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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALDO ACOSTA,

Defendant and Appellant.

B288884

(Los Angeles County
Super. Ct. No. VA128762)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul Anthony Sahagun, Judge. Affirmed.

Boyce & Schaefer and Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Reginaldo Acosta appeals his conviction for first degree murder with a firearm enhancement. He challenges the court's admission of uncharged crimes evidence, denial of his motion to bifurcate the gang enhancement allegation, and issuance of a limiting instruction on gang evidence. He also argues separately that the cumulative effect of these errors and the imposition of assessments and fines without a determination of his ability to pay deprived him of due process. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. The Murder

Defendant and Juan Sanchez were members of the Barrio Los Padrinos (BLP) street gang. On October 17, 2012, defendant, Sanchez, and Sanchez's brother attended a party. Several people at the party, including defendant and Sanchez, used crystal methamphetamine.

Victim Angelo Ortuno was a member of the Compton Varrio 132 gang. Ortuno arrived at the party sometime that evening.¹ Sanchez saw Ortuno put a "ball" of crystal methamphetamine into his pocket. Ortuno told Sanchez that Sanchez's brother had taken Ortuno's car. Ortuno was worried because narcotics were in the car.

In the late hours of October 17, 2012, defendant called his friend, Alma Yanez, and asked her to pick him up. Yanez drove defendant, Sanchez, and Ortuno in her black two-door Ford Explorer to her residence in Compton. Inside Yanez's residence, defendant, Sanchez, and Ortuno made phone calls. Sanchez testified that he, Yanez, Ortuno and defendant all got high on crystal methamphetamine at Yanez's house, but Yanez denied

¹ The gang expert testified that there was no "beef" between Compton Varrio 132 and BLP, and that the gangs "got along."

that she or the others used narcotics. Yanez testified that defendant seemed to be under the influence of alcohol or narcotics.

In the early morning of October 18, 2012, under the impression that they were helping Ortuno locate his car, Yanez again drove defendant, Sanchez, and Ortuno in her Ford Explorer. Ortuno was the front passenger. Sanchez sat behind Yanez, and defendant sat behind Ortuno. Yanez followed defendant's directions and drove into the parking lot of an apartment complex in the City of South Gate.

As Yanez and Ortuno moved to exit the vehicle, defendant shot Ortuno twice in the head. Defendant then unlatched Ortuno's seatbelt and pushed Ortuno's body out the open passenger door. Defendant placed a long-barreled chrome .357-caliber revolver in his waistband.

The shooting shocked Yanez and Sanchez. Defendant instructed Yanez, " 'Drive, stupid, drive.' " While reversing out of the parking lot, Yanez drove over Ortuno's body. Defendant told Sanchez, " 'Be cool' " and " 'Relax, dog.' " Sanchez asked defendant why he shot Ortuno; defendant did not reply.

Yanez dropped off Sanchez at his home, and drove defendant back to Yanez's residence in Compton, where defendant took a shower. At some point, defendant told Yanez something to the effect of, " 'Hey, you didn't see anything, you saw nothing.' " Yanez agreed, stating " 'That's fine. I didn't see nothing.' " Yanez construed defendant's statement as a threat.

2. *The Investigation*

Police recovered Ortuno's body at the South Gate apartment parking lot. A medical examiner determined that Ortuno's killing was a homicide and that the cause of death was multiple gunshot wounds to the head. Given the trajectory of the bullets, the shooter was seated behind and to the left of Ortuno.

The police did not recover narcotics from Ortuno's body after the shooting. The gun used to shoot Ortuno was never found. After further police investigation, Yanez's Ford Explorer was impounded, and defendant, Sanchez, and Yanez were arrested.

Ortuno's blood was found on both the passenger door frame and the rubber trim located along the bottom of the passenger door of Yanez's vehicle. Gunshot residue was detected on the top of the interior roof over the right passenger seat area.

Yanez was arrested when she tried to retrieve her impounded car. She told police she did not report the murder because she was scared. She was aware that she was not supposed to "snitch" based on the "rules of the streets" and knew snitching was dangerous. After the murder, she moved from California with her children, and was provided with relocation assistance from both a state program and the sheriff's department.

