

People v. Pellecer

Supreme Court of California

December 12, 2018, Opinion Filed

S252024

Reporter

2018 Cal. LEXIS 9682 *

THE PEOPLE, Plaintiff and Respondent, v. JAVIER PELLECER, Defendant and Appellant.

Prior History: [*1] Second Appellate District, Division Two, No. B280333.

Opinion

The petition for review is denied.

End of Document

Filed 9/18/18

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

JOURNAL OF APPEAL - SECOND DIST.

SECOND APPELLATE DISTRICT

FILED
ELECTRONICALLY

DIVISION TWO

Sep 18, 2018

THE PEOPLE,

B280333

JOSEPH A. LANE, Clerk

jhatter

Deputy Clerk

Plaintiff and Respondent,

(Los Angeles County
Super. Ct. No. BA417246)

v.

JAVIER PELLECER,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed.

Joseph Shipp, 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, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the Los Angeles County District Attorney's Office, defendant and appellant Javier Pellecer and codefendant Wayne Gray (Gray) were charged with two counts of murder (Pen. Code, § 187, subd. (a); counts 2 & 3).¹ Defendant was also charged with being an accessory after the fact to murder in violation of section 32 (count 4). Codefendants Gray, Jerry Wilson (Wilson), and Leon Panting (Panting) were separately charged with murder in count 1.² As to counts 1 through 3, it was alleged that a principal personally used a firearm within the meaning of section 12022.53, subdivision (b), personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), personally and intentionally discharged a firearm that proximately caused great bodily injury or death within the meaning of section 12022.53, subdivision (d), and 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, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).) Special circumstances were alleged that defendant and his codefendants had committed multiple murders within the meaning of section 190.2, subdivision (a)(3), and that the codefendants killed the named victim in count 1

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

² Codefendants Gray, Wilson, and Panting are not parties to this appeal. They were charged in count 1 with the murder of Charles Westby (Westby). Defendant was not charged with this crime.

while lying in wait, within the meaning of section 190.2, subdivision (a)(15).

Defendant pled not guilty and denied the special allegations.

Defendant was tried separately.

The jury found defendant guilty as charged. It also found the firearm and gang allegations to be true. The trial court sentenced defendant to life without the possibility of parole (LWOP) plus 25 years to life on count 2 and 15 years to life plus 25 years to life on count 3. It stayed the sentence on count 4. Various fines were imposed, and defendant was given presentence custody credit.

Defendant timely filed a notice of appeal.

We affirm.

FACTUAL BACKGROUND

Prosecution's Evidence

The October 6, 2008, Murders of Columbus Campbell (Campbell) and Kavette Watson (Watson)

The parties stipulated that Campbell was a Rollin 60's Crips gang member with the moniker "Eddie Boy."

On October 6, 2008, at approximately 12:30 a.m., Kimberly Ramirez (Ramirez) and a man were talking inside a park in the vicinity of 3415 West 63rd Street in Los Angeles. As they exited their car, someone fired several gunshots from behind them. Ramirez ducked. She saw someone wearing dark clothing shoot at a parked white Mercedes Benz. The shooter then got into a dark colored "Nissan of some sort" that was parked next to the victims' car. The Nissan then drove away.

Campbell had been sitting in the driver's seat; he was deceased from gunshot wounds at the scene.³ Watson, who was 16 years old, had been sitting in the front passenger seat; she was transported to the hospital with gunshot wounds, and she later died from her injuries.⁴

Los Angeles Police Department Detective Ernesto Mendoza, who was assigned to the criminal gang homicide division, responded to the crime scene. He recovered 11 .40-caliber casings from the Mercedes Benz.

Detective Mendoza later determined that defendant owned a blue Nissan Altima. He drove by defendant's residence and saw the vehicle. On November 5, 2008, he directed officers to conduct surveillance on defendant. That day, defendant was detained.⁵ His vehicle was impounded. Later that day, defendant was released.

Police Interview of Crystal Davis (Davis)

Davis lived in the same neighborhood as defendant. She and codefendant Gray had a child together.

Detective Mendoza interviewed Davis on January 20, 2009, about the death of Eddie Boy. She said that codefendant Gray

³ The deputy medical examiner who performed the autopsy on Campbell determined that Campbell had sustained four gunshot wounds to the head, three of which were fatal.

⁴ The deputy medical examiner who performed the autopsy on Watson determined that Watson had sustained four gunshot wounds to the head, and that her cause of death was injuries produced by the gunshots.

⁵ His conversation with police is discussed below.

was a Rollin 60's Crips gang member and had the nickname "Domer." Davis was present when Campbell and Gray got into an argument and fight in an apartment complex in September 2008. Campbell "blind-sided" Gray and hit him in the face; Gray suffered a cut above his eye.⁶

Gray lived about one and one-half miles from the scene of the double homicide. After the murders of Campbell and Watson, he never left his house.

June 2, 2013, Murder of Westby

The parties stipulated that Westby was murdered on June 2, 2013, as a result of multiple gunshot wounds.

Los Angeles Police Department Detective John Jamison arrested Wilson, Gray, and Panting for the murder of Westby. Los Angeles Police Department Detective Eric Crosson told Detective Jamison that someone had assisted those men in disposing of the murder weapon.

Resumption of the Investigation into the Murders of Campbell and Watson

In 2013, Los Angeles Police Department Detectives Miguel Gutierrez and Crosson were assigned to investigate the homicides of Campbell and Watson. Detective Gutierrez requested surveillance on defendant. On October 16, 2013, defendant was detained and brought into an interview room at the police station. Detective Gutierrez also set a "jail operation" in place, whereby a confidential informant (CI)⁷ would be placed

⁶ At trial, Davis denied telling the police all of this.

⁷ The CI was posing as a fellow inmate; he was never actually in custody.

in a cell with a person that the police believe committed a crime so that the suspect would “talk and maybe confess about the crime.”

Detective Gutierrez then interviewed defendant, and the interview was recorded.⁸ During the interview, Detective Gutierrez wanted to “stimulate” defendant so that he would talk about the crime with the CI. Therefore, he told defendant that he (defendant) had loaned his car to the shooter and that his car was used in the shooting. Detective Gutierrez also told defendant about the motive that the shooter had for the shooting (a fight with the victim). And, Detective Gutierrez gave defendant a general location and date and time of the double homicide. Defendant was then placed in a jail cell with the CI.

Defendant's Recorded Conversation with the CI

The CI asked defendant what he was charged with. Defendant replied, “The ultimate” and “187.” The CI asked defendant how long ago the crimes occurred, and defendant replied “Five years ago.” Defendant then said that the “[s]ame motherf***er” just did some “sh***” this year, “in June.” Defendant continued: “But all right like me and him did this one way back then, f*** I, I had nothing to do with this one right now.”

Defendant and the CI then talked about defendant getting picked up after five years. The CI told defendant that the police probably had his car “branded,” but could not put him in the vehicle. Defendant replied that he had put paper plates on the

⁸ Detective Crosson failed to download and get a copy of the video recording. The recording is no longer available in the system because the interview took place years ago.

car and after he "did the . . . job," he put the regular plates back on.

The CI next told defendant: "You know what else you gotta worry about homey? Get rid of those straps. Get rid of 'em." Defendant responded, "All of them are gone." Defendant explained that he sold it to a whole other neighborhood, approximately 30 minutes away.

As their conversation continued, defendant told the CI that his "homeboy" called him and asked him to pick him up. The man went to defendant's car and said, "hey man let's go do this little . . ." and defendant went with him.

The following exchange then occurred:

"[DEFENDANT]: But see when we had did the sh**, 'cause I know the little, it was this little f***in' mayate (n***er) that he got into it with right?

"[CI]: Yeah, yeah.

"[DEFENDANT]: So I . . . you know I didn't care, like 'f*** it.' What I didn't like afterward because there was a girl in there.

"[CI]: Uh.

"[DEFENDANT]: There was like a f***in' sixteen-year old girl in there.

"[CI]: On in there.

"[DEFENDANT]: In the car with homeboy. They were like f***in' asleep like at one in the morning by a motel and sh**.

"[CI]: Oh so you guys rolled up on a car that was . . .

"[DEFENDANT]: So, yeah, so my homey, he's like 'hold on, this fool's in this motel' 'cause he [had] seen the car.

"[CI]: Yea . . . oh so you guys stopped?

"[DEFENDANT]: He stopped but then he looked in the car and he's like 'this mother***er's sleeping in his car' like

[¶] . . . [¶]

"[DEFENDANT]: But I, I didn't know that it was a girl in there asleep too. So he [had] seen her to[o] and just f***it let em

"[CI]: Oh he let 'em both have it?

"[DEFENDANT]: Yea they both

"[CI]: Oh but you know what—you got, you got to do

"[DEFENDANT]: That's that's pretty much it. Yeah. You gotta do what you gotta do."

Defendant then indicated that he did not care about the male victim, but was bothered by the fact that the second victim was a 16-year-old girl.

The CI then asked defendant what he did when his friend jumped out of the car "to do that." Defendant replied, "I just . . . I pulled up right, right next to it. He jumped out 'bam, bam, bam' rolled, the light turned green. . . . There was nobody in sight man." The CI asked where the motel was, and defendant said "[o]n 63rd and Crenshaw."

Next the CI asked defendant about "[t]he heat from back then." Defendant stated that it was gone "two days after" the shooting. Defendant then admitted that he "got rid of this one for him too."

Later in the conversation, defendant indicated that the 2008 shooting was a "target" shooting; they "went looking for that fool" because they knew "where his whereabouts were."

In Detective Gutierrez's opinion, defendant had confessed to being the driver in the 2008 double homicide. Thus, he

generated a report of the jail operation and took it to the district attorney's office.

Gang Evidence

Los Angeles Police Department Officer Gilberto Gaxiola testified as a gang expert for the prosecution.

In 2008, the Rolling 60's Crips had approximately 2,000 members. Defendant was a Rollin 60's gang member with the moniker "Tiny T-Bone." Codefendants Gray (moniker Domer), Wilson, and Panting were also Rollin 60's gang members.

According to Officer Gaxiola, the primary activities of the Rollin 60's gang are murders, shootings, narcotics sales, weapons violations, burglaries, robberies, and vandalism. Gangs want respect from their gang members, rival gang members, and the community. A gang member gains respect in the gang by committing violent crimes or doing something that benefits the gang. Gangs want control, and they want people to fear them so that they can get away with the crimes they commit. "And the more violent crimes that they do is the more fear that rival gang members are going to have with that gang and the community."

Gang members often commit crimes together, and each gang member has a role in the crime. A gang member who commits murder benefits his gang by bringing respect and fear to the community. The murdering gang member also elevates his status in the gang because he committed a violent crime.

The Rollin 60's gang has different cliques that sometimes fight among themselves for power. It has a saying: "[Y]ou're not a 60 gang member until you kill a 60 gang member."

Given a hypothetical mirroring the facts of the instant case, Officer Gaxiola opined that the murders were committed for the benefit of and in association with a criminal street gang. The

homicides showed how violent the Rollin 60's gang is and made it easier for them to commit crimes in the future. The crimes were committed in association with the gang because the shooter went and got the assistance of a fellow gang member. The two gang members worked together to achieve their goal of shooting the victims in the car.

The prosecutor then presented the following hypothetical facts to the expert: A Rollin 60's Crips gang member shoots and kills a victim in the Rollin 60's Crips territory. A second Rollin 60's Crips gang member is asked to and gets rid of the murder weapon. Based on this hypothetical, Officer Gaxiola opined that the crime was committed for the benefit of and in association with a criminal street gang. The second Rollin 60's Crips gang member assisted the shooter in getting rid of the firearm because the firearm is evidence for the police.

Defense Evidence

Defendant rested without testifying or providing an affirmative defense.

DISCUSSION

I. Substantial evidence supports the multiple murder special circumstance and gang enhancement

A. Multiple murder special circumstance

Defendant argues that the multiple murder special circumstance is not supported by substantial evidence.

It is well-established that an appellant "bears a massive burden in claiming insufficient evidence" because the reviewing court's "role on appeal is a limited one." (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.) We review the record in the light most favorable to the judgment and determine whether it discloses substantial evidence such that a rational trier of fact could find

the defendant guilty beyond a reasonable doubt. (*People v. Earp* (1999) 20 Cal.4th 826, 887.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 690.) We do not reweigh evidence, reappraise the credibility of witnesses, or resolve conflicts in the evidence, as these functions are reserved for the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The same standard applies to the review of circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

According to defendant, “the multiple murder special circumstance supporting LWOP cannot stand where [he] did not kill or intend to kill the second victim” (Watson). Defendant is mistaken. As our Supreme Court has noted: “We have never held that the multiple-murder special circumstance requires a jury to find the defendant intended to kill every victim. We also have never held that the intent to kill one victim and the implied malice murder of a second victim is insufficient to establish a multiple-murder special circumstance.” (*People v. Dennis* (1998) 17 Cal.4th 468, 516; see also *People v. Rogers* (2006) 39 Cal.4th 826, 892.) Thus, the prosecution was not required to prove that defendant intended to kill every victim (Campbell and Watson) in order for the jury to find the multiple murder special circumstance true.

Defendant rightly points out that defendant did not “kill[] anyone here.” But, he harbored an intent to kill as an aider and abettor. (§ 190.2, subd. (c).) “In order to support a finding of special circumstances murder, based on murder committed in the course of designated felonies, against an aider and abettor who is not the actual killer, the prosecution must show either that the

aider and abettor had intent to kill (§ 190.2, subd. (c)) or acted with reckless indifference to human life while acting as a major participant in the underlying felony. (§ 190.2, subd. (d).)" (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1753.)

Ample evidence provided that defendant had the intent to kill Campbell based on his role in aiding and abetting Gray in the execution killing of Campbell. (§ 190.2, subd. (c).) He so admitted to the CI—defendant and Gray targeted Campbell. After switching his license plates, defendant drove Gray to where they believed Campbell was. He picked Gray up after he shot the victims. The evidence overwhelmingly demonstrates that defendant went to the scene with Gray with the intent to assist Gray in killing Campbell.

Regarding Watson, defendant's statement to the CI ("[y]ou gotta do what you gotta do") demonstrates his callous disregard for Watson's life. And her murder was a natural and probable consequence of the murder of Campbell. (*People v. Richardson* (2008) 43 Cal.4th 959, 1021–1022; *People v. Chiu* (2014) 59 Cal.4th 155, 165–166.) Gray fired at least 11 .40-caliber bullets into the car where Campbell and Watson were sleeping. Thus, the multiple murder special circumstance is supported by the evidence.

B. Gang association

Defendant argues that "the record does not fairly reflect the charged homicides (or the even more sparsely described accessory activity for disposing of a weapon in 2013) were committed for a gang."

To subject a defendant to the penal consequence of the enhancement set forth in section 186.22, subdivision (b)(1), "the prosecution must prove that the crime for which the defendant

was convicted had been ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’” (*People v. Gardeley* (1996) 14 Cal.4th 605, 616–617, overruled in part on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*).) The prosecution also must prove that defendant’s gang “(1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offense’) during the statutorily defined period. [Citation.]” (*Id.* at p. 617.)

“The substantial evidence standard of review applies to section 186.22 gang enhancements. [Citations.]” (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) An expert witness’s opinion that is factually supported may be relied upon by the trier of fact in finding substantial evidence to support a street gang enhancement. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 620, 625.)

Officer Gaxiola’s testimony provides substantial evidence that the crimes were committed for the benefit of or in association with a criminal street gang. He testified that defendant and Gray were Rollin 60’s Crips gang members. Gang members often commit crimes together and each gang member has a role in the crime. Regarding the double homicide, the shooter (Gray) sought the assistance of a fellow gang member

(defendant), and they worked together to achieve their goal of shooting the victims in the car. As for the disposal of the weapon that was used to kill Westby, defendant admitted to the CI that he got rid of it for Gray.

Moreover, Officer Gaxiola opined that the murders of Campbell and Watson were committed for the benefit of the Rollin 60's gang because they showed how violent the gang is, allowing them to commit more crimes in the future.

This evidence amply supports the findings necessary for the gang enhancement.

II. The trial court properly denied defendant's motion to suppress the "fruits of his arrests," including statements made to a CI, and properly found that the warrantless arrests in 2008 and 2013 were supported by probable cause

Defendant argues that the trial court erred in denying his motion to suppress all fruits of his arrests (notably his 2013 statement to the CI) on the grounds of unlawful arrests. He claims that his warrantless arrest in 2008 was unlawful because the police lacked probable cause to arrest him. Thus, any statements he made during the arrest could not provide lawful grounds for probable cause in 2013, when he was arrested without a warrant for the second time. It follows, according to defendant, that his warrantless arrest in 2013 was unlawful and, therefore, the statements he made to the CI were inadmissible.

A. Relevant proceedings

1. *Preliminary hearing (May 2014) and denial of defendant's motion to suppress*

At the preliminary hearing, defendant made a motion to suppress "everything," including any statements or confessions. An evidentiary hearing then commenced.

Ricardo Zamora (Zamora) testified that on October 6, 2008, he was standing inside the fence of the building where he lived near 3415 West 63rd Street in Los Angeles. Campbell ("Eddie Boy") and Watson were sitting inside a white Mercedes Benz or BMW. Zamora saw a dark-colored car that looked like a "Lumina" occupied by two men, one Hispanic (the driver) and one Black, parked three or four cars back from the white vehicle. The dark-colored car had dealership plates and tinted windows.

One of the men rolled down the window, pointed a gun at Zamora, and threatened to shoot him. Zamora ran inside his apartment and went on the balcony. Ten minutes later, the Black passenger exited the dark-colored vehicle, armed with a pistol. The passenger walked up to the white vehicle and looked inside. He then stepped back and fired several shots inside the driver-side window. When the shooting stopped, the driver of the dark-colored vehicle drove up slowly, picked up the shooter, and drove away. A couple of days later, Zamora told Watson's brother that "Domer" (Gray's gang moniker) was the shooter.

At some point, after doing some research, Detective Mendoza determined that defendant matched the description of the driver and owner of the suspect vehicle. He learned that a blue Nissan Altima was parked at defendant's residence. On November 5, 2008, defendant was arrested in his vehicle and the vehicle was impounded.

While defendant was detained, he admitted that his vehicle, a blue Nissan Altima, had been used in the double homicide that occurred on October 6, 2008. Defendant said that Gray had gone to his house and asked for the keys to his car so he could kill Campbell. Defendant gave him the keys. Defendant was later released from custody.

In 2013, after he was assigned to investigate the murders of Campbell and Watson, Detective Gutierrez reviewed the police reports and determined that defendant was a person of interest. Thus, defendant was arrested and Detective Gutierrez set the stimulation interview and “jail operation” in motion.

After entertaining oral argument, the trial court denied defendant’s motion to suppress, finding that defendant’s statement in 2008 “coupled with the other evidence in this case” provided probable cause to arrest defendant in 2013. The trial court also found that there were no fruits of the poisonous tree, including the statements made to the CI.

2. June 2014 pretrial motion

On June 3, 2014, defendant filed a motion to suppress statements made to law enforcement, based in part upon his contention that the police lacked probable cause to arrest him. An evidentiary hearing commenced.

Detective Mendoza testified that he responded to the scene where Campbell and Watson had been murdered. Both victims had suffered gunshot wounds; 11 .40-caliber casings had been recovered at the scene. Zamora had witnessed the shooting; he reported that the two suspects were in a four-door, blue Nissan Altima with paper license plates and tinted windows.

On October 5, 2008, another shooting took place at 6903 South Van Ness Avenue. On October 27, 2008, Detective Mendoza spoke with the intended shooting victim, Jermaine Watts (Watts). Detective Mendoza recovered five .40-caliber casings, which were the same caliber of casings from the October 6, 2008, double homicide. The “SID Unit” compared the casings from the double homicide and the shooting of Watts and concluded that they matched.

Watts said that the shooter drove a blue Nissan Altima. He had previously seen a male Hispanic driving that car when he visited a woman in an apartment complex across the street.

Defendant's girlfriend, Cecilia Clay (Clay), lived across the street from Watts. Clay told Detective Mendoza that she had heard that defendant may have been involved in the October 5, 2008, shooting on Van Ness; she had heard shooting across the street a few moments after defendant left her residence. She confirmed that defendant drove a blue Nissan Altima.

After defendant was arrested on November 5, 2008, he was interviewed. He was not given *Miranda*⁹ warnings. He was not in handcuffs during the interview. He was not threatened.

The trial court found probable cause, based upon sufficient hearsay that was corroborated under the totality of the circumstances, for defendant's arrest.

3. Defendant's December 10, 2014, motion to suppress his statement to the CI

In December 2014, defendant filed another motion to suppress his statement to the CI¹⁰ pursuant to *Massiah v. United States* (1964) 377 U.S. 201 and section 4001.1, subdivision (b). Relying upon *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*), the trial court denied the motion.

B. Applicable law

A warrantless arrest is permissible under the Fourth Amendment where there is probable cause to believe that a

⁹ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

¹⁰ Defendant apparently also filed another motion to suppress on May 26, 2017. That motion was either not ruled on or seemingly denied.

criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. (*Devenpeck v. Alford* (2004) 543 U.S. 146, 152.) Hearsay evidence may be used to establish probable cause to arrest. (*In re Walters* (1975) 15 Cal.3d 738, 751.)

“Reliable information furnishing probable cause for an arrest does not lose its reliability when it is transmitted through official channels to arresting officers, and the latter may rely upon it when making an arrest. [Citations.]” (*People v. Hogan* (1969) 71 Cal.2d 888, 891.)

C. Analysis

Applying these legal principles, we conclude that there was probable cause to arrest defendant in 2008. Zamora’s eyewitness testimony provided ample evidence to support defendant’s arrest. Also, another victim, Watts, was shot one day before the double homicide. The shooter was driving the same type of vehicle (a blue Nissan Altima) that was used in the double murder. Defendant’s girlfriend, Clay, lived across the street from where the Watts shooting occurred, which is exactly where Watts indicated that he saw a male Hispanic driving a blue Altima.

“One means of establishing probable cause is by matching the description of vehicles. [Citations.] The description need not match the vehicle in every detail. [Citations.]” (*People v. Jones* (1981) 126 Cal.App.3d 308, 314.) Here, witnesses observed a vehicle closely matching defendant’s vehicle near the scene of the October 5, 2008, shooting, and tied the same vehicle to the perpetrators of the double homicide one day later. Detective Mendoza did some research after determining that defendant matched the description of the driver and owner of the suspect

vehicle and discovered that same suspect vehicle, a blue Nissan Altima, was parked at defendant's residence.

Thus, the police had ample evidence of probable cause to arrest defendant in 2008.

The police had the same information that supported probable cause to arrest defendant again in 2013. Further, Detective Gutierrez could use the statements that defendant made during his 2008 interview to support probable cause in 2013, even though those statements were inadmissible because they violated *Miranda*. (*Oregon v. Elstad* (1985) 470 U.S. 298, 309.)

III. The trial court properly admitted defendant's voluntary statement to the CI inside his jail cell

Defendant argues that the trial court erred in denying his motion to exclude his statement to the CI pursuant to the Fifth, Sixth, and Fourteenth Amendments.¹¹

We disagree. The trial court correctly found that *Perkins* applied. (See *Perkins, supra*, 496 U.S. at pp. 296–298.) After all, the detectives placed defendant in a jail cell with a CI who posed as a fellow inmate, just like the informant in *Perkins*. (*Id.* at p. 294.) Defendant proceeded to tell the CI about the murders of Campbell and Watson. (*Ibid.*) Based upon his statements to the CI, defendant considered himself to be in the company of a fellow inmate and not a police officer; thus, there was no coercive atmosphere of an interrogation. (*Perkins, supra*, at p. 296.) Defendant spoke to the CI at his own peril. (*Id.* at p. 298.) It

¹¹ Because we resolve these issues on the merits, there is no need to address defendant's assertion that these challenges were not adequately protected for appellate review, giving rise to a claim of ineffective assistance of counsel.

follows that his statement to the CI was admissible, and there were no constitutional violations.

Moreover, defendant's right to counsel (Sixth Amendment claim) was not violated as no charges had been filed at the time of defendant's conversation with the CI. (*Perkins, supra*, 496 U.S. at p. 299.)

Furthermore, there were no excessive intentional delays between defendant's arrests in 2008 and 2013. Defendant was not investigated after his 2008 detention until the case was reignited by the Westby murder in 2013. He points to no law that precluded the police from reopening its investigation when it had a basis to do so in 2013.

To the extent defendant speculates that he "apparently requested counsel" after the stimulation interview and before he was placed in a cell with the CI, we are not convinced.

Speculation is not evidence. (*People v. Williams* (1988) 44 Cal.3d 883, 933.) And, we have reviewed the transcript of defendant's conversation with the CI; there is no evidence that defendant was "confused" or "stressed" because he had apparently been placed in a jail cell with a "gangster-killer—and potential gang and jail/racial rival."

IV. *The trial court properly instructed the jury on gang evidence and enhancements, and properly admitted the gang evidence*

A. Jury instructions

Defendant challenges the trial court's usage of CALCRIM Nos. 332 and 1403 regarding the consideration of gang evidence.

As noted by the People, defendant never objected or requested any modifications to CALCRIM Nos. 332 or 1403.

Thus, his argument on appeal has been forfeited.¹² (*People v. Covarrubias* (2016) 1 Cal.5th 838, 901.)

Regardless, the trial court did not err in giving these instructions. CALCRIM No. 332 correctly states the law regarding how the jury is to consider an expert's testimony. (*People v. Felix* (2008) 160 Cal.App.4th 849, 859–860.)

Citing *Sanchez, supra*, 63 Cal.4th 665, defendant suggests that Officer Gaxiola's testimony violated the Confrontation Clause. In *Sanchez*, our Supreme Court disapproved of case-specific hearsay to support a gang expert's opinion that was based on conversations with other officers and gang members. (*Sanchez, supra*, at p. 683.) Defendant has failed to identify any "case-specific hearsay" relied upon by Officer Gaxiola. Thus, the jury had "independent competent proof of those case-specific facts" and therefore a basis on which to draw that conclusion. (*Id.* at p. 684.) There was no Confrontation Clause violation here.

Similarly, CALCRIM No. 1403 correctly states the law as to how gang evidence is to be considered. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168, 1170.)

Even if these instructions were faulty, which they were not, any error in giving them was harmless.

"[T]he correctness of jury instructions is not to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (*People v. Burgener* (1986) 41 Cal.3d

¹² Because we reach the merits of this argument and conclude that the trial instructions were not erroneous, we need not consider defendant's contention that he was denied effective assistance of counsel in failing to preserve his claim of instructional error.

505, 538.) Instructional error requires reversal only if the reviewing court, after considering the entire cause, including the facts, instructions, and arguments of counsel, any communications from the jury during deliberations, and the entire verdict, determines that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of error. (*People v. Wims* (1995) 10 Cal.4th 293, 314.)

In this case, the evidence of defendant's guilt was overwhelming. He admitted to the CI that he aided and abetted his "homeboy" in the murders of Campbell and Watson. And there was ample evidence of defendant's gang affiliation. Thus, any assumed instructional error would have been harmless as a matter of law.

B. Gang evidence

On appeal, defendant argues that the admission of the "cavalcade of gang evidence" violated his rights to due process, a fair trial, and his Sixth Amendment right to confront witnesses. But defendant did not raise these objections at trial. He only objected to the gang expert's testimony on the grounds of relevance. Defendant's failure to raise his objections below bar them on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 872.)

Regardless, we note that the admission of the gang evidence was essential to explain the senseless, execution-style murder of two victims who were asleep in a car. Defendant, Gray (the shooter), and Campbell (the targeted victim) were all Rollin 60's Crips gang members. Officer Gaxiola explained that the different cliques in this gang fought among themselves and actually gained status by killing one another. The jury could have inferred that Gray sought revenge and status in the gang by

killing Campbell because Campbell had blindsided him in a fight. It follows that the gang evidence was relevant to the issues in the case and did not render the trial fundamentally unfair. (*People v. Hunt* (2011) 196 Cal.App.4th 811, 818; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

V. Defendant forfeited his objection to CALCRIM No. 721; the trial court properly instructed the jury on the multiple murder special circumstance

Defendant argues that the trial court's instruction on the multiple murder special circumstance (CALCRIM No. 721) was faulty because it did not explain to the jury that defendant had to kill or intend to kill each victim.

As noted by the People, defendant never objected to or requested clarifying language in connection with CALCRIM No. 721. Accordingly, defendant's objection on appeal has been forfeited. (*People v. Covarrubias, supra*, 1 Cal.5th at p. 901.)

Setting this procedural obstacle aside, defendant's argument fails on the merits. The trial court properly instructed the jury with CALCRIM No. 721. (*People v. Williams* (1997) 16 Cal.4th 635, 689.)

Defendant contends that the instruction was erroneously given because there was no evidence that he intended to kill anyone. As set forth above, this argument is meritless. Defendant had the intent to kill Campbell as an aider and abettor, and the jury was instructed on aiding and abetting. Also, defendant's intent to kill Watson was established through the natural and probable consequences doctrine. (*People v. Chiu, supra*, 59 Cal.4th at pp. 165–166.)

Regardless, any instructional error was harmless because, as set forth above, the evidence of defendant's guilt was

overwhelming. There was no reasonable probability of a different result in the absence of this instruction. (*People v. Wims, supra*, 10 Cal.4th at p. 314.)

VI. *The trial court properly denied defendant's motion for a new trial*

Defendant argues that the trial court erred when it denied his motion for a new trial as to his *Trombetta*¹³ claim for the prosecution's failure to preserve the "stimulation" interview, and when it neglected to rule on the section 4001.1 claims.

A. Relevant proceedings

After the verdict, defendant requested to represent himself again, and the trial court granted that request. Defendant then filed a motion for new trial on several grounds. During oral argument, defendant focused on the missing tape recording of his interview. He also raised section 4001.1, subdivision (b), regarding the CI's statement.

Although the prosecutor did not file a written response, he argued that defendant had cross-examined Detectives Gutierrez and Crosson about the interview tape prior to the operation with the CI. The prosecutor said that the detectives could not locate the tape. Detective Crosson testified as to what happened regarding the tape.

B. Applicable law

Section 1181 provides, in relevant part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 5. When the court has misdirected the jury in a matter of law, or has erred in the

¹³ *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*).

decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury; [¶] 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

"In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal.4th 463, 523–524.)

C. Analysis

1. Trombetta claim

Defendant argues that the trial court improperly denied his new trial motion based on the *Trombetta* claim and detectives' loss of the "stimulation" interview tape.

"It is well established in this state that a motion for new trial in a criminal case is a statutory right and may be made only on the grounds enumerated in section 1181 of the Penal Code,

exclusive of all others. [Citations.]” (*People v. Dillard* (1959) 168 Cal.App.2d 158, 167.) *Trombetta* claims are not one of section 1181’s enumerated grounds for a new trial. Thus, defendant’s claim fails.

Regardless, there was no *Trombetta* violation. “Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence “that might be expected to play a significant role in the suspect’s defense.”” (*People v. Catlin* (2001) 26 Cal.4th 81, 159.) “To meet this standard of constitutional materiality, [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (*Trombetta, supra*, 467 U.S. at p. 489.)

Defendant has not demonstrated that the “stimulation” interview possessed exculpatory value. Detective Gutierrez testified that he gave defendant details about the 2008 double homicide, including the fact that defendant had loaned his car to the shooter, the motive for the shooting, and the location of the shooting. There was nothing exculpatory about this conversation.

Moreover, there is no evidence that the police destroyed any evidence. Rather, Detective Crosson simply failed to download and get a copy of the recording. And, there is no evidence that the police acted in bad faith in failing to preserve the tape. (*Trombetta, supra*, 467 U.S. at p. 488 [no evidence that the police intentionally destroyed evidence to prevent the defendant from taking advantage of it]; *Arizona v. Youngblood*

(1988) 488 U.S. 51, 58; *People v. Alvarez* (2014) 229 Cal.App.4th 761, 773.)

2. Section 4001.1

The trial court also properly denied the motion for a new trial on the grounds that admission of the CI's statement violated section 4001.1. Again, this is not one of the statutory grounds on which a new trial motion can be based. (§ 1181.)

Regardless, section 4001.1 is inapplicable because "the statute does not apply where, as here, the conduct at issue was intended to elicit incriminating remarks about uncharged offenses." (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 78.) Because defendant's conversation with the CI occurred before he had been charged with any of the offenses at issue in this case, defendant's reliance upon section 4001.1 is misplaced. (*People v. Gallardo, supra*, at p. 79.)

VII. *The matter is not remanded for a hearing on whether the trial court should strike the firearm enhancement*

Defendant asks that we remand the matter to the trial court to exercise its discretion to strike the section 12022.53 firearm enhancements. Although defendant correctly points out that the newly amended section 12022.53, subdivision (h), which allows a trial court discretion to strike or dismiss an enhancement at sentencing, applies to him and this case, we decline to remand this case for resentencing; the appellate record shows that there is no reasonable possibility that the trial court would exercise its discretion to lessen the sentence. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

Prior to sentencing defendant, the trial court reviewed defendant's "60-something page[]" motion for a new trial and entertained defendant's lengthy oral argument. In that context,

it found no errors of law or any other grounds that would have changed the verdict in this case. In fact, the trial court noted that the verdict was "based on the very strong evidence of [defendant's] conversation with the [CI]." Immediately after denying defendant's motion for new trial, the trial court went on to sentence defendant to LWOP, plus 65 years to life.

"In light of the trial court's . . . pointed comments on the record [and its imposition of LWOP], there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether. We therefore conclude that remand in these circumstances would serve no purpose but to squander scarce judicial resources." (*People v. McVey* (2018) 24 Cal.App.5th 405, 419.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT