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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KAI EDWARDS, Defendant and Appellant.	B236131 (Los Angeles County Super. Ct. No. NA084077)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed.

Law Offices of Paul Richard Peters and Paul Richard Peters; The Defenders Law Group and Lawrence R. Young for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Kai Edwards (defendant) appeals from his murder conviction. He contends that a telephone call he made from jail consisted of inadmissible hearsay admitted in violation of his Sixth Amendment right of confrontation. He also contends that portions of the gang expert's testimony should have been stricken due to insufficient foundation. As we find no merit to defendant's contentions, we affirm the judgment.

BACKGROUND

1. Procedural history

Defendant was charged with the murder of Duncan Battiest (Battiest) in violation of Penal Code section 187, subdivision (a).[1] The information specially alleged that defendant personally used and intentionally discharged a firearm in the commission of the offense, causing Battiest great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e)(1); and that the crimes were gang related as defined in section 186.22, subdivision (b)(1)(C). After a jury trial defendant was convicted of murder in the first degree. The jury also found true the firearm and gang allegations.

On August 25, 2011, the trial court sentenced defendant to 50 years to life in prison, comprised of 25 years to life for the murder and 25 years to life for the gun discharge, with 937 days of actual presentence custody credit. The trial court also ordered victim restitution and mandatory fines and fees. Defendant filed a timely notice of appeal.

2. Prosecution evidence

On January 29, 2009, Battiest was shot outside his home on Walnut Avenue in Long Beach, suffering wounds to his neck and chest which rendered him paralyzed. He died several months later as the result of the neck wound, without having left the hospital.

Daniel Faulk (Faulk) testified he was visiting a friend in the neighborhood at the time of the shooting. He was on his friend's balcony sometime between 6:30 and 7:00

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

p.m., when he saw an African-American man enter the walkway of the building next door. The man, whom he later identified as defendant, was wearing a black hooded sweatshirt, jeans, and Nike shoes with protruding tongues and oversized laces. Moments later, Faulk heard a gunshot and some shouting and saw defendant slowly running or jogging away, holding something. At trial, Faulk identified defendant in court and identified photographs of defendant wearing his distinctive Nike shoes.

Officer Rommel Chavez and several other Long Beach police officers were nearby and went immediately to the scene in response to a radio call. Officer Chavez testified that as he and Officer Sean Deaton approached Walnut Avenue, he saw two African-American men running away from the area. Defendant was removing and discarding clothing as he ran, a common tactic of suspects trying to change their appearance. The two suspects separated as they ran and soon afterward Officer Deaton detained defendant, while Officer Chavez detained the other man, later identified as Travion Toler (Toler). Faulk was taken to each suspect's location for a field identification. He was first shown Toler, who he did not identify. He was next shown defendant and identified him as the man he saw entering the building next door and running away after the gunshot.

Officer Oscar Morales went to the scene of the shooting at approximately 6:45 p.m. and collected a .25-caliber bullet casing and other evidence. Not far from the scene of the shooting, Sergeant Douglas Richard Bender found a discarded blue sweatshirt. When he picked up the sweatshirt, a gun fell out of the pocket. Other items in the pocket included a receipt from an area minimart. A surveillance video obtained from the minimart depicted defendant and Toler next to each other approximately 45 minutes prior to the shooting. Defendant is seen wearing a dark-colored hooded sweatshirt and a blue baseball cap.

Firearms expert Troy Ward (Ward) testified that he tested the gun and the recovered bullet casing as well as the two expended bullets recovered from the victim's body by the coroner. Ward determined that the gun was a .25-caliber semiautomatic pistol which had ejected the shell casing recovered at the scene. He also determined that the bullet recovered by the coroner from the victim's neck had been fired from the same

gun. Although the second bullet was too damaged for a conclusive determination, he noted that it had barrel markings similar to the first bullet.

