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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. OSVALDO HERNANDEZ, Defendant and Appellant.	B223969 (Los Angeles County Super. Ct. No. BA341948)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis Landin and Alex Ricciardulli, Judges. Modified and affirmed.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Defendant Osvaldo Hernandez appeals from the judgment entered following a jury trial in which he was convicted of first degree murder, attempted murder, and possession of a firearm by a felon, with gang and personal gun-use findings. Defendant contends the trial court erred by denying his motion for a pretrial lineup, excluding defense evidence, denying his motion for a new trial, instructing on heat of passion using CALCRIM Nos. 570 and 570A, and not staying the sentence on the felon in possession conviction. We agree that the sentence on the felon in possession count should have been stayed under Penal Code section 654 (undesignated statutory references are to the Penal Code), but otherwise affirm.

BACKGROUND

Jose Villalobos (also known as "Cat") and Gerardo Rincon were shot during a brawl outside Mal's Bar on South Hill Street in Los Angeles in the early morning hours of June 8, 2008. (Undesignated date references are to 2008.) Rincon survived, but Villalobos died. He had been shot once in the face from less than two feet away and once in the chest from more than two feet away. The coroner recovered a large caliber bullet from Villalobos's back. Toxicology tests revealed alcohol, amphetamine, and methamphetamine in Villalobos's blood.

The brawl apparently began as an argument between Esther Velasco and Ramona Prieto. Velasco was Villalobos's girlfriend, and both were members of the Ghetto Boyz gang. Velasco and Villalobos arrived at Mal's Bar about 12:40 a.m. on June 8. Velasco was a regular at Mal's, and bouncers Xavier Maldonado and Deandre Prince and manager Carlos Sevilla all knew her by name. Prince testified that Villalobos and Rincon were also regulars at the bar, which was frequented by members of the Ghetto Boyz gang. Ramona Prieto, her brother Victor Prieto, Victor's wife Tatum, defendant, Enrique Escalante, and Enrique's wife Maria were also drinking at Mal's bar the night of the crimes. Ramona, Victor, and Tatum arrived in Tatum's car, and the others were in Escalante's SUV. Defendant, Victor, and Escalante were members of the Clanton 14 gang, which was a rival of the Ghetto Boyz gang. According to the prosecution's gang

expert, Mal's Bar was located in the territory claimed by the Primera Flats gang, but it was "frequented by" the Ghetto Boyz.

Maldonado and Prince testified that, in accordance with the bar's policy, they patted down defendant, Victor, and Escalante as they entered the bar and visually checked the women's purses. Prince testified that he observed Victor and Villalobos socializing with one another in the bar and saw them purchase drinks for one another. They appeared to be good friends. Velasco also testified that Victor bought a drink for Villalobos.

Prince testified that Ramona, Victor, defendant, and their party left when the bar staff announced that it was closing time. Velasco testified that she went to smoke outside the front door of the bar. She saw defendant, Victor, Ramona, another woman, and one or two other men spray painting on a wall across the street. Ramona asked Velasco what she was looking at, and an argument ensued. Velasco and Ramona met in the middle of the street and continued to argue. One or more members of the bar staff walked over to Velasco and brought her back to the bar. Maldonado testified that defendant, a second man, and the second man's wife were also in the street when he and Prince approached Velasco and brought her back to the bar. Velasco broke free from the bar staff and returned to face Ramona.

Velasco testified that while she was arguing with Ramona, Villalobos and Rincon came out of the bar and ran past her. She tried to run with them, but defendant and Victor approached her, swore at her, and said they were in the "Clanton neighborhood." Victor told her to call "Cat," then Victor and defendant began pulling her hair and punching her with closed fists. While Victor and defendant were hitting her, she heard two shots and heard someone say, "Let's go." Defendant's group ran away. Velasco then saw Villalobos and Rincon lying on the ground, about a car length apart.

Prince testified that after Velasco broke free, he stood between her and Ramona. Victor was a few steps away. Villalobos approached Victor and said, "Grab your friends and I'll grab mine." As Villalobos and Victor talked, defendant approached and began

arguing with Villalobos. Defendant punched Villalobos in the face. Villalobos punched Victor in the face and "[a]ll hell kind of broke loose." It was "one big fight." Victor and defendant began boxing with Villalobos, and other individual fights broke out all around. Ramona grabbed Velasco by the hair and began punching her on the head. Defendant fought with a different man who "got the best of him." Prince restrained another man from defendant's group who appeared to be reaching under his shirt. Victor went to assist Ramona and also began punching Velasco's head. From a distance of seven to eight feet, Prince heard Ramona say, "'Grab the pistola,'" and Victor tell defendant to "'get the gun.'" When Prince heard a gunshot, he looked around and saw defendant holding a gun and standing over Villalobos. Defendant walked up to Villalobos and fired at him twice more. Rincon attempted to move toward Villalobos, and Victor said, "Get him too. Get him." Defendant shot Rincon in the face, then walked up to him and fired again. Prince took cover behind a car and shouted to Maldonado. Defendant aimed the gun at Prince and fired three times. Defendant and his companions ran, got into two vehicles, and drove away.