Sanchez was arrested and interviewed by police. When asked why he did not report the murder to the police, Sanchez stated that he was scared and mentioned his daughter. Sanchez testified that the "paperwork" of his participation in this case verified that he had snitched on defendant and had put his life in danger.

3. *Defendant's Phone Call*

On November 16, 2012, while in jail, defendant made a phone call to a person named Armando. The conversation was recorded by law enforcement and played for the jury.² During the phone conversation, defendant spoke in English and Spanish and made several statements evidencing consciousness of guilt.

² A transcript of the call with English translation was provided to the jury as well.

Defendant stated: “Hey, speak to Alma, and Chucky³ and . . . you know the reason why . . . I had to go. . . . I was waiting homie but, shit was getting . . . too close. So I was feeling it already.” Defendant continued, “I already felt it, already—already felt that shit you know, that shit was, it was attacking my conscience . . .” Defendant said, “go speak to Alma homie, tell her . . . go talk to Alma man, go speak to Alma and Chucky. That’s the only two fools that were there with me, and tell ‘em: ‘Hey fool, I wanna know, that day homie, in the truck homie, with that fool from the, one, [D]irty [S]hoes, homie, you know?” “Dirty Shoes” referred to the Compton Varrio 132 gang, of which Ortuno was a member. In the jailhouse phone call, defendant also stated: “[B]efore anything you get . . . a cool understanding when you speak to Alma and Chucky. You know, and tell her, tell her to sell that damn truck already.”

4. *Charges*

On May 10, 2016, the People filed an information charging defendant with murder and possession of a firearm by a felon. As to the murder count, the People alleged that defendant personally used and intentionally discharged a firearm, which caused the victim’s death. For each count, the People alleged a gang enhancement.

5. *Pretrial and Trial*

The trial court made two rulings prior to trial which defendant challenges on appeal. First, the court granted the People’s motion in limine to present evidence of uncharged crimes, including carjacking and attempted murder, committed by defendant to show identity or common scheme or plan. The court also denied defendant’s motion to bifurcate the gang

³ “Lil Chuckie” was Sanchez’s gang moniker. “Alma” is Yanez’s first name.

allegation from the murder trial. We describe the proceedings relative to these rulings in greater detail in the discussion section below.

Jury trial commenced on December 2017. The People introduced testimony from Sanchez, Yanez, one of the victims of the uncharged crimes, law enforcement officers and investigators, and a medical examiner. Sanchez and Yanez testified to the events of the murder which we have already described.

A Los Angeles County Sheriff's deputy in the gang unit testified that she had contact with defendant in November 2011. During the contact, defendant identified himself as from BLP gang and stated his moniker was "Lil Trix." The investigator arrested defendant for possession of a firearm and documented the tattoos she observed on his body, including the letters BLP on his stomach and LP on his wrist. She testified that if she had observed "187" tattooed on his trigger finger, she would have documented it. A number 187 tattoo was mentioned in her police report.

The People's gang expert testified about (1) gang relationships, (2) defendant's and Sanchez's membership in the BLP gang and their gang monikers, (3) Ortuno's gang (Compton Varrio also known as Dirty Shoes) and his gang moniker, and (4) the significance of gang tattoos. The expert explained that gangs maintain control of their gang territory through fear and intimidation. The reason the expert was of the opinion the shooting was committed for the benefit of BLP was because defendant was with another gang member when he committed the murder.

The expert stated that the primary activities for the BLP gang included shootings, carjackings, and murders. The expert then identified four members of BLP by name and listed the crimes they had been convicted of, including attempted murders

and possession of narcotics while armed with a firearm. The expert stated that defendant's two brothers are BLP members and one was convicted of assault with a deadly weapon and attempted robbery. The expert testified that witnesses are reluctant to come forward based on the danger of snitching in gang culture.

The gang expert was asked about photos taken a week before trial, in which defendant had "187" tattooed to his trigger finger. The tattoo was significant because it meant that the individual was "willing to pull the trigger." The number 187 referred to the Penal Code section for murder. Before the Ortuno murder, Yanez had seen the number "187" tattooed on defendant's right hand. A police witness also observed the same tattoo on defendant's right index finger in January 2013.

