S202921

Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**Court of Appeal**
	No. D057392
Plaintiff and Respondent,	**Superior Court**
	No. SCD212126
ERIC HUNG LE, et al.,	
Defendants and Appellants.	

Appeal from the Superior Court of San Diego County,
The Honorable Charles G. Rogers, Judge

APPELLANT DOWN GEORGE YANG'S PETITION FOR REVIEW

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Appellate Defenders, Inc.
Independent Case System

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

TOPICAL INDEX

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Petitioner, ERIC HUNG LE, respectfully petitions this Court for review following the unpublished decision of the Court of Appeal, Fourth Appellate District, Division One, filed on April 27, 2012, affirming the judgment of the Superior Court of San Diego County. A copy of the opinion of the Court of Appeal ("Opin.") is attached hereto as an Appendix.

NECESSITY FOR REVIEW

Review is necessary in this case to address important issues of law which are likely to recur in other cases, and to preserve for further review issues of federal constitutional dimension.

ISSUES PRESENTED FOR REVIEW:

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO EXCLUDE EVIDENCE OF AN UNCHARGED SHOOTING INVOLVING APPELLANT AND OTHER TOC MEMBERS, THUS DEPRIVING APPELLANT OF HIS DUE PROCESS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS?

2. SHOULD THE TRIAL COURT NOT HAVE INSTRUCTED THE JURY IN CALCRIM NO. 375 THAT THE UNCHARGED CRIME, AS EVIDENCE OF THE GANG ALLEGATIONS, WAS SUBJECT ONLY TO THE PREPONDERANCE-OF-THE- EVIDENCE STANDARD OF PROOF?

3. DID THE TRIAL COURT'S ERRONEOUS EXCLUSION OF TAPE-RECORDED TELEPHONE CALLS BETWEEN SOULIVONG AND APPELLANT, WHEREIN THEY DISCUSSED BO'S INVOLVEMENT IN THE SHOOTING, REQUIRE REVERSAL?

4. DID THE TRIAL COURT ERR BY OVERRULING DEFENSE OBJECTION TO THE PROSECUTOR'S COMMENTS CONCERNING THE DEFENDANTS' FAILURE TO CALL CERTAIN WITNESSES, A COMMENT WHICH SHIFTED THE BURDEN OF PROOF AND DENIED APPELLANT HIS RIGHT TO DUE PROCESS OF LAW, REQUIRING REVERSAL OF THE JUDGMENT?

STATEMENT OF THE CASE AND FACTS

Appellant adopts the procedural facts and the summary of facts contained in the Opinion on pages 1 through 10. The Court of Appeal affirmed the judgment. (Opin. 1, 67.)

ARGUMENT

I

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO EXCLUDE EVIDENCE OF AN UNCHARGED SHOOTING INVOLVING APPELLANT AND OTHER TOC MEMBERS, THUS DEPRIVING APPELLANT OF HIS STATE AND FEDERAL RIGHT TO DUE PROCESS OF LAW.

Prior to trial, defense counsel objected to testimony by Soulivong alleging that appellant participated in at least one uncharged shooting by TOC at Asian Crip targets. The defense argued that the testimony amounted to propensity evidence, that the evidence was irrelevant and, if at all relevant, the probative value of the evidence was outweighed by its potential for prejudice and should be excluded under Evidence Code section 352. (3RT 109-111; 1CT 87-92.) The prosecutor argued that evidence of uncharged shootings was being offered to prove the on-going violent interaction between TOC and AC and was therefore relevant to the defendants' motive and intent pursuant to the exception under subdivision (b) of Evidence Code section 1101. (3RT 114.)

The trial court admitted the evidence finding that the prior shooting incidents were relevant to prove motive and the gang allegation. (3RT 118-119.) Soulavong was allowed to testify that on many occasions he was with other members of TOC when TOC shot at AC targets and on one particular occasion he and appellant went to Mira Mesa and shot at AC targets. (10RT 2230-2232.)

First, appellant submits that evidence of the uncharged shooting constituted impermissible propensity evidence and should have been excluded because the use of evidence of uncharged offenses always creates

the danger of suggesting to the jury that the defendant, because he engaged in other criminal acts, is predisposed to commit crimes. For this reason, the well settled rule of law applicable to the admissibility of "prior crimes" evidence is "that evidence of other crimes is inadmissible when it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged..." (People v. Kelley (1967) 66 Cal.2d 232, 238-239; People v. Haston (1968) 69 Cal.2d 233, 244.)

When the prosecution seeks to admit evidence that a defendant has committed prior bad acts or uncharged prior crimes, the courts have set out three requirements for admission of such evidence: the evidence must be relevant to some material fact at issue; it must have a tendency to prove that fact; and admissibility must not contravene policies limiting its admission. (People v. Bigelow (1984) 37 Cal. 3d 731, 747-748; People v. Thompson (1980) 27 Cal.3d 303, 315.) Here, the evidence of the prior shooting incident failed to meet any one of these three requirements and should not have been admitted.

First, the evidence was not relevant to any material fact at issue in appellant's case. The evidence was purportedly admitted because it was relevant to prove the motive for the shooting at the Han Kuk pool hall. In the overall picture of the case, however, motive was not a contested issue. As the judge observed at the time of the in limine motions, this case was steeped in the history of gang rivalry between TOC and AC and there was really no dispute that the two gangs had been enemies for many years. (3RT 119.) It was anticipated long before trial that the prosecution's gang expert would testify concerning the long history of the violent rivalry between the two gangs. (See 1CT 122-154.) Ultimately, gang motive for the shooting at the pool hall was conceded by the defense, leaving identity as the only pertinent

issue for the jury to determine. (15RT 3184-3185.)

Second, even had the motive for the Han Kuk shooting been a disputed issue at trial, the prior uncharged shooting had only marginal relevance in that it apparently occurred years prior to the Han Kuk shooting, it occurred in a different neighborhood, and, apart from Soulivong's account of the shooting, the incident was entirely undocumented and uncorroborated. Moreover, as already noted, there was abundant other evidence of motive including Soulivong's testimony concerning the numerous shootings in which Soulivong had participated over the years as a member of TOC. The particular shooting involving appellant added very little to the overall proof of motive, while it overwhelmingly suggested that appellant had a propensity to engage in shootings.

Finally, because the evidence was far more prejudicial than probative, and because there was an abundance of far less prejudicial evidence establishing motive, the evidence should have been excluded under Evidence Code section 352. It has been observed that "[t]he two crucial components of section 352 are 'discretion,' because the trial court's resolution of such matters is entitled to deference, and 'undue prejudice,' because the ultimate object of the section 352 weighing process is a fair trial." (People v. Harris (1998) 60 Cal.App.4th 727, 736.) Discretion is delimited by the applicable legal standards, a departure from which constitutes an "abuse" of discretion. (Ibid.; City of Sacramento v. Drew (1989) 207 Cal.App.3d 1287, 1297-1298.)

In exercising its discretion to determine whether to admit evidence of prior uncharged crimes, a court must take extra care and exclude the evidence unless its probative impact clearly outweighs its prejudicial effect. "[B]ecause other-crimes evidence is so inherently prejudicial, its relevancy is

to be 'examined with care.' [¶] ... [I]t is inadmissible if not relevant to an issue expressly in dispute [citation], if 'merely cumulative with respect to other evidence which the People may use to prove the same issue' [citation], or if more prejudicial than probative under all the circumstances." (People v. Alcala (1984) 36 Cal.3d 604, 631-632.)

Here, there can be no doubt that Soulivong's testimony concerning the Mira Mesa shooting was entirely unnecessary to prove the motive for the Han Kuk pool hall shooting and one could not possibly imagine a more prejudicial piece of evidence in a case such as this.

Additionally, admission of this propensity evidence violated appellant's rights to due process of law under the federal and state constitutions and the error requires reversal unless it can be shown to be harmless beyond a reasonable doubt. The due process clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. (In re Winship (1970) 397 U.S. 358, at p. 364.) The admission of evidence of uncharged offenses to show appellant's propensity to commit the charged offense dilutes this standard of proof. California's rule against the admission of propensity evidence is one of long-standing application. The California Supreme Court in People v. Alcala (1984) 36 Cal.3d 604, 630-631, said, "the rule excluding evidence of criminal propensity is nearly three centuries old in the common law. [Citation.]" In People v. Ewoldt (1994) 7 Cal.4th 380, at page 392, the California Supreme Court noted that "the rule excluding evidence of criminal disposition derives from early English law and is currently in force in all American jurisdictions by statute or case law." (People v. Falsetta (1999) 21 Cal.4th 903 at p. 913; see also United States v. Castillo (10th Cir. 1998) 140 F.3d 874, 881 [noting ban on propensity evidence dates back to 17th Century England and early United States history;

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 [noting exclusion of propensity evidence dates back to at least 1684].)

A rule of evidence is subject to proscription under the due process clause if "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citations.]" (Patterson v. New York (1977) 432 U.S. 197, 201-202.) The court in McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 found the prohibition on the use of other acts for character evidence "is based on ... a 'fundamental conception of justice' and the 'community's sense of fair play and decency' as concerned the Supreme Court in Dowling [v. United States (1990) 493 U.S. 342, 353]." (Id., at p. 1384.) "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (United States v. Myers (5th Cir. 1977) 550 F.2d 1036, 1044.)

The California Supreme Court has recognized the possibility that propensity evidence may reduce the burden of proof. (People v. Garceau (1993) 6 Cal.4th 140, 186.) The Garceau court noted in a capital murder case that if the jury used evidence of a prior killing to show the defendant's propensity to kill, "...the prosecution's burden of proof as to the ...identity of [the victim's] slayer, arguably was lightened, thus raising the possibility that defendant's constitutional right to due process of law was impaired." (Ibid.)

Since the error of admitting the prior conduct evidence constituted violations of appellant's federal right to due process of, appellant's conviction is reversible unless the government proves the error to be harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.) In this case, the guilty verdict was not "surely unattributable" to the error. (Sullivan v. Louisiana, supra, 508 U.S. at pp. 277-279.) Nevertheless, even applying the "abuse of discretion" standard of review, the error requires

reversal if it is reasonably probable that a different result would have been obtained in the absence of the error. (People v. Watson (1956) 46 Cal.2d 818, 836; People v. Harris, supra, 60 Cal.App.4th, at p. 741.) Under either standard for reviewing the error, reversal is necessary. The only evidence which put appellant at the scene of the shooting was Soulivong's account of statements made by Erik Le on the night of the shooting. Although Erik Le was seen at the pool hall shortly before the shooting and his fingerprint was found on a beer bottle found outside the pool hall that night, there was no similar evidence placing appellant at the pool hall that night. Although the gun used in the shooting was linked to appellant's brother, even the prosecution gang expert observed that guns float freely between gang members and there was additional ballistics evidence linking the same gun to other shootings which had not involved appellant. (13RT 2789; 15RT 2998.) Where the identity of the shooter was really the only issue for the jury to determine, and where the physical and circumstantial evidence linking appellant to the shooting was so weak, it certainly cannot be said that the propensity evidence did not contribute to the guilty verdict in appellant's case. (Sullivan v. Louisiana, supra, 508 U.S. at pp. 277-279.) Moreover, it is reasonably probable that a different result would have been obtained in the absence of the erroneously admitted evidence. (People v. Watson (1956) 46 Cal.2d 818, 836; People v. Harris, supra, 60 Cal.App.4th, at p. 741.)

II

THE TRIAL COURT SHOULD NOT HAVE INSTRUCTED THE JURY IN CALCRIM NO. 375 THAT THE UNCHARGED CRIME, AS EVIDENCE OF THE GANG ALLEGATIONS, WAS SUBJECT ONLY TO THE PREPONDERANCE-OF-THE- EVIDENCE STANDARD OF PROOF, AND THE ERROR REQUIRES REVERSAL OF THE GANG ENHANCEMENTS

In regard to the prior uncharged shooting discussed in Argument I, appellant's jury was instructed with CALCRIM No. 375, which provided that proof of the truth of the uncharged offense was subject to the preponderance of the evidence standard, rather that beyond a reasonable doubt, and that the jury was to use the evidence for the limited purpose of determining the gang allegation under Penal Code section 186.22. (15RT 3123-3124.) Appellant submits that the instruction directed the jury to use the evidence of the uncharged crime as circumstantial evidence of the truth of the gang enhancement allegations. As such, the jury should ***not*** have been instructed that the uncharged crime was subject to the preponderance-of-the-evidence standard of proof. Rather, as circumstantial evidence of an element or elements of the gang allegation, the evidence was subject to a standard of proof-beyond-a-reasonable-doubt, as is all circumstantial evidence. As such, the jury instruction, as given, was incorrect because the instruction was likely to have led the jury to make findings based upon an insufficient standard of proof.

The CALCRIM Committee has recognized the potential for error in instructing a jury to apply the preponderance standard to proof of uncharged crimes, noting that evidence of other offenses is, in some cases, circumstantial evidence that the defendant committed the offense charged.

(CALCRIM Committee Comment to CALCRIM No. 375 ["when the prosecution's case rests substantially or entirely on circumstantial evidence, there will be a conflict between this instruction [CALCRIM No. 375] and CALCRIM No. 223"], citing People v. Medina (1995) 11 Cal.4th 694, 763-764; People v. James (2000) 81 Cal.App.4th 1343, at p. 1358, fn. 9; People v. Younger (2000) 84 Cal.App.4th 1360, 1382; People v. Jeffries (2000) 83 Cal.App.4th 15, 23-24, fn. 7.)

The jury should not have been instructed that, should they find the uncharged crime proved by a preponderance of the evidence, that the evidence could be used as proof of the gang allegation. Rather, the prior uncharged crime should have been subjected to the same beyond-a-reasonable-doubt standard of proof which applies to any fact necessary to the proof of an element of an enhancement allegation. (People v. Tenner (1993) 6 Cal.4th 559, 566; see also People v. Delgado (2008) 43 Cal. 4th 1059, 1065.) This was error and the error requires reversal if, "in light of the specific language challenged and all the instructions as a whole, there is a 'reasonable likelihood' the jury interpreted the instructions in an impermissible manner." (Estelle v. McGuire (1991) 502 U.S. 62, 72, fn. 4; People v. Cain (1995) 10 Cal. 4th 1, 36.) Here, there is no question that the jury could have interpreted the instructions in anything but an impermissible manner and the error, therefore, requires reversal of the gang allegations.

III

THE TRIAL COURT'S ERRONEOUS EXCLUSION OF EVIDENCE OF TAPE-RECORDED TELEPHONE CALLS BETWEEN SOULIVONG AND APPELLANT, WHEREIN THEY DISCUSSED BO'S INVOLVEMENT IN THE SHOOTING, REQUIRES REVERSAL.

The Court of Appeal assumed, without deciding, that the trial court erroneously excluded defense cross-examination concerning telephone calls 322, wherein appellant said to Soulivong, "They hit Vanessa's house about that shit that Bo did," and 330, wherein appellant expressed concern that Soulivong had snitched or would snitch on Bo, and that Soulivong was "slipping" when he spoke to the police. The Court of Appeal held, nevertheless, that the error was harmless. (Opin. 60-61.) Appellant submits that the exclusion of this evidence resulted in a deprivation of appellant's right to due process of law under the state and federal constitutions and, contrary to the Opinion of the Court of Appeal, the error is thus subject to review under the standard of Chapman v. California (1967) 386 U.S. 18.

Excluding the wiretapped statements offered by appellant to demonstrate consciousness of innocence while admitting the wiretapped statements offered by the prosecutor to prove consciousness of guilt tipped the scales of justice in favor of the prosecution and thus deprived appellant of due process and a fair trial. In Wardius v. Oregon (1973) 412 U.S. 470, 474, the United States Supreme Court explained, in reference to jury instructions which unfairly favor the government, that "the Due Process Clause...speaks to the balance of forces between the accused and his accuser." (See also Washington v. Texas (1967) 388 U.S. 14, 24, conc. opin. by Harlan, J.) Here, the prosecution was permitted to present dozens

of tape recorded telephone conversations purporting to prove appellant's consciousness of his own guilt. Yet appellant was prohibited from presenting, through cross-examination questions, a single word of a single taped conversation suggesting that appellant's fear and anxiety arose from a source other than his own guilt. This constituted not only an arbitrary and unjustified abuse of discretion, it also so favored the prosecution that it resulted in a denial of appellant's constitutional right to due process and fairness.

Because the error resulted in a depravation of appellant's federal constitutional right to due process of law, it requires reversal unless the error can be shown to have been harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18.) Even if there had been no constitutional violation, the error requires reversal because it is reasonably probable that the result would have been more favorable to appellant in the absence of the error. (People v. Watson (1956) 46 Cal.2d 818.) In this regard, the California Supreme Court has "made clear that a 'probability' in [the Watson] context **does not mean more likely than not**, but **merely** *a reasonable chance*, more than an *abstract possibility.*" (College Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704, 715, italics original, boldface added, citing People v. Watson, supra, 46 Cal.2d 818, 837, and Strickland v. Washington (1984) 466 U.S. 688, 693-694, 697, 698.)

As discussed in previous arguments in this brief, the only issue for the jury to determine was whether appellant was present and participated in the shooting and the evidence in support of this was decidedly weak. Moreover, there was ample evidence which corroborated the defense theory that someone other than appellant committed the offense. It is clear that Bo had been a passenger in a car that drove through the parking lot in front of

the Han Kuk pool hall at the time of the shooting and, moreover, Bo confessed to the shooting within minutes of the crime. These facts were consistent with appellant's excluded wiretapped statements expressing concerns about Bo's involvement in the shooting.

Had the jury been permitted to learn of wiretapped conversations in which appellant clearly demonstrated a lack of consciousness of guilt, there is a reasonable probability of a different result. Moreover, it cannot be shown that the exclusion of the evidence did not affect the verdict. The judgment must, therefore, be reversed.

IV

THE TRIAL COURT ERRED BY OVERRULING A DEFENSE OBJECTION TO THE PROSECUTOR COMMENTS CONCERNING THE DEFENDANTS' FAILURE TO CALL CERTAIN WITNESSES, A REFERENCE WHICH SHIFTED THE BURDEN OF PROOF AND DENIED APPELLANT HIS RIGHT TO DUE PROCESS OF LAW, REQUIRING REVERSAL OF THE JUDGMENT.

During the prosecutor's final rebuttal argument, it was argued that the defense had the ability to bring in witnesses to the conversation that occurred after the offense at Orlando's house, that the defense had not done so, and, further, that had those witnesses been called by the prosecution, the witnesses would have lied for their fellow gang members, as the gang culture dictates. The defense objected to these comments as shifting the burden of proof to the defense. The defense objection was overruled. (16RT 3352-3354.)

Appellant submits that the trial court's refusal to sustain the defense

objection and to admonish the jury in regard to the prosecutor's above-quoted comments was error and requires reversal as discussed more fully below. The prosecutor's references to the defendants' failure to call exonerating witnesses here is very similar to the prosecutor's comments in People v. Gaines (1997) 54 Cal. App. 4th 821, 824-826 ("Gaines.") In Gaines, during final argument the prosecutor insinuated that the defense had purposefully not called an alibi witness because that witness would have impeached the defendant's testimony. On appeal, the Court of Appeal found that the prosecutor's argument constituted misconduct because the prosecutor's comments did not merely make a reference to the defendant's failure to bring forth evidence to "corroborate an essential part of his defensive story," (see People v. Varona (1983) 143 Cal. App. 3d 566, 570), but, rather, as here, "[T]he prosecutor was in plain effect presenting a condensed version of what he was telling the jury would have been [the witness's] testimony." The reviewing court further held that, "When this tactic is achieved in the guise of closing argument, the defendant is denied Sixth Amendment rights to confrontation and cross-examination." (Ibid., citing People v. Harris (1989) 47 Cal. 3d 1047, 1083; People v. Bolton (1979) 23 Cal. 3d 208, 215, fn. 4 ["The prosecutor, serving as his own unsworn witness, is beyond the reach of cross-examination."].)

The same is true in appellant's case. During the final rebuttal argument, when the defense would have no opportunity to respond, the prosecutor made it clear that the defense could have called witnesses to repudiate Soulivong's account of the events at Orlando's house on the night of the shooting, but that the defense had not done so. The prosecutor further insinuated that had the defense called such witnesses, they would have "lie[d] for the gang, that's how it works." Thus, not only did the prosecutor shift the

burden to the defense, he also presented to the jury the prosecution's own version of what the missing witnesses would have said on the stand and, even more egregiously than the prosecutor in Gaines, informed the jury that the testimony would have been untrue because "that's what gang-bangers do." Here, contrary to the Opinion of the Court of Appeal (see Opin., pp63-64), the prosecutor went far beyond what occurred in Gaines, and the error requires reversal because it cannot be shown, beyond a reasonable doubt that the error was harmless. (Gaines, at p. 826, citing Chapman v. California (1967) 386 U.S. 18, 24, and People v. Harris, supra, 47 Cal. 3d 1047.) Soulivong was the prosecution's most important witness and the only witness who placed appellant at the scene of the offense and, in fact, put the gun in appellant's hand at the time of the shooting. The prosecutor not only told the jury that it was appellant's burden to bring forth the witnesses who could refute Soulivong's testimony, the prosecutor also implied that the People had attempted to contact those witnesses without success because the witnesses were "gang bangers" who would never cooperate or testify on behalf of the government and, therefore, witnesses who obviously had something to hide from appellant's jury in order to help a fellow gang member. If this were not enough, the prosecutor also insisted that any witness to the events at Orlando's house on the date of the shooting would have lied, anyway, thus implying that this was why the People had declined to call such witnesses. Here, as in Gaines, supra, "The prosecutor's improper remarks were not a glancing blow directed at a peripheral target. They were a head-on assault at the defense." (Gaines, supra, 54 Cal. App. 4th, at p. 826.) Here too, as in Gaines, "[t]he prosecution's case against defendant was far from conclusive." As in Gaines, there was no physical evidence linking appellant to the offense and the prosecution's case really hinged upon

Soulivong's recitation of a conversation he purportedly overheard a short time after the shooting. (Ibid.) The fact that there were no witnesses who could corroborate the contents of that conversation – or even the fact that any such conversation took place – should have been a factor supporting the defense. However, the prosecutor, through calculated misconduct during final rebuttal argument, was able to turn the absence of prosecution witnesses to the People's advantage. Contrary to the decision of the Court of Appeal, this constituted prosecutorial misconduct which denied appellant his Sixth Amendment right to confront and cross-examine witnesses. (See Opin., pp. 63-64.)

V

INCORPORATION OF ARGUMENTS CONTAINED IN THE PETITION FOR REVIEW OF CO-APPELLANT ERIC HUNG LE, TO THE EXTENT THOSE ARGUMENTS INURE TO THE BENEFIT OF APPELLANT YANG.

Pursuant to rule 8.504, subdivision (e)(3) of the California Rules of Court, appellant joins and incorporates by reference all issues and arguments raised by his co-appellant ERIC HUNG LE in Le's Petition for Review, to the extent that those argument inure to appellant Yang's benefit.

CONCLUSION

For the reasons set forth herein, appellant respectfully urges this Court to grant review of the decision of the Court of Appeal.

Dated: May 25, 2012

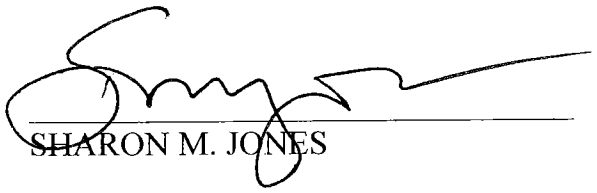
Respectfully submitted,

SHARON M. JONES
Attorney for Appellant
DOWN GEORGE YANG

WORD COUNT CERTIFICATE

Counsel for petitioner hereby certifies that this brief contains 4,509 words, as counted by the word count function of counsel's word processing program.

I declare, under penalty of perjury that the foregoing Word Count Certificate is true and correct. Executed on May 25, 2012, at Ventura, California.



SHARON M. JONES

DECLARATION OF SERVICE BY MAIL

I, SHARON M. JONES, declare that I am over 18 years of age, and not a party to the within cause; my business address is P. O. Box 1663, Ventura, California 93002. I served a copy of the attached APPELLANT'S PETITION FOR REVIEW on the following by placing the same in an envelope addressed as follows:

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Each said envelope was then, on May 29, 2012, sealed and deposited in the United States mail at Ventura, California, with postage thereon fully prepaid. I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on May 29, 2012, at Ventura, California.

SHARON M. JONES

Filed 4/27/12

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ERIC HUNG LE et al., Defendants and Appellants.	D057392 (Super. Ct. No. SCD212126)

APPEALS and CROSS-APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Down George Yang.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant Eric Hung Le.

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1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of DISCUSSION I and II.

APPENDIX

Kamala D. Harris, Attorney General of California, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Erik Hung Le and Down George Yang of murder (Pen. Code,[2] § 187, subd. (a), count 1); attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a), count 2); discharging a firearm from a motor vehicle (§ 12034, subd. (d), count 3); and assault with a semi-automatic firearm (§ 245, subd. (b), counts 4 & 5). The jury also found true that all counts were committed for the benefit of a street gang (§ 186.22, subd. (b)); that as to counts 1, 2 and 3, Le and Yang were principals in the offenses and that during their commission, at least one principal used a firearm (§ 12022.53, subds. (d) & (e)); and finally, as to counts 3 and 4, that Yang personally used a firearm (§ 12022.5, subd. (a)(1)). Le was sentenced to a term of 96 years to life and Yang to a term of 101 years to life.

Le and Yang raise myriad challenges to their convictions. We consider them seriatim. As we explain, we reject their challenges and affirm their judgments of convictions.

The People cross-appeal, contending the trial court erred in staying the sentence under court 4 for the firearm use enhancement under section 12022.5, subdivision (a) and imposing under that count the 10-year "violent felony" term for the gang enhancement

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2 Unless otherwise noted, all statutory references are to the Penal Code.

under section 186.22, subdivision (b)(1)(C). As we explain, we conclude the trial court properly stayed the firearm use enhancement under section 12022.5.

FACTUAL AND PROCEDURAL BACKGROUND[3]

In 2002 Le and Yang were members of the Tiny Oriental Crips (TOC), a criminal street gang that claimed as its territory Linda Vista and parts of Mira Mesa, communities within the City of San Diego. TOC territory included the Han Kuk Pool Hall (pool hall) located on Convoy Street then owned by Don Su (Don) and his wife Kyung Su (Kyung) (together, the Sus). The Sus had owned the pool hall for about three months at the time of shooting. Rivals of TOC included Asian Crips (AC) and the Tiny Rascal Gang (TRG). The pool hall was managed by the Sus' nephew, Min Su (Min).

On the night of June 14, 2002, TOC member Kane Bo Pathammavong[4] and his friends Gerry Ian Sulit, Phouthasanoe Volvo Syrattanakoun, Sherri Pak and Rei Morikawa were drinking in a grassy area near the pool hall. During the evening, Le joined the group. At some later point, Le spotted AC members near the pool hall and yelled out a gang challenge.

Le left to make a phone call to Yang. When Le returned, he told Pathammavong and Syrattanakoun to leave with their friends. Pathammavong and his group left and went to a tea house located in the same shopping center as the pool hall.

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3 We view the evidence in the light most favorable to the judgment of convictions. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to appellants' claims are discussed *post*, in connection with those issues.

4 Pathammavong testified pursuant to an agreement with the district attorney's office in which he pleaded guilty to being an accessory after the fact with a gang allegation, with an agreed-upon sentence of no more than seven years and use immunity, in return for his truthful testimony.

Octavius Soulivong[5] (Octavius) was at the house of his twin brother Orlando, along with Yang and several other TOC members. Around midnight, Orlando received a telephone call. Orlando claimed the caller was Le. After talking to Le, Orlando handed the phone to Yang, who walked outside to talk. When Yang returned, he told the group that he and Le were going to the pool hall. About 15 minutes later, Le arrived at the house. Le told the group there were some AC members at the pool hall and asked whether anyone had a "strap" (e.g., slang for gun). Le left the house shortly thereafter with Yang and John Vue.

Pathammavong and his friends were at the tea house when Le returned. Le said he needed to take care of something and told Pathammavong and his group to stay put. Another car pulled up and parked next to Le's car. Le spoke to a passenger in that car, returned to Pathammavong and his group and told them not to follow. Both cars then left the parking lot.

Pathammavong did not take Le's advice. Thinking there might be a fight or shooting because of the "tension," Pathammavong and Sulit began driving to the pool hall in Pathammavong's car. On the way they heard gunshots and decided to return to the tea house.

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5 Octavius was arrested and charged as one of the shooters in an unrelated crime that took place on Comstock Street in Linda Vista (Comstock shooting). The evidence ultimately showed Octavius's brother was the shooter in the Comstock shooting. In return for testifying in connection with the Comstock shooting and the shooting in the instant case, Octavius was granted use immunity. He ultimately was placed into the witness protection program after receiving threats.

At the time of the shooting, Don and his friend Jinwon Lee were outside the pool hall. TRG members Michael Lieng and Nikhom Somsamout arrived in the parking lot near the pool hall. A car with two people inside pulled into the alley near the pool hall. Shots were fired from the car and then the car sped away. One of the bullets struck Don in the neck area. Another struck Lieng in the right elbow and a third bullet struck Somsamout in the right foot. Don died three days later from the gunshot wound.

After the shooting, Le and Yang returned to Orlando's house where, according to Octavius, they spoke about the shooting. Le claimed he was the driver and Yang the shooter. Le also claimed Yang "shot the whole clip" from the rear left seat of the car driven by Le; Yang shot at people in front of the pool hall and kept shooting without aiming. Le referred to AC members as "ass crack," and bragged that he and Yang shot at them. During Le's recounting of the shooting, Yang interjected and corrected some of Le's statements about the shooting.

TOC members subsequently learned that the shots fired on the night of June 14 had struck and killed Don and not AC members. TOC members, including Yang, agreed not to discuss the shooting any more.

Police investigators recovered a beer bottle in the alley on the south side of the pool hall; a fingerprint matched to Le was found on the neck of the bottle. Police also found several cartridge casings consistent with a 9 millimeter Luger semi-automatic. Because police did not have a murder weapon, a casing was placed into a computer database matching bullets to weapons.

During a search warrant executed at Yang's home, police found under a bed an empty box of 9 millimeter casings along with a gun-cleaning kit. Yang's fingerprints were on the gun box and an instruction manual for the gun.

In early 2005, Deputy Richard Sanchez of the San Diego County Sheriff's Department stopped a car for speeding. The driver was Daniel Manalo, a member of the "B-Down" criminal street gang. During a search of the vehicle, Deputy Sanchez found a 9 millimeter Jennings Bryco semi-automatic handgun with an illegible serial number. Manalo claimed he bought the gun a short time earlier from an individual in Del Mar.

Criminalist Mary Jane Flowers of the San Diego Police Department found the gun had a serial number "1452_66" with the "_" being either a 3 or a 5. Flowers test-fired the gun and placed the results in the computer database. A match came back to the pool hall shooting and four other shootings.

Investigators traced the gun to Yang's older brother, Meng. Meng told police he purchased the gun for Yang from a federally-licensed firearms dealer at a gun show in October 2001. Although Meng filled out the paperwork to acquire the gun, Yang paid for the weapon and accompanied Meng to pick up the gun after the waiting period. Meng told police he gave Yang the gun that day and never saw it again.

Meng identified the box of ammunition recovered during the search warrant as the box that came with the gun. When a detective asked Meng about the gun, Meng said he bought it for Yang and did not know its whereabouts. Meng then blurted out, "Was it used in a murder or something?"

In August 2007 police obtained authorization to wiretap Yang's phone. The record includes myriad incriminating statements involving Yang and the shooting, including as follows:

August 14, 2007 (call between Yang and Meng)

Yang: "[E]ver since last Wednesday, they started asking about that thing. [¶] . . . [¶] Yea, they about to back off but they don't have anything, like the same thing. But the gun, said I sold it that guy 'Slipper.'[6] The gun, they found it at Slipper's." Meng: "Oh really?" Yang: "Yeah. Say you sold it to the Slipper guy and you don't know his name that's it. If they make it hard for you just say, 'You talk to my lawyer. He will answer my questions because you don't know what they're talking about. That's it'." Meng: "All right." Yang: "But if you are afraid—they make you afraid. Don't be. Don't worry about it. Say you sold it to Slipper, that is all."

August 14, 2007 (Yang, Meng)

Yang: "Hey, did they say you bought the gun for yourself or you bought it for me?" Meng: "Yea, I said bought it for me in particular." Yeng: "All right."

August 14, 2007 (Yang, unidentified male (UM))

Yang: "I told Meng to say he sold it to 'Slipper' already. Said that Meng bought it and when he didn't want it, he . . . sold it to 'Slipper.' "

August 14, 2007 (Yang, Meng)

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6 The term "Slipper" is slang for a person of Cambodian descent.

Meng: "Where did you put the gun?" Yang: "Sold it already. [¶] . . . [¶] Sold it to slipper . . . already, I told you. [¶] . . . [¶] Fuck! You told them that you gave me the gun. You just got me involved!"

August 15, 2007 (Yang, Meng)

Yang: "[D]id they say, they don't have the gun?" Meng: "They found the box." Yang: "I think they got the gun. They found a gun but yours they don't get it. The serial numbers on yours, I removed it already. I made sure. Just the box. [¶] . . . [¶] [I]f they don't have the gun, there is nothing they can do. [¶] . . . [¶] It seems like they don't have good evidence. . . . Let them take the box. The box and the paper. [¶] . . . [¶] They found a gun . . . but the one I gave you I removed the serial number already. There is no way they—I removed the serial number before I sold it."

August 15, 2007 (Yang, UM)

Yang: "My brother fuckin' told them [police] that he gave me the strap. [¶] . . . [¶] That was used for the case. [¶] . . . [¶] [T]hey gonna come tomorrow morning and take my ass in for that shit. [¶] . . . [¶] I want to run[.] [¶] . . . [¶] I'm just thinking about running out on this."

August 16, 2007 (Yang, U.M.)

Yang: "[T]hey [police] took Meng yesterday. [¶] . . . [¶] [T]hey lookin' for the strap . . . . [¶] . . . [¶] Meng said . . . he bought me, he got me a strap, he gave me a strap, but they're not sure it's the same one. [¶] . . . [¶] [H]e just kinda slipped. Not bad, there's still nothing."

August 16, 2007 (Yang, Octavius)

Yang: "Hey man—remember back when you first came out, you told me that—that you got that Shirocko?" Octavius: "The what?" Yang: "They [police] got the . . . heater." Octavius: "The what?" Yang: "The thing, you know—" Octavius: "What thing?" Yang: "Fabosha—" Octavius: "Oh yeah—yeah. What about it?" Yang: "How do you know they have it?" Octavius: "Because they told me. They told me that they got it from some big—got it from some fool from B-Down." Yang: "Did they show it to you or what?" Octavius: "No, they just told me. They told me this when I was in jail." [¶] . . . [¶] Yang: "[W]hen they hit [searched] my house, last time, they found the—they found the box. That he [Meng] bought the strap in. Cause he bought it brand

new. [¶] . . . [¶] So it's under his name but . . . I sold that motherfucker a long time ago. You know what I'm saying?" [¶] . . . [¶] Octavius: "[T]hey didn't give me the name of the person who they picked it up from and shit, but he was like—'Yeah, cause—uh—it don't make sense, cause we got the gun from the fool from B-Down and shit.' You know what I mean? . . . I was all, 'I don't know man, whatever.' And then you tell me that the cops went up to Meng and shit and asked MENG about the strap and giving it up and shit, but—I don't know. Either that, though, or they fuckin made some fuckin big ass fuckin story about it or some shit." Yang: "So you knew they were going to go—go talk to Meng already?" [¶] . . . [¶] Octavius: "I didn't know. How the hell was I to know? I don't know what strap you guys talking about." [¶] . . . [¶] Yang: "Whoa, whoa, whoa." Octavius: "What I'm talking about is the one that Bo [Pathammavong] had—that Bo used to kill that one fool?" Yang: "Yeah." Octavius: "OK? That fuckin—uh—the nine." Yang: "Yeah." Octavius: "That's the one that Cuz was talking about. He talking about that nine w-w-was stripped off to fucking—uh—to B-Down. That's the one I'm talking about. I don't know what—what fuckin strap you talking—talking about Meng—[¶] . . . [¶] Yang: "[T]hey [police] didn't say that was the gun used. Cause—if it—I think if it was, they would say, 'Your gun was used for so and so.' You know?"

San Diego Police Department Detective Daniel Hatfield testified as the prosecution's gang expert. In 2002 TOC had between 50 and 60 members, including Le and Yang. The primary activities of the TOC gang in 2002 included murder, robbery,

assault with a deadly weapon, drive-by shootings at occupied residences, shootings at occupied vehicles, auto thefts and burglaries.

DISCUSSION

I

Le's Appeal[7]

A. *Sufficiency of Evidence to Prove Intent to Kill*

Le contends the evidence was insufficient he acted with the intent to kill, requiring his conviction in count 1 for murder be reduced to second degree murder and his conviction in count 2 for attempted murder be reversed.

1. *Standard of Review and Governing Law*

On appeal, "we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard applies when assessing a federal constitutional due process claim: "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318, fn. omitted [99 S.Ct. 2781].)

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7 Yang joined in all issues and arguments raised by Le that would inure to Yang's benefit.

"The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The conviction shall stand "unless it appears 'that upon no hypothesis whatsoever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

"[A]ny murder which is perpetrated by means of discharging a firearm from a motor vehicle, *intentionally at another person outside of the vehicle with the intent to inflict death,* is murder of the first degree." (§ 189, italics added.) Thus, proof of a specific intent to kill (express malice) is required to prove first degree murder on this theory. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386; see also § 188 [Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."].) Premeditation and deliberation need not be proven for first degree murder by a drive-by shooting. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849, 851, fn. 10, 853, fn. 11.) Rather, the murder "could be the product of sudden and spontaneous rage, occurring without premeditation and not occurring in connection with the

commission (or attempt to commit) any felony." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 165, fn. omitted.)

Because there rarely is direct evidence of a defendant's intent, it must usually be determined by looking at all of the circumstances surrounding the defendant's actions. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Whether a defendant had the intent to kill is a question of fact for the jury. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

2. *Analysis*

Based on the evidence presented at trial, we conclude a reasonable jury could have found that Le harbored the requisite intent to kill on the night of the shooting.

Indeed, the record shows that on the night Su was killed, Le and other TOC members were hanging out on a grassy area near the pool hall; that at one point Le saw cars pulling into the parking lot and yelled out a gang challenge because Le believed members of the rival gang AC, whom Le referred to as "ass cracks," were in TOC territory; that Le told the group he was going to call Yang, left and returned about five minutes later and told Pathammavong, "Get your people out of here"; that Pathammavong and Sulit gathered their friends and went to a tea house in the same shopping center as the pool hall; that while Octavius was at his brother's house along with several TOC members, including Yang, Le called and spoke to Orlando and then to Yang, who confirmed that he was going with Le to the pool hall; that about 15 minutes later, Le arrived at Orlando's house, said there were AC members at the pool hall and

asked if anybody wanted to return with him to the pool hall; that before leaving Le asked if anybody had a "strap" and then spoke to Yang, who was known by other TOC members to own a 9 millimeter gun; that Le, Yang and Vue left in Le's car and returned to the pool hall; that Le next drove to the tea house where he met Pathammavong and his group and instructed them to stay at the tea house; that Le approached another car that had parked near Le's car, spoke to a passenger of the other car and then returned to Pathammavong's group and said not to follow; that both cars pulled out of the parking lot at the same time and gunfire erupted shortly thereafter; that after the shooting Le and Yang returned to Orlando's house, where Le spoke about the shooting; that Le confirmed he was the driver and Yang the shooter, and Yang had "shot the whole clip" at some "ass cracks"; and that AC's presence at the pool hall was an act of disrespect to the TOC because TOC considered the pool hall its territory.

We conclude this evidence is sufficient to support the jury's finding that Le harbored the requisite intent to kill on the night of the shooting.

Le contends that any evidence proffered by Octavius is inherently unreliable and cannot be considered to support the intent to kill finding because on the day of the shooting Octavius had consumed 320 ounces of malt liquor between the hours of 2:00 p.m. and midnight and because Octavius was known to be a compulsive liar. However, it was for the jury to decide whether to believe Octavius's testimony and the weight, if any, to afford it. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162 [assessing witness credibility is exclusively the jury's function].) In addition, Le does not dispute that the

trial court properly instructed the jury in this case regarding its role as fact finder and as sole judge of the "believeability of the witnesses."

In addition, even without the testimony of Octavius, there was sufficient, credible evidence to support the jury's finding that Le harbored the requisite intent to kill on the night of the shooting.[8]

We also reject Le's contention that the statement by the People's gang expert that shooting at rivals *without* hitting them shows a lack of intent to kill in this case. However, the jury decides whether there is an intent to kill and not an expert. In any event, the record shows the expert was testifying about the "benefits" a gang derives when shots are fired by one of its members at a rival gang and misses the intended target, or, as in the instant case, hits an unintended target, among other subject matters. This testimony in no way supports Le's argument.

B. *Motion for Severance*

Le next contends the trial court abused its discretion when it refused under section 1098[9] to sever the trials of the two appellants.

1. *Additional Background*

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8 For the same reason, we reject Le's argument there was insufficient evidence of intent to kill to support his conviction in count 2 for attempted murder.

9 Section 1098 provides: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

At the time Le filed his motion to sever, there were three defendants in the case: Le, Yang and Pathammavong. Le mainly argued in his motion that severance was necessary because the People intended to introduce "highly prejudicial" statements by Pathammavong that implicated Le in the crime by placing Le "at or very close" to the proximity of the crime scene and by insinuating that Le knew a shooting was about to take place. Le also argued that severance was necessary because his association with Yang and Pathammavong was prejudicial, inasmuch as he claimed both individuals were much more involved in TOC than he; that there was a likelihood of jury confusion resulting from evidence involving multiple counts against three individuals; that Yang might give testimony exonerating Le if Yang was separately prosecuted; and that the case against him was weak while the case against Yang and Pathammavong was strong.

At the hearing on the motion, the trial court noted Pathammavong was no longer a defendant in the case after pleading guilty and agreeing to testify against Yang and Le. Le's counsel acknowledged that with Pathammavong out of the case, "70 to 80 percent of the argument [on the motion to sever] appears to be moot." Nonetheless, Le's counsel argued severance was still required because the case against Le allegedly was much weaker than the case against Yang.

The trial court denied the motion to sever, reasoning as follows:

"There is, of course, a general preference in the law for joint trials. In part, this is for judicial economy, and in part it's to minimize the emotional and other costs to

witnesses. Certainly that preference, however, must not be allowed to infringe on the right of a defendant to receive a fair trial and due process.

"The cases say that this is something of a discretionary call for the court to make. There are a number of cases that have talked about the various grounds that would either authorize a severance or require one or that should be considered by the court. I don't really see any of those grounds present here. [¶] . . . [¶]

"I understand that there is some circumstantial evidence as to Mr. Yang that doesn't exist with respect to Mr. Le, and there may be some intercepted phone calls of Mr. Yang that don't involve Mr. Le, but, frankly, looking at it as a whole, it seems to me that the evidence is [relatively] comparable as to both of these gentlemen.

"There was a reference in the papers, I think, to the possibility that if severed, Mr. Yang would give exonerating testimony. That representation seems to me to be pretty watery. I certainly don't have anything other than that that might demonstrate a due process o[r] Sixth Amendment violation.

"Bottom line is I believe that in this case it's not a good basis to sever, and I'm going to deny the motion for severance."

2. *Governing Law*

" ' "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Our Legislature has thus "expressed a preference for joint trials."

[Citation.] But, the court may, in its discretion, order separate trials . . . .' " (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 149-150.)

"The court should separate the trial of codefendants 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.' " (*People v. Turner* (1984) 37 Cal.3d 302, 312, overruled on other grounds as stated in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150, superseded by statute as stated in *People v Letner and Tobin, supra,* 50 Cal.4th at p. 163, fn. 20.) "Whether denial of a motion to sever the trial of a defendant from that of a codefendant constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion rather than on what subsequently develops." (*People v. Isenor* (1971) 17 Cal.App 3d 324, 334.)

3. *Analysis*

Le argues that the evidence against him was much weaker than the evidence against Yang, and as such, Le was prejudiced by his "mere association"' with Yang. To support this argument, Le claims there was "scant" evidence establishing his "presence and participation" in the shooting, as compared to the "large amount" of evidence against Yang, which he claims was substantial and included wiretap and other evidence positively linking Yang to the murder weapon.

We disagree with Le that the evidence against him was "scant," as demonstrated *ante* in connection with the summary of evidence on the issue of intent to kill. In fact, the

record shows that at the time the trial court denied the motion to sever there was substantial evidence of Le's involvement in the shooting.[10]

Moreover, we note that Le and Yang were charged with having committed " 'common crimes involving common events and victims.' [Citation.] The court accordingly was presented with a ' " 'classic case' " ' for a joint trial. [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 452-453.)

Thus, on this record we conclude there was neither an abuse of discretion nor gross unfairness when the trial court denied Le's motion to sever. (See *People v. Letner & Tobin, supra*, 50 Cal.4th at pp. 149-150 ["a reviewing court may reverse a judgment only on a showing that joinder ' "resulted in 'gross unfairness' amounting to a denial of due process " ' [Citation.]."])

C. *Request for Foundational Hearing Regarding Testimony by Octavius*

Le next contends the trial court erred both when it refused to hold a hearing pursuant to Evidence Code section 402 before allowing the jury to hear the testimony of Octavius and when it ultimately admitted that testimony. Le contends this testimony was inadmissible hearsay and opinion testimony, and more prejudicial than probative.

1. *Additional Background*

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10 This evidence includes, among other things, placing Le at the crime scene immediately before the shooting, when Le yelled out a gang challenge to members of the AC arriving at the pool hall; Le instructing other members of his group to leave the area, which they in fact did when they went to the tea house; Le leaving and returning a short time later with Yang and others; Le instructing the group at the tea house not to follow as he left in his car along with another car; and shots ringing out within a few minutes after he left. This evidence is in addition to the testimony of Octavius, who testified Le bragged about the shooting after the fact, when Le and Yang returned to Orlando's house, including how Le was the driver and Yang the shooter.

At a pretrial hearing, the trial court summarized what it described as the "interrelated" motions of Le and the People regarding the admission of testimony by Octavius. The People moved to admit Octavius's testimony regarding statements made by Le and, to a lesser extent, by Yang after the shooting, as adoptive admissions. Le moved to exclude those statements as well as any testimony by Octavius regarding a telephone call Le allegedly made before the shooting when Le spoke to Orlando and then Yang.

After hearing argument, the court noted Octavius had provided inconsistent accounts of the events and conversations regarding the shooting in interview transcripts, police reports and the preliminary hearing transcripts. The court found these inconsistencies provided "fertile ground for examination, cross-examination, impeachment, and even impeachment of the impeachment."

The record shows the trial court thoughtfully explained its reasoning to admit the testimony of Octavius, however, noting that the issues raised by the defense went to weight rather than admissibility:

"If we step back from the trees here and look at the forest, though, what are we dealing with? We're dealing with a long-time gang member [Octavius] and friend of the two defendants, or at least one of them; probably intoxicated at the time that he made these observations; talking about things that happened seven or eight years ago. Some of the statements were maybe made when they had only happened about five or six years ago.

"Now the question is, that I'm dealing with, do I not allow his testimony on certain issues? It seems to me that we have to consider what the Evidence Code contemplates. The Evidence Code, of course, contemplates that clearly inadmissible evidence will not be put before the jury.

"But our law also contemplates that the jury will decide the credibility of the witnesses and they will find the facts from the testimony that is there.

"It seems to me that the People have a basis to put this man on the stand, referring to Octavius, and seek from him testimony that he heard the conservation when Mr. Le and Mr. Yang returned.

"By casting it that way, I realize I'm assuming that something happened. But we know that they left and we know [that] they came back, and at some point when they came back, there was a conversation among a group of people. And it is clear that at least at some point in the past, Octavius has said that Mr. Le described what happened and Mr. Yang was joining in.

"Now he's also repudiated that, and counsel get to impeach him with that. But the threshold question is whether that kind of testimony, absent the repudiation, would be admissible. And it is. There is a doctrine of adoptive admissions.

"We use the term 'admission' in this sense as a statement of a party opponent. It doesn't really need to even be against anybody's interest. That's a separate doctrine. But the law is clear that if A and B are standing there, and A is talking about what we did and B is nodding or agreeing or adding details or even standing there equivocally silent, that

is evidence from which a trier of fact may conclude that B was saying, 'Me too,' and adopting those statements. That's what the adoptive admission exception deals with. [¶] . . . [¶]

"I remember reading the testimony of Mr. Octavius Soulivong. I didn't do the prelim. You all have read far more, because you have his discovery statements. [¶] But certainly on page 67, he does confirm that a conversation occurred that consisted of Down Yang and Erik Le describing what happened at the pool hall. And it was made to a group of people, of which he was a part.

"And I think that there's enough here for the district attorney to be able to call him and ask him these questions. I'll rule on objections as they might be made, but it sure seems to me that the district attorney will be able to obtain from this gentleman statements that will be admissible as actual statements of the speaker, an actual admission of the speaker, and one that's adopted by the person that wasn't speaking. [¶] . . . [¶]

"I am going to, so that the record is reasonably clear, allow the People to admit the testimony of Octavius, subject to all objections that may be made."

2. *Governing Law*

Evidence Code section 402 authorizes a trial court to hold a hearing outside the presence of the jury for the purpose of determining the admissibility of evidence. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 897 ["Evidence Code section 400 et seq., sets forth the rules for determining the existence or nonexistence of a preliminary fact when the parties dispute its existence"], overruled on another ground as stated in *People v.*

McKinnon (2011) 52 Cal.4th 610, 640-641.) "But subdivision (b) of Evidence Code section 402 does not mandate . . . that a court must hold an evidentiary hearing on request." (*Ibid.*) Where "no 'preliminary fact' concerning . . . admissibility" is presented, "challenges to the reliability" of proffered testimony go "to the weight of [the] testimony rather than its admissibility (Evid. Code, § 351) . . . ." (*Ibid.*) In such cases, an evidentiary hearing is not warranted. (*Ibid.*)

Moreover, a ruling on a motion under Evidence Code section 402 is not binding if the subject evidence is proffered later in the trial. (*People v. Williams* (1997) 16 Cal.4th 153, 196.) "[T]he court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial." (Evid. Code, § 403, subd. (b).)

"On appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion." (*People v. Williams, supra,* 16 Cal.4th at p. 197 [trial court "was within its discretion in failing to conduct additional proceedings outside the jury's presence on the question of gang evidence."].)

3. *Analysis*

It appears that the "preliminary fact" on which Le argues the trial court was required to conduct such a hearing was the alleged inherent unreliability of Octavius's testimony, given the inconsistent statements he had made over the years regarding the

events and conversations of and about the shooting, and given he had been drinking on the day of the shooting.

Le acknowledges in his brief that portions of Octavius's testimony were likely admissible. However, he argues that an Evidence Code section 402 hearing was the "only viable solution" for the trial court to "parse through the various statements" made by Octavius, which he claims "consisted of an amalgam of potentially admissible and inadmissible statements." We disagree.

By Le's own admission, his challenge to Octavius's statements went to weight and not admissibility; as such, the trial court was *not* required under Evidence Code section 402 to conduct a hearing to determine admissibility based on the alleged "preliminary fact" of unreliability. (See Evid. Code, § 351.) We decline Le's invitation to adopt a rule *mandating* that a trial court conduct an Evidence Code section 402 hearing merely because a witness *may* testify to subject matter that is inadmissible, as such a broad and expansive rule would effectively require a hearing every time a witness took the stand.

In addition, we note that in denying Le's request for a hearing under Evidence Code section 402 the trial court did make a preliminary finding that despite Octavius's inconsistency regarding the events and conversations after the shooting, including who said what, "at least at some point in the past[] Octavius has said that Mr. Le described what happened and Mr. Yang was joining in."

Moreover, even if we concluded the trial court erred by not holding such a hearing, we would further conclude that error does not require reversal. (See *People v.*

Stoll (1989) 49 Cal.3d 1136, 1163 [errors involving exclusion of evidence are generally governed by the *Watson* standard, based on *People v. Watson* (1956) 46 Cal.2d 818, 836, namely whether it is reasonably probably that a result more favorable to defendant would have been achieved absent the error].)

Here, the record shows the trial court was keenly aware that portions of Octavius's statements *may* have been inadmissible and the trial court was prepared to exclude them on proper objection. Le also does not argue that the trial court erred by overruling any of his objections and/or by admitting any one statement of Octavius, as opposed to challenging the *procedure* the court used to rule on the admissibility of those statements. Thus, even if the trial court was required to conduct a hearing under Evidence Code section 402, it is not reasonably probable the result at trial would have been any different.

D. *Pathammavong's Testimony He Was Targeted for Being a "Snitch"*

Le next contends the trial court erred when it overruled his objection to Pathammavong's testimony that while in local custody somebody had "dropped a kite on [him]." Pathammavong explained this meant he was considered a "snitch" and people were out to get him. Pathammavong testified he had no information that defendants were responsible for this conduct. Le nonetheless contends the trial court abused its discretion when it refused to exclude such evidence because it was not relevant and because it was extremely prejudicial.

1. *Additional Background*

While on the witness stand, Pathammavong testified he was concerned for his safety because he would be "green lighted." When asked what that meant, Pathammavong responded he could be shot, attacked or hurt by a gang member. Pathammavong then made the "kite" statement when discussing a problem he experienced while incarcerated. Defense counsel objected, but the court overruled the objection and allowed Pathammavong to testify about being beaten up by five or six people.

At a sidebar after the jury had been excused, defense counsel complained that Pathammavong's testimony was inadmissible hearsay and prejudicial because Pathammavong's testimony would lead the jury to believe appellants "are deadly dangerous people who can cause others to be beat up in jail at any given moment on a whim, and I think that prejudices Mr. Yang and Mr. Le tremendously."

The trial court disagreed, noting in the gang culture there is a custom and practice to retaliate against witnesses who testify against the gang and its members. The court noted that the jury would be instructed to consider the demeanor and attitude of each witness, and that Pathammavong's testimony went to that issue. The court also noted that the probative value of that evidence outweighed any prejudice to Le and Yang, particularly because the court had instructed the jury that any statements by Pathammavong regarding his safety was not to be attributed to either Le or Yang, and because Pathammavong's testimony made it clear that the attack was not connected to appellants.

The following day, members of the jury submitted a note to the court requesting a meeting. One of the jurors explained during the meeting attended by counsel that they were generally concerned for their own safety due to the nature of the case and because their names were mentioned at the beginning of trial.

After conferring with counsel on and off the record outside the presence of the jury, the court, with the assistance of all counsel, discussed how to handle the safety issue raised by jury members. The court noted it had a "dual duty" in this instance: "Let me reason this through. If I thought there were a security concern, and there are cases that have those, then it would be incumbent upon me to take steps to do two things: number one, alleviate that concern for the protection and security of the jurors; and, number two, alleviate it or take measures so that it wouldn't prejudice the defendants." The court also noted it had no information that anybody was in danger, including jury members.

In the presence of the jury and the defendants, the court addressed the note by the juror and communicated that it was satisfied no notes or lists of potential jurors had been removed from the courtroom during voir dire; that after making an inquiry, there was no information of any threat against any juror, court personnel and counsel; and that the instant case did not raise any real concerns beyond the "theoretical concern that would exist because of what you've heard some of the witnesses testify to."

The court next asked the jurors whether any safety concern would influence in any way their ability to be fair and impartial. All jurors gave appropriate responses that they could remain fair and impartial. The court also asked any juror to raise his or her hand if

he or she could no longer follow this admonition. The court noted on the record no hands were raised. The court added that Le and Yang were "entitled to the independent, conscientious decision of each juror. And that means a decision that is made without regard to concerns about your or anybody else's safety as a result of your service in this case."

2. *Governing Law and Analysis*

Evidence Code section 780 provides in relevant part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] . . . [¶] (j) His [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony."

" 'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court. [Citations.]' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084; see also *People v. Valencia* (2008) 43 Cal.4th 268, 302 ["Evidence of fear is relevant to the witness's credibility."].)

"Moreover, evidence of a 'third party' threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant." (*People v.*

Mendoza, *supra*, 52 Cal.4th at p. 1084; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1142 [for evidence that a witness is afraid to testify or fears retaliation for testifying, "there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant."].)

Our Supreme Court in *People v. Mendoza*, *supra*, 52 Cal.4th at pages 1084-1085 discussed *People v. Olguin* (1994) 31 Cal.App.4th 1355, among other authorities, which is instructive on the issue at hand. Briefly, in *People v. Olguin* "an eyewitness to a gang-related shooting testified he left the crime scene and did not voluntarily provide information to the police because ' "I didn't want anything to happen to my house or to my family." ' [Citation.] Over the defendants' objection, the witness testified that someone telephoned him a few days after the shooting, that the caller said they knew where the witness lived and that he had better watch his back, and that the caller also mentioned the name of the defendants' gang. The witness further testified that someone subsequently 'spray-painted the word "Rata" (Spanish for "rat") on his driveway.' [Citation.] In holding the challenged evidence was properly admitted, [the court in *People v.*] *Olguin* explained: 'Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim. . . .

[¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear. A witness who expresses fear of testifying because he [or she] is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into [his or] her home the night before the trial.' [Citation.]" (*People v. Mendoza*, *supra*, 52 Cal.4th at pp. 1084-1085.)

"Likewise, in *People v. Avalos* (1984) 37 Cal.3d 216 . . . , an eyewitness to a crime hesitated before responding affirmatively when asked by the prosecutor whether the person she previously identified in a lineup (i.e., the defendant) was in the courtroom. [Citation.] At an in camera hearing, the trial court ruled the prosecution might ask whether the witness was reluctant to testify out of fear, because 'the fact she felt fear, whether or not caused by specific acts of any persons connected with the trial, was relevant to her credibility and . . . the probative value outweighed any potential prejudice to defendant.' [Citation.] Upon resuming the stand, the witness testified she was afraid to testify. Defense counsel then clarified during cross-examination that the witness's fear was due only to the importance of the event. [Citation.] On appeal, we concluded [in *People v. Avalos*] the evidence was properly admitted: 'The determination that an explanation of [the witness's] hesitation would be relevant to the jury's assessment of her credibility was well within the discretion of the trial court.' [Citation.] Moreover, the

evidence had no prejudicial impact given counsel's clarification that the witness's fear did not reflect on the defendant. [Citation.]

"These authorities make clear that a trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness." (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1085.)

In light of the above authorities, we conclude the trial court properly exercised its discretion when it allowed Pathammavong to testify he was concerned for his safety because while in local custody somebody had "dropped a kite on [him]." Pathammavong explained this meant he was considered a "snitch" and people were out to get him. (See *People v. Mendoza*, *supra*, 52 Cal.4th at pp. 1084-1085; *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369.)

E. *Discovery Violations*

Le next contends he was denied a fair trial because of the allegedly late disclosure by the prosecution of fingerprint evidence on a beer bottle found near the pool hall linking Le to the crime scene and of an e-mail/letter written by a defense witness that portrayed Octavius as a habitual liar. Specifically, he contends the trial court erred by refusing to read a special jury instruction advising the jury that the prosecution did not provide this evidence at least 30 days before trial commenced and that the jury therefore could consider such failure in determining the weight to be given this evidence.[11]

1. *Additional Background—Fingerprint Evidence*

During trial, the prosecutor informed the court and the defense that the People's expert had found an additional set of prints from a beer bottle recovered from the back alley of the pool hall which, when analyzed, matched Le's fingerprints. The prosecutor represented he turned this information over to the defense as soon as he acquired it.

Le's counsel in response argued the fingerprint evidence should be excluded because the prosecutor had violated section 1054 by not providing the information 30 days before trial.

The court found there was no discovery violation because the prosecutor did not willfully suppress evidence as the People did not learn that Le's print was on the beer

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[11] Le in his brief confusingly argues the trial court also erred when it refused to give this special jury instruction with regard to the e-mail/letter evidence, even though the proposed instruction itself addressed *only* the fingerprint evidence.

bottle until that morning. Although the court refused to suppress the evidence, it agreed to a five-day delay of the testimony of the People's expert who discovered the fingerprint evidence in order to give that expert additional time to complete a written report and give the defense time to hire its own expert, if necessary, to investigate the prints after it received the report.

Le's counsel subsequently requested a special jury instruction be given addressing the prosecution's alleged failure to comply with the discovery requirements. In rejecting the proposed instruction, the trial court ruled as follows:

"Here it doesn't seem to me, frankly, that there was a discovery violation. The evidence of the print on the [beer] bottle I find was disclosed as soon as it was known to exist.

"Now, arguably, one could argue that the police were negligent in not tracking down that second envelope of fingerprints earlier and processing it earlier. But that's the worst that can be said. I don't find even a shred of evidence that they willfully waited until the eleventh hour to do this comparison.

"I don't think it was a discovery violation. There was an inadvertent failure to recognize significant evidence. But as soon as that was recognized, it was called to everybody's attention. And I think I acknowledged before, and I certainly acknowledge again, that it's no fun to be surprised by that kind of evidence. But I don't see this as, particularly in a case where the investigation went as long as it did and involved different investigative units, that this was willful or a discovery violation.

"On the issue of prejudice, . . . I don't really think that the cross-examination would likely to have been too much different. It seems to me that since the evidence of the fingerprint on the bottle is somewhat damning, it would be certainly appropriate to establish from the witnesses who were there at the pool hall that nobody saw him that night, because that then supports the inference that the bottle was there for some other reason, had been in the car perhaps and kicked out by the actual people in the car. Who knows?

"Moreover, of course, we did recess and give the defense a chance to get its own expert and to call any expert witnesses that the defense felt might have been fruitful. And that chance was afforded.

"Bottom line is I don't see any impairment of Mr. [Le's] right to a fair trial." Although the court denied the request for a special instruction, the court ruled the defense could address the matter during closing argument.

2. *Additional background—E-mail by Defense Witness*

During trial, defense counsel informed the court that in August 2008 a defense witness sent an e-mail to the district attorney investigator stating that the witness had known Octavius for at least 10 years, that for a time the witness had dated Octavius and that the witness believed Octavius was a habitual liar and lied for no reason at all. Defense counsel explained that in speaking with the investigator, defense counsel had learned the investigator received the e-mail and had shown it to the prosecutor, who looked at the e-mail, put it in a box and forgot about it. Defense counsel argued that the

prosecutor should have turned the e-mail over to the defense and that the failure to do so was a violation of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] (*Brady*) and asked the court to conduct a hearing on whether the prosecutor should be sanctioned.

The prosecutor responded he had learned about the e-mailed letter from an ex-girlfriend that was recovered during a search of her house; he did not have a copy of the e-mail and when he received it, the e-mail appeared to be duplicative of the information already provided to the defense and the defense had the e-mail and it could be used at trial. The prosecutor also noted he took seriously his obligation to turn over information to the defense as it became available.

At a subsequent hearing outside the presence of the jury, the trial court found the prosecutor had failed to comply with his obligation to disclose the e-mailed letter but that no sanctions were warranted because the prosecutor had not willfully suppressed the information:

"I conclude . . . that there is no *Brady* violation in this case. I make that conclusion for the following reasons.

"I think that the question isn't answered simply by looking at whether the content of the document brings it within the *Brady* doctrine. I think you have to look at the circumstances and the effect in this case. I find, as a matter of fact, that the nondisclosure of this document was inadvertent and that the document was not willfully suppressed.

"I note in making that finding that the discovery is some four to 5,000 pages of documents. There are numerous photographs. This was a complex investigation of a

cold case. We have just heard testimony today about how this investigation was reactivated and began to heat up again in 2007, some five years after the actual killing. The case involved gang detectives, homicide detectives, peace officers from other agencies recovering guns and cars, involved district attorney investigators, involved items impounded as physical evidence under one tag number or one description number by the gang detectives, then being transferred and renumbered by homicide detectives.

"In my view and it is my finding that the discovery, frankly, has been managed exceptionally well in a case [this complex] by the district attorney and, frankly, by defense counsel. But there is not even a hint or a scintilla of evidence that this nondisclosure was anything other than inadvertent.

"Moreover, I think we have to look at it in light of the other evidence that exists about [Octavius's] credibility. Granted, the bias of a witness and a witness' credibility is never a collateral matter. However, it certainly cannot be said that this letter . . . was the sole piece of impeaching evidence as to [Octavius] or even, frankly, a significant one. It is a letter from an ex-girlfriend who is upset about pregnancy allegations or rumors or statements made by [Octavius], whom she admittedly dated for some period of time. There is no way to even suggest that a marginal benefit of this in terms of evaluating [Octavius's] credibility is anything more than minor.

"I conclude that there is no *Brady* violation in this case. I certainly don't impose any kind of a *Brady*-based sanction. I am declining to impose any sanction under the discovery laws as well, that is, the statutory laws."

3. *Governing Law and Analysis*

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Our Supreme Court has established that " 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order.' " (*Ibid.*) In considering whether the trial court abused its discretion, we examine whether the trial court's response "was inadequate to dispel any prejudice resulting from the prosecution's conduct." (*People v. Robbins* (1988) 45 Cal.3d 867, 884, superseded by statute as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

As to the fingerprint evidence, we conclude the trial court properly found there was no discovery violation under Penal Code section 1054 et seq. Indeed, we note that Le does not challenge the findings of the trial court that the prosecution did *not* willfully suppress the fingerprint evidence, or that once it discovered the information, the prosecutor immediately turned it over to the defense. (See § 1054.7 "[If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made *immediately* . . . ."], italics added.)

Here, the record shows the People's expert uncovered the fingerprint evidence as the expert was preparing to testify at trial. To ensure there was no prejudice, the court granted the defense's request for a five-day continuance to allow the defense to review the forthcoming report of the People's expert and to conduct their own investigation, if necessary.

The record also shows the defense was aware of the existence of fingerprint evidence on the beer bottle and chose not to examine that evidence or conduct its own investigation. (See *People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049 [noting that "[a]lthough the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation," and further noting that "[i]f the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence."].)

Under the circumstances, we conclude the trial court's decision to delay the trial in order to give the defense an opportunity to investigate the fingerprint evidence, but not to give the requested jury instruction, was a proper exercise of the court's discretion. (See *People v. DePriest* (2007) 42 Cal.4th 1, 38-39 [concluding trial court properly allowed shoeprint evidence to be admitted shortly before trial because the prosecutor informed both the court and defense counsel of the existence of such evidence immediately after it was acquired and because there was no evidence the acquisition of such evidence was unreasonably delayed, and concluding the trial court did not abuse its discretion in denying the defense's request for a continuance with respect to such evidence because the "record supports the court's determination that defendant had ample time and resources to [investigate the shoe print evidence] after trial began."]; see also *People v. Panah* (2005) 35 Cal.4th 395, 459-460 [concluding there was no statutory violation when pathologist

prepared on the eve of testimony a new report after reexamining microscopic slides at request of prosecution].)

As to the e-mailed letter sent to the district attorney investigator, Le takes issue with the finding of the trial court that the nondisclosure of this information was inadvertent. However, because this finding is supported by substantial evidence in the record, we may not reweigh the evidence or reappraise the credibility of the witnesses (e.g., the prosecutor and district attorney investigator) and come to a different finding. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

In any event, we conclude the trial court properly found there was no *Brady* violation in connection with the e-mail. " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (See *People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.)

Here, Le cannot satisfy all three elements. Assuming the e-mail was exculpatory, there is no evidence the prosecution suppressed this information as the defense obtained it from another source and merely confirmed the prosecutor had received it at some point during the investigation. "Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him [or her]. [Citation.] If the material evidence is in a

defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence. [Citations.] Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it ' "by the exercise of reasonable diligence." ' [Citations.]" (*People v. Salazar, supra,* 35 Cal.4th at pp. 1048-1049.)

There also is no evidence Le was prejudiced by the prosecutor's failure to produce the e-mailed letter to the defense. "Prejudice, in this context, focuses on the 'materiality of the evidence to the issue of guilt and innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.)

The trial court in the instant case correctly noted the e-mail did not provide any new information regarding Octavius and/or his credibility (or lack thereof). For this separate and independent reason, even if the e-mail was exculpatory and even if the People suppressed it, we conclude the trial court properly found there was no *Brady* violation because Le cannot establish he was prejudiced by its suppression.

F. *Evidence Pathammavong Was Involved in a Shooting in 2003*

Le next contends the prosecutor engaged in misconduct by misrepresenting that the defense had elicited certain details from Pathammavong regarding a 2003 shooting when in fact it was the prosecutor who had obtained the information from this witness. Le further contends the prosecutor's misconduct was "deceptive and reprehensible and infected the trial with such unfairness as to make [his] conviction a denial of due process." He also contends the trial court erred when it gave a curative instruction to the jury regarding this issue.

1. *Additional Background*

During cross-examination, defense counsel asked Pathammavong about a shooting in 2003 that took place on Comstock Street (e.g., the Comstock shooting). Specifically, Yang's counsel asked Pathammavong whether gangs retaliate against other gang members for cooperating with authorities. After Pathammavong responded, "Yes," counsel then asked, "And isn't that—your experience is really based on the fact that you yourself were involved in a shooting on Comstock Street in 2003 for the same reason, correct?" The trial court sustained the prosecution's objection on the grounds the question was improper impeachment.

Outside the presence of the jury, the prosecutor expressed some concern about the questioning of Pathammavong by Yang's counsel that made it appear that Pathammavong had been *convicted* of another shooting, which was not true. The prosecutor reminded the court that in a motion in limine he had asked that Pathammavong's prior conviction be referred to as "assault with a firearm, and attendant gang allegations."

Counsel for Yang argued that the jury should hear that Pathammavong admitted as part of his plea to being in the car in the Comstock shooting, when two young girls were wounded. The trial court disagreed, finding this argument "border[ed] on specious" because counsel was impermissibly trying to show that if Pathammavong was involved in a previous drive-by shooting, he also may have committed the pool hall shooting.

The next day, the prosecutor asked for a curative instruction based on the fact that, as he remembered it, Pathammavong had been asked by defense counsel whether he shot two little girls in the Comstock shooting and that such questioning was beyond the court's in limine rulings. After a recess, Yang's counsel informed the court that he had reviewed the court reporter's "rough notes" and determined that defense counsel had *not* asked Pathammavong about shooting two girls, as represented by the prosecutor.

The trial court accepted defense counsel's representation, but recalled the issue of the shooting of the two girls on Comstock Street had come up on a few occasions. The trial court therefore ruled to give the proposed curative instruction proffered by the prosecutor, which provided in part:

"A witness's criminal history—this goes for all witnesses—is relevant for you as jurors in assessing the credibility of the testimony of a witness. As I will more fully instruct you at the conclusion of the trial, you may give a witness's criminal history whatever weight you believe it deserves in assessing the credibility.

"There will be an instruction that talks about prior convictions and how that is something that you can consider in determining the believability of a witness, and you

decide how much weight you want to give it based on all of the circumstances, including the conviction.

"You are instructed that, by stipulation, the parties have agreed that Mr. Pathammavong was, in fact, convicted in 2004. He was convicted of conspiracy to commit an assault with a firearm, and there was an attendant gang allegation attached to this charge. This charge of which he was convicted in 2004 is a felony.

"Also, of course, he was convicted in 2009 of being an accessory after the fact of murder, along with a gang allegation, and that, as you heard, arose from his participation in the events about which you are hearing testimony in this trial.

"Please, ladies and gentlemen, you are instructed to disregard any other assertions or suggestions that may have been made or arisen yesterday with regard to Mr. Pathammavong's alleged role in the 2004 crime, the crime for which he was convicted in 2004. And you are likewise instructed to disregard any suggestion as to the details of that crime.

"You are, however, of course, entitled to consider the facts that he was convicted of that conspiracy to commit an assault with a firearm, along with a gang allegation.

"Counsel will be allowed to and entitled to comment on this instruction and that conviction to the extent they see fit in their closing arguments.

"If this seems to be coming to you in a vacuum, just make a note of it and give it the weight to which you believe it's entitled during your deliberations after hearing the arguments of counsel and the instructions of the court."

It is this instruction that Le contends violated his due process rights to a fair trial.

2. *Analysis*

We need not determine whether the prosecution engaged in any misconduct or whether the trial court erred in giving the curative instruction because even if we assume the record supported such conclusions, we nonetheless would conclude any conceivable error, misconduct or deficiency was harmless by any standard. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 193-194 [alleged prosecutorial misconduct harmless where there was no reasonably possibility the jury would have reached a more favorable verdict had the misconduct not occurred].)

Indeed, as noted by Yang's counsel during trial and the trial court, the curative instruction at issue here covered the *same* general subject matter that was covered by the instructions given at the conclusion of testimony. In addition, Le does not contend that the trial court's curative instruction was incorrect under the facts or the law. Rather, the instruction merely cautioned the jurors that the facts underlying Pathammavong's conviction in 2004 were not to be considered.

Finally, although Le contends the instruction cast the defense in a "negative light," our review of the instruction shows it was content neutral. The record also shows the trial court incorporated changes to the proposed instruction suggested by the defense to ensure it was "more passive." If anything, the instruction may have assisted the defense more than the People because it reminded the jury that Pathammavong had been convicted in 2004 of conspiracy to commit assault with a firearm and a gang allegation,

and that the jury could consider that conviction in assessing his credibility (or lack thereof). Le's speculation that the curative instruction prejudiced him is insufficient to establish prejudice. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 [a defendant's proof of prejudice must be a "demonstrable reality" and not simply speculation].)

G. *Third Party Culpability Defense and Ineffective Assistance of Counsel*

Le next contends there was sufficient evidence of a third party culpability defense such that the trial court had a sua sponte duty to instruct the jury on that defense or, alternatively, his counsel should have requested such an instruction.

Regarding his contention the trial court had a sua sponte duty to instruct the jury on this defense, as Le recognizes our high court rejected this same argument in *People v. Abilez* (2007) 41 Cal.4th 472. There, defendant was convicted of several offenses, including murdering and sodomizing his mother. At trial, defendant's defense was that his cousin committed the crimes. On appeal, defendant contended his rights to a jury trial and to due process were violated when the trial court failed to instruct the jury that he did not need to prove his innocence or that his cousin was guilty, but merely raise a reasonable doubt as to his own guilt. (*Id.* at p. 517.) Because defendant did not request such an instruction at trial, his contention was that the trial court had a sua sponte duty "to instruct the jury how the burden of proof applies to third party culpability." (*Ibid.*)

In rejecting this contention, our Supreme Court in *People v. Abilez*, *supra*, 41 Cal.4th at page 517 ruled that although a criminal defendant may use a third party culpability defense to raise a reasonable doubt as to his or her guilt, and the trial court

"has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court[,]' " there is "no special instruction on third party culpability . . . necessary to apprise the jury of the pertinent legal principles" where the jury was properly instructed on the defendant's presumed innocence and the requirement that the jury find him guilty beyond a reasonable doubt. The court reasoned that "[h]ad the jury entertained a reasonable doubt that defendant sodomized and killed the victim and instead believed [his cousin] committed those crimes, presumably it would have acquitted defendant." (*Ibid.*; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 823-824 [concluding trial court did not err by failing to instruct the jury, sua sponte, regarding third party culpability].)

Similar to the jury in *People v. Abilez*, here the jury was properly instructed on the presumption of innocence, the People's burden of proof, and the concept of reasonable doubt. If the jury believed Pathammavong or another individual committed the shooting at the pool house, presumably it would have acquitted Le. We thus conclude the jury instructions did not undermine the presumption of innocence or ease the prosecution's burden of proof.

Without legal support, Le nonetheless contends that because the trial court also instructed the jury with CALCRIM No. 373,[12] the trial court erred by failing to instruct sua sponte on third party culpability. We disagree.

A third party culpability instruction focuses on the significance of a third party's alleged past acts offered as exculpatory evidence during a criminal prosecution of the defendant. In contrast, CALCRIM No. 373 focuses on the significance of the facts that (1) the third party may not be currently participating in the criminal prosecution of the defendant, and/or (2) may not have been, or might not be, criminally prosecuted. (See *People v. Farmer* (1989) 47 Cal.3d 888, 918 [like its predecessor, CALCRIM No. 373 "does not tell the jury it cannot consider evidence that someone else *committed* the crime," but rather it "merely says the jury is not to speculate on whether someone else might or might not be *prosecuted.*"], disapproved on other grounds as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6, italics omitted.)

We thus conclude the fact that CALCRIM No. 373 instructed on an issue irrelevant to third party culpability did not impose upon the trial court an otherwise

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12 CALCRIM NO. 373, as given, provides: "[T]he evidence shows that another person may have been involved in the commission of the crimes charged against these defendants. There may be many reasons why someone who appears to have been involved might not be a co-defendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendants here on trial committed the crimes charged with which they are charged. [¶] This instruction does not apply to the testimony of Mr. Pathammavong."

nonexistent duty to instruct sua sponte on such culpability. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 517.)[13]

Alternatively, Le contends he received ineffective assistance of counsel because defense counsel failed to ask for a third party culpability defense instruction. The burden of proving a claim of ineffective assistance of counsel is on the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, [the defendant] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*In re Harris* (1993) 5 Cal.4th 813, 832-833; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

We need not determine whether the defense's decision not to ask for a third party culpability instruction fell below an objective standard of reasonableness because we find

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13 We also reject Le's unsupported argument that because the trial court instructed the jury with CALCRIM No. 334, the court was required to give sua sponte an instruction on third party culpability. CALCRIM No. 334 states the rule provided in Penal Code section 1111 that a defendant cannot be convicted by the testimony of an accomplice unless it is corroborated by other evidence. The rule exists because the testimony of an accomplice is viewed with a certain amount of caution. (See *People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.) In any event, it also is clear from the record that any error in failing to instruct on third party culpability was harmless because the jury was properly instructed that the People had to prove Le's guilt beyond a reasonable doubt and the jury knew the defense believed another person (e.g., Pathammavong, who bragged about being involved in the shooting after the fact) committed the drive-by shooting. (See *People v. Earp* (1999) 20 Cal.4th 826, 887.)

no prejudice. As already mentioned, the jury was properly instructed on the presumption of innocence, the People's burden of proof and the concept of reasonable doubt. In addition, the record clearly shows that the jury knew the defense believed individuals other than Le and Yang (e.g., Pathammavong) committed the drive-by shooting. If the jury believed a third party and not appellants committed the crime, presumably it would have acquitted one or both of appellants of the crime.

II

Yang's Appeal[14]

A. *Other Crimes Evidence*

Yang contends the trial court abused its discretion when it admitted the testimony of Octavius that Yang participated in at least one uncharged shooting by TOC at AC targets in order to prove motive and the gang allegation.

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14 This court in September 2010 granted Yang's unopposed motion to augment the record to include two rulings made by the judge in connection with motions in limine: a transcript of a tape recording (e.g., People's exhibit 84) played to the jury, and the reporter's transcript of opening statements to the jury.

1. *Additional Background*

During pretrial proceedings, the trial court ruled to admit two or perhaps three incidents, and exclude one incident, regarding uncharged shootings involving TOC, as testified to by Octavius. In an incident described by Octavius in 1998, members of TOC had gathered at the pool hall and in the back alley area of the pool hall for a party. At some point, some AC gang members appeared and Le confronted them and asked them to leave. The AC members left, but returned and fired shots at TOC gang members that hit nobody.

Octavius described another incident in 2002 when Yang, Le and other TOC gang members were shot at by what they believed were AC members at Crown Point in San Diego. In the weeks that followed, TOC responded by shooting at some AC gang members' houses in Mira Mesa. Nobody was injured in either shooting. Octavius said Yang was with him when they shot at the houses.

Finally, another incident took place in 2005 regarding a gang fight and shooting in which Le was convicted.

In admitting the incidents in 1998 and 2002 but excluding the 2005 incident, the trial court ruled as follows:

"It seems to me that these questions need to be addressed under principles of relevance and [Evidence Code] section 352 and [Evidence Code] section 1101(a) and (b), if applicable. I'll do that in reverse order.

"[Evidence Code section] 1101 is the rule that says that evidence of a person's character is normally not admissible to prove his conduct on a specific occasion. 1101(b) is sometimes referred to as an exception to that rule. It's really not, if you read it. It's an elaboration of the rule.

"It says, in effect, if you're using evidence that might be considered otherwise character evidence to prove some other relevant issue, then it's not going to be kept out by subdivision a.

"The very first one on the list that we all learned in law school was motive, of course. Motive, intent, identity, common plan or scheme, absence of mistake, those things.

"It seems to me that to the extent any of this might be 1101(b) evidence, it comes under the motive exception. I think there's necessarily an overlapping of the pools between character evidence, which is inadmissible under [subdivision] a, and motive evidence, which is such evidence offered for a different reason other than to prove conduct on a specified occasion.

"I had not focused on the point until [the prosecutor] made it, too, that when it's a bad act of the Asian Crips, it's really not 1101(b) evidence as to these gentlemen. But I think that point is well taken. I don't think that section 1101(a) or (b) precludes the admission of any of this evidence if it's otherwise relevant and passes muster under [Evidence Code] section 352.

"Let's step back from the trees again and look at the forest. This is clearly a gang case. It's steeped in the gang culture. I think the evidence is going to be that the Tiny Oriental Crips [TOC] and the Asian Crips [AC] were both around for a long time, certainly before 1998. I think it's the gang culture, just as it is with the Capulets and the Montagues [in *Romeo and Juliet* by William Shakespeare], that these grudges are nursed and kept alive for many years. And I think that a four-year gap doesn't preclude it from being relevant for motive today.

"It seems to me that the question of motive answers the question of relevance. There's actually a jury instruction that says having a motive may tend to show that the crime was committed or that somebody did it. Not having a motive tends to show the reverse. So it's clearly relevant.

"Given the fact that this case will be steeped in the gang culture and the relevance that attends to proof of the gang allegation, I think that [Evidence Code] section 352 is not a bar either.

"My ruling is going to be that incident 3, that is, the facts of an earlier shooting by the Asian Crips at the pool hall, is admissible. I'm told that's a Tiny Oriental Crip/Asian Crip dispute that was believed to be behind that.

"[Incidents] 4 and 1, as we have been calling them, are likewise admissible. If they're the same thing, so be it. And if they're different, they still each involve one gang committing an act of violence towards the other and then the other committing an act towards the one, and I think that those are relevant given the fact that my reading of the

preliminary hearing transcript was consistent with what the prosecutor has said; that is, that I think that if a jury accepts the People's evidence, they would be finding that Mr. Le and Mr. Yang went over there [to Mira Mesa] to go after Asian Crips, and the fact that it was [another gang] that got hit doesn't alter the relevance of that motive.

"The facts of the 2005 event leading to Mr. Le's conviction for Penal Code section 245 are not going to be admissible . . . ."

2. *Governing Law and Analysis*

As the trial court recognized, evidence of a defendant's prior crime or bad act is generally inadmissible to prove a defendant's bad character or propensity to commit the charged offense. (Evid. Code, § 1101, subd. (a).[15]) However, such evidence may be admissible when relevant to prove some relevant fact other than criminal propensity, such as intent, motive, identity or the absence of mistake or accident. (Evid. Code, § 1101, subd. (b).)

When reviewing the admission of evidence of other offenses, a court considers: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crimes evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. (*People v. Thompson* (1980)

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15 Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

27 Cal.3d 303, 315.) A court's decision to admit other crimes evidence is reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

In the instant case, the record shows the trial court carefully considered whether to admit the "other crimes" evidence. We conclude the trial court properly exercised its discretion when it ruled to admit two (or three, if two of them were not identical) of the incidents and exclude one of them. The two incidents admitted into evidence clearly went to the issue of motive for the pool hall shooting, given that both of the prior incidents involved TOC gang members shooting at other gangs including AC members. In addition, both of these incidents were relevant to the gang allegations charged in this case, as also found by the trial court.

We further conclude the trial court did not err and abuse its discretion when it found the probative value of this other crimes evidence involving TOC and AC gang members was not "substantially outweighed" by the probability that its admission would "create substantial danger of undue prejudice" to Le and Yang, particularly given the significance of the role the gangs played in this case and given the gang allegations the People were required to prove. (See Evid. Code, § 352; see also *People v. Zapien* (1993) 4 Cal.4th 929, 958 [" 'The prejudice [that Evidence Code section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' "]; *People v. Wilson* (1992) 3 Cal.4th 926, 938 [a trial court is vested with broad discretion in determining the admissibility of evidence and its exercise

of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse]; *People v. Butler* (2005) 127 Cal.App.4th 49, 60 [concluding trial court did not err when it admitted into evidence an altercation between defendant and a group of people a week before defendant's unprovoked attack and killing of a member of that *same* group]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212 [concluding trial court did not err when it admitted evidence of defendant's involvement in a prior gang-related incident that led to a shooting to prove intent and malice when defendant killed a rival gang member for gang-related purposes]; compare, *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [evidence is prejudicial if it uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues].)

Finally, the record shows the jury was properly instructed that it could consider the other crimes evidence only for limited purposes and not to show Yang or Le were persons of bad character, and that it could not consider this evidence at all unless the prior acts were shown by a preponderance of the evidence (discussed in more detail *post*). The jury is presumed to have followed this instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) For this separate and independent reason, we conclude Yang did not suffer "undue prejudice" for purposes of Evidence Code section 352 in connection with the admissibility of this other crimes evidence.

B. *Gang Allegation and CALCRIM No. 375*

Yang next contends CALCRIM No. 375, as given by the trial court, allowed the jury impermissibly to find the gang allegation true based on the preponderance of the evidence standard.

1. *Additional Background*

Without objection by any party,[16] the trial court instructed the jury pursuant to CALCRIM No. 375 as follows:

"The People presented evidence that a defendant committed another offense that was not charged in this case.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] . . . [¶]

"If the People have not met this burden of preponderance of the evidence with respect to this evidence about which I am speaking, you must disregard the evidence entirely.

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16 Because Yang failed to raise this issue at trial it is forfeited on appeal. (See *People v. Moore* (2011) 51 Cal.4th 1104, 1139-1140; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' "].) Nonetheless, we reach the merits of the issue to avert any claim of ineffective assistance of counsel.

"If you decide that the defendant committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant had a motive to commit the offenses alleged in this case.

"*Do not consider this evidence for any other purpose except for the limited purpose of determining the gang allegation under Penal Code section 186.22.*

"Do not conclude from this evidence that the defendant or either of them had a bad character or is simply disposed to commit crime.

"If you conclude that a defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the crimes or allegations charged. The People must still prove each charge and allegation beyond a reasonable doubt." (Italics added.)

Yang claims the italicized portion of the above instruction directed the jury to use the preponderance of the evidence standard to find true the gang enhancement under section 186.22.

2. *Governing Law and Analysis*

" '[T]he correctness of jury instructions is 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. Carrington* (2009) 47 Cal.4th 145, 192.) "In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of

the charge and the entire trial record. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

CALCRIM No. 375, as instructed by the trial court, itself addresses and eliminates Yang's argument when it states that *if* the jury concludes the defendant committed the uncharged offense, that conclusion "is not sufficient by itself to prove that the defendant is guilty of any of the crimes *or allegations charged*" and that the People "must still prove each charge *and allegation beyond a reasonable doubt*." (Italics added.)

In addition, the jury was properly instructed with CALCRIM No. 1401, regarding the gang enhancement, and told, "The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." The court also gave CALCRIM No. 220, defining reasonable doubt and explaining the People's burden of proof, and CALCRIM No. 224, instructing the jury how to evaluate circumstantial evidence and the conclusions that may be drawn from that evidence, and explaining that before the jury could rely on such evidence it had to conclude that the People proved each fact beyond a reasonable doubt.

In the context of the overall charge to the jury, we conclude there was no error when the trial court instructed the jury with CALCRIM No. 375. (See *People v. Moore*, *supra*, 51 Cal.4th at p. 1140; *People v. Carrington*, *supra*, 47 Cal.4th at p. 192.)

C. *Exclusion of Wiretap Evidence*

Yang also contends the trial court erred and abused its discretion when it refused to admit two wiretapped calls involving Yang.

1. *Additional Background*

During cross-examination of the investigating officer primarily responsible for obtaining the wiretap order, Yang's counsel asked whether the officer was familiar with wiretap call 322, made on August 9, 2007, between Yang and Octavius, in which Yang said, "They hit Vanessa's house about the shit that Bo [Pathammavong] did." When the officer responded in the affirmative, Yang's counsel then asked about call 330 made on that same day between Yang and Octavius. With that question, the prosecutor objected and asked for a sidebar conference.

Outside the presence of the jury, counsel for Yang noted that call 330 involved a search warrant discussion between Yang and Octavius which provided: "He [Yang] says: They gonna try and catch you slipping. They fucking—they try to bring up the shit, you know, about Bo and shit, dog. They will bring up that shit about Bo because I guess --. and then Mr. [Octavius] Soulivong says: You don't have to worry about that or worry about it though. And Down Yang says: Nah, I ain't worrying, dog. No, I believe you, dog. I just, you know—you ain't going to snitch on Bo or anybody. Basically you slipped. But you know they are going to try to catch you slipping."

Yang's counsel argued call 330 was relevant because it showed that Pathammavong was the shooter and explained Yang's state of mind including the reason he considered running away, namely because Yang believed someone else was the shooter but the gun used in the shooting belonged to his brother.

The trial court ruled the statements were hearsay and not subject to any hearsay exception, including state of mind, and were not an admission by a party opponent or a prior inconsistent statement. The trial court sustained the prosecutor's objection and instructed the jury to disregard the testimony about call 322.

2. *Governing Law and Analysis*

Under Evidence Code section 1200, subdivision (a) " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Except as provided by law, hearsay evidence is inadmissible. (Evid.Code, § 1200, subd. (b).)

Assuming for purposes of argument only the trial court erred by excluding wiretap calls 322 and 330 either as non-hearsay or as an exception to the hearsay rule, we conclude that error was harmless. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 ["the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*," and absent "fundamental unfairness, state law error in admitting evidence is subject to the traditional [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836] test."]; see also *People v. Hall* (1986) 41 Cal.3d 826, 834 ["As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense."].)

First, the record is replete with evidence of the defense's theory that Pathammavong was the shooter, including evidence of Pathammavong bragging about

the shooting after the fact. That the defense believed Pathammavong was the shooter was already before the jury without regard to wiretap calls 322 and 330.

Second, the record shows other wiretap calls the jury did hear covered the same general subject matter as calls 322 and 330. In one such call, Yang talked about the "gun that was used for Bo[] [Pathammavong's] shit," and in another Octavius referred to the "[gun] that "Bo used." Thus, we conclude it was not reasonably probable that a result more favorable to Yang would have been reached absent the trial court's alleged error in failing to admit the two wiretap calls. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

D. *Prosecutorial Misconduct*

1. *Additional Background*

During closing, Yang's counsel argued to the jury that the People had failed to proffer any witnesses to corroborate the testimony of Octavius, despite his testimony that there were others present at his brother Orlando's house when Le and Yang discussed the shooting after returning to the house that same night.

In rebuttal, the prosecutor in response argued:

"And much has been made of, well, why only Octavius [came] and testif[ied] about that conversation at that house[.] I think common sense answers that question, if not all the gang evidence you heard. Being in the gang world and indoctrinated as you are now, do you really think all those hard-core TOC guys were going to come to law enforcement and say, ['Y]eah, I will testify against . . . my gang. Sure. Let me at 'em.

Love to do it.['] Is it really what you expected was for the People to bring in this parade of hard-core bangers to testify against these hard-core bangers?

"Or—now the defense has no burden. It is my burden here to prove this case. But, at the same time, they have the ability to call witnesses. They have the ability to test evidence. They have the ability to do all those things. Could they have called in people from Orlando's house? [Yang's] friends? [Le's] friends to come in and, as Octavius told us, you lie for the gang. That's how it works. Could they have brought them in to say, ['H]ey, I was there, and this didn't happen[.'] Sure."

Defense counsel objected to this argument to the "extent it shifts the burden." The court overruled that objection, and the prosecutor continued, "You didn't have anybody coming in and saying, [']I was with these two. They didn't do it.[']"

2. *Governing Law and Analysis*

When, as here, the alleged misconduct " 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. ' "A prosecutor may 'vigorously argue his [or her] case and is not limited to "Chesterfieldian politeness" ' [citation], and he [or she] may 'use appropriate epithets . . . .' " [Citations.]' [Citation.] 'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it

is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

" 'It is now well established that although *Griffin* [*v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229] prohibits reference to a defendant's failure to take the stand in his [or her] own defense, that rule "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]" [Citations.]' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304.)

Here, Yang wisely does not argue that the prosecutor's comments about the witnesses the defense did not call improperly drew attention to Yang's decision not to testify. Instead, Yang argues the above comments by the prosecutor improperly switched the burden of proof to him to establish innocence. Yang relies upon *People v. Gaines* (1997) 54 Cal.App.4th 821 to support his contention.

In *People v. Gaines*, the prosecutor commented not only upon the absence of an alibi to corroborate defendant's version of events, but further asserted that the alibi's testimony would have conflicted with the testimony of defendant because he allegedly "slipped and he told some untruths" while on the witness stand. (*People v. Gaines*, *supra*, 54 Cal.App.4th at p. 824.) According to the prosecutor in *People v. Gaines*, the defense did not call the absent witness, despite the fact that witness had been present at the trial, because the witness would have impeached defendant's story. (*Ibid.*) The court

determined the prosecutor's conduct denied defendant his Sixth Amendment rights to confrontation and cross-examination. (*Id.* at p. 825.)

In the instant case, the prosecutor's comments were made in the context of explaining to the jury how difficult it is in a gang case to convince a gang member to come forward and cooperate with law enforcement and ultimately testify against the gang and/or its members. The prosecutor's remarks were in response to the argument of the defense regarding the People's failure to call additional witnesses to corroborate the testimony of Octavius. Unlike the prosecutor in *People v. Gaines*, the prosecutor in the instant case did *not* argue to the jury what the substance of the absent witnesses' testimony would have been, how that testimony, if given, would have conflicted with the testimony provided by appellants, neither of whom, in any event, testified in the instant case, or how that testimony undermined their case. Thus, we conclude *People v. Gaines* is inapposite and Yang was not denied his Sixth Amendment right to confront and cross-examine witnesses.

III

The People's Cross-Appeal

In their cross-appeal, the People contend the trial court erred in staying the 10-year section 12022.5, subdivision (a)(1) enhancement to count 4. They contend that the trial court had discretion to treat the gang enhancement under section 186.22, subdivision (b)(1) as a "serious offense" within the meaning of section 1192.7, subdivision (c)(31), as opposed to a "violent felony" for purposes of section 667.5, subdivision (c)(8). They

further contend that *if* the trial court had properly exercised that discretion, the two enhancements would not have conflicted and been subject to the California Supreme Court decision of *People v. Rodriguez* (2009) 47 Cal.4th 501, as found by the trial court.

Briefly, in *People v. Rodriguez* defendant fired several shots at three rival gang members. The jury convicted defendant of three counts of assault with a firearm and also found true the allegations defendant (i) personally used a firearm (§ 12022.5, subd. (a)) and (ii) committed a violent felony to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). With respect to each offense, the trial court imposed the firearm and gang enhancement. (*People v. Rodriguez*, *supra*, 47 Cal.4th at pp. 504-505.)

Our Supreme Court reversed and remanded the case for resentencing. (*People v. Rodriguez*, *supra*, 47 Cal.4th at p. 509.) In so doing, it held that imposing both enhancements for defendant's use of a firearm in the commission of a single offense violated section 1170.1, subdivision (f), which provides:

"When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, *only* the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (Italics added.)

The People contend that *People v. Rodriguez* does not govern the instant situation because unlike the situation there, in the instant case the gang enhancement in count 4 was "generically [pled] and proved under section 186.22, [subd.] (b)(1) without a gun use

allegation and without such a finding made by the jury." According to the People, under section 1170.1, subdivision (f) the "greatest" of the two enhancements was for gun use under section 12022.5 because that enhancement netted five more years in prison than the difference between the gang use enhancement for a "serious" (e.g., five-year additional term under section 186.22, subdivision (b)(1)(*B*)) as opposed to a "violent" felony (e.g., 10-year term additional term under section 186.22, subdivision (b)(1)(*C*)).

Thus, according to the People, if the trial court had merely imposed the 10-year sentence under section 12022.5 and the five-year sentence under 186.22, subdivision (b)(1), the two enhancements would not have conflicted with the dual use prohibition of section 1170.1, subdivision (f) as discussed in *People v. Rodriguez*, *supra*, 47 Cal.4th at page 509. Yang therefore would have been sentenced to 24 years in prison under count 4 as opposed to the 19 years he received.

Although the People attempt to distinguish *People v. Rodriguez* on the basis that the gang enhancement in the instant case was generically pled and there was no gun use allegation or finding made by the jury in connection with that enhancement, we conclude this is a distinction without a difference. That the trial court may have exercised its discretion and treated the gang enhancement as a mere "serious felony" and not as a "violent felony" for purposes of section 186.22, subdivision (b)(1), as the People contend, does not change the fact that under *either scenario* the gang enhancement involved Yang's use of a firearm, which we conclude makes *People v. Rodriguez* applicable.

We therefore conclude the trial court did not err when it found it lacked the discretion under the facts of this case to impose both the personal gun use enhancement under section 12022.5, subdivision (a) and the gang enhancement under section 186.22, subdivision (b)(1)(*B*) *or* (b)(1)(*C*).[17]

DISPOSITION

The judgment of convictions of Le and Yang is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.

17 In support of this argument, the People rely on *People v. Robinson* filed on October 28, 2011. However, our Supreme Court granted review of *People v. Robinson* on February 15, 2012, and ordered the matter transferred to the Court of Appeal, First Appellate District, Fifth Division, with directions to vacate its decision and reconsider the cause in light of *United States v. Jones* (2012) 565 U.S. ___ [132 S.Ct. 945]. (See *People v. Robinson* S198522.)