Maldonado testified that Ramona grabbed Velasco by the hair and was punching her, but he never saw any men fighting with Velasco. Other fights broke out. Villalobos and Rincon ran out of the bar and toward the fight. Villalobos was "having words" with another man. An unknown man ran past Maldonado and punched defendant in the face, knocking him to the ground. At that time, "[h]ell broke loose . . . ." People were "fighting everywhere." Maldonado then saw that defendant, who was about 10 feet from Maldonado, had a handgun. Maldonado saw defendant aim the gun at Villalobos and fire it two or three times in rapid succession. Villalobos fell to the ground. Defendant made eye contact with Maldonado, who released a man he had been restraining and ducked down. Rincon ran toward Villalobos. Defendant turned, aimed the gun at Rincon, and fired. Maldonado ran across the street and took cover behind a car with Prince. Defendant looked around the area and fired a few more rounds toward the area where Maldonado and Prince were hiding. The police found bullet holes in a metal security

door near the bar and an expended bullet near the door, and Maldonado testified the door was in the area that defendant was firing toward.

A few days after the shootings, Prince circled defendant's photograph in a photographic array and wrote, "This look [*sic*] like the shooter." The detective showed Prince a second photograph of defendant, and Prince wrote, "I am 100 percent sure this the [*sic*] shooter." Prince also identified defendant at trial as the shooter. Maldonado similarly identified defendant as the shooter a few days after the shootings and again at the trial. He circled defendant's photograph in a photographic array and wrote "shooter" on it. In May of 2009, Prince identified a photograph of Enrique Escalante in a photographic array as depicting the man who appeared to be reaching under his shirt and whom Prince restrained during the brawl.

Rincon testified he was a member of the Ghetto Boyz gang and was present at Mal's Bar in the early morning hours of June 8, but he was inebriated. He went outside to leave, was struck on the head, and woke up in a hospital. He learned he had been shot in the chin, but he remembered nothing about the shootings.

The prosecution introduced photographs of the graffiti on the wall across the street from Mal's Bar, which stated "Barrio C14" and included the monikers "Toro" (Victor), "Limpster" (Enrique Escalante), and "Readie." The prosecution's gang expert testified that defendant's moniker was "Listo," and that the English translation of "listo" was "ready." Police recovered five .45-caliber casings, but no guns.

Prince testified that he told the police that Victor was drinking from a can of Monster Energy drink when he approached Mal's Bar, and Prince took it from him and discarded it on the side of the building. Prince believed he told the police that the shooter had a silver and orange beer can in his pocket, which he discarded before entering. Prince recalled directing the police to the two cans. Prince also believed that he told the police that the shooter, "the sister," and another woman were drinking from a blue cup. Prince believed that he told the prosecutor in May of 2009 that the shooter drank from the silver and orange beer can. The police collected these containers, a water bottle, and a

Corona bottle and submitted them for DNA testing. The parties stipulated that the major DNA profile on the Corona bottle matched defendant; the DNA on the Monster Energy can matched Victor; the major DNA profile on the blue cup was female, and defendant was excluded from contributing to the minor profile, but Ramona, Victor, and Enrique Escalante were not; and defendant, Ramona, Victor, and Enrique Escalante were excluded from being the source of DNA on the silver and orange beer can.

Ramona, who was charged along with Victor and defendant, testified in her own defense that when the bar announced it was closing time, everyone in her group except defendant left, walked across the street, got into their vehicles, and waited for defendant. Victor got out of the car, but Ramona did not see Victor spray painting. Ramona felt sick and got out of the car. She heard Velasco yelling at Victor, saying they had "crossed the line," they were "disrespecting," and something about "ghetto." Ramona said they were all from the ghetto. Velasco became angry and argued with Ramona. Sevilla escorted Velasco back to the bar, but Velasco ran back to Ramona. The two security guards then attempted to escort Velasco back to the bar. Velasco broke free and tried to hit Ramona, but Victor held Velasco's hands. Velasco swung at Victor. Defendant ran across the street toward Ramona and Victor. Villalobos, Rincon, and several others were chasing defendant. Rincon hit defendant, who went down to one knee. A fight broke out. Victor went to assist defendant, and they were fighting Rincon and two other men (not Villalobos). Defendant fell to the ground three times. Velasco struggled to take Ramona's camera, then pulled Ramona's hair and shook her. Ramona let go of her camera, and Velasco ran up to Victor and struck him in the face with the camera. Ramona heard three gunshots, but did not see a gun, tell anyone to get a gun, or hear anyone else tell anyone to get a gun. Victor grabbed Ramona's arm, led her to the car, and they drove away.

The parties stipulated that defendant had a 1998 felony drug conviction.

Defendant, Ramona, and Victor were tried together before a single jury. Ramona and Victor were acquitted of all charges. The jury convicted defendant of first degree

murder, attempted murder, and possession of a firearm by a felon. It found that the attempted murder was willful, deliberate, and premeditated; that defendant personally used and fired a gun in the commission of the murder and attempted murder, causing death or great bodily injury (§ 12022.53, subds. (b), (c), (d)); and the murder and attempted murder were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). The court sentenced defendant to prison for 50 years to life.