The People provided the jury with a transcript of and played an audio recording of defendant's jail phone call with Armando.

The People also elicited testimony from the victim of a carjacking and attempted murder committed by defendant 13 days after the Ortuno murder. The victim testified that he and his grandfather had pulled to the side on Interstate 15 Freeway in San Bernardino, when a Honda Civic stopped in front of them. Defendant exited from the car, approached and asked for a ride. The victim refused. Defendant then brandished a handgun, pointed it at the victim's face, and forced him to enter the right rear passenger side of the victim's car. The grandfather complied with defendant's order to sit in the front passenger seat. Defendant's female companion sat in the driver's seat and defendant sat behind her. Defendant's male companion sat between defendant and the victim in the backseat.

The victim testified that defendant appeared to be in charge of his companions and gave orders. While the female

drove, defendant demanded money from the victim and grandfather. Defendant told them: “‘I will do you guys a favor. I will let you live, but you have to give me \$500 each.’” The grandfather turned around and passed cash to defendant. When defendant demanded more money, the grandfather pulled out his own handgun, which unbeknownst to defendant was not loaded, and pointed it at defendant. As defendant aimed his gun at the grandfather, the victim grabbed it and was shot in the hand. The grandfather then dropped his gun and grabbed defendant’s gun. Defendant’s male companion picked up the grandfather’s gun, pointed it at the grandfather, and pulled the trigger. Realizing that the gun was not loaded, the male companion pistol whipped the victim and the grandfather. During the altercation, defendant regained control of his gun and discharged another two or three rounds. The car crashed, and defendant and his companions fled on foot.

At the close of the People’s case, the trial court granted the defense motion for judgment of acquittal on the gang allegation and struck the allegation as to both the murder and felon in possession counts. The court reasoned that the murder surprised the occupants of the vehicle, the victim was not a rival gang member—although he was in a different gang—and there was no evidence defendant bragged about the murder or attempted to profit from the notoriety of being a killer. In light of the dismissal of the gang allegation, the parties agreed to the withdrawal of exhibits submitted to prove the predicate offense requirement. The trial court later gave a limiting instruction on gang activity evidence, directing the jury to consider the gang activity evidence only for the limited purpose of deciding whether defendant was the person who committed the murder and evaluating the credibility of witnesses. The instruction stated the jury could not consider the evidence for any other purpose,

such as evaluating defendant's character or his disposition to commit a crime. Defendant did not object to the instruction.

Defendant presented no evidence. For the possession of a firearm by a felon count two charge, the parties stipulated that defendant previously was convicted of a felony.

The jury found defendant guilty of first degree murder and possession of a firearm by a felon, and found the firearm use allegations to be true. The court struck the prior prison term allegation.

Before sentencing, defendant moved for a new trial, arguing that he was prejudiced by the court's admission of the gang evidence to prove the gang enhancement, which was ultimately dismissed. The People argued that the gang evidence established identity because Acosta and the witnesses were known by their street monikers. The court denied the new trial motion finding there were sufficient reasons to admit the gang evidence other than to prove the gang enhancement.

The trial court sentenced defendant to an aggregate term of 50 years to life in prison. Without objection, the court imposed a court operations fine, a criminal conviction assessment, and a restitution fine.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues that the court erred in admitting evidence of uncharged crimes, denying his motion to bifurcate the gang enhancement, issuing the limiting instruction on the gang evidence, and imposing fines and assessments without a prior ability to pay determination. We address each in turn as well as defendant's argument of cumulative error.

