Filed 3/14/12 P. v. Trejo and Benites CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JASON TREJO and ERIC BENITES, Defendants and Appellants.	B227399 (Los Angeles County Super. Ct. No. NA077735)

APPEAL from judgments of the Superior Court of Los Angeles County, John David Lord, Judge. Affirmed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant Jason Trejo.

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant Eric Benites.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants and appellants Jason Trejo and Eric Benites appeal on multiple grounds from a judgment of conviction of murder, multiple counts of attempted murder, assault with a firearm, and as to Benites, possession of live ammunition by a minor. The evidence at trial demonstrated that appellants had recently joined a Long Beach criminal street gang, and over a span of several weeks, executed at least four different shootings targeting rival gang members.

First, appellants contend that there was insufficient evidence on which to base their conviction for assault with a firearm because the evidence showed only that Benites pointed a gun at the victim. We disagree and hold that pointing a loaded gun while using threatening language, as Benites did here, constitutes assault with a firearm.

Second, appellants, who were 14 and 15 years old at the time of their arrests, contend that they did not knowingly and intelligently waive their rights against self-incrimination before making damaging statements to the police. Based on our examination of the totality of the circumstances, we conclude that their waivers were valid.

Third, appellants assert that the trial court erred in instructing the juries that, in deciding such issues as appellants' identity, plan, and intent, they could rely on evidence of uncharged assaults and shootings. Appellants have forfeited their right to argue that the admission of such evidence to prove identity and intent was erroneous, because they conceded the admissibility of this evidence for such purposes below. Further, their arguments fail on the merits, because the uncharged offenses, most of which were directed at the same victims targeted in the shootings for which they stood trial, have substantial probative value with respect to the issues of appellants' identity, plan, and intent.

Finally, Benites argues that the trial court abused its discretion in committing him to state prison instead of the California Youth Authority (CYA) without first commissioning a study regarding his amenability to treatment at CYA, and that to the extent trial counsel should have requested such a report but failed to do so, Benites was denied effective assistance of counsel. However, Benites was statutorily ineligible for *commitment* to CYA and thus the trial court was not required to assess his amenability to CYA treatment. Further, the trial court did not abuse its discretion in placing great weight on the severity of Benites' offenses in declining to order that Benites be *housed* in CYA.

We thus affirm the judgment in all respects.

PROCEDURAL BACKGROUND

Criminal Charges Against Appellants

Appellants were charged with the following crimes: in count 1 with murder (§ 187, subd. (a))[1]; in counts 2, 3, 4, and 6 with attempted premeditated murder (§§ 664/187, subd. (a)); and in count 5 with assault with a firearm (§ 245, subd. (a)(2)). Benites was further charged in count 7 with attempted premeditated murder (§§ 664/187, subd. (a)) and in count 8 with possession of live ammunition by a minor (§ 12101, subd. (b)(1).)

It was alleged that all of the counts were committed for the benefit of a gang. (§ 186.22, subd. (b)(1)(C).) It was further alleged that (1) Trejo personally used a firearm causing death or great bodily injury in count 1 (§ 12022.53, subds. (b)-(d)); (2) Trejo personally and intentionally discharged a firearm in count 2 (§ 12022.53, subds. (b)-(c)); (3) Benites personally used a firearm causing death or great bodily

---

[1] All undesignated statutory references are to the Penal Code.

injury in counts 3 and 4 (§ 12022.53, subds. (b)-(d)); (4) Benites personally used a firearm in count 5 (§ 12022.5, subd. (a)); (5) Benites personally and intentionally discharged a firearm in count 7 (§ 12022.53, subds. (b)-(c)); and (6) a principal personally used a firearm causing death or great bodily injury in counts 1, 3, and 4 (§ 12022.53, subds. (b)-(d), (e)) and personally and intentionally discharged a firearm in counts 2 and 6 (§ 12022.53, subds. (b)-(d), (e).)

Appellants pleaded not guilty and denied the special allegations. Separate juries were impaneled for each appellant, who were tried as adults. (Welf. & Inst. Code, § 707, subd. (d)(2).)

Hearing on Appellants' Waiver of Miranda Rights

The trial court conducted a hearing pursuant to Evidence Code section 402 ("402 hearing") after appellants objected to the introduction at trial of statements made by appellants following their arrest. Appellants did not testify or introduce any evidence at the 402 hearing.

1. *Miranda Warnings and Waiver as to Benites*

Officer Malcolm Evans testified that he and his partner, Detective Mendoza, met with Benites on January 14, 2008, at 12:28 a.m. Benites was 15 years old at the time of the interview. He was under arrest and had been placed in handcuffs, but was uncuffed for the interview. The officers did not tell him why he was under arrest; they instead told him they wanted to speak to him about an "incident." The officers did not ask him if he wanted to call his mother. Officer Evans did not ask Benites how far he had gotten in school. He also did not ascertain whether Benites was on probation.

The officers presented to Benites a form containing legal advisements, and told him that he should read the form, and if he understood it, put his initials at the end. Benites read the form out loud in front of the officers. Officer Evans asked him if he understood everything as he read it, and he said yes. Benites initialed next to each of the rights stated on the form, and signed the form. Thus, Benites signed his initials after each of the following statements: (1) I have the right to remain silent; (2) Anything I say may be used against me in court; (3) I have the right to talk to a lawyer and have one present with me while I am being questioned; (4) If I cannot afford a lawyer, one will be appointed for me; (5) I understand each of these rights explained to me. Next to item No. 6, which states, "I want to talk," Benites wrote "yes." Officer Evans told him that by saying he wants to talk, Benites was indicating he wanted to talk about the reason he was there. He told Officer Evans that he wanted to talk.

Approximately one hour into the interview, Officer Evans told Benites he was going to start recording the interview. At the beginning of the recording, Officer Evans again presented him with the *Miranda* form and reminded him of his *Miranda* rights before interviewing him for another 25 minutes.

2. *Miranda Warnings and Waiver as to Trejo*

At approximately 2:13 a.m. that same morning, Officer Evans and Detective Mendoza met with Trejo. Officer Evans asked Trejo if he could read and write, and Trejo did not give him any indication that he could not. Officer Evans also asked him if he was in school, but did not ask if he was in special education. The officers did not ask Trejo if he was tired or how much sleep he had had the day before.

