, and then defendants returned to the car. When they returned, Flores said, “he hit [Roche] up” “that [Roche] said he wasn’t from nowhere and . . . he said ‘Yeah, you are, you’re a Nut.’” Adame knew that “Nut” or “Peanut” referred to the Pico Nuevo gang.

On cross-examination, Adame testified when she saw Roche walking after picking up Ortega, she did not tell anyone. She also testified that she did not recall telling anyone in the car that she did not like Roche; she said she did not like his sister.

At trial, Adame testified that when she saw Roche, she said to Cleaver, “That’s Cynthia’s brother,” and referred to him as “Drips.” She denied saying he was a member of a gang, but she knew he was a member of the A.T.D. tagging crew. She also denied hearing anyone use the term “Peanuts” or “nuts” the night of the shooting.

3. Accomplices as a Matter of Law

The evidence does not support Ortega’s contention that Adame and Cleaver were accomplices as a matter of law. They were not gang members. They did not know Flores very well and did not know Ortega at all. There was no evidence of a discussion in the car among the women, Flores and Ortega about hurting Roche or evidence that the women wanted Roche assaulted. There was no evidence that either of the women knew that Flores had a gun prior to the shooting. Cleaver saw the gun only when Flores and Ortega returned to the car after shooting Roche.

The evidence also does not support Ortega’s contention that Adame “targeted” Roche. She did point him out to Cleaver as a person she recognized. Adame knew

Roche through school and through his sister. She also was not targeting Roche by simply answering Flores' question about Roche's gang affiliation. Adame told Flores that Roche was from a tagging crew and she did not know if he was a Pico Nuevo gang member. The facts simply show that Adame was present in the car.

Cleaver was the driver of the car and did not know "what was going to happen away from [her] car." Cleaver followed the directions of Flores and Ortega, without being aware of their criminal intentions. (See *People v. Boyer* (2006) 38 Cal.4th 412, 467 [an accomplice must share the knowledge and intent of the principal].) Cleaver "had no idea what had happened" and she did not learn about Flores' and Ortega's crime until a week later.

In sum, there was evidence that Cleaver and Adame were in the car with defendants and dropped them off so they could question Roche about being a gang member, but Cleaver and Adame did not know that the defendants were armed and planning to shoot Roche. Absent such knowledge, they were not accomplices. (See *People v. Boyer, supra*, 38 Cal.4th at p. 467.)

In support of Ortega's argument that Cleaver and Adame were accomplices as a matter of law, he relies on the case of *People v. Medina* (2009) 46 Cal.4th 913. In *Medina*, two defendants were convicted as aiders and abettors on charges of first degree murder, and a third defendant was convicted as the principal. The defendants were members of a gang. They verbally challenged the victim, who was the member of a rival gang, which resulted in a fistfight between the defendants and the victim. After the fistfight, one of the defendants shot and killed the victim as he was driving away from the scene of the fight. (*Id.* at p. 916.) The Supreme Court held that there was sufficient evidence to support the convictions of the two non-shooting defendants as aiders and abettors, because a rational trier of fact could have concluded that the shooting death of the victim was a reasonably foreseeable consequence of the gang attack. "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'"

[Citation.]” (*Id.* at p. 920.) The test “‘is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable.’” (*Ibid.*, italics omitted.)

The instant case is distinguishable from *Medina*. In *Medina*, all three defendants participated in the beating of the victim, who was later shot to death by one of the defendants. (*People v. Medina, supra*, 46 Cal.4th at p. 916.) In the instant case, Cleaver and Adame did not participate in planning or carrying out the attack on Roche.

Inasmuch as Cleaver and Adame were not accomplices as a matter of law, we may consider their testimony in determining whether there is substantial evidence of Ortega’s guilt. Their testimony established that defendants stated to each other, “Let’s hit him up. We’re going to hit him up.” They got out of the car, chasing Roche into an alley. Cleaver and Adame heard two gunshots, and Flores and Ortega ran back to the car, directing Cleaver to leave. Cleaver saw Flores with a gun. Flores bragged that they “hit up” Roche and “got him.”