1. *The Court Properly Admitted the Uncharged Crimes Evidence to Show Identity and Common Scheme or Plan*

Defendant argues the court erred in admitting evidence of uncharged crimes because the evidence was not sufficiently similar to the murder to show identity or common scheme or plan. Alternatively, he asserts that even if relevant, the evidence should have been excluded under Evidence Code section 352 for undue prejudice.

a. *Relevant Proceedings*

Before jury selection, the prosecution sought to introduce evidence of the uncharged carjacking and attempted murder that defendant had committed 13 days after the charged murder to prove identity and common plan or scheme. The People argued that the uncharged and charged crimes shared “unique criminal characteristic[s].” In both, defendant was accompanied by a female driver and a fellow BLP gang member, defendant showed a willingness to commit murder with a loaded revolver inside the confines of a vehicle while he was positioned in the backseat, and defendant’s victim was seated in the front passenger seat. The motive for each appeared to be theft (methamphetamine and cash, respectively). The prosecutor emphasized the nearly identical physical setting in which the two sets of crimes were committed—in a vehicle in which defendant sat immediately behind the victim: “I understand that it’s a sliding scale with respect to the similarity that is required but just the facts of both of these cases, the criminal characteristics, I can’t recall a previous gang case I’ve handled where the execution took place within the confines of the vehicle.” By way of contrast, the prosecutor pointed to what he described as the more typical gang drive-by shooting or other outside encounter.

Defense counsel argued the uncharged crimes should be excluded because they were a product of random spontaneous acts and the only similarity between the uncharged and charged crimes was that a firearm was discharged inside a vehicle.

The trial court ruled the uncharged crimes evidence was admissible to show a common scheme or plan. The court did not expressly rule on whether the evidence was admissible to prove identity.⁴ The court found that in the uncharged and charged crimes, defendant was armed with a loaded firearm, he was in a position of advantage in the backseat of a vehicle, and he pointed the firearm at the victim seated in the front passenger seat. The court noted that in the uncharged crimes, defendant could have easily robbed the victims outside their vehicle and taken the vehicle without forcing the victims into the front and rear seats. The court found the probative value of the uncharged crimes evidence was not outweighed by any prejudicial effect under Evidence Code section 352. The court indicated that it would give a limiting instruction either at the time of, or after, the presentation of the uncharged crimes evidence if defense counsel fashioned the appropriate instruction.

Without objection at the close of evidence, the court instructed the jury with CALCRIM No. 375, which allowed the jury to consider the evidence for “the limited purpose of deciding whether: [¶] (A) The defendant was the person who committed

⁴ On appeal, the parties do not distinguish admissibility on the basis of identity from common plan. “This distinction, between the use of evidence of uncharged acts to establish the existence of a common design or plan as opposed to the use of such evidence to prove intent or identity, is subtle but significant.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.) In the present case we find the analysis essentially the same for both.

the offenses alleged in this case; or [¶] (B) The defendant had a plan or scheme to commit the offenses alleged in this case.” The instruction admonished: “Do not consider this evidence for any other purpose except for the limited purpose of mentioned above. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.”

b. Applicable Law and Standard of Review

“Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition,’ such as identity, common plan, or intent. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common plan, and intent ‘only if the charged and uncharged crimes are sufficiently similar to support a rational inference’ on these issues.” (*People v. Edwards* (2013) 57 Cal.4th 658, 711 (*Edwards*)). And, “its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352).” (*People v. Leon* (2015) 61 Cal.4th 569, 598 (*Leon*)). “We review the trial court’s determination for abuse of discretion, and view the evidence in the light most favorable to the trial court’s ruling.” (*Edwards, supra*, 57 Cal.4th at p. 711.)

In *People v. Ewoldt, supra*, 7 Cal.4th at page 402, our Supreme Court held that to prove the existence of a common design or plan, “evidence of uncharged misconduct must demonstrate ‘not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which

they are the individual manifestations.’ [Citation.]” “To show a common design, ‘evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts.’” (*People v. Leon, supra*, 61 Cal.4th at p. 598.)

An example of such similarity is found in *People v. Edwards, supra*, 57 Cal.4th at pages 711–712, where evidence that defendant committed a prior murder in Hawaii was admitted to prove his identity as the perpetrator of the charged murder in California, as well as intent and common design. The common features of the murders were sufficiently distinctive to support the inference that the same person committed both acts. Both victims were older Caucasian women who lived alone on the first floor of an apartment building. (*Ibid.*) The cause of death for both women was strangulation, and both suffered broken noses and ligature marks on their wrists and ankles. The evidence also strongly suggested both victims had been sexually penetrated. (*Id.* at p. 712.)

c. The Court Did Not Abuse Its Discretion in Admitting the Uncharged Crimes Evidence

Defendant argues that the carjacking incident was not sufficiently similar to the murder in this case to establish either identity or common scheme or plan. We disagree.

