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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
FRANCISCO ZAMORA et al.,  
Defendants and Appellants.

A130618  
(Alameda County  
Super. Ct. No. 163896)

**INTRODUCTION**

On August 21, 2009, 14-year-old R.C.<sup>1</sup> was shot while walking down the street in East Oakland with two friends. He died of multiple gunshot wounds. Although he had no tattoos, and was not a gang member, witnesses opined that he was killed in retaliation for the fatal shooting of 22-year-old gang member Juan Carlos Bettencourt, and the nonfatal shooting of two other gang members, at a nearby recreation center on August 18, 2009. Several witnesses identified defendant Montano as the shooter. One witness identified codefendant Zamora as Montano's aider and abettor. Both Montano and Zamora were convicted of murder, and Zamora was additionally convicted of being an ex-felon in possession of a gun.

On appeal, Zamora argues that his convictions are not supported by substantial evidence, and that Penal Code section 654<sup>2</sup> bars multiple punishment for murder and gun

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<sup>1</sup> We will use only the initials of all minors' names to maintain their confidentiality.

<sup>2</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

possession. He and Montana jointly contend that gang, MySpace, and lay opinion evidence was improperly admitted. We find no errors and will affirm the convictions.

### **STATEMENT OF THE CASE**

Codefendants Francisco Zamora (Zamora) and Julio Montano (Montano) were charged with the murder of R.C. on August 21, 2009. (§ 187.) The information further alleged that Zamora was armed with a firearm (§ 12022, subd. (a)(1)) and that Montano personally and intentionally discharged a firearm causing death. (§§ 12022.5, subd. (a), 12022.53, subds. (b)-(d) & (g).) In a second count, Zamora was charged with being an ex-felon in possession of a gun. The information also alleged that Zamora had served a prior prison term for felony assault. (§§ 667.5, subd. (b), 245, subd. (a)(1).)

A jury found both defendants guilty of murder, and Zamora also guilty of being an ex-felon in possession of a gun. As for the firearm allegations, the jury found the arming allegation against Zamora not true, and the firearm discharge allegations as to Montano true. The court dismissed the prior prison term allegation against Zamora.

On December 10, 2010, the court sentenced Zamora to 27 years to life and Montano to 50 years to life. Both defendants timely appeal.

### **STATEMENT OF FACTS**

#### *William Alexander's Testimony*

William Alexander lived in an apartment in East Oakland near 50th and Bancroft Avenues and was very familiar with the people in the neighborhood. His apartment shared the same building and lot with the liquor store next door. Alexander was a recovering alcoholic, having consumed alcohol since childhood. He worked at the liquor store, helping out Mo the owner by stocking shelves, watching out for thieves, and running errands. In exchange, Mo would occasionally pay Alexander \$20 or \$30 and give him whatever he needed from the store. However, he was not a regular store employee.<sup>3</sup>

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<sup>3</sup> According to Alexander, the store had three doors, one for the bathroom, one for the backyard that was locked up, and the front door, that “everybody goes through,” including employees.

Alexander had known R.C. for two years. He saw R.C. at least once a day at the store. R.C. lived in an apartment building on 50th Avenue at Bancroft, kitty corner to the liquor store. In Alexander's opinion, R.C. was "basically a good kid" and Alexander liked him. R.C. was not a gang member, and Alexander never saw him in the company of any gangsters.

After the shooting at the Rainbow Recreation Center, there were suspicious cars in the neighborhood, but not a lot of traffic on the street. On August 21, between 11:00 a.m. and 1:00 p.m., Alexander saw R.C. riding his miniature Harley Davidson motorbike up and down Bancroft and 50th Avenues.<sup>4</sup> He was with a couple of boys. A few hours later, at 5:00 or 6:00 p.m., he saw R.C. on the motorbike, by himself. R.C.'s motorbike had run out of gas, and Alexander gave him some. At approximately 7:00 p.m., he saw R.C. on his front porch stoop; Alexander was at the liquor store. Alexander next saw R.C. walking up the street with two other kids; he could not say if these were the same kids he had seen with R.C. that afternoon. The next time Alexander saw R.C., "[h]e got shot."

Alexander had seen Zamora five or six times in the couple of months before the shooting. Zamora was driving a brownish-tanish colored car.<sup>5</sup> Alexander identified a picture of the gold car he saw Zamora "driving up and down the block" on August 21. He told police "there was . . . two Hispanic[s] that kept driving around. . . . And they were driving around back and forth up Bancroft, down Bancroft, up 50th, back down 50th." He described the driver to the police as having the number "1" tattooed on one shoulder and the number "3" tattooed on the other. He described the passenger as shorter and darker skinned than the driver, and bald. At trial, Alexander confirmed his previous statement to police that he had seen the driver and passenger of the gold car before the shooting.

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<sup>4</sup> Alexander testified several times that he did not wear a watch and consequently was not sure about times.

<sup>5</sup> Alexander is color blind, but he can see some colors.

Alexander also saw Zamora in the liquor store. He came into the store a couple of days before the shooting, and the day after the shooting. Alexander could not remember if Zamora came into the store on August 21 at 6:00 or 7:00 p.m., although he may well have told the police that.