There was other independent evidence that connected Ortega to the crime. A gun linked to Flores was a “candidate as having fired” the bullets that killed Roche. An individual who lived near the crime scene heard two gunshots and saw two young men running away from the alley and enter a car. Records of Cleaver’s cell phone shows several calls to and from Ortega’s girlfriend’s cell phone on the night of the murder, placing Ortega and Flores together at the time of the crime.

4. Failure to Instruct on Accomplice Testimony with Regard to Adame

In the alternative, Ortega asserts that the trial court erred in failing to instruct the jury to determine whether Adame was an accomplice. While the trial court did give the accomplice instruction pursuant to CALJIC No. 3.19 with regard to Cleaver, the court determined that there was no evidence to support the instruction as to Adame because she was not aiding and abetting and was just a passenger in the car. We agree with the trial court.

Adame was not a gang member and did not know Flores or Ortega well. She never was involved in directing Cleaver to drive anywhere. When she responded to Flores' inquiries about Roche, she never called Roche a "Peanut" or said anything about disliking Roche, and she never told Flores or Ortega to hurt Roche. Adame did not participate in the shooting but sat in the car with Cleaver, unaware of the criminal intent of the passengers. She was simply present at the crime scene, and mere presence at a crime scene is insufficient to establish accomplice liability. (*People v. Lewis* (2001) 26 Cal.4th 334, 369.)

The evidence does not support Ortega's assertion that Adame acted as an accomplice, and the trial court did not err when it refused to instruct the jury on accomplice testimony pursuant to CALJIC No. 3.19 as to Adame.

C. Motion to Bifurcate Trial of Gang Allegations

Ortega contends that the trial court violated his right to due process in denying his motion to bifurcate the trial on the gang enhancement allegation. In the alternative, he claims the trial court erred by failing to exclude "highly inflammatory" evidence pertaining to Flores' gang affiliation. We disagree.

1. Denial of Bifurcation

In *People v. Hernandez* (2004) 33 Cal.4th 1040, the Supreme Court addressed the question of bifurcation of gang enhancement allegations. It began by examining its holding on bifurcation of prior conviction allegations: because of the unique potential for prejudice if the jury learns of the defendant's prior convictions, the value of bifurcating trial of the allegations has been recognized by the Legislature and the courts. (*Id.* at pp. 1048-1049, citing Pen. Code, § 1025 and *People v. Calderon* (1994) 9 Cal.4th 69, 74-77.) The court then observed that trial of gang enhancement allegations differs, in that "[a] prior conviction allegation relates to the defendant's status and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that

offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation.” (*Hernandez, supra*, at p. 1048, italics omitted.)

Additionally, “the Legislature has given no indication of a similar concern regarding enhancements related to the charged offense, such as a street gang enhancement. Nothing in section 186.22 suggests the street gang enhancement should receive special treatment of the kind given prior convictions.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

The Supreme Court did not go so far as “to say that a court should never bifurcate trial of the gang enhancement from trial of guilt.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) It noted that “[t]he predicate offenses offered to establish a ‘pattern of criminal gang activity’ (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant’s actual guilt.” (*Hernandez, supra*, at p. 1049.)

The Supreme Court left it to the trial court’s discretion to determine whether to bifurcate trial of gang enhancement allegations. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1050.) In doing so, it noted that the trial court’s discretion to deny bifurcation is broader than its discretion to admit gang evidence when no gang enhancement is alleged. (*Ibid.*) It also noted that the burden is on the defendant “‘to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.’” (*Id.* at p. 1051.)