Here, the trial court was within its discretion to conclude the evidence of the uncharged crimes was relevant to prove identity because the common features of the uncharged carjacking and Ortuno’s murder were “ ‘sufficiently distinctive so as to support the inference that the same person committed both acts.’ ” (*Edwards, supra*, 57 Cal.4th at p. 711.) In both crimes, defendant positioned himself in the backseat of the vehicle with

the victim in the front passenger seat, and shot a loaded gun at the victim while they were both inside the car. The setting within a passenger vehicle, the positioning of the victim and defendant in the seats, and the willingness to fire a deadly weapon within the small confines of vehicle are all hallmarks unique to defendant's mode of attacking his victims. These features are distinctive enough to show that it was defendant who committed Ortuno's murder.

Defendant argues that the trial court abused its discretion in admitting the uncharged crimes to prove identity or common plan based on dissimilarities with the charged crime: "Ortuno's killer deliberately waited to kill Ortuno until the car reached a parking lot. But the uncharged shooting was not planned, occurring when the victims unexpectedly began struggling with the robbers for control of the gun. The Ortuno killing was a murder with an unknown motive; the motive for the uncharged attempted murders was robbery and carjacking."

We acknowledge dissimilarities but conclude the trial court reasonably admitted the evidence, for there are many more similarities than defendant credits. Defendant positioned both victims in the front seat of the car, and placed himself at an advantage behind them. Fellow gang members were present. Defendant wielded a gun in both instances and fired it in close range at the passenger in the front passenger seat. Although both crimes developed differently, they ended in the same way: defendant firing a weapon within the confines of a vehicle at a victim seated in front of him. His method of maintaining control of and assaulting the victims was the same. (See *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 828 [similarities in kidnapping victims from the side of the road, placing them in a van, and sexually assaulting them].)

Both shootings involved the same motive of theft. (*People v. Walker* (2006) 139 Cal.App.4th 782, 804 [“ ‘[t]he presence of the same motive in both instances may be a contributing factor in finding a common plan or design’ ”].) Defendant initially commanded the victim’s vehicle and demanded money from the two men during the uncharged carjacking. Evidence of the Ortuno murder suggested defendant’s motive was theft because Ortuno had a “ball” of crystal methamphetamine and more drugs in his car before his death, and no narcotics were recovered from his body. During closing argument, defense counsel argued that Ortuno was killed for his “ball of crystal meth” and the car that contained drugs.

The record also supported the inference that defendant occupied a leadership role in both the uncharged and charged crimes. In the uncharged crimes, the victim testified that defendant appeared to be in charge of his two cohorts and gave orders during the incident. In the charged crime, Yanez testified that she followed defendant’s instructions on where to drive and his orders not to report the crime. When these “similarities are viewed in the aggregate, the pattern of similar characteristics is sufficiently unusual and distinctive that a rational inference of identity may be drawn.” (*People v. New* (2008) 163 Cal.App.4th 442, 471.)

Defendant asserts that even if the evidence was admissible to show identity or common plan, it should have been excluded under Evidence Code section 352. A trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. “ ‘Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable ‘risk to the fairness of the proceedings or the

reliability of the outcome [citation].’ ” ’ [Citation.]” (*Edwards, supra*, 57 Cal.4th at p. 713.)

The tendency of the evidence to prove identity and common design or plan was strong. On the other hand, the evidence of the uncharged offenses was not unduly inflammatory. Both uncharged crimes victims survived defendant’s assault with injuries to their hands in what appeared to be a botched carjacking that defendant eventually abandoned. (See, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 842; *People v. Case* (2018) 5 Cal.5th 1, 41; *Edwards, supra*, 57 Cal.4th at pp. 713–714; *People v. Foster* (2010) 50 Cal.4th 1301, 1332.) Those facts pale in comparison to the execution style killing of Ortuno.

Any prejudice was dispelled by the trial court’s instruction. “Do not conclude from [the uncharged crimes] evidence that the defendant has a bad character or is disposed to commit crime.” This instruction “ ‘minimiz[ed] the potential for improper use.’ ” (*Foster, supra*, 50 Cal.4th at p. 1332.) We presume that jurors follow the court’s instructions. (*Case, supra*, 5 Cal.5th at p. 41.)

We are also confident the admitted evidence contributed little, if at all, to the verdict obtained. There was no element-focused defense a trial, only an assertion by defense counsel in closing argument that he honestly did not know what happened in the car coupled with an emphasis on reasonable doubt and attacks on Sanchez’s and Yanez’s credibility. That is because there was not much else to argue. There was strong independent evidence of guilt, and in particular, of defendant’s identity as the perpetrator. This was most significantly shown in defendant’s own statements on the recorded jail call directing “Armando” to get “a cool understanding when you speak to Alma and Chucky” (the “only two fools that were there” in the truck with defendant and “that fool from the . . . [D]irty [S]hoes”) and to tell Alma “to sell that damn truck already.”

We conclude the trial court did not abuse its discretion in finding the uncharged crimes evidence admissible under Evidence Code sections 1101 and 352.

2. *The Trial Court Did Not Err in Denying the Motion to Bifurcate the Gang Evidence*

Defense counsel moved in limine to bifurcate the gang enhancement. The People opposed the motion, arguing the gang evidence was inextricably intertwined with the facts underlying the murder, specifically the gang evidence was relevant: (1) to establish defendant's identity as the shooter through his gang moniker; (2) to assess the eyewitness' credibility; and (3) to provide context to defendant's out-of-court statement referring to "Dirty Shoes." Defense counsel asserted that identity was not an issue, given that both eyewitnesses knew defendant by his moniker of "Lil Trix." The court denied the motion to bifurcate, finding gang evidence would be introduced in the first phrase even if the trial were bifurcated. At trial, the gang evidence was admitted as we have previously described.

On appeal, defendant argues "the trial court's denial of the motion to bifurcate permitted the prosecutor to introduce highly inflammatory evidence that was only relevant to prove the enhancement." The trial court's eventual acquittal of defendant on the gang enhancement, the defense contends, confirms the prejudicial effect of the denial to bifurcate.

Defendant's argument presupposes that even if the trial court had bifurcated the trial, gang evidence would not have been admitted on the underlying charge. Defendant is incorrect both on the law and on the facts. Evidence of gang membership may be relevant to and admissible in the trial of the substantive offense even without a gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory,

membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*Ibid.*) “To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (*Id.* at pp. 1049–1050.)

“Accordingly, when the evidence sought to be severed relates to a charged offense, the ‘burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. . . . The burden is on the defendant . . . to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice.’” (*Hernandez, supra*, 33 Cal.4th at p. 1050.)

We review a trial court’s denial of the motion to bifurcate a gang allegation for abuse of discretion based on the record as it stood at the time of the ruling. (*Hernandez, supra*, 33 Cal.4th at pp. 1048–1450.) “Given the public policy preference for the efficiency of a unitary trial, a court’s discretion to deny bifurcation of a gang allegation is broader than its discretion to admit gang evidence in a case with no gang allegation.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 952 (*Franklin*).)

We conclude the trial court did not abuse its discretion. Evidence of defendant’s gang membership would have been properly admitted on the murder charge whether or not the trial was bifurcated for at least four reasons: First, as we have already observed, the prior uncharged crimes evidence showed defendant’s common plan of shooting at a victim in a car while in the presence of a fellow gang member. The presence of gang

associates in each of the vehicles gave defendant significant advantage over his victims.

Second, defendant's membership in BLP and the gang expert's testimony about the types of violent crimes committed by BLP, gang intimidation, and gang hostility toward "snitches" was also relevant to the jury's assessment of Sanchez's and Yanez's credibility. Neither witness voluntarily reported the crime to police immediately after the killing, yet they both identified defendant at trial. Sanchez and Yanez explained that they did not initially go to the police because they were afraid for themselves and their families. "Whether members of a street gang would intimidate persons who testify against a member of that or a rival gang is sufficiently beyond common experience that a court could reasonably believe expert opinion would assist the jury." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 945 [holding that the gang expert testimony was relevant to witness credibility]; *People v. Ayala* (2000) 23 Cal.4th 225, 276 [evidence suggesting gang involvement was admissible as bearing on witnesses' credibility].)

Third, defendant's gang moniker was also relevant to the jury's understanding of the identification of defendant by Sanchez and Yanez. Yanez testified that "Lil Trix" or "Trix" had shot the victim in the head. Sanchez similarly testified that "Lil Trix" shot the victim. Defendant's gang affiliation helped to explain how those witnesses knew defendant by his gang moniker.

Finally, the gang evidence was admissible to explain defendant's jailhouse phone call to Armando and his reference to "Dirty Shoes," a derogatory term for Ortuno's gang, thus connecting him further to the crime.

That the trial court ultimately acquitted defendant of the gang enhancement meant no more than that the People had

failed to establish the predicate facts for the enhancement. It did not diminish the relevance of the gang evidence to the underlying murder. On this point, we find *Franklin* instructive. The *Franklin* defendant was convicted of burglary, false imprisonment, and other crimes. The jury found true a gang enhancement as to some but not all of the crimes. At trial significant gang evidence was introduced, including that the defendant's gang had 85 to 90 members, some of whom had committed gang crimes of murder, assault, robbery and other crimes; that gang crimes were committed to instill fear in the community and discourage witnesses from testifying in court; and how members of one gang associate with members of other gangs especially under the auspices of the Mexican Mafia. The gang expert evidence in *Franklin*, in general, mirrored the evidence in the present case.

Here and in *Franklin*, the trial court denied bifurcation, and in both cases evidence to prove the enhancements was ultimately found to be legally insufficient. In the present case, the trial court acquitted defendant of the gang enhancement. In *Franklin*, the Court of Appeal found that the true findings on the gang enhancement were not supported by substantial evidence and struck them. (*Franklin, supra*, 248 Cal.App.4th at pp. 947, 957.) The appellate court reminded, "That the defense countered with a different theory did not diminish the relevance of the gang evidence offered in support of the prosecution's case, *nor does our conclusion that substantial evidence does not support true findings on the gang allegations mean that such evidence was inadmissible to prove the substantive charges.*" (*Id.* at p. 953, italics added.)

Defendant relies on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) to show that denial of his bifurcation motion was error. In *Albarran*, the defendant and

another man fired guns at a house. Prior to trial, the court ruled that the proffered gang evidence was relevant not only to the gang enhancement but also to the issues of motive and intent for the underlying charges. (*Albarran, supra*, 149 Cal.App.4th at p. 220.) The jury found the defendant guilty of the charged offenses and found the gang enhancement allegations true. (*Id.* at p. 222.) On a motion for a new trial, the trial court found there was insufficient evidence to support the gang findings, the trial court granted the new trial as to the enhancement but denied it as to the underlying charges. The gang allegations were ultimately dismissed. (*Ibid.*)

The Court of Appeal reversed and ordered a new trial, holding that, even if some of the gang evidence was relevant to the issues of motive and intent, other “extremely inflammatory” gang evidence was admitted that had no relevance to the underlying charges. (*Albarran, supra*, 149 Cal.App.4th at pp. 227–228.) This evidence included gang graffiti of threats to kill police officers, defendant’s tattoo showing allegiance to the Mexican Mafia (a violent prison gang), and descriptions of other gang members and their arrests. (*Id.* at pp. 220–221.) The court concluded this evidence “had no legitimate purpose” in the trial and posed the danger “that the jury would improperly infer that whether or not [defendant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished.” (*Id.* at p. 230.) The court held that the “case present[ed] one of those rare and unusual occasions where the admission of evidence . . . violated federal due process and rendered the defendant’s trial fundamentally unfair.” (*Id.* at p. 232.)

We do not find defendant’s reliance on *Albarran* persuasive: the gang evidence there was far more inflammatory

than in the present case. The gang evidence here was directly related to the circumstances of the murder and the identification of defendant as the killer. The trial court did not abuse its discretion in denying the motion to bifurcate.

