

Filed 7/30/04 (Opn. on Rehearing)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE PARTIDA,

Defendant and Appellant.

B161356

(Los Angeles County
Super. Ct. No. TA061403)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Arthur M. Lew, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, Laura J. Hartquist, Deputy Attorney General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

An information filed in the Los Angeles County Superior Court charged appellant with one count of murder in violation of Penal Code section 187, subdivision (a). The following enhancements were also alleged: (1) appellant personally and intentionally discharging a firearm which proximately caused great bodily injury and death within the meaning of section 12022.53, subdivision (d); (2) appellant personally and intentionally discharging a firearm within the meaning of section 12022.53, subdivision (c); and (3) appellant personally using a firearm within the meaning of section 12022.5, subdivision (a)(1) and 12022.5, subdivision (b). Appellant pled not guilty and denied the special allegations.

A jury found appellant guilty of first-degree murder and also found the allegation that appellant personally and intentionally discharged a firearm causing great bodily injury and death to be true.

Appellant was sentenced to 25 years to life for the murder and a consecutive 25 years to life for the enhancement, for a total of 50 years to life in prison. Appellant was ordered to pay a restitution fine of \$10,000 pursuant to section 1202.4, subdivision (b). A parole revocation fine of \$10,000 was stayed pending successful completion of parole pursuant to section 1202.45. Appellant received 381 days of custody credit.

Appellant filed a timely appeal from the judgment.

STATEMENT OF FACTS

On August 11, 2001, Jesse Moreno was killed as he, Dominic Barboa, Evette Mendoza and Eric Mendoza ordered food at the Tacos El Unico taco stand. While at the stand, located at the corner of Glencoe Street and Long Beach Boulevard, the group noticed a green van exit the parking lot onto Long Beach Boulevard. Appellant, the passenger in the van, tried to get Moreno's attention. Appellant then spoke to the driver of the van, and then asked Moreno, "Where are you from?" Moreno and Barboa turned around and told appellant, "We don't bang." Appellant responded, "I'm from USV,

Unos Sin Verguenza.” The van then left and did a U-turn on Glencoe.

After Barboa went to get his food, he sat facing Long Beach Boulevard, while Moreno sat on the guardrail with his back toward Long Beach Boulevard. While Barboa and Moreno began to eat, Evette remained standing, afraid and wanting to leave. Evette saw appellant approaching on foot down Long Beach Boulevard toward Moreno with a gun in his hand. When appellant pointed the gun at Moreno, Moreno attempted to jump the guardrail, but was blocked because Barboa was in the way. Instead, Moreno ran in the other direction toward the parking lot. After falling between two tables, Barboa got up and began to run, along with Evette and Eric. As appellant pointed the gun at Moreno and shot, he said, “Fuck you. I’m from USV, Unos Sin Verguenza.” After Moreno fell to the ground, both Barboa and Evette ran back towards him.

Moreno died from two gunshot wounds to his back. Los Angeles County Sheriff deputies, including Richard Tomlin, arrived at the scene, and found shell casings in the area. After Detective Tomlin inquired at the Sheriff’s station about USV, he went to the area of Bennett Street and Long Beach Boulevard where he observed tagging on several apartment buildings. USV was written on one wall with an arrow pointing down along with several monikers, including the name “El Stalker.” Detective Tomlin later found information documenting appellant as “El Stalker,” and included his photograph along with five other similar looking individuals. From this six-pack of photographs, Barboa reluctantly identified appellant as the shooter. Barboa circled appellant’s picture and wrote “His The Shooter” and signed his name. At trial, after admitting that he did not want to be a snitch, Barboa testified that he randomly circled the photograph and was told what to write next to the picture. When Evette Mendoza was shown the photographs, she also circled appellant’s picture and signed her name and wrote, “I know it’s him. I remember his face.”

On August 21, 2001, appellant and a female juvenile were arrested in appellant’s mother’s van. A handgun was recovered from the female juvenile, which was later determined to be the gun that fired the shell casings found at the crime scene.

One of the prosecution witnesses was Detective Richard Valdemar, a 31-year member of the Los Angeles Sheriff's Department. Defense counsel objected to his testimony on the grounds that it was more prejudicial than probative and that the testimony was cumulative. The objection was overruled and significant testimony regarding gangs was admitted. At first, Detective Valdemar testified as to his experience and qualifications as a gang witness. He detailed various work assignments over a 16-year period that brought him into contact with major crimes and with gangs, including prison gangs, the Mexican Mafia and the Brown Beret Organization.