He recalled seeing Montana at the corner of 50th and Bancroft on the night of the shooting, and the night afterwards. He also recalled seeing both men in the liquor store together, prior to the shooting. He also saw them talking outside the store when he was stocking shelves, at around 7:30 or 8:00 p.m., but he was not sure of the time. He estimated it was an hour to an hour and a half before the shooting.

The liquor store had a good camera surveillance system that rolled continuously. Alexander identified both Zamora and Montana in still photographs isolated from the store's surveillance film footage for August 21. Specifically, he identified a still of Montano inside the store that was time-stamped 7:07 p.m. according to the camera's timer. He also identified still photos of Zamora inside the store time-stamped at 7:07 p.m. He recalled that he came within four or five feet of Montano, who was reaching for a beer from the cooler, probably around 7:30 p.m. the night of the shooting.

He also identified still photographs of himself wearing glasses, a hat and dark clothing, with Mo and the security guard, time-stamped 8:27 p.m. Defense counsel showed him several other still photographs time stamped 8:13. Alexander recognized himself in one, but not the others. He recognized himself in a still photo time-stamped at 8:23. He did not recognize a white Cadillac seen in some of the footage and never saw Zamora get out of that car.<sup>6</sup>

Alexander believed he was stocking inside the store when he saw Zamora and Montano "talking outside the car" at perhaps 7:30 or 8:00 p.m. and that he saw R.C. and his friends at 8:15 p.m. However, Alexander could not "really give a time."

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<sup>6</sup> At trial, Zamora's defense counsel attempted to get Alexander to identify his own feet, and Montano and Zamora in other footage, but Alexander was unable to do so. Although the prosecutor offered to stipulate to the contents of the camera surveillance tapes, Zamora's counsel did not accept the offer and no stipulation was ever formalized.

Alexander walked past Zamora and Montana sometime between 8:00 and 8:30 p.m. He ran an errand for Mo that did not take him long, and was on his way to buy some single cigarettes. He noticed a \$40,000 truck pull up to the new fire station on Bancroft, and the people in it said they were workers. He went back towards the liquor store to ask what time it was; he wanted to make a mental note of the time, so that he could inform the foreman of what he saw, in case it turned out that the “workers” were actually thieves, which they turned out to be. He told the police who interviewed him about the shooting that this occurred at 8:20 p.m.

He then continued on his way to the smoke shop. While he was en route to that store, Alexander saw the same gold car he had seen earlier parked in front of a building that used to be a club at the intersection of Bond and Bancroft.

Zamora alighted from the car on the driver’s side. Montano was on the passenger side, and the two of them talked over the roof of the car. Zamora had his arms on the roof. Zamora was wearing a white tank top, black pants and a hat. He had tattoos on his right forearm and neck. The number 1 was tattooed on one shoulder and the number 3 was tattooed on the other shoulder.<sup>7</sup> Montano was wearing dark clothing. He was not wearing a hood over his head.

Alexander overheard Zamora and Montano conversing in Spanish and a little bit of English. Zamora said “pinche” and Montano said “Border Brothers.” Montano walked away from the car, with something 12 to 18 inches long, wrapped in something white, held against his thigh. Zamora drove off, on Bond Street, which is one way towards downtown Oakland. At this point, Montano was on Bond Street, and Alexander was in the middle of A Street, approximately 44 feet away.

Alexander kept his attention on Montano as he continued walking because he “just had a bad feeling” about him, based on his observation that Zamora and Montano were

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<sup>7</sup> Zamora was directed to remove his shirt and show the jury his tattoos. Alexander testified that Zamora’s tattoos were similar to what he remembered, especially the 1 and 3 on the shoulders; however, Zamora had more tattoos than he could see, given his angle and the light and shadows on August 21, 2009.

not from the area and were “driving sporadically as if they were looking for somebody.” From the corner of Judd Street and Fremont Way, he saw Montano walking down Bond Street. From 48th Avenue and Foothill, Alexander saw Montano again on 48th Avenue and Bond Street. Alexander kept walking towards his destination, a store at 47th and Foothill.

The store was closed, but an acquaintance gave him a few cigarettes. He was not comfortable going back the way he came, so he decided to go down 47th Avenue towards Bond Street. When he got to the corner of 47th and Foothill, he saw the gold car. Zamora was driving on Bond Street and he turned right onto 47th. Alexander put his head down and continued walking on 47th Avenue to get “to where I knew some people just in case anything happened.”

As Alexander reached the middle of the block, he saw three people cross Bond Street to 47th Avenue, moving towards him. He heard two or three pops. The sound came from Bond Street. Alexander saw “the flashes and then the kid dropped.” He saw the other guys run; Alexander ran in the opposite direction, back up 47th Avenue to Foothill. The shots were fired almost simultaneously with his seeing the gold car being driven by Zamora. After the shots were fired, Alexander saw the gold car again. It was going down Bond Street towards 47th Avenue and downtown Oakland. Alexander then left the area. When he returned, the ambulance was leaving.

Alexander probably drank “about four beers from 1:00 o’clock to 8:00 [o’clock]” that day. He then drank two shots right after he “got done stocking the store.”<sup>8</sup> Nevertheless, he felt clear headed enough to make an identification of the defendants, even though it put his life in jeopardy. He could not go back home, and he had been in custody since July 29 because he had not wanted to testify. However, it was the right thing to do, and he felt “morally certain” that “they are the gentlemen that did it.”