DISCUSSION

1. Denial of motion for lineup

Less than three weeks after the commission of the charged crimes, defendant filed a motion requesting that "all prospective witnesses" attend a court-ordered lineup. Attached to the motion was a copy of a police report stating that on June 11 Prince and Maldonado were shown photographic arrays containing photographs of Victor, Ramona, and defendant, and they identified defendant as the shooter. The prosecutor's opposition described the events outside the bar and the identifications of defendant as the shooter by Prince and Maldonado and an identification of defendant by Velasco as present and proclaiming, "This is Clanton's neighborhood." The opposition stated, "Javier [*sic*] Maldonado immediately recognized Hernandez and stated, 'That's the shooter.' Maldonado circled Hernandez's picture and wrote, 'shooter.' Deandre Prince pointed to Hernandez's picture and said 'That's the shooter.' He wrote that Hernandez's picture 'looks like' the shooter; when shown a different picture of Hernandez, Prince wrote he was 100% sure Hernandez was the shooter." The opposition further noted that Ramona and "Victor Prieto's girlfriend, Tatum Carreno" had also told the police that defendant was present. The prosecutor argued there was no reasonable likelihood of a mistaken identification that a lineup would tend to resolve.

At the hearing on the motion, defendant agreed that the facts presented in the prosecutor's opposition were correct, but stated that defendant contended he was not the

shooter. The trial court denied the motion, stating it found no material issue of identification.

Defendant contends that the trial court erred by denying his motion. He argues the "circumstances were ripe for misidentification," Prince's "identification cannot be said to be certain" because he initially wrote that defendant's photograph "'looks like' the shooter," and Maldonado's and Prince's identifications were not "corroborated by other evidence or identifications."

As a preliminary matter, we note that defendant did not forfeit this claim by failing to seek interlocutory writ review of the trial court's denial of his motion. (*People v. Mena* (2012) 54 Cal.4th 146, 158 (*Mena*).)

"[D]ue process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) "[W]hether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries" that are entrusted to the trial court's discretion. (*Ibid.*) The court should consider "not only . . . the benefits to be derived by the accused and the reasonableness of his request but also . . . the burden to be imposed on the prosecution, the police, the court and the witnesses." (*Ibid.*)

None of the matters cited by defendant is sufficient to show that there was a reasonable likelihood of a mistaken identification that a lineup would tend to resolve. Maldonado and Prince identified defendant's photograph in a photographic array and, in the case of Prince, from a second photograph. They were certain of their identifications, and their identifications were consistent with one another. There is no reason to believe that they would not have identified him in a lineup. Even if they were mistaken about whether defendant was the gunman, nothing suggests that a lineup would have had any

tendency to resolve such a mistake. And codefendant Ramona and Tatum Carreno (codefendant Victor's wife or girlfriend) had told the police that defendant was present during the commission of the crimes. The trial court thus did not err in denying the motion.

In addition, defendant has not demonstrated he was prejudiced by the court's purported error, which is subject to analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Mena*, *supra*, 54 Cal.4th at p. 161.) As *Mena* observed, "There may be some circumstances in which a defendant would be able to establish prejudice. However, many attempts to do so will founder on the shoals of speculation. The mere assertion that the witness might *possibly* have failed to make a positive identification cannot demonstrate prejudice under *Watson*. . . . [I]f the defendant had been successful on the writ and obtained a lineup, the defendant may have been identified." (*Mena*, at p. 162.) Because both Maldonado and Prince identified defendant as the shooter with certainty a few days after the crimes, then repeated their identifications at trial, and nothing indicates they ever deviated from their identifications, it is speculative to argue they would not have identified him in a pretrial lineup. Thus, "Defendant fails to establish on this particular record that, but for the trial court's failure to order the lineup, he would have obtained a more favorable result." (*Id.* at p. 166.)

2. Exclusion of Escalante's statements to the police

Defendant predicated his defense on mistaken identity and argued that Escalante shot the victims. To this end, he sought to introduce through Detective Thompson the following statements Escalante had made to the police during the investigation of the crimes: Escalante was "Limpster" from Clanton 14, he was present at the bar on the night of the charged crimes, he was struck on the jaw and knocked to the ground, and he drove the black SUV from the scene. The prosecutor objected that the statements were hearsay, and defendant argued they were declarations against penal interest. The trial court agreed with the prosecutor that the statements did not fall within the exception for declarations against penal interest and sustained the objection.

Defendant later asked the court to reconsider its ruling, and the prosecutor filed points and authorities in opposition. The opposition included a police "Statement Form" reflecting statements made by Escalante during a November 5, 2008 interview regarding the charged offenses. The form stated, "The group stayed at [Mal's] bar until it closed. Escalante said as he was leaving the bar and [*sic*] he realized his wife Maria had a [*sic*] too much to drink, to the point he needed to assist her to their vehicle, Black Nissan Armada. Escalante said he heard two females arguing and he looked over and observed that several people were rushing toward him. Enrique said that it was at this point someone hit him, knocking him to the ground. Enrique said he heard the sound of several gunshots and then fled the location in his Armada, along with his wife Maria and [defendant]. Escalante said that he did not see who was shooting and denied that he was the person who shot." The parties agreed that if Escalante were called as a witness, he would assert his privilege against self-incrimination. Defendant argued that Escalante's statements constituted declarations against penal interest and statements of his mental or physical state under Evidence Code sections 1250 and 1251. The trial court again ruled that Escalante's statements were inadmissible, stating, "Basically, the summary of the statement given to him by the police [*sic*] does not reflect any statement against penal interest, and I don't think that the exception[s] in 1250 and 1251 apply in this particular case. Moreover, I don't think that Escalante's state of mind or mental condition is an issue in this case. If he was a defendant, it would be, but he is not."

Defendant contends that Escalante's statements were declarations against penal interest because they put him at the scene, "Maldonado testified that the shooter had been punched and fell to the ground before shooting the victims," and Escalante showed consciousness of guilt by telling the police "he 'fled.'" He argues that the trial court violated "both state law and [his] state and federal due process rights to present a defense and compulsory process" by excluding evidence of Escalante's statements.

As a preliminary matter we note that defendant has not cited any portion of the record to support his compulsory process claim, and, accordingly, he has forfeited it.

(*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) Our review of the record revealed no indication that the court or prosecutor interfered with defendant's right or ability to call Escalante as a witness. Indeed, defendant told the trial court that Escalante was under subpoena to the prosecution, but the parties agreed he would refuse to testify.

We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

The trial court correctly ruled that Escalante's out-of-court statements to the police did not meet the requirements of the hearsay exception for declarations against penal interest set forth in Evidence Code section 1230. His statements that he was present, was punched and knocked to the ground during the brawl, and "fled" after the shooting did not, when made, so far subject him to the risk of criminal liability that a reasonable man in his position would not have made the statements unless he believed them to be true. Neither presence at the scene during a brawl or shooting nor being punched and knocked to the ground placed Escalante at risk of criminal liability. Similarly, saying he "fled," if indeed he used that word, did not subject him to the risk of criminal liability or even imply consciousness of guilt, absent a basis for imposing criminal liability upon him. Flight is a reasonable reaction to a dangerous situation, such as a shooting or brawl.

Defendant attempts, as he did in the trial court, to make Escalante's statement self-inculpatory by integrating it with testimony later adduced at trial that "the shooter" was punched and fell to the ground. Defendant's attempt is both factually misleading and legally insufficient. Evidence Code section 1230 requires that a statement be incriminating "when made," not when it is linked to and interpreted in light of trial

testimony. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 175.) As the Supreme Court said of redaction in *People v. Duarte* (2000) 24 Cal.4th 603, "By its nature an after-the-fact process employed with respect to a previously existing declaration . . . simply cannot bear on, let alone alter, the declarant's motives or any other circumstance that might affect a given declaration's fundamental reliability and inform a court's assessment thereof." (*Id.* at p. 614.) Nothing in the record indicates that at the time he made his statement to police Escalante knew what Maldonado had told the police, and Escalante could not possibly have known the content of Maldonado's future trial testimony. Thus, Maldonado's trial testimony cannot be used to attempt to bring Escalante's statements within the scope of Evidence Code section 1230.

Defendant's argument is factually misleading because Maldonado did not testify that just one man was knocked to the ground and the sole man knocked to the ground was the person who shot the victims. Instead, Maldonado identified defendant as "the shooter," then continued to refer to defendant as "the shooter." He testified that an unknown person punched "the shooter" and knocked him down and later identified defendant as the person whom the unknown person punched and knocked down. It was evident from the testimony of all percipient witnesses that the shooting followed a large brawl. Maldonado and Prince testified that "hell" "broke loose," "people [were] fighting everywhere," and it was "one big fight." Ramona testified that defendant was knocked down three times. Thus, even if it were permissible to evaluate Escalante's statement in light of the trial testimony, it would not be self-inculpatory because defendant was also knocked down and Maldonado was not identifying the shooter as the person who was knocked down; instead, he identified the shooter as defendant and later recounted that defendant was knocked down.

Accordingly, Escalante's statements were inadmissible hearsay, and the trial court did not err by excluding them. Nor did their exclusion violate due process. Proper application of the rules of evidence does not impermissibly infringe upon the defendant's right to present a defense. (*People v. Thornton* (2007) 41 Cal.4th 391, 443.) A defendant

"'does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible'" under the rules of evidence. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [116 S.Ct. 2013].) Although the exclusion of reliable evidence that is highly probative of the defendant's innocence violates due process (*Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150]), Escalante's proffered statements had no exculpatory value.

3. Denial of motion for new trial

Defendant also contends that the trial court erred by denying his motion for a new trial, which was based upon newly obtained evidence purportedly showing that Escalante was the shooter. This evidence consisted of (1) a declaration signed by Victor Prieto; (2) testimony by defendant's brother Gabriel Hernandez, defense counsel, and the defense investigator about Prieto's statements during a postverdict meeting on November 5, 2009; (3) a videotape of a postverdict meeting between Escalante, Victor, Gabriel Hernandez, and other members of the Clanton 14 gang; and (4) an audio recording of a meeting between Enrique and Maria Escalante, defendant's sister Mayra Fregoso, defendant's mother Maria Hernandez, and defendant's former girlfriend, Beatrice Alvarez.

a. Victor's declaration and statements

Victor's declaration stated that when he heard the gunshots he looked around and saw defendant on the ground. Defendant did not have a weapon. Victor then saw Escalante with a gun in his hand. Less than ten seconds had elapsed between the shots and Victor's observation of a gun in Escalante's hand.

Victor testified at the hearing on the new trial motion and recanted the contents of his declaration. He admitted that after the verdicts he had met with defense counsel and others in the courthouse cafeteria, and had discussed "what happened on the night of the shooting at Mal's bar." Victor did not remember telling them he saw anyone with a gun and doubted he told them that because he did not see anyone with a gun. The defense investigator later met him on his half-hour lunch break from work and asked him to sign

some papers. Victor asked to read them first, but the investigator assured him that "everything was in order" and "kept rambling on about other stuff." Victor was short on time and just signed the papers without reading them. Victor also testified that he and defendant were involved in the fight, he saw defendant get knocked to the ground at least once, but he did not see anyone with a gun before, during, or after the shootings. He did not recall seeing a gun in Escalante's hand or seeing Escalante hand defendant a gun. He did not recall telling defense counsel that it would have been impossible for defendant to have fired the shots, but he supposed or guessed "[t]hat might be correct."

Defense investigator Lawrence De Losh testified that he attended the meeting with Victor and defense counsel in the courthouse cafeteria. During that meeting, Victor stated that when he heard the gunshots he saw defendant on the ground, then looked around and saw a gun in Escalante's hand. He later saw Escalante hand the gun to defendant as they returned to the SUV. On December 17, 2009, De Losh met with Victor at a restaurant and presented him with a declaration to sign. Victor read the document, then signed it.

Gabriel Hernandez testified he was at the meeting with Victor and defense counsel in the courthouse cafeteria, and Victor said that about ten seconds after the gunshots, he saw a gun in Escalante's hand and defendant "on the ground getting up."

The parties stipulated that if defense counsel were called as a witness, he would testify that he surreptitiously recorded the meeting with Victor and others in the courthouse cafeteria, but accidentally deleted the file. Counsel would also testify that Victor said that nine seconds after he heard shots he saw the gun in Escalante's hand. Victor was cooperative and agreed to help in an attempt to obtain a recorded admission by Escalante.

The prosecutor asked the court to also consider the statement Victor gave the police soon after his arrest the day after the shootings, a copy of which was attached to the prosecutor's opposition to the new trial motion. In his statement, Victor denied

seeing anyone with a gun and denied knowing whether the shooter was on his "side and not on their side."

b. Video recording

Gabriel Hernandez testified that at defense counsel's suggestion, he tried to obtain a recorded statement regarding the shootings from Escalante. To that end, there was a meeting at the home of Gabriel's cousin. Gabriel did not know his cousin's real name, surname, or the name of the street she lived on. According to Gabriel, the only gang members present were Victor and Escalante. Gabriel denied he belonged to a gang, but he admitted he had a "C-14" tattoo between his thumb and forefinger, and he showed the court a 10-inch tall Clanton tattoo across his entire stomach. (The reporter's transcript of the new trial hearing erroneously refers to "Clanton" as "Planton.") Gabriel admitted that he violated the terms of his parole by associating with other gang members during this meeting. A video camera was set up to record the meeting surreptitiously. Gabriel identified himself, Victor, Escalante, a man he knew only as Juan, Robert Torres, a man he knew only as Juero, and at least two other men and a woman he did not know at 3 minutes and 9 seconds and at 3 minutes and 15 seconds into the video. Subsequently, someone pushed a door into the camera and thereafter the image was either blocked by the door or out of focus. Gabriel did not identify any person's voice or testify as to any statement made by any individual.

Defense counsel played three segments of the video during Victor's testimony at the hearing and attempted to have Victor identify himself and others. Victor testified the quality of the video was so poor that he could "barely" recognize himself in it. He did not recall whether Escalante attended the meeting. Victor recognized his own voice in one of the segments defense counsel played, but he did not recognize anyone else's voice and did not recall what was discussed that night. He explained that there were several meetings, and "we were drinking."

Defense counsel admitted that the video recording was of such poor quality that transcribers and an interpreter who were retained to produce a transcript and translation

were unable to do so. Counsel nonetheless provided the trial court with a two-page transcript of two pairs of statements. Counsel apparently played the portions of the video recording corresponding to the partial transcript in the course of Victor's testimony. None of the exhibits at the new trial hearing was actually admitted in evidence, and although we granted defendant's motion to augment the appellate record with trial counsel's copies of the two-page partial transcription of the video recording, the recording itself is not part of the record.

The first page of the partial transcript reflects the following pair of statements:

"Victor[:] When I turned around, I believe . . . (inaudible) . . . the hiena grabbed me. I'm thinking it's Cat. By this time he should have been up, I didn't knock him out, he fell on his ass. Somebody grabbed me (inaudible) I took a, I can't see who grabbed me. (Inaudible.) I socked three or four times the only (inaudible) behind me the only people behind me are two fools who hadn't gone down. **I didn't know it was you.** I'm thinking they're blasting at me. [¶] That's when I see who's grabbing me and she fell on her ass. I'm looking at Listo get up. I didn't know if he got knocked out a second time, or what. I didn't see when you got knocked down I didn't see none of this.

"Enrique[:] We're losing it, fuck yeah we're losing it, I grabbed one I tried to grab another one." (Ellipses and boldface in original.)

The second page of the partial transcript reflects the following pair of statements:

"Unk[nown:] From what I hear homes, I don't know how it went down, but from what I hear homes (inaudible) Listo won't even talk to me about that shit homes, the homies say you know what **after you did what you done homes**, Listo got the shit homie. You know what security they didn't witness that shit. They didn't witness you passing it but witnessed Listo carrying it.

"Enrique[:] (Inaudible) gimmie that shit, gimmie mine, I had another gauge **cause I was using that one**, he said gimmie mine, gimmie mine (inaudible)[.]" (Boldface in original.)

Defendant conceded that he had not established Escalante's unavailability as a witness.

c. Audio recording

Mayra Fregoso testified that she, Maria Hernandez, and Beatrice Alvarez went to Escalante's house to visit him and his wife Maria sometime in January of 2010. Fregoso had an audio recorder hidden on her body and recorded the conversation without the knowledge of the Escalantes. Although we granted defendant's motion to augment the appellate record with trial counsel's copy of the 63-page transcription of the recording, the recording itself is not part of the record. We have, however, read the entire transcript of the recording. Fregoso, Alvarez, and Hernandez did most of the talking, and often interrupted each other and the Escalantes. Fregoso, Alvarez, and Hernandez repeatedly stated that they had heard that Escalante had committed the charged crimes and was going to "turn [himself] in," complained that defendant's daughter was depressed, and complained that people had not donated or raised money to hire an attorney for defendant. Escalante said he had been sending "him" money, but otherwise remained silent, denied their assertions, or responded ambiguously. At no time did he admit that he shot the victims. Indeed, he stated that when a prosecutor told him that Victor identified him as the shooter and the prosecutor asked Escalante if that was true, he replied, "'No, it wasn't none of us.' . . . '[I]t wasn't any of us.'"

d. Trial court's ruling

After hearing argument, the trial court denied the new trial motion, stating, "Well, it may be that if all of this had been presented to the trier of fact there might have been a different result, but the question is whether any of that evidence could be presented to the trier of fact. And the only statement that I think that arguably could be presented is this statement by Mr. Prieto, and I frankly believe he made the statement. But making the statement does not necessarily make it true because in his particular case he had a certain bias given that he's a fellow gang member, Mr. Hernandez, and he now disavows making the statement, and immediately after the incident he was questioned over a period, it

appears to be about an hour or so and he made no mention at all of the gun. So as I said, just because he made the statement, that doesn't mean it's true. [¶] And the real question I think is, is the evidence—is his post-acquittal statement made to you counsel and others worthy of belief by the jury. Now, if he was called as a witness he wouldn't say what you wanted him to say, you would impeach him. If he did say what you wanted him to say, the People would impeach him with the other statement. So in my view taking it in context and considering all the other circumstances, which include two security guards who were very close to the scene saying that your client was the person who had the gun, I don't think that Mr. Prieto's statement is worthy of belief by the jury."

e. Propriety of denial

A motion for a new trial may be based upon newly discovered evidence that could not, with reasonable diligence, have been discovered and produced at trial. (§ 1181, subd. 8.) The trial court may consider the credibility, as well as the materiality, of the evidence in determining whether introduction of the evidence in a new trial would render a different result reasonably probable. (*People v. Delgado* (1993) 5 Cal.4th 312, 329.) The determination of a motion for a new trial rests so completely within the trial court's discretion that its ruling will not be disturbed on appeal absent a manifest and unmistakable abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 730.)

Victor's declaration, together with the testimony of other witnesses attempting to bolster it after he recanted, was potentially admissible as a prior inconsistent or consistent statement if he testified at a new trial, but the prosecution could also introduce his prior statement to police that was inconsistent with his declaration. As the trial court noted, Victor's credibility could have been cast into further doubt by the introduction of evidence of his shared gang membership with defendant, which showed bias, and his lengthy delay in coming forward with information that would have exonerated his friend.

As far as the appellate record demonstrates, neither of the recordings included any evidence that would have been admissible if defendant were granted a new trial. Defendant argues that the recorded statements were admissible as declarations against

interest, but he is incorrect. The transcript of the audio recording includes no self-inculpatory statements by Escalante. The women associated with defendant accused Escalante of committing the charged crimes, but he remained silent, denied their assertions, or responded ambiguously. If Escalante had been a codefendant, defendant might have succeeded in persuading the trial court that particular statements in the audio constituted adoptive admissions, but that exception was inapplicable because Escalante was not a codefendant. (Evid. Code, § 1221.)

The second transcribed statement from the video that was attributed on the transcript to Escalante might have qualified as a declaration against penal interest if defendant were able to establish the identity of the speaker and the speaker's unavailability, but because the speaker seemed to be saying he was using a second gun and defendant was demanding to be given his own gun, the statement does not exonerate defendant and falls far short of showing that a different result would be reasonably probable if the court granted defendant a new trial. Notably, the speaker refers to "another gauge." With reference to guns, the noun "gauge" commonly refers to "the size of a shotgun barrel's inner diameter nominally expressed as the number of lead balls each just fitting that diameter required to make a pound <a 12-*gauge* shotgun>" (<http://www.merriam-webster.com/dictionary/gauge?show=0&t=1342042472> as of Aug. 2, 2012), and nothing in the record indicates a shotgun was fired in the course of the events giving rise to the charged offenses. The coroner recovered a large-caliber bullet from Villalobos's body and did not testify that he found any shotgun wounds. The police found .45-caliber casings, but did not indicate that they found any shotgun pellets or other evidence indicating that a shotgun was used. Defendant did not offer any evidence showing that "gauge" could be used to refer to a handgun. We further note that defendant's argument depends in large part upon the accusatory content of the first statement in each pair of transcribed statements, that is, the statements to which Escalante purportedly responded. But those statements were not made by Escalante and the responses attributed to Escalante did not admit or incorporate the accusations. Because

Escalante was not a codefendant, the statements attributed to him did not constitute adoptive admissions.

Accordingly, the trial court did not abuse its discretion by concluding that defendant failed to show that a different result would be reasonably probable if he were granted a new trial. Most of the newly obtained material was inadmissible, and the trial court reasonably concluded that Victor's declaration was not credible.

4. Heat of passion instructions

Without objection, the trial court instructed the jury on sudden quarrel or heat of passion with former CALCRIM Nos. 570 and 570A. As given, the first of these instructions provided as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if he or she killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his or her reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

The court then elaborated upon "heat of passion," using former CALCRIM No. 570A: "Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his or her own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. *In deciding whether the provocation was sufficient, consider whether an ordinary person of*

average disposition would have been provoked and how such a person would react in the same situation knowing the same facts. [¶] If enough time passed between the provocation and the killing for an ordinary person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

Defendant contends that the italicized language in former CALCRIM No. 570A "erroneously required the jury to consider *how* a reasonable person of average disposition would have reacted to the provocation, instead of just whether such a person would have reacted from passion rather than from judgment. By instructing the jury, in effect, that it could convict [defendant] of voluntary manslaughter and attempted voluntary manslaughter only if his homicidal actions were reasonable, the trial court lightened the prosecution's burden of proof for murder and attempted murder, in violation of [defendant's] state and federal due process rights."

We note that the same issue is pending before the California Supreme Court in *People v. Beltran*, review granted June 15, 2011, S192644.

Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury misconstrued or misapplied the challenged instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016–1017.)

Heat of passion has both objective and subjective components. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) The defendant must subjectively act in the heat of passion. (*Ibid.*) But the claimed provocation must be sufficient to cause a reasonable person under the same circumstances to act rashly, without deliberation and reflection, from passion rather than from judgment. (*Ibid.*) A defendant may not "'"set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused . . . ."'" (*Id.* at pp. 1215–1216, quoting *People v. Steele* (2002) 27 Cal.4th 1230,

1252.)

The first portion of the challenged sentence ("In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition would have been provoked") is unobjectionable. Viewed in isolation, the remainder of the sentence ("how such a person would react in the same situation knowing the same facts") arguably could be construed to invite the jury to consider how an ordinary person of average disposition would have behaved, which would be inappropriate. But the initial portion of the instruction clearly and correctly sets forth the elements of heat of passion: "1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his or her reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." The introductory clause of the challenged sentence clearly limits its scope to the third enumerated element, not the first two. Reading the entire challenged sentence in light of the instruction as a whole, it is not reasonably likely that the jury would have understood the challenged sentence to mean that it could find that defendant acted in the heat of passion only if an ordinary person of average disposition would have reacted the same way. Accordingly, although the wording of the former CALCRIM No. 570A left something to be desired, the trial court did not err by instructing with it.

5. Application of section 654 to defendant's possession of firearm conviction

The trial court imposed a concurrent sentence for defendant's conviction of possession of a firearm by a felon. Defendant contends that this violated section 654 because the record did not show that he possessed the gun at any time prior to or after the shootings. We agree.

Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute prohibits punishment

for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*Ibid*.) But if a defendant had separate objectives that "were either (1) consecutive even if similar or (2) different even if simultaneous," multiple punishment is permissible, even if the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Britt* (2004) 32 Cal.4th 944, 952; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant's intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

A conviction for firearm possession by a felon "presents a unique circumstance in the minefield of section 654 cases in that this charge involves an important policy consideration," namely, minimizing the danger to public safety arising from free access to firearms, a danger presumed to be greater when the person possessing the firearm is a convicted felon. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1409.) Whether possession of the gun and an offense in which the gun is used are divisible depends upon the facts of the case. (*Id.* at p. 1408; *People v. Bradford* (1976) 17 Cal.3d 8, 22.) Where the evidence shows a possession distinctly antecedent to and separate from the primary offense, both crimes may be punished, but where the evidence shows possession only in conjunction with the primary offense, both offenses may not be punished. (*Bradford*, at p. 22.) "[M]ultiple punishment is improper where the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . .'" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144 quoting *Ratcliff*, at p. 1412.) But "section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Jones*, at p. 1145.)

The record did not reveal the location of the gun before or after defendant used it. Testimony that defendant was patted down for weapons before entering the bar tends to

show that he was not carrying the gun while in the bar. Prince testified that during the street brawl he heard Ramona and Victor shout commands to "get" the gun. Defendant may have obtained the gun at that moment from another person, from the Prietos' vehicle, or from Escalante's vehicle—in which defendant had ridden to the bar. Although it is possible that defendant had actual or constructive possession of the gun prior to or after the shooting, the record includes no substantial evidence supporting such an inference. Accordingly, the sentence on the felon in possession count should be stayed.

DISPOSITION

The sentence on count 3, felon in possession of a firearm, is stayed pursuant to Penal Code section 654. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

I concur:

JOHNSON, J.

Rothschild, J., dissenting:

I agree with Hernandez that the jury instructions concerning provocation were erroneous and that the error was prejudicial. I also agree that Escalante's out of court statements should have been admitted as statements against penal interest. I would reverse and remand for a new trial, and I therefore respectfully dissent.

Hernandez's argument concerning the jury instructions is based on a correct statement of the law: In order for provocation to be sufficient to reduce murder to manslaughter, it must be sufficient to cause an ordinary person of average disposition "to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*People v. Breverman* (1998) 19 Cal.4th 142, 163, internal quotation marks omitted.) The provocation need not be sufficient to cause an ordinary person of average disposition *to commit homicide*. (*People v. Najera* (2006) 138 Cal.App.4th 212, 223.)

Former CALCRIM No. 570A is ambiguous because it instructs the jury to consider "whether an ordinary person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts." Although it is conceivable that the jury could interpret the phrase "how such a person would react" as referring solely to the ordinary person's *mental state* (that is, whether such a person would react by acting rashly, without due deliberation and reflection, and from passion rather than from judgment), it is at least as likely that the jury would reasonably interpret the phrase as referring to an ordinary person's *conduct* (that is, whether such a person would commit homicide). On the latter interpretation, the instruction is legally erroneous.

Former CALCRIM No. 570 does not cure the ambiguity in former CALCRIM No. 570A. Former CALCRIM No. 570 instructs the jury that the third element of the provocation defense is that "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." The problematic sentence of former CALCRIM No. 570A

unambiguously relates to that element. But former CALCRIM No. 570A instructs the jury, in deciding whether the third element has been proven, to consider "how such a person would react." There is nothing in either instruction to prevent the jury from reasonably interpreting the phrase "how such a person would react" as referring to the ordinary person's conduct rather than to the ordinary person's mental state. In other words, the jury could have reasonably concluded that it should consider the ordinary person's conduct in determining whether an ordinary person would act rashly and without due deliberation, from passion rather than from judgment.

The improper instruction was prejudicial because there is a reasonable probability that Hernandez would have obtained a more favorable result in the absence of the error. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 172-174, 178.) The evidence shows that Hernandez was knocked to the ground in the course of a brawl involving several other individuals. It is reasonably probable that, if the jury had known not to consider whether an ordinary person of average disposition *would commit homicide* under those circumstances, the jury would have concluded that the provocation was sufficient because an ordinary person of average disposition in Hernandez's circumstances would have acted rashly and without due deliberation. Moreover, the prosecutor compounded the prejudicial effect of the ambiguous instruction by arguing in terms of the *incorrect* interpretation of the instruction. In closing, the prosecutor argued as follows: "Assuming this was just a fist fight, assuming this was a fight between 2 fellow gangs, does the average person pull out a gun and then shoot other people? [¶] What happens? Is that the provocation that is necessary to kill another human being? To shoot another human being in the face? And that's why the heat of passion fails[.]" Thus, the prosecutor expressly argued that the heat of passion defense failed because an "average person" would not have committed homicide under these circumstances. The jury instructions did not inform the jury that the prosecutor's argument was incorrect as a matter of law. On the contrary, the ambiguity in former CALCRIM No. 570A allowed the jury to accept the argument as legally valid. For all of these reasons, I conclude that it is reasonably

probable that Hernandez would have obtained a more favorable result under proper instructions, so the convictions must be reversed.

I also agree with Hernandez's argument that the trial court abused its discretion by excluding evidence of Escalante's statements to the police. Escalante, a gang member, admitted during a police interview that he was knocked to the ground in the course of the brawl that precipitated the shooting. That admission was against his penal interest—it placed him at the scene of the crime and gave him the motive and the opportunity to commit it. Indeed, it gave him the same motive that Hernandez allegedly had. I conclude that it was an abuse of discretion to exclude Escalante's statements.

For all of the foregoing reasons, I respectfully dissent.

ROTHSCHILD, J.