Regarding graffiti, Valdemar testified, "I call it the newspaper of the street. By reading graffiti gang members are able to tell who is prominent in that community and by carefully reading it and seeing whose marking the graffiti out you can tell who's in conflict with them and who are their allies and what the current squabbles may be. [¶] I also know the gang members' nicknames and sometimes their alliances with prison gangs." As between various gangs, graffiti can also be "a marking out of territory and often an act of disrespect."

After seeing a photograph of graffiti in the area of the crime he testified that USV means "Those Without Shame" or "Ones Without Shame." A mark of "USV 13" would mean a southern gang associated with the Mexican mafia. Examining a photo showing "USV 13," "Hood" and an arrow pointing to the ground, Valdemar opined this meant the USV gang is claiming the particular area as their neighborhood. Explaining initials and nicknames shown on an additional photograph, Valdemar testified as follows: "I would say that was a roll call. . . . A roll call is a list of names that are associated with that gang and probably with the [clique] of that gang which would be a subdivision of the gang." Since he was not familiar with this particular graffiti he assumed it meant that a new gang was coming into the territory.

Asked about how gangs acquire territory, Valdemar answered, "Well, first of all, they will try to claim as much territory as they can get away with and then they'll hope to recruit more members and make the gang larger so they can claim more territory." He

was next asked how gangs recruit new members, to which he responded, “They sometimes use coercion to get members, but most of the time they attract their members. They consider themselves elite and so they try to draw members to themselves by establishing their power, their influence within the community, their respect.”

The next series of questions developed the issue of reputation and respect, as it exists within the gang culture. “How does a gang or gang members gain . . . influence and power and respect?” was answered: “Their definition [of respect] is fear and that’s how they gain respect. [¶] . . . [¶] So they try to establish this fear, this ability to commit crime and violence on the street and that is in their opinion producing respect.” When the District Attorney asked, “When gangs commit crimes, the more crimes they commit the more enhancement they have for their reputation?” Valdemar answered, “Yes, sir.” He described the types of crimes that enhance a gang’s reputation could vary “completely from sniffing paint or graffiti or with a murder. But the more noteworthy crimes that draw the most attention to the gang are the crimes of violence.” The District Attorney then asked, “So the more violent the crimes, the more they’re respected, the more they’re feared?” The answer was “Yes, sir.”

The enhancement of respect “would make their enemies reluctant to challenge them for fear that they would be overcome by the stronger gang. [¶] It also enhances their ability to offer protection to people who might want to join their gang. It also helps them enforce the regulations in their culture against snitching and other things that they consider violations of their code of conduct.” Further, the enhanced respect for the gang “makes the community reluctant to do their civic duty of reporting the violations of crime and it makes them fearful of being a witness, even being a victim in recording and identifying gang members.” A snitch was defined “[i]n their culture a snitch is anyone who cooperates with law enforcement. That person is marked for death.”

Detective Valdemar also testified regarding the process by which members of Hispanic gangs acquire their monikers. He testified that in Hispanic gangs, members are given names by older members of the gang when they first come in, “and so names like

stalker, killer, psycho, sniper – those are names to be especially mindful of. That would mean in the gang’s eyes these people have the potential to be especially violent.”

(Emphasis added.)

At the conclusion of this testimony, the District Attorney posed the following hypothetical:

“Let’s assume that we have this person who admits that he is a gang member from USV and has admitted to a deputy sheriff that he is, and he has indicated that his moniker is Stalker. [¶] . . . [¶] And this person in this hypothetical – this person . . . is in a van with another individual. They drive through a taco restaurant or taco stand where there is an outdoor patio and they contact a group of individuals, more or less and 18 year-old male Hispanic, 16 year-old male Hispanic, 16 year-old female Hispanic and a 12 year-old male Hispanic and this person, Stalker, says to the individuals – primarily to the male individuals – this 18 year-old and this 16 year-old, ‘where you from?’

[¶] . . . [¶]

“After that is said the individual says ‘we’re not – we’re from nowhere. We don’t gang bang’ or ‘we don’t gang,’ and then . . . Stalker says, ‘this is USV, Unos Sin Verguenza,’ then drives away. [¶] Several minutes later the same individual, Stalker, then comes walking up to those individual and as he’s walking up with a gun in his hand says, ‘fuck you’ or ‘fuck.’ This is USV Unos Sin Verguenza. As he starts shooting the individual in the back as the individual is running – the victim is running.

“First of all, when this person, this hypothetical person, Stalker, shouts out the name while he’s shooting – what does that do to the gang, if anything?”

Detective Valdemar answered, “He’s making sure that the victims and any bystanders know that it is a gang related crime; that he’s claiming that territory. [¶] It’s also a second challenge to the person who might have denied gang membership. You know, he’s saying, ‘here’s my gang’ and the person again has an opportunity to claim his

own gang or show cowardice and run.” The District Attorney next asked whether there was any significance to the fact that the shooter in the hypothetical did not hide his face. The answer was: “Yes sir, the person who commits the crime while not disguised has some esteem placed upon that act -- the brazen act of doing it that way, and he also claiming affiliation when he’s going to claim it as a gang killing.

The District Attorney’s last question in this area was, “Finally sir, hypothetically, this person is arrested a week or so later after this incident. With this person, Stalker, is a female juvenile, and when they are both contacted . . . there are no weapons found on Stalker. However, on the female juvenile there’s a gun found that evidence shows was used by Stalker in the earlier shooting I had just mentioned to you.” Detective Valdemar explained, “In my experience many times the females carry the weapons since they’re less subject to pat down searches”

APPELLANT’S CONTENTION

Appellant contends that the admission of inflammatory gang evidence violated his due process rights and was error under Evidence Code section 352.¹ On January 27, 2004, we filed our initial opinion affirming the judgment of the trial court. Respondent filed a petition for rehearing which raised several issues. Respondent noted that the court did not address the issues of waiver and ineffective assistance of counsel. Respondent’s supplemental brief also argued that this court “found that gang evidence is admissible to prove motive but then held that all of the gang evidence relevant to motive was inadmissible” and that we ruled on the specific issue of evidence concerning “snitches” without giving respondent a chance to address the issue.

We granted the People’s petition for rehearing. In an order filed March 16, 2004, we requested the parties to submit further briefing on the following issues: 1. Whether appellant waived his right to object to the admissibility of gang evidence on due process

¹ All further undesignated statutory references are to the Evidence Code.

grounds; 2. Whether trial counsel was ineffective for failing to object to the admissibility of gang evidence on due process grounds; and, 3. The prejudicial effect of the gang evidence, or any portion thereof, on the trial of appellant. The People submitted a supplemental letter brief on April 1, 2004 and appellant submitted a letter brief on April 15, 2004. Having read and considered the parties' supplemental briefs, we address the points raised in the petition for rehearing and again conclude that the trial court committed section 352 error, but find that error to be harmless in this case.

DISCUSSION

Waiver

The People argue that appellant failed to raise a due process objection to the admissibility of the gang evidence in trial and therefore waived the right to raise this objection on appeal. We agree the general rule is that constitutional errors, like any others, are ordinarily waived absent a specific objection. (*People v. Millwee* (1998) 18 Cal.4th 96, 128-129; *People v. Champion* (1995) 9 Cal.4th 879, 918; *People v. Crittenden* (1994) 9 Cal.4th 83, 126; *Miranda v. Arizona* (1966) 384 U.S. 436.) California courts have reasoned that an objection alerts the trial court “to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.” (*People v. Williams* (1988) 44 Cal.3d 883, 906.) Stated otherwise, the waiver policy serves two purposes, first to bring errors to the attention of the trial court so that the court may correct or avoid any errors and provide the defendant with a fair trial. (*People v. Boyette* (2002) 29 Cal. 4th 381; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.) Second, to prevent a “defendant from speculating on the result of the trial and raising the objection after an unfavorable verdict.” [Citation.]” (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

Although a due process objection was not raised during the trial, appellant's counsel made it abundantly clear that she objected to the admission of the expert gang testimony. She first attempted to exclude the evidence by requesting a section 402

hearing, she renewed her objection prior to opening statements, and then again prior to the testimony of prosecution's gang expert. These objections relied exclusively on section 352 and argued that certain gang evidence was too prejudicial to be admitted in the trial. Appellant did not however, raise the due process objection until the filing of his opening brief on appeal.

This court based its initial ruling on the section 352 objection. We did not however, adequately address the issue of the waiver of appellant's right to raise a due process objection. Upon further review, we do not find a waiver of the due process objection to be appropriate for several reasons. First, as noted by appellant, a reviewing court may consider on appeal a claim raising a pure question of law on undisputed facts." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; citing *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Wade v. Taggart* (1959) 51 Cal.2d 736, 742.) The content of the testimony of the gang expert is undisputed in this case.

Next, we also conclude that raising a due process objection in the trial court would have been futile. Trial counsel raised the section 352 objection several times in the trial court and that objection was always rejected. There was no realistic possibility that a due process argument would have been more persuasive. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Simon* (1927) 80 Cal.App. 675, 679.) Respondent tacitly acknowledges this conclusion in its supplemental letter brief which states that trial counsel's decision not to object on the basis of due process "could have been a reasonable tactical decision that any such objection would have been fruitless. Appellant's objection based on section 352 had already been overruled by the trial court."

We also note that when the foundation of an alleged section 352 error is that the erroneously admitted evidence was more prejudicial than probative, a due process analysis would virtually duplicate the section 352 analysis. It has been noted, "[a] careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People*

v. Jennings (2000) 81 Cal.App.4th 1301, 1314; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334.) The California Supreme Court recognized section 352 as providing a realistic safeguard from due process violations. (*People v. Falsetta* (1999) 21 Cal.4th 903, 919-920; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) In the factual circumstances of this case, the evaluation required by section 352 and by due process is virtually coextensive. (See e.g. *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.)

We also conclude the policy reasons for finding a waiver has occurred would not be advanced by finding of a waiver in this case. Lastly, after taking all the previously stated reasons into consideration we would, if necessary, elect to exercise our discretion to consider the due process issues. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) Although as discussed below, we believe that the trial court erred in the admission of some of the gang related evidence, we do not believe that the error was of constitutional dimension.

If appellant's due process rights were not violated, appellant argues in the alternative that the defense attorney provided ineffective assistance of counsel by not preserving this federal constitutional issue. *People v. Coddington* (2000) 23 Cal.4th 529, 651-652 held that in order "[t]o establish constitutionally ineffective assistance of counsel under either the state or federal constitutional right to counsel, appellant must demonstrate (1) . . . that counsel's performance . . . did not meet the standard to be expected of a reasonably competent attorney, and (2) that he suffered prejudice as a result of that failure. Prejudice [can be] established if there was a reasonable probability that, absent counsel's errors, the result would have been different. [Citations.]" We will consider the ineffective assistance of counsel, if any, after we determine whether any error occurred and its effect on the trial.

Expert Testimony

California law permits a person with special knowledge, skill, experience, training or education in a particular field to qualify as an expert witness and to give testimony in the form of an opinion. Such testimony is admissible if its subject matter is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (§ 801, subd. (a).) “The subject matter of the culture and habits of criminal street gangs” meets the “criterion” for admissibility of expert testimony under section 801. (*People v. Williams* (1997) 16 Cal.4th 153, 196; *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; see § 801, subd. (a).) The admission of expert testimony has been upheld when used to educate the trier of fact “concerning territory, retaliation, graffiti, hand signals, and dress.” (*People v. Valdez, supra*, 58 Cal.App.4th at p. 506.) It has also meant that the prosecution may “introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.)

Evidence Code 352

Evidence Code section 352 provides:

“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

“[E]vidence is probative if it is material, relevant, and necessary. ‘[H]ow much “probative value” proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).’” (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20.) “Prejudice for purposes of Evidence Code section

352 means evidence that tends to evoke an emotional bias against the defendant”
(*People v. Crew* (2003) 31 Cal.4th 822, 842.)

California courts have long recognized gang membership evidence has a potentially prejudicial effect. Our Supreme Court has condemned the introduction of “evidence of gang membership if only tangentially relevant, given its highly inflammatory impact.” (*People v. Cox* (1991) 53 Cal.3d 618, 660.) Evidence of gang membership also creates a risk jurors will infer that the defendant has a criminal disposition and is therefore guilty of the crime charged. (*People v. Williams, supra*, 16 Cal.4th 153, 193; *People v. Champion, supra*, 9 Cal.4th 879, 922.) Evidence of gang membership should be excluded if the evidence is only relevant to prove a defendant’s criminal disposition. Gang evidence is admissible only when it is logically relevant to some material issue in the particular prosecution other than as character trait evidence. (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 240; *People v. Perez* (1981) 114 Cal.App.3d 470, 477-478.)

Appellant contends that because there was no gang allegation in this case and because the victim was not a gang member, evidence of appellant’s gang affiliation was not relevant and was highly prejudicial. Starting with the section 402 hearing, appellant’s trial counsel continuously objected to the admissibility of gang evidence. Appellant’s position is that “[a]s soon as the irrelevant and inflammatory evidence about Hispanic gangs and their propensity for violence and other intimidating activities came in, it was impossible for appellant to get a fair trial. (*McKinney v. Rees* [(9th. Cir. 1993)] 993 F.2d 1378; *People v. Maestas* [(1993)] 20 Cal.App.4th 1482.)”

Appellant argues:

“In the instant case, the gang expert’s testimony about the criminal activities committed by Hispanic gangs, particularly its goal of committing violent acts in order to instill fear in the populace and thus gain respect was more prejudicial than probative. . . . However, the prosecutor went beyond the evidence to prove that appellant, by virtue of his name, ‘Stalker,’ and the reputation of

Hispanic gangs in general, did not just commit murder, but did so to solidify his reputation as someone to [be] feared by everyone in the community. The prosecutor essentially sought to prove that appellant was not just guilty of murder, but of being a terrorist in the streets.”

Respondent’s argument is:

“The trial court properly admitted Valdemar’s testimony, as the evidence was relevant to prove appellant committed first-degree murder (§187, subd. (a)) and did so due to his suspicion that Moreno was a member of a rival gang, to claim that area as USV territory, and to enhance ‘respect’ for the gang in that neighborhood. As noted by the trial court, an explanation was necessary for the jury to understand appellant’s motive for the shooting, namely why appellant would ask Moreno where he was from, why he would shout his gang name while committing the shooting, and why appellant would want to shoot Moreno. The jury would not have understood what ‘where you from’ meant, or the meaning and relevance of the tagging in the area, without a gang expert explaining gang culture generally, the significance of gang graffiti, and the meaning being the words appellant used. . . . The significance of the gang graffiti, i.e., an act of claiming gang territory, combined with the fact that appellant confronted Moreno and Barboa shortly before the shooting, and that appellant shouted ‘USV’ both before and during the shooting, showed he was contemplating and planning violent confrontation to establish the neighborhood as USV territory. . . . The fact that appellant [was] contemplating and planning a violent confrontation was relevant to show Moreno’s murder was intentional and premeditated.”

Respondent argues:

“[A]bsent the evidence . . . the jury would have learned only that appellant, a gang member, killed someone. There would have been no explanation for why a gang member would randomly kill someone in his gang’s territory. The jury would not know what it meant to be a ‘gang member.’ However, the expert

testimony explained that gang members committed violent crimes in order to gain ‘respect’ and enhance their reputation. This, in turn, helped protect the gang by making other gangs reluctant to attack such a fearsome opponent.”

“The evidence regarding how gangs treat ‘snitches’ was relevant and admissible for the purpose of offering an explanation as to why Barboa would first identify appellant as the shooter and then decline to identify appellant in court.”

Respondent concludes:

“The testimony was limited to only the gang evidence that was necessary to explain the meaning of certain evidence to the jury and to provide the jury with needed information regarding gang culture.”

While we agree with respondent in principle, we disagree in part with the application in this case. Starting with the basic concept that relevant evidence is evidence that goes to prove or disprove a material issue in dispute in the litigation, some understanding of gangs was relevant in this case and some gang evidence was undoubtedly admissible. We agree with respondent that without an appropriate gang context to explain the murders in the present case, the killings would appear inexplicable. The victims did nothing to provoke the shooting by appellant. They were unarmed and merely standing in the fast food restaurant when this incident occurred. Neither victim knew appellant, and appellant had apparently never met the victims.

This opinion holds that merely because some gang evidence is relevant to the issue of motive and/or intent, does not necessarily mean that any and all available evidence regarding gang culture and life-style is relevant and admissible in the trial. The obligation of the trial court to carefully scrutinize such evidence prior to its admission is not fulfilled by and does not terminate after an initial determination that some of the available gang evidence will qualify for admission. Failure to individually evaluate the probative value of the various statements that might be given by the gang expert against their prejudicial effect is giving mere lip service to the acknowledged inflammatory nature of gang testimony. The trial court should assure that just enough, but no more,

gang testimony should be admitted in a trial than is relevant [in a section 352 analysis] to prove the point in question. In this case we could have reached a different result had there been an actual gang enhancement allegation.² However, since the prosecution elected not to make that allegation, some of the extensive testimony about gang culture was admitted in error.

Detective Valdemar provided testimony regarding the following aspects of gangs and gang culture:

- Graffiti and its significance to the gangs in the neighborhoods.
- The name of the gangs in the area.
- Gangs claim as much territory as possible.
- Gangs attract members by establishing their power, influence within the community.
- Power and influence equal respect.
- To gain respect, gangs establish fear by commission of crimes and violence in the streets.
- The more crimes gangs commit, the more they enhance their reputation.
- Crimes vary from sniffing paint or drawing graffiti to committing murder.
- The more violent the crime, the more the gang is respected/feared.
- Respect would make their enemies reluctant to challenge them.
- Respect enhances their ability to offer protection to people on the street who may want to join the gang.

² Penal Code section 186.22, subdivision (a) provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers or assists in any felonious criminal conduct by members of that gang” is guilty of a violation of 186.22, subdivision (a). Penal Code section 186.22, subdivision (b)(1) is an enhancement applicable when a person commits a felony “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”

- Respect enforces regulations in culture against snitching and other violations of their code of conduct.
- Respect makes a community reluctant to do their civic duty of reporting the violations of crime and makes them fearful of being a witnesses, or reporting and identifying gang members.
- A “snitch” is anyone who cooperates with law enforcement.
- A “snitch” is marked for death.
- In Hispanic gangs, members are given names by older members when they first come in.
- Names like stalker, killer, psycho and sniper are names to be especially mindful of. These names mean in the gang’s eyes these people have the potential to be especially violent.

The trial court’s admission of the entirety of this voluminous gang expert testimony was in error under section 352. The testimony of Detective Valdemar was in part both cumulative and more prejudicial than probative. Keeping in mind the fact that evidence of gang affiliation had already been received through the testimony of other witnesses and the important fact that no gang allegation was made in this case, the testimony of the gang expert went well beyond what was necessary to support the offer of proof given by the prosecution.

Given the offered relevance of the expert witness testimony, we find that the following testimony was appropriately admitted because its probative value is not substantially outweighed by its prejudicial effect:

- Graffiti and its significance to the gangs in the neighborhoods.
- The name of the gangs in the area.
- Gangs claim as much territory as possible.
- Gangs attract members by establishing their power, influence within the community.

- Power and influence equal respect.
- To gain respect, gangs establish fear by commission of crimes and violence in the streets.
- The more crimes gangs commit, the more they enhance their reputation.
- Crimes vary from sniffing paint or graffiti to murder.
- The more violent the crime, the more the gang is respected/feared.

The following evidence however, was either not relevant to the issue of motive, intent or premeditation, or, if it had some relevance, that relevance was substantially outweighed by the prejudicial effect. We find the following testimony was admitted in error:

- Respect would make their enemies reluctant to challenge them.
- Respect enhances their ability to offer protection to people on the street who may want to join the gang.
- Respect enforces regulations in culture against snitching and other violations of their code of conduct.
- Respect makes a community reluctant to do their civic duty of reporting the violations of crime and makes them fearful of being a witnesses, or reporting and identifying gang members.
- In Hispanic gangs, members are given names by older members when they first come in.
- Names like “stalker,” “killer,” “psycho,” and “sniper” are names to be especially mindful of. These names mean in the gang’s eyes these people have the potential to be especially violent.

Relevance requires that evidence be excluded if it is not probative of an issue in dispute. The principal argument for relevance was motive. We believe the testimony erroneously admitted as described above does not go to either prove or disprove either appellant's motive in this case or the element of premeditation. At best, the portion of the testimony of the gang expert identified above was only marginally relevant to this issue. While motive is always relevant, it is not an element of the crime and here the balance between probative and prejudicial tips toward prejudicial due the volume and inflammatory nature of the gang expert's testimony.

We also disagree with respondent that this evidence would go to prove that Moreno was contemplating and planning a violent confrontation and therefore the murder was intentional and premeditated. Respondent's brief did not adequately articulate how this evidence would go to establish Moreno's mental state beyond a reasonable doubt and we do not independently ascertain the connection. Furthermore, the facts of the incident itself lead to no other conclusion but that this murder was intentional and premeditated. After passing the victims in a car, appellant returned on foot armed with a handgun, shouted gang names and shot the victim in the back.

In the supplemental letter brief respondent argues that no error occurred because "substantial gang evidence had already been properly admitted at trial. The evidence which this Court held was admitted in error was no stronger and no more inflammatory than the evidence that had already been properly admitted." We specifically reject this "cat out of the bag" argument. The fact that some gang evidence may be admitted because it is relevant to prove an issue in dispute at the trial, does not provide a basis on which to argue that additional gang evidence should be allowed in because, it is "no stronger and no more inflammatory" than the evidence already admitted.

Respondent also offered the somewhat unusual argument that because the culture and habits of criminal street gangs are not common knowledge, the expert testimony was a proper means of explaining those matters to the jury and "[w]ithout the expert testimony, the jurors would have been left with only the uniformed myths about the

gangs, which were potentially more prejudicial than the reality.” Given the nature of the expert testimony, it is difficult if not impossible, to conceive what “uninformed myths” were “more prejudicial than the reality.” No gang evidence should have been admitted based on this rationale.

Additional testimony was offered on the rationale that it explained Mr. Barboa’s reluctance to testify because he did not want to be identified as a snitch to the gang. Mr. Barboa told the trial court that he did not want to testify because he did not want to “snitch.” The jury was not thereby lacking an explanation for Mr. Barboa’s reluctance. Although the expert testimony that snitches are marked for murder is a highly prejudicial explanation, many cases have allowed similar testimony to be admitted on the same rationale. For that reason we elect not to disagree and accede to this result and do not find that the trial court abused its discretion in admitting this testimony.

Before moving on however, we note our belief that the information that being a “snitch” is a dangerous pastime in a criminal environment and makes such person subject to retaliation is a matter well within the common knowledge of the average juror. Perhaps the time has nearly arrived when it can be agreed testimony that snitches are at risk does not require expert testimony.

The erroneous admission of evidence, however, does not require reversal unless it is reasonably probable appellant would have obtained a more favorable outcome had the evidence been excluded. (§ 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We agree with respondent that the admission of the additional gang evidence was harmless.³ There was convincing evidence of appellant’s guilt absent the excluded portion of the expert testimony. Even without the gang evidence, the remaining evidence provided substantial evidence to support the jury’s verdict. There was eyewitness testimony of the identity of the shooter.

³ As we have concluded that the error was harmless in this case, we also find there is no vitality to the argument of incompetence of counsel.

It was undisputed that the shooter first passed the victims in a van and then returned on foot with the weapon and shot the victim in the back as he fled the scene. The weapon used in the shooting was found in the possession of appellant's companion one week after the incident.

We also found relevant and admissible the portion of the expert testimony which explained the "where are you from" challenge delivered to the victim. Also relevant was the testimony regarding the significance of new gang graffiti in a neighborhood. The jury had already heard testimony concerning appellant's gang affiliation. This evidence came from the testimony of Evette, testimony from Deputy Aguilar of appellant's admission of gang membership and his moniker. Evidence of USV and "El Stalker" tagging in the area had already been admitted into evidence. The remaining evidence in this case was strong. Therefore, we cannot say it is reasonably probable that exclusion of the objectionable portion of the expert gang testimony would have resulted in a more favorable verdict for appellant. (*People v. Watson, supra*, 46 Cal.2d at pp. 835-836.) Any error, therefore, was harmless. In light of our conclusion that the gang evidence was not unduly prejudicial and harmless in this case, we reject defendant's contention that his conviction must be reversed.

"The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.]" (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146-1147.) "[A]dmission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

We conclude that admission of this evidence did not violate defendant's right to due process of law under the federal Constitution; which would require us to determine whether the claimed error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.