The officers presented the same form containing legal advisements to Trejo, who read it out loud. Trejo did not appear to have any problem reading the form and did not ask for help. Trejo wrote his full name next to the first line. Although Officer Evans testified that "it's not the greatest writing," he could read it. The first name "Jason" was legible, but the last name "Trejo" was more difficult to decipher because the "r" and the "e" appeared to be written on top of each other. Officer Evans asked him to initial at the end of each line if he understood everything. As Trejo read each advisement of rights, he initialed the line. He also wrote "yes" after item 6 stating "I want to talk." Trejo printed his full name at the bottom of the form where it asked for his signature.

Trejo was asked if he wanted anything to eat or drink, but he said no and that he had already been given a bottle of water which he consumed. Officer Evans asked Trejo if he knew the difference between right and wrong; Trejo said that he did. Officer Evans asked him for an example of something that was wrong, and Trejo said it would be wrong to steal and to do badly in school. When asked to give an example of something that would be considered right, he said "to do well in school." The officers pointed to a piece of pink paper on the desk and asked Trejo if it would be true or a lie to say the paper was blue; Trejo responded that it would be a lie. The officers also asked Trejo if it was the truth or a lie that they were police officers, and he answered that it would be true. They asked Trejo if it would be truthful or a lie to say that the walls of the interview room were soft, and Trejo said that would be a lie. Trejo stated that he had learned about right and wrong and about telling the truth and telling lies from his family and from school.

At approximately 3:45 a.m., the officers stopped the interview, and reconducted an interview that they recorded. During that second interview, the

officers advised him again regarding his *Miranda* rights. That interview ended at approximately 4:00 a.m.

3. *The Court's Ruling*

Appellants argued that the waivers were not valid because the advisement form was inadequate, and because appellants were only 14 and 15 years old, they were asked to sign the waivers after midnight, and they were not told why they were arrested or allowed to call their parents. Trejo's counsel further argued that the illegible manner in which Trejo wrote his name on the form should have indicated to the police that he was of insufficient intelligence to understand the consequences of waiving his right to silence. The court stated that it was "not a penmanship test" and denied the motion to exclude appellants' statements to the police.

The Verdict

The juries found appellants guilty of all the counts as charged, and found the murder to be first degree and all the attempted murders to be premeditated. All the special allegations were found true, except that Trejo's jury found that he personally used a firearm in counts 1 and 2, but not that he intentionally discharged it causing death or great bodily injury.

Sentencing

Benites requested that the trial court order him housed in the CYA. The court declined to issue such an order and sentenced him to state prison for four consecutive terms of 25 years to life, plus five terms of 15 years to life, plus 85 years and eight months.

Trejo was sentenced to state prison for four consecutive terms of 25 years to life, plus four terms of 15 years to life, plus 52 years.

The court subsequently modified both Trejo's and Benites' sentences to terms of 50 years to life in prison, calculated on a sentence of 25 years to life in prison for count 1, plus an additional consecutive sentence of 25 years to life in prison for the firearm enhancements pursuant to Penal Code section 12022.53. All other sentences previously imposed were ordered to be served concurrently to this sentence.

EVIDENCE AT TRIAL[2]

Appellants' Gang Membership

Chris Zamora, a Long Beach police officer and expert on gangs, testified that appellants were members of the West Side Longos, or WSL, a criminal street gang in Long Beach. Trejo's monikers were "Little Man" and "Little Jay" and Benites' monikers were "Darky" and "Terco."

As of 2008, the West Side Longos were rivals with another Hispanic gang, the East Side Longos, as well as the graffiti tagging crew "Los Marijuana Smokers," or LMS. They also counted as their rivals the Insane Crips gang. Benites' brother, Bobby Cano, had been murdered by a member of LMS. After his murder, it was believed that there was not enough retaliation against LMS.

---

[2] Appellants only challenge the sufficiency of the evidence with respect to count 5 (assault with a firearm). For the remaining counts, rather than include an exhaustive description of all the evidence admitted at trial, we merely synopsize the evidence, except where a more detailed discussion is necessary to resolve the other issues on appeal.

Shooting on December 27, 2007 (Count 6)

Johnny Williams testified that he was standing next to his car near 23rd Street and Earl Avenue in Long Beach, talking to two friends, when he saw two Hispanic men walking up the street towards him. He saw one of the men hold up a gun, point it at the three of them, and start shooting. He dropped to the ground. Approximately 47 rounds were fired before the shooter and his companion left. He was not able to identify the shooter, but remembered he had tattoos of "1" and "8" under his eyes.

Possession of Ammunition (Count 8)

On January 1, 2008, Detective Timothy Everts of the Long Beach Police executed a search warrant of Benites' residence. Inside a backpack, he found a sock containing numerous live .22 caliber rounds.

Shooting on January 6, 2008 (Counts 1-2)

Isaac Alcarez testified that, on the afternoon of January 6, 2008, he was walking down Cedar Avenue towards the corner of 15th Street in Long Beach when he saw his friend Florentino Rivera on a scooter. Alcarez was a member of the East Side Longo gang at that time; Rivera was not a gang member. As Alcarez approached Rivera, and was within four feet of him, he heard two shots and looked to the left and saw Trejo, whom he knew as "Lil Man" or "Jay," and Benites, whom he knew as "Darky." He identified Trejo as the shooter.

Alcarez and Rivera ran across the street, and Alcarez could see that Rivera had been hit; he was touching his chest and throwing up blood and then he collapsed. An autopsy later performed on Rivera revealed that he died from a single gunshot wound.

Alcarez testified that he had known Trejo for six years and Benites for two years before the shooting. Trejo lived around the corner from where Rivera was shot, in East Side Longo territory. Alcarez had tried, unsuccessfully, to recruit Trejo into the East Side Longos, but Trejo had joined the "enemy" gang West Side Longos instead. Alcarez testified that the East Side Longos were not getting along with the West Side Longos at the time of the shooting. Trejo had shot at him on one occasion prior to the day Rivera got shot, and Benites had previously shot at him on two occasions. Alcarez first stated that Trejo had shot at him three years earlier, but then testified that the three shootings had all occurred in the two weeks before the Rivera shooting, all in the same vicinity. In all these instances, Benites and Trejo were together.

Shootings on January 10, 2008 (Counts 3-5)

Marvin Coleman testified that on January 10, 2008, he and his friends David Cuevas, Jonathan Bugarel, and one other friend were sitting on the front stairs of Bugarel's apartment building in Long Beach. Bugarel went inside to take out the trash, and soon after, two Hispanic men approached them from behind the building. The taller man pulled a bandana over his face and then pulled out a gun. One of the men yelled out "WSL," which stands for West Side Longos. As Coleman was running away, he was shot in the back. At trial Coleman identified Trejo as the shorter man. He was not able to identify Benites.

Coleman recognized Trejo as a man with whom he had "got into it" at a skate park in the neighborhood a week and a half before the shooting. That day, Trejo was with another Hispanic man.

Cuevas also testified about the shooting on January 10, 2008. He testified that two men wearing black hoodies came through the back gate and approached

them. The taller one pulled out a gun and pointed it at Cuevas, Coleman, and Brian Velasquez while calling out, "Where is the LMS? This is West Side Longo." The shorter one pointed at Coleman and said, "He is from B.I.G.," the abbreviation for the Baby Insane Gang, a sect of the Crips. Then the taller one started shooting and hit Cuevas in the back and the arm. Cuevas did not get a good enough look at the men's faces to be able to identify them.

Bugarel testified about the events that evening as well. He and Coleman had been in Bugarel's apartment and were about to leave, but then Bugarel was called back in to take the trash out. As he was taking the trash out to the dumpster behind the apartment building, he was startled to see two men near the dumpsters. They asked him something but at the time of trial he did not remember what they said. One of them had his right arm extended and he may have been holding a gun, but Bugarel could not remember. Bugarel quickly turned around and went back inside his apartment. When he got back inside his apartment, through a window he saw two shadows pass by moving towards the front of the apartment. His father then asked him a question, and then immediately after, Bugarel heard gunshots. He went outside and saw his neighbor David Cuevas lying on the ground.

After the shooting Bugarel identified Benites from a six-pack photographic lineup as the person who shot Cuevas and Coleman, but he admitted at trial that he did not actually see the shooting and relied on the fact that Coleman told him the taller one was the shooter. From a photographic lineup he also identified Trejo as the shorter man who was with the shooter. At trial, Bugarel identified Benites as the taller man and Trejo as the shorter one he saw behind his apartment.

Like Coleman, Bugarel also remembered Trejo as the man who had started a problem at a skate park a couple of weeks earlier, and he also recognized Benites as the man who had been with Trejo at the skate park. Bugarel testified that he and

Coleman went to the skate park and appellants hopped over the fence of the park, tried to beat up Coleman, and chased him off with a stick.

Detective Brad Scavone, a City of Long Beach police officer, interviewed Bugarel on February 1, 2008, regarding the events on January 10, 2008. According to Scavone, Bugarel told him that Benites pointed a gun at him and asked him where he was from; Bugarel responded that he did not "gang bang." According to Bugarel, Benites then jumped over the fence into the alley, and Trejo called for him to come back. At that point Bugarel ran back inside his apartment.

Vicente Gonzalez, a former LMS gang member, testified that when gang members want to start a fight with someone, they ask the other person where they are from. Bugarel, who is not a gang member, testified that the phrase "where are you from" is used by gang members to mean "what gang are you from?"

January 11, 2008 Shooting at the L.A. Market on 10th Street (Count 7)

Anabel Guzman, the then-girlfriend of West Side Longo member Jose Ramirez, testified that on the afternoon of January 11, 2008, Ramirez's brother asked her to pick up Trejo and Benites in her van and give them a ride to a birthday party. Guzman had met Trejo and Benites two or three weeks earlier when she had given them a ride to Trejo's house. At that time they told her they were from West Side Longo. Trejo said he went by the name "Lil Man", and Benites said he went by "Tercko."

While Guzman was giving them a ride on January 11, Benites asked her to stop at the L.A. Market on 10th Street. Guzman saw a man and a couple of girls in front of the market. She parked in the alley next to the market and Benites got out while Trejo and her three young children remained in the car with her. Benites went around the corner to the front of the market, and Guzman heard three gun

shots. Then Benites came running back to the van, got back in the car, and told Guzman to go. She said, "No." He pointed a gun at her head and told her, "I'm not playing with you." When she still refused to go, he said, "I'll fucking shoot your ass, and I'll come after your family." At that point she drove off.

As they were driving down Martin Luther King Boulevard and were at the intersection of Ninth Street, Benites pointed down in the direction of 10th Street and asked Trejo, "Do you remember we shot them fools, them bitch ass fools from LMS over there?" Trejo did not respond. When they got to a gas station at the corner of Seventh Street, Guzman asked them to get out and did they did.

Vicente Gonzalez testified that he was the target of the shooting on January 11, 2008. He was exiting the market with a friend and two girls when he saw Benites, whom he recognized because they had previously gotten in a fight because Gonzalez was from LMS and Benites was from another gang. Benites reached inside his pants, took out a gun and, pointing it at Gonzalez, said, "Fuck LMS." Gonzalez turned around and started running, and he heard five shots. None of them hit him.

Benites' Statements While in Custody[3]

Officer Jason Lehman, a police officer for the City of Long Beach, testified that he and his partner Officer Neveling transported appellants from the police station to a juvenile booking facility in Long Beach at approximately 4:45 a.m. on January 14, 2008, after they had been arrested and questioned by Detective Evans. Detective Evans advised Officer Lehman and his partner that Benites had received his *Miranda* warnings and had waived his rights. On the car ride to the juvenile

---

[3] Evidence of Benites' statements was not presented to the jury deciding the charges against Trejo.

booking facility, Officer Lehman asked Benites if he understood that he did not have to talk to him and asked if the detectives had spoken with him about his rights not to talk to him and to keep quiet. Benites responded, "Yeah."

After they arrived at the booking station, Benites' handcuffs were removed and he was seated on a bench. Benites began telling Officer Lehman that approximately three months earlier he had been "jumped" into the West Side Longo gang, when three gang members beat him up for one minute. He said his moniker was "Terco," which was the same one used by his brother who had been killed. He stated that he was sent on missions by the older homies in the gang, and that he has to execute those missions to the best of his ability to stay in the gang, gain status in the gang, and not get in trouble from his own gang. Officer Lehman explained that a mission is a violent criminal activity that an older gang member asks a younger gang member to complete. Benites said he had to "put in work" and would continue to put in work for the gang, and he was proud that he had put in enough work to attain a West Side Longo tattoo. Officer Lehman explained that "putting in work" means committing enough crimes to earn status within the gang sufficient to get a gang tattoo.

Benites also told Officer Lehman that he had carried lots of guns since joining the gang, including .22 and .38 caliber guns, and that guns get passed around by the homies. He carried revolvers on his missions because the shell casings do not eject from the gun and therefore leave less evidence. He explained that he puts black duct tape around the grip of the gun. Benites told Officer Lehman that he was not scared of anybody and that he would smoke anybody, especially a "mayate," a derogatory term that Hispanic gang members use to describe black gang members.

Benites told Officer Lehman about a shooting that occurred at 23rd Street and Earl (count 6). Benites, Trejo and "some other dude" were sent on a mission to kill members of the Insane Crip gang, a black gang. Trejo drove the car, and Benites and the younger gang member got out of the car; the younger gang member fired 15 to 20 rounds from a nine-millimeter weapon and then the two of them ran back to the car and the three boys drove away.

Benites also told Officer Lehman about a shooting near 10th Street and Martin Luther King Boulevard (count 7). He stated that he was present in an alley and had a gun.

Trejo's Statements While in Custody[4]

Officer Lehman also testified that Trejo made statements to him about his criminal activity at the juvenile booking facility in the early morning hours after his arrest. Prior to this conversation, Officer Lehman asked Trejo whether he understood his rights, and Trejo said that he did. Trejo was awake and alert while they spoke.

Trejo began by telling Officer Lehman that he had been a member of West Side Longo for approximately three months, and that his moniker was "Little Man." He said he had been "jumped" into the gang by being beaten up by three gang members for approximately one minute and he had been a man about it. Officer Lehman told him that by joining a gang, Trejo would be getting into some bad business and committing crimes, and Trejo responded that he was "down for his WSL" and flashed West Side Longo gang signs. Trejo also explained that he and Benites were members of the Fifth Street clique of the gang that claimed the

---

[4] Evidence of Trejo's statements was presented only to the jury considering the charges against him.

area of Fifth and Cedar Streets as their turf. He said that by doing missions that the older homies sent him on, he had put in enough work to get a West Side Longo tattoo, but had not yet gotten the tattoo. He said, "We're CK and BK all day and we'll shoot any Crip that challenges us in this city." Officer Lehman testified that "CK" stands for "Crip Killer," and "BK" stands for "Blood Killer," a reference to the primarily African-American Crips and Bloods gangs. Trejo added that he would also shoot a Mexican if he had to.

Officer Lehman asked what Trejo would do if he was sent on a mission to smoke a gang member, and he said he would complete the mission. He told Officer Lehman that he had carried a .38 caliber gun and put black duct tape on the grip. He claimed to have shot the gun. Officer Lehman asked Trejo if he knew why he was going to jail, and he said it was because somebody had snitched on him.

Trejo stated that he had been sent on a mission to smoke a Mexican in the area of 15th and Cedar Streets (counts 1 and 2). He said, "I don't know why we shot a Mexican dude. We usually shoot the mayate gangsters." He said he was carrying a .38 gun, which he referred to as a "heater" or a "burner." He said he pointed the gun at his target, cocked the hammer back on the gun, and was about to shoot when one of his homies got in the way and got shot. Trejo said he would have smoked the target if the other homey had not stepped in the way. After the shooting, everyone ran in different directions and he ran back to his apartment. He hid the gun and listened on a police scanner. Later one of the older homies took the gun, and Trejo said he thought it was probably in Mexico now. He said he usually hides guns in the rear of his refrigerator between the paneling, or in a chicken nugget box in the freezer covered by chicken pieces.

Trejo also stated that a few weeks earlier he had driven Benites and another "youngster" so they could execute a mission to kill Insane Crip Gang members (count 6). He parked near the intersection of 23rd and Earl Streets. Benites had a .22 caliber gun and the "youngster" had a nine-millimeter gun. Those two exited the vehicle and Trejo waited for them; he heard approximately 15 gunshots in rapid fire succession, then Benites and the youngster ran back to the car and Trejo drove them away.

Trejo also said he had been sent to kill an LMS gang member at a liquor store near 10th Street and Martin Luther King Boulevard (count 7, as to Benites only). He said, "The LMS dude deserves to be shot." He said he was in an alley with some of the other homies during the shooting.

Trejo asked Officer Lehman how much time he thought he was going to get in jail for this, and when Lehman said he did not know, Trejo said, "I think I'm going to get about 15 years." He said he was not concerned, because once he was inside, he was going to gain more status in the gang, and by the time he go out, he would be the one calling the shots and telling the younger homies who to smoke. He said he was ready to do that.

DISCUSSION

I. *Sufficiency of Evidence as to Conviction for Assault with a Deadly Weapon*

Trejo contends there was insufficient evidence to support his conviction for assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(2).) We disagree.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could

find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*).) Reversal of a conviction for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Where substantial evidence supports a conviction, we must affirm, even though the evidence would also reasonably support a contrary finding. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

"Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Penal Code section 245, subdivision (a)(2) provides for increased punishment when the person commits an assault with a firearm. (§ 245, subd. (a)(2).)

"[A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) "'The pivotal question is whether the defendant intended to commit an act likely to result in such physical force. . . .'" (*Id.* at p. 785.) "To point a loaded gun in a threatening manner at another . . . constitutes an assault, because one who does so has the present ability to inflict a violent injury on the other and the act by its nature will probably and directly result in such injury." (*People v. Miceli* (2002)

104 Cal.App.4th 256, 269; see *People v. Hartsch* (2010) 49 Cal.4th 472, 507-508 ["pointing a gun at someone in a menacing manner is sufficient to establish the requisite mental state" for assault]; cf. *Rodriguez, supra*, 20 Cal.4th at p. 11, fn. 3 [noting the "long line of California decisions" holding that an assault is not committed by a person's merely pointing an unloaded gun at another person].)

Sufficient evidence was presented at trial to support Trejo's and Benites' convictions for assault with a deadly weapon. Although Bugarel testified at trial that he did not remember whether Benites pointed a gun at him, Detective Scavone testified that Bugarel told him that Benites pointed a gun at him while asking where he was from, gang lingo indicating a hostile and threatening challenge. Moreover, Coleman's testimony that he was shot immediately thereafter in the front of the same building adequately supports the conclusion that the gun Benites pointed at Bugarel was loaded. Thus, the jury was presented with sufficient evidence from which to conclude that Benites pointed a loaded gun at Bugarel while threatening him, conduct that constitutes assault with a deadly weapon. Sufficient evidence was presented to convict Trejo for this offense as well on an aiding and abetting theory.