Long Beach Police Officer Chris Zamora testified as the prosecution's gang expert. He was familiar with the Insane Crip gang (Insane Crip gang or Insane Crips) and had personally investigated the gang throughout most of his 10-year career. The Insane Crips territory was primarily central Long Beach, with smaller pockets in north and south Long Beach. Some of its 900 members were spread throughout California. Officer Zamora had investigated Insane Crip gang activity in San Bernardino, Riverside, and Orange Counties. He explained that there were small subgroups or "cliques" within the Insane Crip gang, each with its own identifying signs or symbols. One such clique was known as Baby Insane. Although most Crip gang members wore blue, some members of the Baby Insane clique wore red, the color used by rival Blood gangs. The clique had adopted the Cleveland Indians's team logo, sometimes using just a feather as its sign and sometimes using the entire logo. Members of the Baby Insane clique were young and very violent.

Officer Zamora testified that the primary criminal activities of the Insane Crips included assaults, fights, possession of illegal weapons, gang shootings, murder, and narcotics sales. He had investigated cases involving all such crimes and Insane Crips members. As predicate acts showing the gang's criminal nature, Officer Zamora presented two certified dockets, one showing the 2009 conviction of Don Acklin (Acklin) for murder (§ 187) committed in 2007; and another showing the 2008 conviction of Warren Jackson (Jackson) for carrying a loaded firearm (§ 12031) in 2008. Officer Zamora testified that he knew Acklin and knew him to be an active member of the Insane Crips. He also knew Jackson, and had assisted in the arrest leading to Jackson's conviction of carrying a loaded firearm. The arrest took place during a gang meeting at a public park. Jackson admitted to Officer Zamora that he was a member of the Baby Insane clique, and showed him the tattoo of the number "3" on his arm, indicating the third letter of the alphabet -- a "C" for Crips.

In Officer Zamora's opinion defendant was an active member of the Insane Crip gang. His opinion was based in part on defendant's tattoos. Photographs of defendant show a red "3" tattoo on his neck, and a "B" over an "I" on his right arm. The crossed out "B" on defendant's right shin indicated his rivalry with the Blood gang. The word "Insane" appears on one shin and "Babies" appears on the other. In Officer Zamora's opinion the tattoos showed that defendant was a member of the Insane Crips and the Baby Insane clique. Officer Zamora also believed that Toler was an Insane Crips member.

Officer Zamora was familiar with the Insane Crips's rival, the Rollin' 20's Crip gang (Rollin' 20's), and had investigated criminal activity by its members most of his career. Officer Zamora believed that Battiest was a member of the Rollin' 20's, as well as an "O.G." which meant he was a somewhat older, more respected gang member. Battiest had an "ES 20's" tattoo on his arm.[2]

At one time the two gangs were a single gang, with many family and neighborhood ties, but over the years they split apart and became bitter rivals. The feud was ongoing at the time of the shooting, and both gangs claimed the area of the shooting as their territory. Officer Zamora testified that Insane Crips members referred to Rollin' 20's members by the derogatory names, "Twink" and "Twinkie." Rollin' 20's members called Insane Crips members "Bugs." "Cuz" meant a member of any Crip gang. Thus when one Crip gang member referred to another, he would call him, "Cuz." Although the Insane Crip gang was the larger of the two, both were equally violent and aggressive, and equally involved in criminal activity. Sometime in 2008, Officer Zamora had investigated a Rollin' 20's member who had violently assaulted an Insane Crips member.

Officer Zamora was asked to give an opinion after assuming the following hypothetical facts: a member of the Insane Crips goes to the 400 block of Walnut in January 2009, walks up to a Rollin' 20's member, and shoots him; the shooter is caught a short time later in the evening, wearing a Cleveland Indians cap. In Officer Zamora's

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[2] "ES" stood for eastside.

opinion, the crime was committed for the benefit of and at the direction of a criminal street gang. He based his opinion upon his familiarity with gang warfare and the gang custom of shooting and killing rivals. He explained that a gang's reputation for being particularly aggressive instilled fear in the rival gang and in the community at large, which benefitted the shooter's gang by discouraging residents from calling the police and rivals from invading its territory, thus allowing the gang to sell drugs and survive. Officer Zamora explained that the shooter also benefitted individually by an enhanced reputation within his gang and the community, especially when the victim was an O.G.

Detective Teryl Hubert, testified that she obtained audio recordings of certain telephone calls made from county jail, where all outgoing calls by inmates are recorded. The prosecution played the hour-long redacted recording of a conversation that took place nearly one year after defendant's arrest. Detective Hubert identified defendant's voice, labeled "K" in the transcript of the redacted recording.[3] She testified that a repeating message warning that the call might be recorded or monitored was not included in the redacted recordings, but could be heard every five minutes on the original. The conversation appears in part to be about the shooting and in other parts defendant can be heard using the term "Twinkies" while speaking of the Rollin' 20's gang.

3. Defense evidence

Officer Chris Martinez testified that while on patrol on January 29, 2009, he was called to the crime scene at approximately 6:43 p.m. There he spoke to Faulk. Officer Martinez transported Faulk to two separate field show-ups and was in his company for 30 to 40 minutes. Faulk told Officer Martinez he had seen the subject run "in a full sprint" after hearing the gunshot. Faulk identified the person he saw running away, based upon his clothing and appearance.[4]

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[3] The transcript, exhibit 43A, was before the jurors during the playing of the recording, but not admitted into evidence, and it is not reproduced in the appellate record.

[4] Detective Hubert testified during the prosecution's case that Faulk had identified defendant's shoes as Converse-style shoes.

Forensic Specialist Nancy Preston performed gunshot residue tests on defendant and Toler. Defendant was tested at 8:25 p.m. the night of the shooting. Detective Hubert submitted the samples to the Los Angeles County Sheriff's Department crime lab, where analyst Joseph Cavaleri (Cavaleri) analyzed the results and determined that both were positive for gunshot residue. Cavaleri explained that a positive test meant that defendant and Toler could have fired a gun, handled a gun, been next to someone who fired a gun, or touched a surface with gunshot residue on it before being tested.

The parties stipulated that that according to the United States Navy the sun set on January 29, 2009, at 5:21 p.m. and the end of civil twilight was 5:47 p.m.

DISCUSSION

I. Recorded telephone conversation

A. No confrontation clause violation

Defendant contends that the trial court erred in admitting portions of defendant's in-custody telephone conversation over his objection that it was hearsay and violated his right of confrontation under the Sixth Amendment.

Defendant challenges only the following colloquy:

> "[Defendant]: Oh yeah, I forgot. I forgot. Hey, bro, you know you was standing right there on the stairs, Cuz, as that situation.
>
> "[R]: I know, my nigger.
>
> "[Defendant]: You didn't see me?
>
> "[R]: I didn't know it was you.
>
> "[Defendant]: Man, I did that, huh?
>
> "[R]: Yeah. Right there, right.
>
> "[Defendant]: I was looking at you. I'm like, damn, bro, right there, right?
>
> "[R]: I saw when he dropped and everything. At first I was like gonna go out there with Cuz.

"[Defendant]: It's a good thing you didn't."

The Sixth Amendment bars the "admission of testimonial statements of a [declarant] who [does] not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 68 (*Crawford*).)