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<sup>8</sup> Alexander testified on cross-examination that he drank the two shots after the shooting, at around 8:30 or “9:00 o’clockish.”

After the shooting, Alexander wrote a note to R.C.'s family offering to help and recounting what he had seen. He spoke to R.C.'s parents and gave a statement to the police.<sup>9</sup> With the police, he watched the surveillance videos at the store; he never saw any stills until trial. He saw both defendants in the liquor store the day after the shooting.

Alexander left the Bay Area after October 12, 2009. He has lived in Oregon since then, fearful of retaliation. At the time of trial, he had been in protective custody as a material witness for over 30 days.

#### *Other Eye-Witness Accounts*

Fifteen-year-old J.O. was with R.C. the day and night he was shot. He, C.F., and R.C. had been riding R.C.'s motorbike in the afternoon. They put it away at R.C.'s house when it got dark and ended up at J.O.'s house on 46th and Bancroft. About 15 minutes later, the boys left J.O.'s house to go to the store at 47th and Foothill. The boys were chasing each other as they walked. J.O. ran ahead of the other two, and turned from 46th Avenue onto Bond Street. R.C. and C.F. had stopped about 26 feet behind J.O. while R.C. tied his shoe. As J.O. approached 47th Avenue, he saw Montano running towards him in the middle of the street. He recognized Montano from having seen him the day before, near R.C.'s house. At that time, Montano was nearly bald.

Montano was wearing a dark hoodie with the hood up and blue or black jeans. J.O. saw Montano pull a chrome revolver from his sleeve; Montano's right hand was over it, preventing J.O. from seeing the gun clearly. Montano looked at J.O., but ran past him. Seconds later, J.O. heard several gunshots in rapid succession and saw flashes from the gun.

The three boys, who were on Bond Street, but almost at the corner of 47th Avenue, ran around the corner onto 47th Avenue, going towards Foothill. When J.O. and C.F. realized R.C. had fallen, they ran back to help him. J.O. tried to call 911, but the line was busy. He believed the shooting occurred sometime between 8:30 and 9:00 p.m.

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<sup>9</sup> The DVD of Alexander's statement to police was played for the jury. The jurors requested the transcript to assist them in their review of the statement.

After the shooting, Montano continued running west on Bond Street. At trial, J.O. did not recall hearing any cars after the gunshots, but he told police that he heard a car go by at a high rate of speed.

J.O. positively identified Montano as the shooter in a physical lineup on October 22, 2009, from the liquor store surveillance video, and at the preliminary hearing. J.O. told police he thought Montano was a Sureño because he was wearing blue shoes the day before, and he was bald. He was sure of his identification of Montano as the shooter because the day before the shooting was the first time he had seen Montano; he had never seen him before in the area, and he always paid attention to people who were not from the neighborhood.

Ruben Tarango, who lived near 47th Avenue and Bond Street, heard gunshots and the sound of a car speeding west on Bond on the night of August 21, 2009.

Raba Sbeih was sitting on the porch of her home on 47th Avenue on August 21, 2009 at about 8:30 p.m. She saw a man wearing baggy light-blue jeans, a black hoodie and white shoes running in the middle of Bond Street. He looked afraid. She saw R.C. and his two friends, all of whom she recognized, walking in the opposite direction on Bond, toward 47th Avenue. She walked down her steps to see what was happening, and she saw that the running man was going towards the boys. The man grabbed R.C., who struggled to get away. She heard R.C. say, “Why me?” She heard four gunshots and saw flashes. The other boys ran up the hill. R.C. tried to run, but he fell down. The shooter ran down Bond, in the opposite direction from the boys.

Sbeih identified Montano as the shooter. She saw his face when he turned his head both ways “to see if anybody was around.” The street was lit by five bright streetlights at 47th and Bond, and the shooting took place near a streetlight. She had no question about her identification. She told her parents and brothers what she saw, but she

was afraid to talk to the police. Her family sent her on vacation for three months and talked about moving.<sup>10</sup>

### *Gang Evidence*

Officer Eugene Guerrero testified as an expert on Hispanic street gangs in Oakland. The three main Hispanic gangs in Oakland are the Norteños, the Border Brothers and the Sureños. The Norteños are the largest and oldest gang in the city. Their territory includes 50th Avenue and Bancroft. Norteños identify with the color red and the number 14.

The Border Brothers gang is the second largest gang in Oakland. It grew out of the crack wars of the 1990's. Old Norteño groups and independent gangs joined for the purpose of controlling the crack cocaine trade.

The Sureño gang is the third largest gang in Oakland. It was formed when families relocated to Oakland from Southern California. In 2000, the South Side Locos gang was formed by a few of the original Sureño members. Zamora was one of the founding members. South Side also referred to Southern California. In Oakland, South Side Locos and Sureños are the same gang. The gang's territory included the back of the Rainbow Recreation Center. The gang identified with the color blue, the number 13, and the initials SSL.

Tattoos show loyalty to the gang. Displaying one's tattoos in a rival gang territory is a way of promoting one's gang and disrespecting the rival gang, and it could be seen as a challenge. Guerrero opined that a person who displayed tattoos of a one and a three at 50th and Bancroft would be showing he was a Sureño in Norteño territory.

Zamora had self-identified as a South Side Loco and a Sureño since June of 2000.<sup>11</sup> He had two convictions for gang-related felonies. Based on Zamora's long-standing, self-admitted Sureño gang membership, and the items recovered from his

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<sup>10</sup> Sbeih never talked to the police. She talked to the prosecutor the day before her testimony.

<sup>11</sup> Zamora told Guerrero he used to be a Border Brothers member before he became one of the founders of the South Side Locos gang.

residence, room, and vehicle by Guerrero and other law enforcement agencies, Officer Guerrero was of the opinion that Zamora was at least affiliated with the South Side Locos and Sureño gangs, and was very possibly an active member, at the time of trial. The fact that he was in a Norteño area with Montano, a known gang member, showing off his Sureño tattoos, was also a significant factor in forming his opinion.

He also opined that Montano was an active member of the South Side Locos. He based this opinion on the clothing and items recovered when Montano was arrested, the items recovered in a search of his residence, the fact that he was in a Sureño pod at Santa Rita Jail, his tattoos, including one he had gotten since his arrival in Santa Rita, and gang-related pictures on his phone. On October 3, 2006, Zamora had his throat slashed in prison by Ronnie Padilla, a South Side Locos/Sureño leader. Zamora later told Dalen Randa, his probation officer, that he was attacked because he failed to execute a hit for the Mexican Mafia. He did not say that he was attacked for trying to drop out of the gang. Officer Guerrero, who knew both Zamora and Padilla, opined that the attack was the result of a power struggle between Zamora and Padilla over control of the South Side Locos that had not yet been resolved.

Dalen Randa had been supervising Zamora since 2007. Zamora's probationary terms included prohibitions against belonging to a gang, acting on behalf of a gang, associating with known gang members, frequenting areas known for gang activities, possessing gang graffiti materials, obtaining new gang tattoos or other markings, and being in buildings and vehicles in which deadly or dangerous weapons were present.

In the Spring of 2007, Randa warned Zamora about his inappropriate gang appearance, and took photographs of him. Zamora had a the number "1" tattooed on his right shoulder and the number "3" tattooed on his left shoulder that advertised he was a Sureño; he was wearing blue jeans and a blue belt. He had the word "Oakland" tattooed on the back of his head and the words "fuck the world" tattooed on the back of his neck. On his right arm he had a tattoo of a laughing clown, signifying the gang slogan "laugh now, cry later" which in gang parlance means live in the moment and for the gang; deal with the consequences later. Zamora had a prison tattoo of a clock near a cow, signifying

doing time. Over the next several appointments, a tattoo of the number “13” below Zamora’s left eye was visibly reduced, and Zamora said he was getting his tattoos removed. However, he subsequently got a pair of eyes tattooed on the back of his shoulders.<sup>12</sup>

In July 2007, Randa saw two MySpace profiles for Zamora, one under the name Francisco and one under the name “Oso 100s.” Oso is Zamora’s nickname. Zamora admitted to Randa that both MySpace sites were his. The Oso 100s site sported numerous gang-related images. The Francisco site had been last updated on August 21, 2006; the Oso 100s site had been last updated on July 14, 2007.<sup>13</sup> A search of Zamora’s residence and car on August 14, 2007 yielded several CD’s of Sureño music. Zamora’s probation was violated based on the Oso 100s site and the CD’s, and Zamora served a 30-day jail sentence.

On September 3, 2008, another probation search of Zamora’s home revealed numerous pieces of gang indicia. Some time later, Zamora told Randa his current status was acceptable to the gang. In November 2008, he said he was no longer accepted in the gang.

At Santa Rita County Jail, where Zamora was housed during trial, Sureños and Border Brothers were housed separately from Norteños, who were in the general jail population. Zamora’s classification sheets showed that in March of 2003 Zamora stated he was affiliated with a Sureño gang from 103rd Avenue in Oakland. In July of 2003, he indicated he was affiliated with the Sureños and South Side Locos. In October of 2006, he admitted affiliation with the Sureños and South Side Locos, Oakland, and 50’s. And,

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<sup>12</sup> Officer Guerrero confirmed that to his knowledge the only tattoo Zamora had removed was the number “13” under his left eye.

<sup>13</sup> A Piedmont police officer testified as an expert on setting up and maintaining a MySpace account. MySpace kept a record of when a user updated his profile. Although any user could post something on another user’s site, only the account owner could update his or her own profile. However, it was possible for one user to set up an account in someone else’s name without the person knowing about it, or to set up an account at someone’s request.

in March of 2007, he identified himself as an affiliate of the South Side Locos, and 50's. After Zamora had his throat slashed in 2006, he was housed in administrative segregation. In January of 2009, Zamora stated he was a Sureño drop out, and in October of 2009, he stated he was a South Side Locos drop out. At the time of trial, he was in administrative segregation.

Officer Guerrero was familiar with the shooting at the Rainbow Recreation Center in which 22-year-old Juan Carlos Bettencourt was killed. That center is in Sureño gang territory and it is "a known spot or location where the South Side Locos gang hangs out." Bettencourt had the numbers "1" and "3," SSL, Loco 13, and three dots tattooed on his hands. The tattoos signified his affiliation with the South Side Locos. Two other boys, aged 13 and 15, were also shot, but survived. Both of them admitted their affiliation with the South Side Locos gang; one sported several South Side Locos tattoos. According to Bettencourt's cousin, the shooters were wearing black bandanas over their faces, indicating that they were members of the Border Brothers gang. The phrase "pinche Border Brothers" which William Alexander later reported hearing, means "fucking Border Brothers."

Based on the "totality of [the] circumstances and facts," it was Guerrero's opinion that "the killing of [R.C.] was in retaliation of the killing of Juan Carlos Bettencourt at the Rainbow Recreation Center." The Border Brothers gang had demonstrated its dominance and strength by committing a violent act on Norteño turf. By killing R.C. in Norteño territory, showing the tattoos, and making the statement "pinche Border Brothers," the Sureños showed everybody their courage, strength and dominance. According to Guerrero, it was very common for retaliation shootings to be carried out by at least two people to show loyalty to the gang, and he noted that the shooting of Bettencourt also had been carried out by two people. It was also common for gang members to share weapons among themselves.

### *Zamora's Defense*<sup>14</sup>

Zamora's grandparents lived on 50th Avenue, three houses from the liquor store on 50th and Bancroft. They had lived in that house for over 20 years. During 2009, Zamora and his children visited his grandparents at their home every week or two weeks.

According to Zamora's sister, on August 21, 2009,<sup>15</sup> he was at a birthday party for her and for his daughter. The party was held at her mother's house on 57th Avenue and it lasted from 1:30 or 2:00 p.m. until 11:00 p.m. Zamora was at the party the whole day, starting at 9:00 a.m. when the kids' jumper arrived, but he left "for a minute" with his friend Junior in a blue truck and returned in a blue truck.<sup>16</sup> He left for the store wearing blue jeans, a black shirt and a black hat. When he came home, he changed into black pants and a white tank top. According to both Zamora's sister and mother, Zamora did not leave the house again. Zamora's sister did not know Montano and had never seen him at her house, which she shared with her brother in 2009.

Zamora had been a gang member at one time, but he had changed after getting married and having four kids.

Zamora's mother owned a gold New Yorker, which Zamora drove occasionally. He did not drive it on the day of the birthday party. According to Zamora's mother, Zamora and Junior left for the store in the blue truck, but returned in a white Cadillac. Zamora had access to a computer at his mother's house.

C.F., an admitted Sureño, was walking on 48th Avenue with R.C. and J.O. when R.C. was shot. The shooter was wearing a black hoodie, shorts and blue shoes. He told the police that he did not see the shooter. He also described the shooter as Black, 14 or 15 years old, wearing blue shoes. He admitted that he had not told the police the truth

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<sup>14</sup> Montano did not present any witnesses.

<sup>15</sup> August 21, 2009 was a Friday, and Zamora's sister did not remember what day the party was actually on, just that it was a year earlier.

<sup>16</sup> Zamora's sister identified her brother and Junior in a still from the liquor store's camera surveillance footage taken at 7:09:36. She also identified a white Cadillac captured in the footage as belonging to Junior.

because he was scared. He had moved to San Diego after the shooting. At trial, C.F. identified Zamora as the shooter.

Mohsan Albarsar owned the store at 50th Avenue and Bancroft. He did not recognize Zamora, but did recognize Montano as a customer. He did not think his surveillance camera showed much of the fire station across the street. Sometimes the clock near the store ran slow. Alexander helped out in the store in exchange for money and food. No one asked him how many doors the store had.

## **DISCUSSION**

### **A. Zamora's Contentions**

#### **I. Substantial Evidence Supports Zamora's Conviction For Murder.**

Defendant Zamora argues that a comparison of the camera surveillance footage from the store, William Alexander's statement to Sergeant Fleming on August 24, 2009, and Alexander's testimony at trial demonstrates that "[t]his is the rare situation when a witness's testimony is so inherently unreliable that it cannot . . . support a conviction." Specifically, he argues that the surveillance camera footage (1) does not show Zamora driving or arriving at the store in a gold, brown or white Chrysler. It does show: (2) a white Cadillac stopping in front of the store at 7:07:04, and Zamora entering the store at 7:07:25 with someone defense counsel identified as "Junior"; (3) Zamora wearing a dark short-sleeved shirt, not a white tank top, at that time; (4) Zamora shaking hands with Montano at 7:07:38; (5) Montano talking to Junior at 7:07:56; (6) Montano and Zamora slapping hands at the cash register, and Montano leaving without Zamora, at 7:09:34-42; (7) Zamora leaving the store at 7:10:19; (8) Zamora re-entering the store almost immediately thereafter and then leaving with Junior; (9) Zamora getting into a white Cadillac at 7:10:58, and the Cadillac leaving 22 seconds later; (10) Montano returning to the store with a man in a striped shirt at 8:06:19, buying things, leaving, and crossing Bancroft at 8:09.

Without citation to the record, Zamora asserts that the camera footage shows *Alexander's* feet, clad in "distinctive black and white shoes" at 8:10:42, and also shows that at 8:24:41, when the DVD ends, that Alexander was still in the store, since "[t]here is

only one door” and Alexander was not seen leaving by that door. According to Zamora, Alexander left the store at 8:27:38; a police car went by at 8:29:39; Alexander came out of the yard at 8:30:42 and entered the store a minute later; at 8:31:29 walked up Bancroft “in the direction of the house next door”; and at 8:31 re-entered the store, talked to someone and then exited the store, again going opposite the direction of the shooting.

Citing Raba Sbeih’s testimony that she was sitting on the porch on August 21, 2009, at about 8:30 p.m. when she saw the prelude to the shooting and the shooting itself, Zamora infers that “it is impossible for him to have been at the corner of 47th and Foothill, and then at the scene of the shooting at the time the shooting was reported to have happened.” He also finds it inherently improbable that in the missing six minutes of the video from 8:42:50 to 8:49:25 Alexander could have gone to the fire station across the street from the store, seen and overheard Montana and Zamora talking over the roof of the gold car, continued on to the store at Foothill and 48th Avenues for cigarettes and come back to 47th Avenue between Foothill and Bond Street to see the shooting. Having reviewed the entire record on appeal and applying the correct standard of review, we do not accept Zamora’s view of the evidence.

The rule of inherent improbability or physical impossibility on which defendant relies has been stated thusly: “ ‘Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]’ ” (*People v. Lyons* (1956) 47 Cal.2d 311, 319–320.)

Our research has not disclosed any case in which evidence found believable by the trier of fact was held to be inherently improbable or physically impossible as a matter of

law. Nor has defendant cited such a case. According to Witkin, “[t]he inherent improbability rule . . . is a statement of the power of the trial judge; it is not a doctrine of appellate review.” (3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 103, p. 161.) “The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Jones* (1990) 51 Cal.3d 294, 314.) Substantial evidence is evidence of “ ‘ponderable legal significance’ ” that is “ ‘reasonable in nature, credible, and of solid value.’ ” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) “We view the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028.) “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

William Alexander’s testimony was neither inherently improbable nor physically impossible, the surveillance footage notwithstanding. The testimony by Alexander was that the store had *three* doors, not one. One of the doors led to a backyard. The testimony also established that Alexander lived next door to the liquor store, on Bancroft, and that the apartment and store were part of the same building. For all the record shows, Alexander could have left the store at any time through the back door, into the yard and from there into the apartment and out into the street. Alexander testified that he left from the house to go buy cigarettes on Bancroft, and from there walked to 47th Avenue via Judd Street, which would have been the opposite direction from the shooting.

Nor does Raba Sbeih’s testimony, that she was sitting on her porch at approximately 8:30 p.m. when the events leading up to the shooting began to unfold before her, establish Alexander could not have seen and heard what he testified he saw and heard. Sbeih’s estimate of the time was approximate, as were all of Alexander’s time estimates. He testified he did not wear a watch and was not sure of the times when things

happened. The only evidence which could have firmly established a timeline was not admitted, because Zamora's counsel objected to it.<sup>17</sup>

The jury had before it the surveillance camera footage, Alexander's testimony, evidence of his statement to Sergeant Fleming, as well as the testimony of all of the other witnesses to the shooting. The jury was made well aware of Alexander's shortcomings as a witness, which were exposed by aggressive cross-examination and zealous argument, and yet the jury still found him credible. In our view, nothing in the surveillance camera footage demonstrates that his testimony was inherently improbable or physically impossible. Substantial evidence supports Zamora's convictions.

## **II. Substantial Evidence Supports Zamora's Conviction For Possession Of A Firearm By An Ex-Felon.**

Defendant Zamora also argues there was insufficient evidence to support his conviction for constructive possession of a firearm by an ex-felon because the evidence did not establish that he had control of the firearm in Montano's personal possession. We disagree for the following reasons. Viewing the evidence in the light most favorable to the judgment, including circumstantial evidence and any reasonable inferences drawn from that evidence, as required on review (*In re James D.* (1981) 116 Cal.App.3d 810, 813), we find the evidence was sufficient to sustain the conviction.

The evidence showed Zamora's mother owned a gold car, and Zamora was driving it around with Montano as his passenger earlier in the day. The jury was entitled to infer from Alexander's testimony that the item Montano held against his thigh covered in a white cloth was a gun, and that it was the gun that Montano used a few minutes later to shoot R.C. The jury could also infer from Alexander's testimony and statement to the police that the gun had been in the car with the two defendants before the shooting, and that both had access—and control—over it while it was in the car. Officer Guerrero's testimony that gang members often acted in pairs and shared weapons strengthened that

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<sup>17</sup> Prior to argument, the prosecutor offered to stipulate to the contents of Exhibit M, a certified public document which reflected that "the first [911] call came in at 20:48" or 8:48 p.m. Counsel refused to stipulate, and the court denied the prosecutor's motion to reopen to admit the evidence.

inference. In our view, taken together, this evidence provided substantial support for the jury's conclusion that prior to the shooting Zamora was in constructive possession of the gun used to kill R.C.

*People v. Sifuentes* (2011) 195 Cal.App.4th 1410 (*Sifuentes*), on which defendant Zamora relies, is inapposite. In that case, a gun was found under a mattress in a motel room shared by Sifuentes, Lopez and two women. A gang expert testified in a similar vein as Officer Guerrero did in this trial. However, in *Sifuentes*, “[t]here was no evidence defendants had used or were about to use the gun offensively or defensively.” (*Id.* at p. 1418.) Here, there was ample evidence that the gun was about to be used, and was used, to shoot a 14-year-old boy, in retaliation for an earlier gang shooting. Substantial evidence supports the conviction.

### **III. The Gang Evidence And My Space Evidence Were Properly Admitted.**

Defendant Zamora argues that the trial court erroneously admitted: (1) evidence about the Rainbow Recreation Center murder a few days before the murder of R.C.; (2) evidence of Zamora's gang involvement from December 2006 to October 25, 2008; (3) evidence about the history, culture and operation of gangs in Oakland; and (4) evidence of Zamora's MySpace pages. His claim is that the trial court abused its discretion under Evidence Code section 352, and violated his federal due process rights, by admitting evidence that was more prejudicial than probative. Montano joins in this argument. In our view, the evidence was properly admitted.

“In general, ‘[t]he People are entitled to “introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.” [Citation.]’ [Citation.] ‘[E]ven where gang membership is relevant,’ however, ‘because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it.’ [Citations.] On the other hand, ‘ “[b]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.’ [Citations.]” ’ [Citation.] On appeal, we review for abuse of discretion a trial court's

ruling on whether evidence is relevant, not unduly prejudicial, and thus admissible. [Citation.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 655 (*McKinnon*).

Here, the evidence admitted was relevant to motive. Taken at face value, the killing of a 14-year-old boy walking with his friends in his neighborhood before 9:00 p.m. on an August night was completely senseless. The prosecution’s theory of the case, that R.C. was killed in retaliation for the killing and wounding of rival gang members at a nearby recreation center a few days earlier, provided an explanation for the otherwise inexplicable. Without the evidence of the rivalry between Sureños and Norteños in Oakland—i.e., the affiliation of Border Brothers with Sureños; the association of the color red with Norteños; of the number 13 with Sureños; and the defendants’ documented affiliations with Sureño gangs—the evidence of Zamora’s tattoos (especially the “1” and “3” on the shoulders), and the meaning of the words “pinche Border Brothers,” would have been meaningless. The gang evidence also provided a clue to the reason R.C. was shot: his attire—red shoes and a red rosary—may have made him a target, even though he had no known gang affiliation.<sup>18</sup> In our view, the probative value of this evidence on the question of motive was highly probative and far outweighed its potential for prejudice.

The same is true of the MySpace evidence. Zamora argues that there was insufficient authentication of the MySpace sites as accessible by him, but we disagree. Zamora’s probation officer began supervising Zamora, and monitoring him for compliance with the gang conditions of his probation, in January 2007. On August 10, 2007, the probation officer found the MySpace sites. Zamora admitted to his probation officer that the MySpace sites were his. He had access to a computer at his mother’s house. The evidence of Zamora’s gang involvement from 2000 to 2007 as a whole suggested that if Zamora himself did not update the MySpace sites, they were updated with his tacit approval. Nothing in the evidence suggested that the MySpace account he

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<sup>18</sup> Zamora’s counsel argued in closing argument that R.C.’s rosary was also red, and there was testimony to that effect, although R.C.’s father testified the rosary was purple.

had admittedly created had been hijacked and defaced with gang indicia by someone else. Zamora's admission to his probation officer that he created the MySpace account provided sufficient authentication of the MySpace sites. Furthermore, the MySpace evidence was probative of Zamora's ongoing gang involvement at a time when he professed to be trying to extricate himself from the gang life.

The court held an Evidence Code section 402 hearing on Officer Guerrero's proposed testimony to carefully evaluate the probative value and potential prejudice of the gang evidence before exercising its discretion to admit it. The court complied with the requirements of *McKinnon, supra*, 52 Cal.4th 610. No abuse of discretion appears.

#### **IV. Section 654 Does Not Bar Separate Punishment For Possession Of A Firearm By An Ex-Felon.**

Defendant Zamora argues that imposition of consecutive sentences for murder and illegal possession of a firearm by an ex-felon was barred by section 654<sup>19</sup> because "[t]here was absolutely no evidence" to support an implied finding by the court that he had constructive possession of the firearm, or that Montano had physical possession of the firearm, earlier than the murder. He also argues that multiple punishment for murder and illegal possession of a firearm were barred, even if there were separate acts, because the possession of the firearm and the shooting of the firearm were part of a continuous course of conduct committed pursuant to a single objective. We disagree.

Section 654 bars multiple punishment for a single act that violates multiple laws, or multiple acts that comprise an indivisible course of conduct committed pursuant to a single intent and objective. "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could

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<sup>19</sup> Section 654, subdivision (a) provides in pertinent part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

reasonably deduce from the evidence. [Citation.]” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

In this case, we have already concluded there was substantial evidence to support the jury’s finding that defendant was in constructive possession of the firearm prior to and during the shooting. This evidence supports the court’s implied findings that there were two acts of firearm possession, and that they were motivated by separate intents and objectives that were independent of, and not merely incidental to, each other. “ ‘[W]here the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.’ ” (*People v. Bradford* (1976) 17 Cal.3d 8, 22, [quoting *People v. Venegas* (1970) 10 Cal.App.3d 814, 821.])

In *Jones, supra*, 103 Cal.App.4th 1139, the Court of Appeal collected and discussed the many cases which apply the distinction set forth above. More recently, in *People v. Jones* (2012) 54 Cal.4th 350, our Supreme Court impliedly approved the reasoning of the earlier *Jones* case with respect to the application of section 654 to “a defendant who is convicted of possession of a firearm by a felon and of committing a separate crime with that firearm.” (See *People v. Jones, supra*, 54 Cal.4th at p. 358, fn. 3.)

As the Court of Appeal explained in *Jones, supra*, 103 Cal.App.4th 1139, the crime described in section 12021 is committed as soon as the ex-felon takes a firearm into his or her control. And, whenever the defendant arrives at the scene of a crime already in possession of a firearm, “ ‘[a] justifiable inference from this evidence is that defendant’s possession of the weapon was not merely simultaneous with the [murder], but continued before, during and after those crimes.’ [Citation.] ‘Commission of a crime under section 12021 is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere

intent to possess the proscribed weapon. [Citations.] In other words, in the case here, defendant's intent to possess the weapon did not import or include the intent to commit the [murder].' [Citations.]" (*Jones, supra*, at p. 1146.)

Here, as in *Jones, supra*, 103 Cal.App.4th 1139, the trial court did not articulate the factual basis for its finding that section 654 did not bar multiple punishment under the facts before it, but its imposition of consecutive sentences for the firearm possession and murder constituted an implied finding that the firearm possession was a separate act with a distinct intent and objective. That implied finding must be upheld on appeal if it is supported by substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

As in *Jones, supra*, 103 Cal.App.4th 1139, the evidence here was sufficient to allow the inference Zamora's constructive possession of the firearm was antecedent to and separate from the primary offense of murder, and "[i]t strains reason to assume that [Zamora] did not have possession for some period of time before" the shots were fired. (*Id.* at p. 1147.) On the other hand, nothing in the record supports the conclusion that Montano (aided and abetted by Zamora) suddenly came into possession of the firearm simultaneously with the shooting. Therefore, the trial court did not err in impliedly finding that the act of possession of the firearm, and the act of firing the firearm, were separate acts, motivated by independent intents and objectives.

## **B. Montano's Contention**

### **I. Alexander's Lay Opinion About the Strength of His Opinion Was Properly Admitted.**

At trial, the prosecutor asked Alexander: "And you are a hundred percent certain these men are the men?" Zamora's attorney objected that the question was "leading." The court sustained the objection. The prosecutor then asked, "Do you feel morally certain?" Alexander answered, "I'm morally certain." Montano's counsel then stated, "Objection, Your Honor," and Zamora's counsel stated, "Argumentative." The court overruled the objections.

On appeal, defendant Montano argues that Alexander's feelings "about his own credibility and the accuracy of his own identification had no probative value" and the

court abused its discretion by permitting the answer to stand. Not only that, but “[t]he use of speculative (and therefore irrelevant), lay opinion testimony at trial, erroneously admitted in violation of the state Evidence Code and decisional law, violated [his] fair trial and due process rights under the Fourteenth Amendment.” Zamora joins in this argument. In our view, the trial court did not admit speculative or irrelevant evidence, and we reject both the state law and constitutional claims of error.<sup>20</sup>

“A lay witness may testify to an opinion if it is rationally based on the witness’s perception and if it is helpful to a clear understanding of his testimony.” (*People v. Farnam* (2002) 28 Cal.4th 107, 153; Evid. Code, § 800.) We review the trial court’s evidentiary rulings for abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.) We find no abuse of discretion here. The witness did not comment on his own credibility or on the objective accuracy of his identification. He expressed the degree of certainty he subjectively felt in his identification. First, Alexander’s opinion testimony was not speculative; it was based on his personal experience. (Evid. Code, § 702.) Second, it was helpful in conveying to the jury how confident he felt about his opinion, and was just as informative and helpful to the jurors as if he had said he was not sure at all, or pretty sure but not positive, or 100 percent sure (in response to a nonleading question). Moreover, whatever sting the comment may have had was dissipated by the time Zamora’s counsel finished her cross-examination of him. *She* asked him if he was “morally certain that these were the two people that did the shooting”; if he was “morally certain” that the only time he saw Zamora’s tattoos was when Zamora was leaning over the car; and if he was “morally certain” the gold car had body damage on the driver’s

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<sup>20</sup> “A defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial.” (*People v. Partida* (2005) 37 Cal.4th 428, 431.) Here, the objections to “leading” and “argumentative” questions, and the objection on no stated ground at all, did not lay the groundwork for an appellate argument claiming error in admitting improper lay opinion with the effect of violating due process. Ordinarily, defendants’ appellate claims would be barred, but we have the discretion to entertain claims that would otherwise be deemed forfeited. (*People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6.) In the interest of judicial economy, and to forestall potential further claims of ineffective assistance, we will do so here.

side, to which Alexander responded he was only “pretty sure.” No error, prejudicial or otherwise, appears.

**CONCLUSION**

Substantial evidence supports Zamora’s convictions for murder and possession of a firearm by an ex-felon. Section 654 does not bar separate punishment for both crimes. The trial court properly admitted gang evidence, MySpace evidence, and lay opinion evidence.

**DISPOSITION**

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Dondero, J.