II. *Validity of Appellants' Miranda Waivers*

Appellants contend that the trial court erred in admitting statements they made to police after their arrests because they did not voluntarily, intelligently, and knowingly waive their rights against self-incrimination as established by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). "When a court's decision to admit a confession is challenged on appeal, 'we accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*.'"

(*People v. Lessie* (2010) 47 Cal.4th 1152, 1169.) We indulge in every presumption to uphold a trial court's judgment.

"Under California law, issues relating to the suppression of statements made during a custodial interrogation must be reviewed under federal constitutional standards." (*People v. Nelson* (2012) 53 Cal.4th 367, 374 (*Nelson*).) "'Under the Fifth Amendment to the federal Constitution, as applied to the states through the Fourteenth Amendment, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." (U.S. Const., 5th Amend.) "In order to combat [the] pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights" to remain silent and to have the assistance of counsel. (*Miranda*, at p. 467.) "[I]f the accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease, and any statement obtained from him during interrogation thereafter may not be admitted against him at his trial" [citation], at least during the prosecution's case-in-chief [citations].' [Citation.] 'Critically, however, a suspect can waive these rights.' [Citation.] To establish a valid waiver of *Miranda* rights, the prosecution must show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary." (*Nelson, supra,* 53 Cal.4th at pp. 374-375.)

"Determining the validity of a *Miranda* rights waiver requires 'an evaluation of the defendant's state of mind' [citation] and 'inquiry into all the circumstances surrounding the interrogation' [citation]." (*Nelson, supra,* 53 Cal.4th at p. 375.) "This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 (*Fare*).) "When a juvenile's waiver is at issue, consideration must be given to factors such as 'the juvenile's age,

experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.' [Citations.]" (*Nelson, supra*, 53 Cal.4th at p. 375.) "This approach allows the necessary flexibility for courts 'to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved.' [Citation.]" (*Id.* at p. 379.) However, "'"[n]either a low I.Q. nor any particular age of minority is a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood."' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 384 (*Lewis*) [finding that schizophrenic defendant who was less than 14 years old understood and waived his *Miranda* rights].)

In *Fare*, the United States Supreme Court held that the circumstances surrounding the interrogation of the juvenile defendant in that case demonstrated that he had validly waived his rights against self-incrimination. The court relied upon the following facts: "The transcript of the interrogation reveals that the police officers conducting the interrogation took care to ensure that respondent understood his rights. They fully explained to respondent that he was being questioned in connection with a murder. They then informed him of all the rights delineated in *Miranda*, and ascertained that respondent understood those rights. There is no indication in the record that respondent failed to understand what the officers told him. Moreover, after his request to see his probation officer had been denied, and after the police officer once more had explained his rights to him, respondent clearly expressed his willingness to waive his rights and continue the interrogation.

"Further, no special factors indicate that respondent was unable to understand the nature of his actions. He was a 16 and 1/2-year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit." (*Fare, supra*, 442 U.S. at pp. 726-727.)

Appellants contend that the trial court failed to apply the "totality of the circumstances" test in ruling on their motion to suppress their statements to Officer Lehman. Our duty on appeal is to independently examine the record and consider appellants' "'age, experience, education, background, and intelligence'" (*Nelson, supra*, 53 Cal.4th at p. 375) to determine whether they had the capacity to understand the nature of their Fifth Amendment rights and the consequences of waiving those rights. Having conducted this inquiry, we conclude that the trial court properly denied appellants' motion to suppress their statements.

First, the fact that Trejo and Benites were 14 and 15 years old, respectively, at the time they were questioned does not render their waivers *per se* invalid. (*Lewis*, *supra*, 26 Cal.4th at p. 379.) Rather, their young age simply requires us to more carefully scrutinize the record to determine whether they voluntarily, intelligently and knowingly waived their *Miranda* rights before they made incriminating statements to Officer Lehman regarding their perpetration of numerous crimes at the direction of older members of their gang as well as their use of firearms.

Detective Evans testified that each appellant read aloud and signed the *Miranda* warnings and waiver form indicating in writing that he wanted to talk. Each signed the waiver at the outset of his interview with Detective Evans, not after lengthy or improper questioning. Neither of them asked to speak with a guardian or an attorney, neither was told that he could not speak with someone else, and neither was denied food, water, or a break. After initially waiving their rights, they were reminded two more times of their right to silence. Before telling Officer Lehman details about their criminal activity, both specifically told him that they understood their rights.[5]

The fact that Benites and Trejo signed the waiver forms after 12:28 a.m. and 2:13 a.m., respectively, does not diminish the validity of their waivers in light of the evidence that they understood what they were signing. Officer Lehman testified that Trejo was awake and alert when they spoke several hours later. Similarly, the fact that they were not offered the chance to contact a parent or guardian does not render their waivers invalid: "a mere failure of the authorities to seek the additional consent of an adult cannot be held to outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made." (*People v. Lara* (1967) 67 Cal.2d 365, 379, disapproved on other grounds in *People v. Mutch* (1971) 4 Cal.3d 389.) Although the police did not tell them why they were under arrest, instead telling them that they wanted to talk to them about an "incident," there is little doubt that appellants knew the reason they had been arrested and were being questioned. When Officer Lehman asked Trejo if he knew why he was going to jail, he said it was because somebody had snitched on him.

---

[5] Appellants do not contend that they should have been fully readvised of their *Miranda* rights prior to their transportation to the juvenile booking station by Officer Lehman at 4:45 a.m.

Trejo asks us to speculate that he was of "insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be." (*Fare*, *supra*, 442 U.S. at p. 726.) However, our task is not to speculate but rather to draw reasonable inferences, so long as the record supports such inferences. (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.) There was no indication that Trejo was of such low intelligence that he could not understand the consequences of waiving his *Miranda* rights. Trejo did not appear to have any problem in reading aloud the *Miranda* advisement form and did not ask for help. While Trejo's counsel suggests that the manner in which Trejo signed the top of the form demonstrates that he had trouble spelling and writing his own name, which in turn suggests a mental deficiency in the 14-year old, we disagree with Trejo's characterization of the record on this point. Although Officer Evans testified that "it's not the greatest writing," he could read Trejo's signature. Trejo correctly answered Officer Evans' questions designed to determine if he understood the distinction between right and wrong and the truth and lies. No evidence was introduced at the 402 hearing that Trejo was in special education classes or had a low I.Q. Thus, nothing in the record compels the conclusion that Trejo was of insufficient intelligence to knowingly waive his rights against self-incrimination.

In addition, Officer Evans testified that he had learned prior to his interview with Trejo that Trejo was on probation. Therefore, like the minor in *Fare*, Trejo already had experience with the criminal justice system.

Similarly, there was no evidence particularly demonstrating that Benites was not intelligent or sophisticated enough to understand the nature or consequences of his waiver of his *Miranda* rights. To the contrary, the record demonstrates that Benites had a level of sophistication about the criminal judgment system

suggesting that he would be well-acquainted with the right to remain silent. For instance, Benites told Officer Lehman that he preferred to use a revolver to other types of guns because it left less evidence at the scene.

In sum, there is nothing in the record to suggest that Trejo or Benites did not understand their rights or the consequences of waiving them. The trial court correctly denied their motions to suppress their statements.

III. *"Other Bad Acts" by Appellants*

Appellants contend that the trial court erred in failing to correctly instruct the jury regarding the use of evidence at trial relating to their uncharged criminal activity. The uncharged crimes about which the jury heard include: (1) the incident at the skate park where Benites and Trejo tried to beat up Coleman (who Benites later shot); (2) three occasions on which Trejo and Benites shot at Alcarez; and (3) the January 11, 2008 incident, for which only Benites was charged (count 7), where Guzman drove Trejo and Benites to L.A. Market on 10th Street and Benites tried to shoot Gonzales there.

"Subdivision (a) of [Evid. 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." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).) Thus, evidence of uncharged crimes may be admitted to prove facts such as the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Evid. Code, § 1101, subd. (b).)

"[E]vidence of uncharged misconduct '"is so prejudicial that its admission requires extremely careful analysis."'" (*People v. Lewis* (2001) 25 Cal.4th 610, 637; see *People v. Lindberg* (2008) 45 Cal.4th 1, 23; Evid. Code, § 352.) In exercising its discretion to determine whether uncharged offenses have sufficient probative value that they should be admitted, the trial court weighs "'(1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 783.) "[W]here uncharged offense evidence is cumulative, it will often be inadmissible pursuant to Evidence Code section 352." (*People v. Leon* (2008) 161 Cal.App.4th 149, 168-169; see *Ewoldt, supra,* 7 Cal.4th at p. 405.) A trial court's exercise of discretion under Evidence Code section 352 shall not be disturbed on appeal absent a showing that such discretion was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

We review the trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) The de novo standard of review is applicable in assessing whether instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

The trial court instructed both juries with a modified version of CALCRIM No. 375, as follows: "The People presented evidence that the defendant committed other offenses that were not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. . . . [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not

required to, consider that evidence for the limited purpose of deciding whether a witness could identify the defendants, or to decide whether: [¶] The defendant acted with the intent to kill; or [¶] The defendant acted with premeditation; or [¶] The defendant acted with the intent to promote criminal conduct by gang members; or [¶] The defendant had a motive to commit the offenses alleged in this case; or [¶] The defendant had a plan to commit the offenses alleged in this case."

The court also instructed the juries that "[i]n evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any charge, or that any allegation has been proved. The People must still prove each charge and allegation beyond a reasonable doubt."

At trial, appellants made only limited objections to the above jury instruction. They argued (unsuccessfully) that the jury should not be instructed that they could rely on the uncharged acts to find a common plan, an intent to kill, premeditation, or an intent to promote the criminal conduct of a gang. They conceded that the evidence was relevant to identity, intent, and motive.

On appeal, they argue that the evidence of uncharged acts should not have been admitted to prove identity, intent, and a common plan. However, because they conceded below that uncharged acts were relevant to prove both identity and intent, they have forfeited their right to argue that the trial court erred in admitting the evidence for such purposes. Even if they did not forfeit their contentions, however, they are incorrect that the evidence was erroneously admitted on the

issues of appellants' identity and intent. We also find no error in the admission of the uncharged acts to prove a common plan.

Skate Park Incident

Appellants object to the fact that, based on the jury instruction on uncharged crimes, the jury could have relied on the incident where appellants tried to beat up Coleman at the skate park, in order to prove identity, a common plan, and intent. We find no error.

"Evidence of *identity* is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator." (*Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.)

Generally speaking, "[f]or identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Ewoldt, supra*, 7 Cal.4th at p. 403.)

However, "'[w]here a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a "distinctive modus operandi" analysis of other factors.' [Citations.]" (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 893; see *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 585 ["The requirement for a distinctive modus operandi does not apply when the prior and charged acts involve the same perpetrator and the same victim. The courts have concluded that evidence of prior

quarrels between the same parties is obviously relevant on the issue whether the accused committed the charged acts."]; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 668 ["'evidence of threats of violence by an accused against the victim of an offense is proof of the identity of the offender'"].)

Appellants argue that the skate park assault was inadmissible to prove identity because that uncharged crime did not share sufficiently distinctive characteristics with the later crimes for which appellants were charged and tried. However, appellants ignore the fact that the incident at the skate park and the shooting on January 10, 2008 (count 4) involved the same victim (Coleman), and thus the prosecution was not required to show that the uncharged and charged crime shared unusually distinctive traits. Evidence about appellants' involvement in the uncharged assault at the skate park is highly relevant to the hotly-contested issue of whether it was appellants who shot Coleman two weeks later, on January 10, 2008 (count 4). More specifically, the credibility of Coleman and Bugarel's eyewitness identifications of Trejo and Benites as the perpetrators of the shooting was greatly bolstered by the fact that they recognized appellants from the earlier incident at the skate park. Thus, this evidence had substantial probative value and was admissible to prove identity.

Appellants also contend that this evidence should not have been admitted to prove a common plan. To be admissible to prove a common plan, a lesser degree of similarity between the uncharged and charged acts is required than for evidence offered to prove identity. "[I]n establishing 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.]" (*Ewoldt, supra*, 7 Cal.4th at p. 402.) "To establish

the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.) Evidence of uncharged acts has been admitted to show a common plan where the prior offenses "'(1) are not too remote in time, (2) are similar to the offense charged, and (3) are committed upon persons similar to the prosecuting witness. [Citations.]'" (*Id.* at p. 397.)