3. *The Limiting Instruction on Gang Evidence Was Properly Given*

Defendant also contends that it was error for the trial court to give a limiting instruction on gang evidence. The court instructed jurors with CALCRIM No. 1403: “You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant was the person who committed the murder. You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit [a] crime.”

On appeal, defendant contends the instruction was erroneous because it told jurors they could consider “[defendant’s] propensity in deciding whether he was guilty of murder.” The quick answer is that the instruction says just the opposite. It states: “ ‘You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit a crime.’ ” This may explain why defense counsel failed to object to the instruction. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 [defendant forfeited for appeal claim that jury instruction was misleading, where defendant failed to request modification or clarification in the trial court].) We address the merits of defendant’s argument because of his separate point that failure to object resulted in ineffective assistance of counsel.

“We review de novo whether a jury instruction correctly states the law. [Citation.] Our task is to determine whether the trial court ‘ “fully and fairly instructed on the applicable law.” [Citation.]’ ” (*People v. Lopez* (2011) 198 Cal.App.4th 698, 708 (*Lopez*)). Here, the limiting instruction, was neither contrary to law nor misleading. As the court concluded in *People v. Samaniego, supra*, 172 Cal.App.4th at pp. 1148, 1168, CALCRIM No. 1403 states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the credibility of witnesses.

The sentence in the limiting instruction that defendant challenges—“You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant was the person who committed murder”—correctly informed jurors that they could consider gang evidence on the issue of the shooter’s identity and on its effect on witness credibility. (*Hernandez, supra*, 33 Cal.4th at p. 1049.) We find no error in the instruction and no ineffective assistance of counsel for failure to object.

4. Cumulative Error

As we have found no error, we need not address defendant’s claim of cumulative error.

5. Fines and Assessments

Defendant was ordered to pay a \$300 restitution fine (Pen. Code, § 1202.4), a \$30 court facilities assessment (Gov. Code, § 70373) on both counts, and a \$40 court operations assessment (Pen. Code, § 1465.8) on both counts. Defendant argues that, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the trial court violated his federal and state right to due process by imposing the \$140 in assessments and the \$300 restitution fine without determining his ability to pay. He asserts “the

assessments must be reversed and the execution of the fine stayed until and unless the [P]eople demonstrate that [defendant] has the ability to pay.”

In *Dueñas*, a homeless, jobless mother of two children, who subsisted on public aid while suffering from cerebral palsy, appealed fines imposed against her despite the trial court’s finding that she could not pay them. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160–1161.) Dueñas was caught in a longstanding cycle of poverty that had been exacerbated by fines she accrued by driving with a suspended license. Dueñas had repeatedly served time in jail in lieu of paying fines because of her inability to pay, and had suffered other severe adverse consequences due to nothing more than her own impoverishment. (*Ibid.*)

These facts bear no resemblance to the present case.

In contrast to *Dueñas*, at the sentencing hearing in this case, defendant did not object to the above assessments or fine, nor did he alert the court to any issues relating to his ability to pay.⁵ The record contains limited information about defendant’s financial circumstances. At the time of sentencing, defendant was 27 years old. The probation report indicated that defendant was in prison custody when he was arrested for the present case and that in a “2011 Own Recognizance Report,” defendant’s mother stated that defendant “had been working part-time through temporary agencies as a warehouse worker and also did

⁵ The People argue defendant forfeited his *Dueñas* argument on appeal by failing to assert his inability to pay in the trial court. The People also contend *Dueñas* was correctly decided in part and wrongly decided in part. We need not address these issues as we conclude the facts of defendant’s case fail to invoke the principles set forth in *Dueñas*.

odd jobs in construction and recycling.” There was no other information about defendant’s financial assets or liabilities. Defendant’s lengthy prison sentence suggests that, in addition to whatever assets defendant may have, defendant will be able to satisfy the relatively small assessments through his prison wages. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 490; Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1) [prison wages range from \$12 to \$56 per month].)

DISPOSITION

The judgment is affirmed.

RUBIN, P.J.

WE CONCUR:

BAKER, J.

MOOR, J.