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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ANTHONY SORIA,

Defendant and Appellant.

B275214

(Los Angeles County
Super. Ct. No. VA122116)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed with directions.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Shawn McGahey Webb

and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

At trial, defendant James Anthony Soria admitted shooting Victor Avila to death in a Los Angeles alley. Soria also admitted shooting at Victor Avila's cousin Ralph Avila, who fled the alley without injury. The jury convicted Soria of murdering Victor Avila and of attempting to murder Ralph Avila.

Soria's uncle Jose Cuellar was in the alley with Soria. The jury acquitted Cuellar of assaulting the Avilas with a baseball bat, but could not reach verdicts on other counts against Cuellar. Cuellar thus had nothing to appeal. Soria is the sole appellant.

The parties had conflicting accounts of the confrontation.

The prosecution maintained Soria and Cuellar had gone out hunting the Avilas, seeking to ambush and kill them. The prosecutor argued Soria and Cuellar planned for Cuellar to threaten and divert the Avilas with a baseball bat and thus enable "Soria to come up behind and start blasting."

Soria's lawyer argued Soria had no plan at all. Rather, Soria unexpectedly chanced upon the alley and discovered two large and fearsome men—Victor and Ralph Avila—menacing his small uncle Cuellar, who was alone and holding off the Avilas with a bat. Soria shot at the Avilas to defend his uncle Cuellar from a deadly attack. Soria fired at both Avilas, killing Victor Avila and missing but scaring off Ralph Avila.

Soria raises four issues: jury instructions, evidence rulings, ineffective assistance of counsel, and error under *People v. Franklin* (2016) 63 Cal.4th 261. We affirm on the first three issues and remand with directions on the fourth.

I. Jury instructions

Soria's first set of issues concerns jury instructions. The trial court bowed to the trial lawyers' preference for CALJIC instructions.

A. Standard of review

In criminal cases, a trial court must instruct on general principles of law relevant to the issues raised at trial, including the defendant's theory of the case. (*People v. Anderson* (2011) 51 Cal.4th 989, 996.) We independently review jury instruction issues for legal error. (See *People v. Simon* (2016) 1 Cal.5th 98, 133.) Failure to object to an instruction forfeits any claim of error on appeal. (*People v. Cardona* (2016) 246 Cal.App.4th 608, 612.) There is no forfeiture, however, if the court's instruction was an incorrect statement of law or if the instructional error affected the defendant's substantial rights. (*People v. Mason* (2013) 218 Cal.App.4th 818, 823.)

B. The doctrine of "defense of another"

As the admitted shooter and killer, Soria's defense at trial was "defense of another." This doctrine specifies when the goal of defending someone else justifies lethal force. The doctrine comes in two versions: perfect and imperfect.

The perfect version of defense of another justifies force to defend another when one sincerely and *reasonably* believed a sufficiently serious attack was imminent. (Cf. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [perfect self-defense].) The imperfect version of this defense reduces the offense from murder to voluntary manslaughter if the killer sincerely but *unreasonably* believed force was necessary. (See *People v. Randle*

(2005) 35 Cal.4th 987, 995–1000, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172.)

C. Soria's arguments about jury instructions

Soria makes three arguments about jury instructions. First, he complains CALJIC 5.12 was the proper instruction, but his trial counsel did not request it and the trial judge did not give it. Instead, Soria's trial counsel requested and the trial court gave CALJIC 5.13. Second, Soria complains CALJIC 5.14, which was given, incorrectly states the law. Third, he asserts CALJIC 5.31, which the court also gave, was misleading.

1. CALJIC 5.12

Soria's first instructional claim is that he was entitled to use deadly force to resist force likely to produce great bodily injury, but the jury instructions did not convey this principle. Specifically, Soria says his trial counsel did not request CALJIC 5.12, it was not given, it was mandatory, and therefore Soria is entitled to a new trial.

This argument errs. The title of CALJIC 5.12 is "Justifiable Homicide in *Self-Defense*," but Soria never claimed self-defense. CALJIC 5.12 did not fit Soria's defense. There was neither evidence nor argument that Soria saw or had any need to defend himself in the alley. Because Soria's defense was not self-defense, the CALJIC self-defense instruction was not appropriate. Soria's trial counsel asked for the "defense of others" instructions, not self-defense. That trial lawyer was right not to request an instruction on self-defense and the trial court was right not to give it.

The CALJIC instructions appropriate to this case thus were different than CALJIC 5.12. The trial court gave those appropriate CALJIC instructions. In the CALJIC series, the two

instructions after CALJIC 5.12 state the “defense of another” defense. These instructions are 5.13 and 5.14. CALJIC 5.13 is titled “Justifiable Homicide -- Lawful Defense of Self or Another.” CALJIC 5.14 is titled “Homicide in Defense of Another.” These instructions fit Soria’s defense-of-another defense. Soria’s trial counsel requested these instructions and argued the case in their terms. The trial court gave both requested instructions. Soria concedes “CALJIC 5.13 is a correct statement of the law”

In sum, Soria’s first complaint about instructional error is groundless.

In a variant of this invalid argument, Soria complains about particular wording. He claims the court should have used the phrase “threat of great bodily injury” instead of the phrase “forcible and atrocious crime.” Soria’s argument is insubstantial because these phrases are synonyms in the context of this case, which was, as his counsel put it, that Soria entered the alley and saw “two big guys that are there,” referring to Victor and Ralph Avila. According to counsel, Soria saw the Avilas confronting Cuellar, who clutched the bat. Soria’s trial counsel portrayed Soria’s supposed perception of his “little” uncle Cuellar in graphic terms: “this little guy standing there with a bat probably peeing on himself. Probably just -- oh, God, I’m about to die. I’m about to leave this earth right now. That’s the scene on which this man [Soria] rolled up on.” Soria’s theory of the case thus was that Soria saw Victor and Ralph Avila ready to kill Cuellar, thus forcing Soria to start “blasting” to “extricate his uncle from danger.”

When the specific threat in a case prompts the reaction “oh, God, I’m about to die,” the “threat of great bodily injury” is equivalent to the threat of a “forcible and atrocious crime.” Both

phrases accurately describe the threat of a fatal beating. In a further permutation, Soria claims his trial lawyer was not relying on a defense that Victor and Ralph Avila were committing a forcible and *atrocious* crime when Soria shot them. This is inaccurate. Soria's trial lawyer indeed argued Soria "had a right to put [Victor Avila] down, [to] protect his uncle [Cuellar] from a physical, *atrocious* attack." (Italics added.)

Soria also argues his trial counsel did not request and the trial court did not give CALJIC 5.16, which defines forcible and atrocious crimes. Soria writes this "is not the primary error of which appellant complains." This statement implies Soria does count this omission as error of some sort. Yet if Soria wanted the terms "forcible" and (the antiquated) "atrocious" clarified, he had a duty to request such clarification. He did not. (*People v. Barillas* (1996) 49 Cal.App.4th 1012, 1023.) This forfeiture did not affect Soria's substantial rights. "Atrocious" in common parlance means "something very bad." The prospect of being beaten to death is something very bad. The jury never asked for clarification on this point. It reached a verdict in less than two hours. The jury instructions as given explained the law correctly.

2. CALJIC 5.14

Soria launches a second attack on a different CALJIC instruction, which is 5.14. We italicize the disputed portion:

"CALJIC 5.14 Justifiable Homicide in Defense of Another

"The reasonable ground of apprehension does not require actual danger, but it does require (1) that the person about to kill another be confronted by the appearance of a peril such as has been mentioned; (2) that the appearance of peril arouse in [his] [her] mind an actual belief and fear of the existence of that peril; (3) that a reasonable person in the same situation, seeing and

knowing the same facts, would justifiably have, and be justified in having, the same fear; and (4) *that the killing be done under the influence of that fear alone.*”

Soria claims this italicized requirement four is legal error. Yet *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 held “an instruction which states that the party killing must act under the influence of such fears alone, is a correct statement of the law.”