Contrary to appellants' contention, the skate park incident was sufficiently similar to the later shooting of Coleman and other rival gang members to be admissible to show a premeditated plan to eliminate Coleman, whom they suspected of belonging to the Crips, and members of other rival gangs such as LMS and East Side Longos. Each of the shootings for which appellants were charged involved them going on a mission together to assault rival gang members: They shot at Williams on December 27, 2007 as part of a mission to kill Insane Crip gang members (count 6); they shot at Alcarez on January 6, 2008 because he was a member of the East Side Longo gang (counts 1-2); on January 10, 2008, they went looking for LMS gang members, and ended up shooting Cuevas as well as Coleman, who they suspected was Crip gang member (counts 3-4); and Benites shot LMS gang member Gonzalez on January 11, 2008, while saying "Fuck LMS" (count 7). The assault at the skate park occurred within two weeks of the charged crimes, and it involved Coleman, one of the same victims of the January 10, 2008 shooting. The fact that appellants used a stick in the first assault instead of a gun as they did in their later crimes is not disqualifying; "[a] rule *not* allowing prior assaults when the persistent assailant simply varies the mode of attack would only reward creativity." (*People v. Lindenauger* (1995) 32 Cal.App.4th 1603, 1611,

italics added.) The trial court thus did not err in permitting the jury to consider this act for the purpose of proving a plan on appellants' part.

Appellants do not seriously contest that their earlier attempt to beat up Coleman is evidence of appellants' intent to target rival gang members, including Coleman. Rather, they contend that appellants' intent was not really at issue, because "[t]here was nothing ambiguous" about their crimes and thus evidence about this incident was cumulative. However, by pleading not guilty, appellants put in issue all elements of the charged offenses, including their intent. (*People v. Carpenter* (1997) 15 Cal.4th 312, 379, superseded by statute on another ground as noted in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107; *People v. Balcom* (1994) 7 Cal.4th 414, 422.) Given that the evidence of the skate park incident was properly admitted to show identity and a common plan, even if there was already ample evidence in the record about appellants' intent, appellants can show no additional prejudice from the fact that the jury was also instructed they could consider the prior assault for the issue of intent. Certainly, the uncharged act of chasing Coleman with a stick pales in comparison to the charged crimes of murder and attempted murder, and was unlikely to inflame the passions of the jury. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211 [in weighing probative value versus prejudice to defendant, court should consider "whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses"].) Thus, we find no error in the court's instruction on uncharged crimes as it relates to the skate park incident.

Uncharged Shootings of East Side Longo Member Alcarez

Appellants also argue that the jury was improperly allowed to rely upon evidence that, before Trejo and Benites shot at Alcarez and Rivera on January 6,

2008, crimes which formed the basis for counts 1 and 2, Benites had shot at Alcarez on two occasions and Trejo had attempted to shoot him once. The trial court did not abuse its discretion in admitting evidence of these uncharged shootings as to the issues of identity, common plan, and intent.

Like the skate park incident, these uncharged shootings by Trejo and Benites involved the same victim as one of their later crimes. Thus, these acts were plainly relevant to prove that appellants were the men who later shot at Alcarez on January 6, 2008, and it was inconsequential whether the crimes shared the same distinctive characteristics. (*People v. Kovacich, supra*, 201 Cal.App.4th at p. 893.) Similarly, these shootings were relevant to show a common plan and an intent on appellants' part to attack East Side Longo members and other rival gang members. (*People v. Zepeda, supra,* 87 Cal.App.4th at p. 1212 ["The fact that defendant previously committed a drive-by shooting, under circumstances indicating that he did so for gang-related purposes, helped show that he likely committed the instant drive-by shooting for gang-related purposes."].) The probative value of these earlier shootings was bolstered by the testimony that they had all occurred within two weeks of the later shooting of Alcarez and they all took place in the same vicinity. (*People v. Kipp* (1998) 18 Cal.4th 349, 371 [finding that "probative value is further enhanced by the proximity of the two incidents in time . . . and in location"].) We find no abuse of discretion in permitting the jury to consider the uncharged shootings by Benites and Trejo to prove identity, plan, and intent.

L.A. Market Shooting

Trejo also objects to the fact that the jury deciding his guilt or innocence was permitted to consider as one of the uncharged offenses Benites' attempted shooting of rival gang member Gonzalez in front of the L.A. Market on January 11, 2008.

Officer Lehman testified that Trejo told him that "they" had been sent to the liquor store near 10th Street and Martin Luther King to kill an LMS gang member. Trejo said he was in the alley with some of the other homies during the shooting. Trejo told Officer Lehman, "The LMS dude deserves to be shot."

Trejo's involvement in the shooting at the L.A. Market is relevant to the issues of a common plan and intent for the same reasons that the assault at the skate park and the three uncharged attempts to shoot Alcarez: It falls within the same pattern of a string of missions by Benites and Trejo to kill rival gang members, taking place in the same vicinity and within two weeks of all the charged offenses.

Trejo's involvement in the shooting at the market was not relevant to the issue of identity, and we do not believe the jury would have used it for this purpose. While appellants contend that the jury instruction was erroneous because it did not specify which particular uncharged acts could be used for which particular purpose, at trial appellants failed to object to the instruction on this ground, and thus they forfeited an appellate claim of error on this point. (*People v. Rundle* (2008) 43 Cal.4th 76, 151, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The trial court had no sua sponte obligation to modify the instruction in this manner. The defendant in *Lindenauger* similarly argued that, in instructing the jury, the trial court should have matched the prior act evidence with each issue to be proven. Finding that the trial court had no sua sponte obligation to so instruct the jury, the appellate court further found that such an instruction would have been repetitious of instructions already given; and that the pattern instruction was sufficient in instructing the jury what inferences could be drawn from the other bad acts and stating the limited purposes for which the jury could consider such evidence. (*Lindenauger, supra*, 32 Cal.App.4th at p.

1615; see also *People v. Wilson* (2005) 36 Cal.4th 309, 327 [finding no prejudice from failure of trial court to define the other crimes evidence in the jury instruction because "[d]elineating the other crimes might have caused the jury to focus on the crimes, and a defendant may want to avoid any such focus."]) We agree with the *Lindenauger* court.

In sum, we find no error in the instruction on the jury's permissible uses of uncharged acts.

IV. *Denial of Commitment to CYA for Benites*

Benites contends that the trial court abused its discretion in committing him to state prison instead of CYA. He further argues that the court erroneously failed to obtain a report on his amenability to the training and treatment offered CYA as required by Welfare and Institutions Code section 707.2, and, in the alternative, that his trial counsel was ineffective in failing to request such a report. Benites is mistaken.

Trial Court's Denial of Benites' Request for an Order to be Housed at CYA

At sentencing, Benites' counsel asked the court to "make a housing recommendation for Y.A. housing as long as possible" since Benites was still a minor. Counsel argued that since Benites had been in custody he had realized the seriousness of his offenses, had graduated from high school, and had participated in an honors writing program. Father Michael Kennedy, co-chaplain at the juvenile hall where Benites had been confined pending trial and sentencing, testified about Benites' transformation as a person of faith and shared some of Benites' writings about his faith.

The prosecutor argued that given the seriousness of the multiple offenses for which Benites had been convicted, resulting in one teenager's death and the loss of a kidney in another, he should not be housed at CYA. He noted that some skepticism about Benites' transformation was warranted given that jurors had complained that Benites was "mad-dogging" them, or intently staring at them, during the trial, and that Benites' brother was currently facing charges for intimidating a witness in the hallway at trial.

The court "completely set aside any activity having to do with the defendant's brother," and indicated that it was "concentrating solely on Mr. Benites and his conduct." The court noted "it is true that two jurors indicated that both defendants were mad-dogging the jury when counsel and the court were at sidebar." The court further found that even if Benites' conversion was sincere, he could not overlook the fact that Trejo, Benites' cohort in all their crimes, had told the police that he expected to serve only 15 years in prison and then emerge as a shot caller in the gang. Even if it was Trejo and not Benites who made that statement to the police, the court found it highly likely that the two friends and accomplices had discussed this notion, and clearly, both believed it.

The court further considered Benites' young age and the fact that Benites was motivated to avenge the death of his younger brother at the hands of gang members, but found that "balanced against those two equities, I have a shooting spree that is just incredible. . . . [I]n that short period of time . . . they seemed to be shooting . . . everybody in sight. [It] didn't make any difference really whether that person could have had a connection with Mr. Cano's death at all."

The court declined to issue an order that Benites be housed in CYA, instead ruling as follows: "As far as housing in CYA between now and whenever they would otherwise let him go, I'm turning Mr. Benites over to the custody of the

Department of Corrections, and they should house him wherever they think it's appropriate." The court concluded, "Despite the age, that was the main thing that, you know, caused me to ponder this case and the appropriate sentence, but the level of violence" required a prison sentence.

Benites Was Statutorily Ineligible for Commitment at CYA

In arguing that the trial court abused its discretion in not sending him to CYA, Benites fails to distinguish between the decision to *commit* a minor to CYA versus the decision to order a minor *housed* at CYA. (*People v. Higareda* (1994) 24 Cal.App.4th 1399, 1411 (*Higareda*).) As discussed below, Benites was statutorily ineligible for commitment at CYA, and, for this reason, the trial court was not required to obtain an amenability study and counsel was not ineffective for failing to request one.

Welfare and Institutions Code section 1732.6 states, in pertinent part: "(a) No minor shall be committed to the Youth Authority when he or she is convicted in a criminal action for an offense described in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 of the Penal Code and is sentenced to incarceration for life, an indeterminate period to life, or a determinate period of years such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years." (Welf. & Inst. Code, § 1732.6, subd. (a).) This provision disqualifies Benites from consideration for commitment to CYA, because he was convicted in a criminal action of murder and attempted murder, both violent felonies pursuant to section 667.5, subdivisions (c)(1) and (c)(12). These convictions and his conviction for assault with a firearm further constitute "serious felonies" pursuant to section 1192.7, subdivisions (c)(1), (c)(9), and (c)(31). Because even under Benites' reduced sentence he will be confined for

a term of 50 years to life in prison, he falls squarely within the ambit of Welfare and Institutions Code section 1732.6, subdivision (a) and the trial court was prohibited from committing him to CYA rather than state prison.

Moreover, the requirement of Welfare and Institutions Code section 707.2 that a trial court order an amenability report expressly does "not apply where commitment to the [CYA] is prohibited pursuant to Section 1732.6." (Welf. & Inst. Code, § 707.2, subd. (b).) Therefore, the court plainly did not err in failing to order such an evaluation, and it would have been futile for trial counsel to have requested one.

The Trial Court Properly Exercised Its Discretion Not To Order Benites Housed at CYA

Even if a minor is ineligible for commitment to CYA, the trial court has discretion to order that custody of the minor be transferred to CYA, "solely for the purposes of housing the inmate." (Welf. & Inst. Code, § 1731.5, subd. (c); see *People v. Nguyen* (1993) 15 Cal.App.4th 1699, 1702.) We review for an abuse of discretion the trial court's decision on whether to order that a minor be housed at CYA. (*Higareda, supra*, 24 Cal.App.4th at p. 1413.)

In exercising its discretion as to whether to order a minor housed at CYA, the trial court may properly consider "'[t]he need to protect society, the nature and seriousness of the offense, the interests of justice, the suitability of the minor to the training and treatment offered by [CYA], and the needs of the minor.'" (*Higareda, supra*, 24 Cal.App.4th at p. 1411.) In *Higareda*, the appellate court found that the trial court had not abused its discretion by denying a request for housing in CYA based on the violent nature of the minor defendant's crimes and the trial court's

conclusion that the defendant was deeply entrenched in the criminal lifestyle. (*Id.* at pp. 1412-1413.)

Benites suggests that the trial court did not properly exercise its discretion because it did not take into account his needs, and instead improperly focused on misconduct by Benites' brother, unspecified improper looks that Benites supposedly gave to the jury, and statements by Trejo that he would come out of prison a shot caller.

The court did not rely on improper matters. It expressly stated that it was not relying on misconduct by Benites' brother. And our review of both the public and the sealed transcripts confirms that the court appropriately found that Benites had been staring at or "mad-dogging" the jury, conduct which undermines Benites' claim that he had transformed himself while in custody. Further, based on the enthusiasm Benites expressed in his statements to Officer Lehman about his role in the gang, the court was entitled to infer that Benites shared Trejo's belief that he would emerge from prison as a shot caller.

The trial court expressly considered Benites' needs, indicating that it had weighed both Benites' young age and the fact that he had been dealing with his brother's murder. However, the court ultimately determined that given the "level of violence" by Benites during his shooting spree, he should serve his time in state prison. The court appropriately exercised its discretion in denying the request to order that Benites be housed at CYA.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.