We agree with respondent that whether offered for the truth or for a nonhearsay purpose, the conversation was nontestimonial. The confrontation clause is not implicated by statements that are not testimonial. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.) Testimonial evidence includes formal testimony and statements resembling testimony, such as responses to police interrogation undertaken to obtain evidence to be used at trial. (*Davis v. Washington* (2006) 547 U.S. 813, 830 (*Davis*); *Crawford*, *supra*, at pp. 51-52.) On the other hand, an "off-hand, overheard remark" is not testimonial, even if it is inadmissible hearsay. (*Crawford*, at p. 51.) Thus, a conversation between prisoners and a secretly recorded statement to a government informant are both nontestimonial. (*Davis*, *supra*, at p. 825, citing *Bourjaily v. United States* (1987) 483 U.S. 171, 181-184; *Dutton v. Evans* (1970) 400 U.S. 74, 87-89.) As federal courts have repeatedly held, "statements unwittingly made to an informant are not 'testimonial' within the meaning of the confrontation clause." (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402, citing inter alia, *U.S. v. Smalls* (10th Cir. 2010) 605 F.3d 765, 778 [recorded conversation between prisoner and informant posing as prisoner].) Moreover, secretly recording such statements to preserve them as evidence does not render them testimonial. (See *Arauz*, at pp. 1402-1403.) It follows that the recorded telephone conversation between defendant and a friend was nontestimonial and did not implicate the Sixth Amendment.

B. No hearsay violation

Defendant provides no analysis to support his conclusion that the statements were inadmissible hearsay under the ordinary rules of evidence. At most, he concludes that because the statements could be construed as admissions, they were unreliable and amounted to the "most terrible kind of hearsay." As there was no constitutional violation

in admitting defendant's own statements, the statements were admissible as an exception to the hearsay rule. (See Evid. Code, §§ 1204, 1220.) Further, the statements of the other party to the conversation did not have any independent relevance. At most they provided a context for defendant's statements which were a classic party admission. (Evid. Code, § 1220.)

The cases cited by defendant to illustrate his contention bear no resemblance to this case. (See, e.g., *People v. Blackington* (1985) 167 Cal.App.3d 1216 [codefendant's pretrial statements to police and others inadmissible without evidence of conspiracy]; *People v. Rios* (1985) 163 Cal.App.3d 852 [incriminating hearsay statements originally made to police and erroneously admitted as prior inconsistent statements after the witnesses refused to answer any questions at trial without evidence of evasiveness]; *People v. Shipe* (1975) 49 Cal.App.3d 343, 355 [witness's pretrial statements to police erroneously admitted after witness asserted Fifth Amendment]; *People v. Harris* (1969) 270 Cal.App.2d 863 [same].)

Defendant has also failed to demonstrate that his admissions of guilt should have been excluded under Evidence Code section 352. "When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled. [Citation.] On appeal, the ruling is reviewed for abuse of discretion. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) The trial court's discretion will not be disturbed unless it 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.)

Defendant contends that the recorded statements should have been excluded because they were "highly speculative and prejudicial."[5] An uncoerced admission of

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[5] Defendant does not explain his claim that the conversation was speculative, but appears to suggest that the conversation should have been excluded because it was connected to the shooting only by inference, rather than by direct evidence. As

guilt is prejudicial to the defendant because it is highly probative. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) However, "[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

In any event, defendant has not demonstrated that the court's ruling resulted in a miscarriage of justice. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.) A miscarriage of justice is demonstrated when there appears a reasonable probability that defendant would have achieved a more favorable result in the absence of the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As respondent notes, the evidence that defendant was the shooter was overwhelming. An eyewitness identified defendant as the person he saw entering the property next door just before hearing gunfire, and as the person who then immediately ran from the area wearing a black hooded sweatshirt, jeans, and Nike shoes with protruding tongues and oversized laces. Surveillance video from a convenience store showed defendant, in the company of Toler, 45 minutes before the shooting, wearing a dark-colored hooded sweatshirt. Officer Chavez saw defendant discarding clothing as he ran from the area with Toler, and a dark-hooded sweatshirt was later found in the bushes along their route. The handgun that fell out of a pocket of defendant's sweatshirt was later determined to have fired the fatal bullet. Photographs taken of defendant's shoes after his arrest depict distinctive Nike shoes with protruding

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defendant's contention is undeveloped and unsupported by authority, we decline to address it. In any event, logical inferences drawn from circumstantial evidence are not necessarily less probative than direct evidence. (See *People v. Maury* (2003) 30 Cal.4th 342, 396.)

tongues and oversized laces. Under such circumstances, there was no reasonable probability of a different result without the challenged conversation.