“In the case at bench, [Soria] could have requested additional instructions with regard to his feeling anger toward [the Avilas] as well as fear, or with regard to a situation where anger and fear were both causal factors. He did not do so. Nor did he argue to the jury the presence of such dual motivation or feeling. Under such circumstances, his argument on appeal must fail.” (*People v. Trevino, supra*, 200 Cal.App.3d at p. 880; see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1042-1047.)

3. CALJIC 5.31

Soria claims there was a third instructional error because the trial court gave the following version of CALJIC 5.31, to which we add italics:

“CALJIC 5.31 Assault With Fists—When Use of Deadly Weapon Not Justified

“An assault with the fists does not justify the person being assaulted in using a deadly weapon *in self-defense* unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon [him] [her].”

This instruction is about self-defense. This instruction was pertinent to Cuellar’s case (because Cuellar had wielded a bat against the Avilas) but not Soria’s, which, to repeat, did not involve self-defense. This instruction was not error.

II. Evidence objections

Soria's second ground for appeal concerns two tapes played at trial. One was of Cuellar's interview. The other was Soria's. In 2011, police arrested Cuellar first. Only later did they find and arrest Soria. Cuellar and Soria both spoke to police after arrest, but separately. The trial court admitted tapes of these two 2011 police interviews in their entirety. Soria complains both recordings contained inadmissible evidence. We review evidence rulings for abuses of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.)

A. Cuellar's interview

Cuellar's interview lasted about an hour and 45 minutes. In our record, the transcript is 86 pages.

1. Background

Cuellar testified during the defense phase of the trial. During a break in his testimony and out of the jury's presence, the trial court discussed the Cuellar interview tape with counsel. Everyone agreed the jury could hear Cuellar's prior inconsistent statements. Soria's appellate counsel made the same concession. At trial, Cuellar and Soria objected to 13 particular statements or sentences within Cuellar's lengthy interview. The evidentiary basis was that the objectionable statements were "self-serving conclusions and opinions that are otherwise inadmissible under the law."

The trial court pondered whether to redact Cuellar's interview but ultimately did not. The court noted the "interview in its entirety cuts both ways, cuts all ways. [Cuellar] makes . . . very incriminating, highly inflammatory statements toward the victim Mr. Victor Avila. He makes inflammatory statements towards his nephew. He incriminates himself to some extent. [¶]

But the statements are what he said and they are subject to cross, and they are both helpful and damaging. I don't want to be parsing out, especially when he's represented to the jury that he was fearful and he was truthful, but then he wasn't truthful [¶] This is part and [parcel] to the totality of the statements and . . . the way he elocutes when he's speaking to the police officer [¶] I want to make sure that the record is very clear so that the Court of Appeal understands I looked at this transcript in its entirety and I measured out those things and I wanted to make a fair and impartial determination under [Evidence Code section] 352 and as to the admissibility [of] any and all of these comments."

2. Waiver

On appeal, Soria makes specific evidentiary objections to 18 particular statements within this long interview. Yet 13 of these 18 appellate objections are to statements to which trial counsel did not object.

A judgment shall not be reversed by reason of the erroneous admission of evidence unless there appears of record an objection that made clear its specific ground. (Evid. Code, § 353.)

Soria thus has forfeited the 13 appellate objections he did not present to the trial court.

3. Two categories of preserved objections

As stated above, the evidentiary basis for the defense objections was that the challenged statements were "self-serving conclusions and opinions that are otherwise inadmissible under the law." The five specific challenges Soria did assert at trial fall into two categories. The first category encompasses four specific

statements, while the second category involves a single statement.

a. First category: Soria was “red”

In the first category, Cuellar in his 2011 interview claimed (in four slightly different ways) that Soria was agitated and looked like he was “up to no good” just before the killing. In one version of this statement, Cuellar said Soria looked “red” right before the shooting. This observation prompted Cuellar to ask Soria “what’s going on?” Soria said nothing and departed. Cuellar told detectives, “Okay, and I figured it myself, I said you know what, *this guy is up to no good.*” Elsewhere Cuellar again explained, “I just seen his face. I just know his -- like a dad knows about a son. That *he’s up to no good.*” (Italics added.)

For two independent reasons, the trial court did not abuse its discretion to admit this testimony.

i. Impeachment

First, Cuellar’s 2011 statements were prior inconsistent statements, admissible to impeach the veracity of his 2015 trial testimony. Cuellar described the crucial events twice: first in 2011 to police and then at the 2015 trial. The prosecution claimed the two versions were inconsistent and proved Cuellar was a liar. The court properly allowed jurors to hear the evidence and to judge for themselves.

The arguable inconsistency here was as follows. When testifying in 2015, Cuellar changed his 2011 claim that Soria was “red” and “up to no good.” Cuellar’s 2015 version was not that Soria looked “red” but that Soria was “not himself. A little just off.” “I mean, *I wouldn’t say angry*, but I would say out of ordinary. He wasn’t him.” (Italics added.) Also, at trial Cuellar omitted statements that Soria was “up to no good.”

Although this particular conflict was not ineluctable, the trial judge had a proper basis for deciding the jury could find Cuellar's 2011 statements to be inconsistent with his 2015 testimony. Cuellar's incentives changed from 2011 to 2015. In 2011, Cuellar knew police had not located Soria. That gave Cuellar an incentive to exculpate himself by incriminating Soria, whom police might never find. The situation changed once police captured Soria. When Cuellar and Soria were codefendants in a murder trial, Soria no longer was a conveniently missing fall guy, but instead was a family member seated at the defense table. By then, Soria and Cuellar both had counsel who were striving to present a consistent defense.

The trial court did not abuse its discretion by concluding the statements Soria was "red" were inconsistent with testimony Soria was not "angry." This was proper impeachment. The testimony was admissible.

ii. Lay opinion

Second, and as an independent basis for admission, these statements were proper lay witness opinion testimony. Taken together, the statements characterize Cuellar's impression of Soria's demeanor, appearance, and body language, minutes before the killing. The killer's demeanor just before shooting was relevant. The statements supported the prosecution's theory that Soria was agitated, which went to motive. The prosecution argued Victor Avila was the source of Soria's agitation and Soria left to hunt and murder him. Cuellar's 2011 statements tended to contradict Soria's defense that he happened upon the Avilas only by chance and shot at them only to defend Cuellar.

The statements were proper lay testimony. They were rationally based on the perception of the witness and helpful to a clear understanding of his testimony. (See Evid. Code, § 800.)

The trial court had proper discretion to overrule objections under section 352 of the Evidence Code. The statements were brief -- only sentence fragments, actually -- and involved no extraneous or improper topics.

b. Second category: South Side tattoo

The second general subject of Soria's evidentiary objections was to the following portion of the police interview of Cuellar. We quote extensively for context.

"[Detective]: You're talking about the victim in this case [Victor Avila]?"

"Cuellar: The victim.

"[Detective]: This guy that's dead?"

"Cuellar: Yes.

"[Detective]: Do you ... how do you know him?"

"Cuellar: I mean, we stay there, you know. I live there.

"[Detective]: So he's your neighbor?"

"Cuellar: Yea, my neighbor. We try to keep everything calm there, you know.

"[Detective]: Do you know do you get to know his name?"

"Cuellar: No, I know him by whatever he used to come out and tell me his gang name or something.

"[Detective]: Well, what was that?"

"Cuellar: Blue.

"[Detective]: Okay.

"Cuellar: But he. . .

"[Detective]: Okay.

“Cuellar: Yea that’s what he used to come at me as. But I mean, I don’t gang bang sir, I . . . I don’t play that stuff, okay, you know. I don’t do none of that. But there you go that we lived in the same place, we got to keep things calm. But like I’m repeating to you I have a nephew [Soria] that’s just.

“[Detective]: So he [Blue] had a problem with your nephew [Soria]?

“Cuellar: Yes.

“[Detective]: What was the problem?

“Cuellar: I have no idea. They had an incident up and going, like it’s just a problem of seeing thing, like oh I can’t see you because you’re bald. Or I can’t see you because you’re from you’re from I stay here and you’re not from around here. You know so.

“[Detective]: Okay. And [your] nephew [Soria], is. . . is he from a gang?

“Cuellar: No, he’s not. He’s not, he’s just uh, he’s bald, he has tattoos but he’s just.

“[Detective]: He’s got some tats, tats on him. What what’s he have on him?

“Cuellar: I believe it’s South Side. On his back, but that’s it.

“[Detective]: What’s that all about?

“Cuellar: Beat’s me, for real. Beats me because when you can’t have that I mean, what’s the point of having that if you’re not from a gang or being involved.”

This testimony was admissible for two reasons. First, the defense failed to specify a specific and valid evidentiary objection to this testimony. The defense’s objection was, “I would object to

that.” The only specific objection defense counsel offered was the statements were “self-serving conclusions and opinion that are otherwise inadmissible under the law.” Cuellar’s statements were not inadmissible self-serving conclusions and opinions, assuming this objection qualifies as specific. Cuellar based his report of Soria’s tattoo on personal knowledge of his nephew, whom he professed to have known long and well. Cuellar also claimed personal knowledge that Soria was not in a gang. Cuellar’s profession of confusion about the logical conflict between having a South Side tattoo and not being in a gang was Cuellar’s account of his own analysis of the matter.

Second, assuming there was a valid defense objection under Evidence Code section 352, the trial court did not abuse its discretion by admitting this testimony. The testimony was relevant to show motive. Soria did not request any limiting instruction. The testimony was brief. There was no probability this evidence would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury that would substantially outweigh its probative value. The probative value was significant. Cuellar explained victim Victor Avila had a “problem” with Soria. This problem arose, Cuellar said, from the fact Victor Avila (mistakenly) deduced from Soria’s looks -- Soria’s shaved and “bald” head and his tattoo -- that Soria was in a rival gang. These facts were probative of motive. A reasonable inference was that Victor Avila had a problem with Soria, Soria had a problem with Avila, and Soria could solve the problem by removing Avila. As Stalin supposedly said, no man, no problem. The probative value was substantial because motive can be important in explaining human behavior.

Any *undue* prejudice was minimal because Cuellar maintained Soria was *not* a gang member. The mention of a South Side tattoo was fleeting. Cuellar, not police, introduced the topic of gangs. Cuellar did so only to explain why he knew Victor Avila by the gang name of Blue and why Blue had a “problem” with Soria. These facts were legitimate context to this case. It was not error to admit this testimony.

B. Soria’s interview

Soria’s interview was admissible because, as he concedes on appeal, he failed to make a specific objection to this evidence. A judgment shall not be reversed by reason of the erroneous admission of evidence unless there appears of record an objection that made clear its specific ground. (Evid. Code, § 353.)

Police interviewed Soria after his arrest in 2011. After *Miranda* warnings, Soria voluntarily answered questions for about 20 minutes. The transcript of this interview is 16 pages long. The prosecution moved to play this tape. Soria initially objected on the ground Soria was not testifying in the case. The prosecutor said the recording was admissible whether or not Soria testified. The trial court stated that, as long as there was no confrontation clause issue as to Cuellar, it was “inclined to allow the prosecution to play the” recording. This tentative ruling was proper because Soria’s statements were admissions by a party opponent under Evidence Code section 1220.

The next day, Soria’s counsel renewed his objection but never specified its evidentiary basis. The defense attorney requested an Evidence Code section 402 hearing, “because there’s objectionable information in there including domestic violence, gang—a lot of things I’d like the court to hear and make a ruling on that prior to it being played.” The trial court responded, “All

right. What is it specifically?” Soria’s counsel said the police had asked “about gangs, they ask[ed] about domestic violence in the case.”

The prosecutor replied “this is [Soria’s] statement. He [Soria] denies everything, including that [referring to gangs and domestic violence]. The only mention of the [domestic violence] is that it was a [district attorney] reject. So I don’t see any harm to it.” When the trial court asked Soria’s counsel whether Soria denied gang membership, Soria’s attorney answered yes. The trial court began to ask Soria another question about the taped interview when Soria interrupted to protest the tape also revealed that an interrogating detective told Soria a falsehood: that Cuellar had fingered Soria to police. The prosecution promised to put that detective on the witness stand to explain his statement was a false ruse. That detective testified as promised, thus eliminating this ruse issue.

In sum, Soria objected to the gang and domestic violence topics in his taped interview but never specified the specific evidentiary basis for his objections. Accordingly, Soria waived these trial objections according to subdivision (a) of Evidence Code section 353, which requires that evidentiary objection be “so stated as to make clear the specific ground of the objection”

On appeal, Soria acknowledges he failed to specify the basis for his objections. Soria claims the doctrine of futility excuses it. This is incorrect. Soria objected to this same evidence two days in a row and the trial court never refused to consider the repetitive objections. To the contrary, the trial court reliably was receptive to counsel’s concerns, attentive to counsel’s arguments, courteous, and obliging. There is no basis for a futility argument.

To support his futility argument, moreover, Soria cites an inapposite case: *People v. Hill* (1998) 17 Cal.4th 800, 820. *Hill* is inapposite for two reasons. It did not interpret section 353 of the Evidence Code. The *Hill* case also presented a case unlike the context of Soria's trial. Our Supreme Court described the extreme and "unusual" situation in *Hill*, where the defense attorney was named Blum:

"Although defense counsel Blum objected to some of the instances of prosecutorial misconduct, he did not do so in all cases. Moreover, some of the times Blum objected he either did not adequately state the grounds of his objection or failed to request the jury be admonished. Nevertheless, we note Blum was subjected to a constant barrage of Prosecutor Morton's unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods. With a few exceptions, all of Morton's misconduct occurred in front of the jury. Her continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous that Blum was thrust upon the horns of a dilemma. On the one hand, he could continually object to Morton's misconduct and risk repeatedly provoking the trial court's wrath, which took the form of comments before the jury suggesting Blum was an obstructionist, delaying the trial with 'meritless' objections. These comments from the bench ran an obvious risk of prejudicing the jury towards his client. On the other hand, Blum could decline to object, thereby forcing defendant to suffer the prejudice caused by Morton's constant misconduct. Under these unusual circumstances, we conclude Blum must be excused from the legal obligation to continually object, state the grounds of his objection,

and ask the jury be admonished. On this record, we are convinced any additional attempts on his part to do so would have been futile and counterproductive to his client.” (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

Soria’s trial differed from Hill’s. There was no unethical conduct by counsel. The trial atmosphere was never poisonous. Soria’s objections were outside the jury’s presence. The trial judge was never sarcastic or critical of counsel. Soria’s objections would not have been futile.

Soria’s failure to specify the legal bases of his evidentiary objections to the trial court bars Soria from using these objections to attack the verdict and judgment below. (Evid. Code, § 353, subd. (a).)

III. Ineffective Assistance of Counsel

Soria incorrectly argues his trial counsel was ineffective. The problem, Soria argues, is that counsel did not ask the court to include Soria’s name in a mid-trial instruction to the jury. Soria’s argument is unavailing, however, because there was no factual basis for including Soria’s name in this instruction.

The instruction was about the limited relevance of gang evidence. The defense wanted to prove the Avilas were gang members. The prosecution wanted to keep gang evidence out. The trial court decided to admit the evidence, but for a limited purpose only. The limited and proper purpose was to allow Cuellar to argue the baseball bat was valid self-defense because the Avilas’ status as gangsters made them especially fearsome to Cuellar. The improper and forbidden purpose was to tarnish Victor Avila’s character and to imply killing a violent gangster was justified.

Cuellar decided to testify and, just before he took the stand, the trial court and counsel analyzed the appropriate bounds of Cuellar's impending testimony. Both Soria and Cuellar asked the court to allow Cuellar to testify Victor Avila was a member of a gang called Florencia 13. Evidence that victim Victor Avila was a frightening and violent gangster would support Soria's defense that Soria was justified in shooting Avila, whom Soria contended was about to kill Soria's uncle Cuellar. Cuellar also wanted the jury to hear this evidence to support Cuellar's defense that Cuellar's use of the baseball bat against Victor and Ralph Avila was justified self-defense. The prosecution sought to avoid all mention of gangs, saying the case had "nothing to do with the gang motive. It's still a personal beef between two guys [Soria and Victor Avila]." The trial court ruled that, if Cuellar is "going to defend himself because [Victor Avila was from the] Florence [gang], then [the gang is] admissible."

In response to the trial court's ruling that it would permit Cuellar to identify Victor Avila as a gang member, the prosecution asked the court to admonish the jury that there was only a limited proper purpose for evidence of Avila's gangster status. The trial court agreed to give a limiting instruction.

After this discussion, the trial court welcomed jurors back into the courtroom and admonished them as follows.

"I'm going to make a couple of admonitions to you before we get started with this witness's [Cuellar's] testimony. Okay?

"You may hear evidence that one or more individuals involved in this case was affiliated with a street gang. You may hear that. That evidence is to be used by you for one reason only, that is what that perceived membership's [effect] was on Mr. Cuellar. Okay? What he believed. He can explain why he acted

as he did and what he thought and why he behaved as he did. That's the only reason why you hear the testimony.

"You may hear the testimony to explain why Mr. Cuellar did what he did or said what he said. Anything along those lines. It's not relevant for any other purpose. It's not relevant to show the people may have bad character. I'm saying the other person he might be testifying to. It's not relevant to show that the person is a violent person. It's not offered to show that the person's a criminal or was deserving of being—whatever happened to him. It's not relevant for any other of those character purposes. It's only relevant as it's affected Mr. Cuellar's perception."

Cuellar then testified as his attorney predicted: that Cuellar armed himself with a bat out of fear of Victor and Ralph Avila, and the fact that the Avilas were gang members increased Cuellar's fear of them.

Soria argues his counsel should have asked that this admonition include Soria as well. There was, however, no factual basis for extending this admonition to Soria. Soria had not yet testified and in fact never would. There was no evidence to support the notion that Victor's gang membership affected Soria's state of mind at any time.

A party is not entitled to an instruction on a theory for which there is no supporting evidence. (*People v. Memro* (1995) 11 Cal.4th 786, 868.) Soria's counsel was not ineffective for failing to request an instruction that violated this rule.

Additionally, this instruction did not bar Soria from arguing (or bar the jury from inferring) that the Avilas' gang membership contributed to Soria's supposed fear of them. The instruction ordered the jury not to infer a gang member was bad

character or “was deserving of being—whatever happened to him.” Soria remained free to argue, and did argue, without objection or limitation, that the Avila’s gang membership supported his defense of justification.

Soria’s counsel was not ineffective for failing to ask his name be included in this instruction, which was to benefit the prosecution and not the defense. The prosecution asked for it, despite the prosecutor’s sage view that “I don’t think it’s going to help much.” The instruction did not hamper Soria’s defense. Soria’s counsel was not ineffective for sharing the prosecution’s perspective that this instruction was of slight import.

IV. Remand

The parties agree a limited remand under *Franklin* is appropriate. (See *Franklin, supra*, 63 Cal.4th at pp. 272–287; *People v. Jones* (2017) 7 Cal.App.5th 787, 817–820.) This remand is proper because Soria was 22 years old when he committed these crimes, the court sentenced him to state prison for 75 years to life on May 17, 2016, and intervening legal developments have given the youthful Soria the possibility of an earlier release. (See *Franklin, supra*, 63 Cal.4th at pp. 272–287; *People v. Jones, supra*, 7 Cal.App.5th at pp. 817–820.) We remand to allow the presentation of evidence regarding Soria’s youth.

In letter briefing this court requested, the Attorney General also concedes Soria should be given a new sentencing hearing at which the trial court can consider whether to strike the firearm enhancements pursuant to the discretion conferred by Senate Bill No. 620, which became effective January 1, 2018. (See *People v. Chavez* (2018) 22 Cal.App.5th 663, 712.)

DISPOSITION

The judgment is affirmed. The matter is remanded to allow the presentation of evidence regarding Soria's youth and for the trial court to consider whether to strike the firearm enhancements pursuant to the discretion conferred by Senate Bill No. 620.

WILEY, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.