Here, the trial court exercised its discretion to deny the motion to bifurcate the gang allegations, indicating that the gang allegations were “inextricably attached to the charged offense.” The court stated: “Okay. Again, looking at *People [v.] Hernandez* and what *Hernandez* says to the trial court is whether or not the enhancement is inextricably attached to the charged offense, and then looking at the facts of this particular case as gleaned from the newspaper, from the preliminary hearing transcript,

from arguments previously made in this matter, these two gentlemen were riding in a vehicle with two young ladies. One of the gentlemen asked the ladies, when they saw the gentleman walking on the street, whether or not they knew anything about him. Apparently the answer was, in essence, no, but somebody in the vehicle, either Mr. Flores or Mr. Ortega, instructed the driver to turn around so they could get out of the vehicle and confront the victim. Language was gleaned that a challenge was made, a classic gang challenge to the victim, for example, ‘Where you from,’ allegedly attributed to the victim. He indicated he was not from anywhere. There was an announcement made, either by Mr. Ortega or Mr. Flores, that, ‘this is Rivera gang, dawg.’ One of the defendants, perhaps it was Mr. Flores, we don’t know yet, asked one of the females in the vehicle whether or not the victim was from Pico Nuevo, and that, when one of the defendants got back in the vehicle, a statement was made by one of the defendants that, ‘we hit the victim up.’ The gang expert testified that that’s gang language for asking where this particular person, what gang he was from. And, apparently, one of the defendants also indicated that the victim was called ‘Nut,’ which is an abbreviation for ‘Peanut,’ which is some sort of a moniker for the Pico Nuevo gang, and that the testimony from the gang expert was that Pico Nuevo was a rival gang of Rivera 13.

“So it’s the court’s opinion, in exercising its discretion as spelled out in *People* [v.] *Hernandez* and under [section] 352, that the gang enhancement allegation is more probative. It’s not minimal. It’s inextricably attached to the charged offense. Everybody indicates that motive is not an element of the crime charged. That’s true, but motive may be considered, as an instruction given to the jury, as the basis for why the crime came about. So, in exercising my discretion, the court does find that the facts of a gang allegation are relevant to the predicate charges, that that information is probative to motive, intent and identity.”

Ortega’s reliance on our case of *People v. Albarran* (2007) 149 Cal.App.4th 214 is not persuasive. In *Albarran*, the jury found the defendant guilty of attempted murder, shooting at an inhabited dwelling, and attempted kidnapping for carjacking, with true findings as to gang enhancement allegations. The trial court dismissed the gang

enhancements for insufficient evidence but refused to grant the defendant's new trial motion as to the underlying charges. (*Id.* at p. 217.) The trial court believed that some gang evidence was relevant to the motive or intent for the underlying crimes even though the gang evidence was not sufficient to prove the gang allegations. The appellate court found the motive was not apparent from the circumstances and the gang expert conceded not knowing the reason for the crimes. The court found a due process violation, because there was no permissible inferences that could be drawn from the gang evidence as to the underlying charges. (*Id.* at pp. 229-231.)

The *Albarran* court recognized it was a rare and unusual occasion where the admission of evidence violated due process. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 232.) The court observed that “as a general rule, evidence of gang membership and activity 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. [Citation.] Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. [Citations.]” (*Id.* at pp. 223-224.)

Unlike the circumstances in *Albarran*, the gang evidence in the instant case was relevant as to Ortega's motive and intent and to show why Roche was killed. The evidence clearly showed that Roche was targeted because of his possible membership in a rival gang. Additionally, the gang expert in the instant case testified as to a gang-related motive for the killing. The trial court did not abuse its discretion in denying the bifurcation motion. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1050.)

2. Photographic Gang Evidence

Ortega also contends that the trial court erred when it permitted defendant's jury to hear “the most inflammatory evidence of Flores's gang affiliation.” He challenges the introduction of the photo of Flores' “Fuck Peanuts” tattoo, a photo of a Rivera 13 gang member's tattoo depicting “a violent assault upon a ‘Peanut Man,’” a photo of Rivera 13

graffiti announcing that the gang members were “killers,” and a photo of Flores and another man holding guns to their heads.

Initially, the People contend, with the exception of the photo of Flores’ “Fuck Peanuts” tattoo, Ortega has forfeited his challenge to the introduction and admission of the gang evidence by failing to raise an objection in the trial court. We agree. (Evid. Code, § 353; *People v. Pinholster* (1992) 1 Cal.4th 865, 935, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Mattson* (1990) 50 Cal.3d 826, 853-854.) But in any event, the trial court did not abuse its discretion in permitting the introduction of the challenged evidence. It was relevant to prove the charged offense and the gang allegation.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (*Id.*, § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id.*, §§ 400, 402.) We review the trial court’s determination as to admissibility that turns on relevance for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Evidence Code section 352 gives the trial court the discretion to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) We will not disturb the trial court’s exercise of its discretion on appeal unless the court has abused its discretion (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070), i.e., if its decision exceeds the bounds of reason. (*DeSantis, supra*, at p 1226.)

As with any other evidence, we review the trial court’s decision to admit evidence pertaining to gangs and gang membership for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Waidla, supra*, 22 Cal.4th at p. 717.) Gang evidence clearly has a potential for prejudice. (*Carter, supra*, at p. 1194; *People v. Albarran, supra*, 149 Cal.App.4th at p. 223.) When it meets the test of relevancy,

however, it is admissible unless its prejudicial effect clearly outweighs its probative value. (*Carter, supra*, at p. 1194; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) The trial court properly admits gang evidence when it is relevant to a material issue at trial. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413.) It is not admissible when its only purpose is to prove “a defendant’s criminal disposition or bad character” in order to create “an inference the defendant committed the charged offenses.” (*Albarran, supra*, at p. 223; accord, Evid. Code, § 1101, subd. (a).)

In order to prove the specific intent necessary for murder and deliberation and premeditation, the evidence in the photographs was relevant. The tattoo was probative of defendants’ motive and intent for murder. The other tattoo and the graffiti photographic evidence verified the deep hatred and dislike between the two gangs. The gang warfare was certainly relevant to show motive, although it had a potential to affect the jury. Moreover, the evidence as to Flores was relevant to rebut his pretrial statement that he had no intent to shoot Roche. In sum, the trial court did not abuse its discretion in permitting the prosecutor to introduce the photographic gang evidence. (See *People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

D. Prosecutorial Misconduct

Ortega contends the prosecutor committed misconduct by “failing to control the conduct of his own expert witness” and allowing inadmissible evidence of Ortega’s arrest record to be brought before the jury. Assuming *arguendo* there was misconduct, it was not prejudicial.

Prosecutorial misconduct “involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.” (*People v. Panah* (2005) 35 Cal.4th 395, 462.) There may be prosecutorial misconduct even in the absence of intentionality or bad faith. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) However, reversal for prosecutorial misconduct is not required unless defendant has been prejudiced thereby (*People v. Fierro* (1991) 1 Cal.4th 173, 209), i.e., if it is reasonably probable defendant would have

obtained a more favorable result absent the misconduct (Cal. Const., art. VI, § 13; *People v. Hill* (1998) 17 Cal.4th 800, 844; *People v. Watson* (1956) 46 Cal.2d 818, 836).

Prior to trial, the trial court ordered that Ortega's arrest records not be brought before the jury during the gang expert's testimony concerning his membership or association with the Rivera 13 gang. The court explained that "the gang expert can testify based upon hearsay, and the gang expert can testify that, based upon records or information that he has looked through, that Mr. Ortega has associated in the past with members of Rivera 13"

At trial, the following colloquy occurred between the prosecutor and Deputy Clark, regarding Ortega's association with the Rivera 13 gang:

"[The Prosecutor]: Do you have an opinion if Mr. Ortega would be an associate of Rivera 13?

"[Deputy Clark]: Yes, I do.

"[The Prosecutor]: What is that opinion?

"[Deputy Clark]: It's, again, based on my training, my experience, as well as police reports that I have—

"[The Prosecutor]: Let me interrupt you real quick. Have you reviewed documents that indicate to you or have shown or displayed to you Mr. Ortega in the company of other Rivera 13 gang members?

"[Deputy Clark]: Yes.

"[The Prosecutor]: Okay. One document or more than one document?

"[Deputy Clark]: I've had the opportunity to view at least six crime reports now that list Mr. Ortega with—or I'm sorry. I should say as being arrested with—

"[Ortega's trial counsel]: Your Honor, I'm going to object to this line of questioning, and I'm going to ask to approach the bench."

Ortega's trial counsel moved for a mistrial. The trial court denied the motion. The court stated that it would admonish the jury to disregard and not consider Deputy Clark's previous answer regarding the documents reviewed. The court also instructed the jury, "An answer was given by Detective [*sic*] Clark regarding documents he looked at

upon which he based his opinion whether or not Mr. Ortega is or is not an associate. I'm striking that entire answer that he gave to that question. And when I strike that answer, you're not to consider that answer for any purpose whatsoever, so do keep that in mind." The jury must be presumed to have followed the court's admonition and instruction, which cured any harm. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

It is clear that the prosecutor did not attempt to elicit inadmissible evidence in violation of a court order (*People v. Crew* (2003) 31 Cal.4th 822, 839), and in fact attempted to prevent his witness from violating the court order. To the extent the witness's statements may be considered prosecutorial misconduct, it was not prejudicial and reversal is not required. In light of the non-specific references to "police" and "crime" reports and the trial court's admonition, it is not reasonably probable Ortega would have received a more favorable result in the absence of the witness's statements. (*People v. Hill, supra*, 17 Cal.4th at p. 844.)

E. Firearm Enhancement For Vicarious Use Based on the Gang Enhancement

Ortega contends the imposition of a 25-years-to-life sentence for the vicarious personal use of a firearm, based upon the finding that the crime was gang-related, violates his equal protection and due process rights. We disagree.

Ortega argues that a person who aids and abets the personal use or discharge of a firearm in a gang case is similarly situated to the aider and abettor in a non-gang case, and section 12022.53, subdivisions (d) and (e)(1), impermissibly treats these two groups of offenders unequally. Ortega acknowledges that his claim has been rejected by the court in *People v. Gonzales* (2001) 87 Cal.App.4th 1 and *People v. Hernandez* (2005) 134 Cal.App.4th 474. We acknowledge Ortega's need to raise this issue in order to preserve it for federal review, but we reject his contention.

Ortega contends that equal protection is violated because it singles out accomplices who commit a crime for the benefit of a gang, as opposed to accomplices who do not commit a crime for a gang. As noted in *Gonzales* and *Hernandez*, while it is true that equal protection is violated if similarly situated groups are treated in an unequal

manner, the two groups Ortega identifies are not similarly situated. “Unlike other aiders and abettors who have encouraged the commission of a target offense resulting in a murder, defendants committed their crime with the purpose of promoting and furthering their street gang in its criminal conduct.” (*People v. Gonzales, supra*, 87 Cal.App.4th at p. 13.) “[A]nd on that basis, their equal protection argument fails.” (*Ibid.*) There is a rational basis for treating the two groups differently. (*People v. Hernandez, supra*, 134 Cal.App.4th at p. 483.)

Ortega also claims that imposing the firearm enhancement without requiring intent and knowledge of the firearm use violates due process. This argument was also rejected by *Gonzales* and *Hernandez*.

The firearm enhancement statute “is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang members who aid and abet that offense in furtherance of the objectives of a criminal street gang. Section 12022.53, subdivision (e) is precisely the clear expression of legislative intent to extend an enhanced penalty to aiders and abettors [¶] [Defendant’s] argument is contrary to aider and abettor jurisprudence in California. As we have seen, the only requirement is that the aider and abettor intend to facilitate the target offense and that the offense ultimately committed is the natural and probable consequence of the target offense.” (*People v. Gonzales, supra*, 87 Cal.App.4th at p. 15; accord, *People v. Hernandez, supra*, 134 Cal.App.4th at p. 483, citing *Gonzales*.) Hence, it does not violate due process.

DISPOSITION

The judgments are affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.