Because we find nothing arbitrary, capricious or patently absurd in the trial court's refusal to exclude the conversation, and no miscarriage of justice, we find no abuse of discretion and no reversible error.

II. Gang testimony

Defendant contends that there was insufficient admissible evidence to support the jury's finding that the murder was gang related.

A crime is gang related if it was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (See § 186.22, subd. (b)(1).) A "criminal street gang" means "an ongoing association of three or more persons with a common name or common identifying sign or symbol; [that] has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and [that] includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; § 186.22, subds. (e) & (f).)

First, defendant contends the expert's opinion that the Insane Crip gang was a criminal street gang was unsupported by substantial evidence because the prosecution sought to prove a pattern of criminal gang activity with just one predicate offense. He is mistaken. Two certified dockets, one showing Acklin's 2007 murder in violation of section 187, and the other showing Jackson's 2008 possession of a loaded firearm in violation of section 12031 were introduced into evidence. Both offenses were qualifying predicate offenses and both offenses were committed within three years of each other as required by section 186.22, subdivision (e).

Defendant next contends that the expert's opinion was unsupported by substantial evidence because the expert's "predicate testimony . . . was hearsay and therefore should

have been stricken." Further, defendant contends that the admission of such hearsay violated his Sixth Amendment right to confrontation.

Defendant did not object to the testimony in the trial court on these grounds. His oral motion in limine was unclear, but appears to have been a request to limit or exclude the expert's testimony based on a lack of evidence of defendant's knowledge that the victim was a member of the Rollin' 20's gang. Defendant's vague objection did not preserve a hearsay challenge for appeal. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208-1209; Evid. Code, § 353.) Nor did it preserve his claim of violation of his right of confrontation. (See *People v. D'Arcy* (2010) 48 Cal.4th 257, 290.)

In any event, defendant's contention lacks merit. Without referring to any particular testimony to illustrate his point, defendant argues that the testimony of Officer Zamora was based on "gossip and innuendo from around the police station . . . ." We find no gossip or innuendo in Officer Zamora's testimony. Moreover, a gang expert's opinion may be based on information drawn from many sources and on years of experience, and may include otherwise inadmissible hearsay, so long as it is reliable. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 618-620.) "Thus, a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies. [Citations.]" (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1122.)

To illustrate his contention that there was insufficient evidence of a pattern of criminal activity, defendant cites *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander*), where the expert testified that a gang's primary activities included the commission of certain crimes, but his opinion was unsupported by sufficient evidence that the gang consistently and repeatedly committed the enumerated crimes. (See *id.* at pp. 613-614.) Defendant's reliance on that case is misplaced, as here Officer Zamora gave detailed testimony concerning the basis for his opinion, including his experience and training as well as his personal contact with the Insane Crips gang, in marked contrast to the conclusory and insufficient offerings in *Alexander*. (*Id.* at p. 614.)

Here, a pattern of criminal activity was sufficiently established with the predicate offenses committed by Acklin and Jackson. In turn, the predicate offenses were sufficiently established with certified copies of court dockets, which were admissible and presumptively reliable. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1461; Evid. Code, § 452.5, subd. (b).) In addition, Officer Zamora testified that both Acklin and Jackson were members of the Insane Crip gang. Far from relying on gossip or innuendo, Officer Zamora testified that he knew Acklin and Jackson because he had personally investigated them and their gang over many years, and had assisted in the arrest of Jackson for the predicate crime.

In sum, Officer's Zamora's opinion was adequately supported by information drawn from his experience, conversations with gang members, and his investigations of gang-related crimes. (See *People v. Gardeley, supra*, 14 Cal.4th at pp. 618-620; *People v. Hill, supra*, 191 Cal.App.4th at pp. 1121-1122.) His expert opinion was thus admissible and provided substantial evidence that defendant's gang was a criminal street gang.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST