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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN CERDA, JR.,

Defendant and Appellant.

A133103

(Contra Costa County
Super. Ct. No. 1001346)

Based on a fatal drive-by gang shooting, defendant Martin Cerda, Jr., was convicted of first degree murder (Pen. Code, § 187),¹ conspiring to commit murder (§§ 182, subd. (a)(1), 187), shooting a firearm from a motor vehicle (former § 12034, subd. (c)),² conspiring to shoot a firearm from a motor vehicle (§§ 182, subd. (a)(1), 12034, subd. (c)), and street terrorism (§ 186.22, subd. (a)). The jury also found that the murder, conspiracy, and shooting offences were committed to benefit a street gang (§ 186.22, subd. (b)(1)) and that a principal in the offenses used a firearm resulting in the death of the victim (§ 12022.53, subd. (e)(1)). The court sentenced defendant to prison for 50 years to life.

¹ All further section references are to the Penal Code.

² Former section 12034 was repealed and re-enacted as section 26100 without substantive change. (Stats. 2010, ch. 711, § 4.)

Defendant appeals his conviction on several grounds. He claims that the prosecutor acted with purposeful ethnic discrimination in exercising peremptory challenges against two African-Americans and that the court erred in admitting evidence that the vehicle used in the shooting had been used in a prior crime, in admitting police testimony describing prior gang killings, in admitting a letter written by defendant in custody awaiting trial, and in imposing stayed gang enhancements. We shall modify the sentence to strike the unauthorized gang enhancements but affirm the judgment in all other respects.

STATEMENT OF FACTS

Three young men—defendant, Alberto Alejandre, and Hung Nguyen—were jointly charged in the drive-by shooting of 20-year-old Francisco Perez. Defendant was tried separately from the two others because he gave a statement to the police admitting that he drove the vehicle, but incriminating the other men as the shooters. (*Bruton v. United States* (1968) 391 U.S. 123, 126.) In two separate trials each man claimed the others shot Perez, but all three were convicted and have appealed separately. (See *People v. Alejandre* (Sept. 5, 2013, A131367) [nonpub. opn.]; *People v. Nguyen* (Sept. 5, 2013, A135195) [nonpub. opn.].) The following statement of facts is based solely upon the evidence presented at defendant’s trial.

The August 5, 2009 shooting

Francisco Perez lived on Maricopa Street in San Pablo. Perez was a former Sureño gang member who years before had testified against defendant’s older brother, Victor Cerda, at a trial in which Victor was convicted of murdering a rival Norteño gang member. In 2009, he lived with his grandmother and left for work every weekday morning at 7:00 a.m. On the morning of August 5, as Perez left for work a fusillade of gunfire erupted. Perez’s grandmother saw a man in a white van shooting at her grandson. A bullet grazed Perez’s forehead and another bullet perforated his torso, liver, heart, and lungs. Perez collapsed on the street and died in front of his grandmother.

Police investigation

The police arrived at the scene and found 19 shell casings from two different firearms. The recovered shell casings were nine-millimeter and .40 caliber. The police obtained a surveillance videotape from a nearby store that shows a white van driving back and forth on Maricopa Street in the minutes before the shooting. The videotape also shows Perez initially walking toward the store then running from the van as it drove slowly towards him with its side door open.

The police had the van under electronic surveillance at the time of the shooting. Two days before Perez was killed, the police investigated a crime involving a white van on the highway near the Carquinez Bridge. The police discovered the van was registered to Alejandro and, after locating the van near Alejandro's home, placed a global positioning device (GPS) on the van to track its movements. On the morning of the Perez shooting, the police were following the van with the aid of the GPS device. Minutes before the shooting, the van parked on an empty street and a police officer following the van observed someone in the van repeatedly open and close the vehicle's sliding side door. The van then drove down a small street. The surveillance officer did not follow directly behind for fear of being observed by the van occupants. The officer used the GPS device to monitor the van's location over the next few minutes. The device showed that the van drove slowly back and forth through the neighborhood of 23rd and Maricopa Streets, making two U-turns and slowing to a speed of five miles per hour at that street intersection at 7:06 a.m. — the time and place of the shooting.

Cell phone records revealed that Nguyen was in the area at the time of the shooting and minutes after the shooting several calls were placed from Nguyen and Alejandro to Caesar Sanchez, a Sureño gang member. Nguyen's calls were transmitted by cell phone towers along the route traveled by the white van, which continued to be electronically tracked. The van drove to Richmond and parked at 7:30 a.m. Sanchez picked up the three men and drove them to Alejandro's house. Defendant and Alejandro went to sleep at the house and Nguyen went home. The three men met later that day at

Alejandro's house where the police arrested them together. A search of defendant's house found the two handguns used in the Perez shooting, both hidden in the grass clippings catch-bag of a lawn mower. The van was recovered and the fingerprints of defendant, Alejandro, and Nguyen were found in it.

Defendant's police statement

Defendant was interviewed by the police following his arrest. Defendant initially denied all knowledge of the shooting. He said he spent the entire morning in bed and claimed not to know that his cousin Alejandro owns a white van. The police told defendant that they had been tracking the van for days with a GPS device and knew he was in the van. The police suggested that defendant may have been in "the wrong place at the wrong time" and should talk to them before Alejandro and Nguyen did.

Eventually defendant admitted driving the van but claimed Alejandro and Nguyen were the shooters and that they acted without him knowing their intentions. The police asked defendant if, just before the shooting, the van's sliding door opened and closed and defendant admitted it was open but said Nguyen opened the door to yell out at a girl passing on the street. Defendant also admitted driving slowly through the neighborhood of 23rd and Maricopa Streets and making u-turns but claimed he was just following directions from his friends. Defendant said he was driving down Maricopa when he saw Perez on the street and Nguyen told defendant to "stop right here." Defendant recognized Perez as the man who "snitched on [defendant's] brother." Defendant stopped the van, expecting Nguyen to "hop off and beat him up" or "[t]alk shit to him." Instead, the sliding door opened and Nguyen and Alejandro fired at Perez. Defendant sped away and the two men told defendant it was payback for his brother. Defendant told the police he did not want revenge on Perez and "was trying to change" his life and leave the gang.

Defendant's trial testimony

At trial, defendant admitted driving the van but insisted he did not know that Alejandro and Nguyen intended to shoot Perez. On cross-examination, defendant admitted that he lied to the police through most of the interview following his arrest.

Defendant also admitted being a Sureño gang member for 10 or 12 years and that a “key part” of being a Sureño is punishing “snitches,” including killing them. Defendant also admitted that his brother Victor gained “a lot of respect” among Sureños for killing a Norteño and that defendant admired his brother. When challenged about his claim that he wanted to leave the gang, defendant admitted that he had “not really” been removing himself from the gang at the time of the shooting and had obtained a gang tattoo shortly before his arrest.

Gang evidence

Officer Robert Brady of the San Pablo police department testified as a gang expert. He testified about the rival Sureño and Norteño street gangs and described their history, criminal activities, and symbols. Brady testified that gangs rely on violence and fear to maintain territory and to retain control over its members. To support his testimony that Sureño is a violent criminal street gang, he described two recent cases in which Sureños were convicted of killing rival Norteños to benefit the Sureño gang.

The officer also testified about violence within the Sureño gang. Brady said gangs rely on secrecy and will retaliate against a gang member for “snitching,” or talking to the police. The officer said a gang member who snitches on another gang member will be beaten or killed. Brady testified about a Sureño murder in which a fellow gang member “snitched” and Victor Cerda, from prison, instructed a Sureño nicknamed “Whisper” to retaliate but Whisper was killed by the informer’s friends before he could punish the informer. Brady testified that defendant bears a tattoo commemorating Whisper. A photograph of the tattoo was shown to the jury; the tattoo reads “RIP Whisper.”

Brady testified that defendant was a Sureño gang member at the time of the Perez shooting. He based his testimony on defendant’s Sureño tattoos, his self-identification as a Sureño when jailed, the blue clothes and bandana he was wearing at the time of his arrest (Sureños identify with blue), and his association with known Sureños. Brady testified that Alejandro and Nguyen, with whom defendant was arrested, were also Sureño gang members. Alejandro is defendant’s cousin.

Brady interpreted a slang-filled letter that defendant wrote while in custody awaiting trial. The letter was addressed to defendant's "homegirl" Lulu Torrez and referred to a recent shooting reported in the newspaper. The newspaper article, which defendant enclosed in his letter, said three men were arrested but the article withheld the shooters' names. Defendant provided the first and last names of the shooters, as well as their ages, and asked Torrez to give the information to "Chato," whose house was "shot up," and said he would try to get the shooters' addresses so Chato can "handle hales" (the job). The officer testified that, in his opinion, defendant was "sending out information to people on the street to commit a retaliatory shooting."

Brady described the murder committed by defendant's brother and Perez's role in testifying against him. Brady was later asked a hypothetical question: "Would three Sureño gang members going out finding a person who had testified against one of their fellow gang members, gunning them down in the street, constitute a crime committed for the benefit of and in association with or furtherance of the Sureño criminal street gang?" Brady replied "yes" and explained that killing an informant "keeps the Sureño gang moving, keeps the snitches out [and] that dissuade[s] people from snitching, both gang members and the public for fear of retaliation. It gives the gang members themselves status and respect in the gang for being willing to commit acts of violence such as murder."

DISCUSSION

I. Substantial evidence supports the trial court's finding that the prosecutor did not challenge prospective jurors on the basis of race.

Defendant claims the prosecutor improperly exercised peremptory challenges against African-American prospective jurors on the basis of race. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) There were three African-Americans in the jury pool. Two African-Americans were called into the jury box and the prosecutor struck both of them. Defendant objected and the trial court found, by a "bare minimum," a prima facie case of discrimination and asked the

prosecutor to explain his reasons for excluding the jurors. The court accepted the prosecutor's race-neutral reasons and found there was no purposeful discrimination. Defendant challenges that finding.

“ ‘Under *Wheeler, supra*, 22 Cal.3d 258, “[a] prosecutor’s use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against ‘members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds’—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citation.]” [Citation.] “Such a practice also violates the defendant’s right to equal protection under the Fourteenth Amendment.” ’ ” (*People v. Taylor* (2010) 48 Cal.4th 574, 611.)

“In ruling on a motion challenging the exercise of peremptory strikes, the trial court follows a three-step procedure.” (*People v. Clark* (2011) 52 Cal.4th 856, 904.) “First, the defendant must make out a prima facie case by ‘showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’ [Citations.] Second, once the defendant has made out a prima facie case, the ‘burden shifts to the State to explain adequately the racial exclusion’ by offering permissible race-neutral justifications for the strikes. [Citations.] Third, ‘[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.’ ” (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

“ ‘[T]he critical question in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor’s justification for his [or her] peremptory strike.’ [Citation.] The credibility of a prosecutor’s stated reasons ‘can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’ ” (*People v. Hamilton* (2009) 45 Cal.4th 863, 900.) All relevant circumstances may be relied upon in determining whether there has been purposeful discrimination, including disparate treatment of similarly situated panelists. (*People v. Lenix* (2008) 44 Cal.4th 602, 616, 622.) “If a prosecutor’s proffered reason for striking a black panelist

applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.” (*Miller El v. Dretke* (2005) 545 U.S. 231, 241.) “Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson's* third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons.” (*People v. Lenix, supra*, at p. 607.)

“The existence or nonexistence of purposeful discrimination is a question of fact. [Citation.] We review the decision of the trial court under the substantial evidence standard, according deference to the trial court’s ruling when the court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror. [Citations.] ‘[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor’s race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.’ [Citation.] ‘We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]’ [Citation.] A prosecutor’s reasons for exercising a peremptory challenge ‘need not rise to the level justifying exercise of a challenge for cause.’ [Citation.] ‘ “[J]urors may be excused based on ‘hunches,’ and even ‘arbitrary’ exclusion is permissible, so long as the reasons are not based on impermissible group bias.” ’ ” (*People v. Hamilton, supra*, 45 Cal.4th at pp. 900-901.)

A. Prospective Juror E.M.

E.M. was a married, 61-year-old African-American male living in Walnut Creek who worked as a massage therapist. The prosecutor stated several reasons for striking E.M.: (1) E.M.’s wife is a social worker who “deals extensively with gangs and gang rehabilitation,” which concerned the prosecutor because part of defendant’s “appeal” to

the jury would be that he “is the younger brother of a hardcore gang member and maybe following in [the brother’s] footsteps” and E.M. may “feel sorry for” defendant; (2) E.M. has a bachelor’s degree in psychology and worked as a mental health counselor for teens, which the prosecutor felt may make E.M. “sympathize” with defendant as if he were a patient; (3) When E.M. was asked on a written juror questionnaire, “Do you have any strong feelings about gangs or gang members due to personal experiences you have had?” E.M. answered “maybe.” In explanation, E.M. wrote, “My wife works with gang involved member[s] & victims on a daily basis, so I hear her stories often.” In summarizing his reasons for striking E.M. from the jury, the prosecutor said he believed E.M.’s psychology education, former work as a teen counselor, current work as a massage therapist, and interaction with his wife who worked with gang-involved youth, would make him a juror sympathetic to the defense.

Substantial evidence supports the prosecutor’s stated reasons for challenging E.M., and the trial court reasonably concluded the reasons were race-neutral. The credibility of a prosecutor’s stated reasons “ ‘can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’ ” (*People v. Hamilton, supra*, 45 Cal.4th at p. 900.) Attorneys selecting a jury often regard a panelist who is educated in psychology or worked as a mental health counselor as one who may be sympathetic to the defense. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [peremptory challenge properly based on juror’s experience as a social services caseworker]; *People v. Clark, supra*, 52 Cal.4th at p. 907 [peremptory challenge properly based on juror’s experience in counseling or social services]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790–791 [peremptory challenge properly based on juror’s educational background and experience in psychiatry or psychology].) Defendant acknowledges this point but argues that E.M.’s education and counseling work occurred years earlier, lessening its relevance. But there is nothing improbable about drawing an inference about a panelist’s disposition from the panelist’s field of study and employment even if the panelist later pursued another field of work.

Moreover, E.M. had ongoing experience with the counseling field through interactions with his wife, who was a social worker assisting gang-involved youths. Defendant argues that the prosecutor “exaggerated and misstated the record as it pertained to E.M.’s wife’s occupation, indicating the reasons were not genuine.” Defendant claims E.M. never said his wife worked in “gang rehabilitation,” as characterized by the prosecution. But while E.M. did not use the term “gang rehabilitation,” the prosecutor’s characterization was nonetheless a fair summary of the information E.M. disclosed. E.M. wrote on his questionnaire that his wife worked for the Oakland Unified School District as an attendance placement specialist who works with high school students “who are failing to succeed socially & academically.” He stated that his wife “works regularly with students who have gang involvement or are victimized by gangs. She works often with Alameda County Juvenile Justice officers & judges to place students re-entering after being released from juvenile detention.” From this information, the prosecutor could reasonably conclude that E.M.’s wife worked in rehabilitating gang members and that E.M., “hear[ing] her stories often” and himself once working with troubled teens, would be sympathetic to defendant as a young gang member.

The comparative juror analysis defendant offers does not further his claim. Defendant contends that Juror No. 23, like E.M., had experience working with troubled teens yet was selected to serve on the jury. Juror No. 23 was a 58-year-old nonAfrican-American man with degrees in civil engineering and business administration who worked as a homebuilding consultant. On his questionnaire, Juror No. 23 responded to the question “Do you have any strong feelings about gangs or gang members due to personal experiences you have had?” by stating “I’m concerned about my CASA child getting involved with gangs.” During voir dire, Juror No. 23 explained that his reference to CASA means that he volunteers as a Court Appointed Special Advocate for children in dependency proceedings. While E.M. and Juror No. 23 both worked with troubled teens, a full reading of the record makes clear that Juror No. 23 was far more likely to be sympathetic to the prosecution than E.M. “Advocates do not evaluate panelists based on a single answer” during voir dire, nor should reviewing courts. (*People v. Lenix, supra*, 44

Cal.4th at p. 631.) Juror No. 23's questionnaire responses revealed that he was a businessman friendly with police officers who expressed "empathy" for the victim's family. Juror No. 23 reported that his friend was murdered by gang members and stated his determination to keep the foster child he assisted away from gangs. Juror No. 23 also said he believed police officers were "better trained in observing situations" when the juror assesses witness credibility at trial. Juror No. 23 pledged to apply the law fairly but conceded that his experience working with troubled teens tended to make him likely to favor the prosecution. Contrary to defendant's assertion, E.M. and Juror No. 23 were not similarly situated.

B. Prospective Juror A.B.

A.B. was a single, 26-year-old unemployed African-American male living in Hercules. The prosecutor stated several reasons for striking A.B. from the jury: (1) A.B. "is fairly young;" (2) "made no attempt to get any type of formal education" beyond attendance at "some college or tech school"; (3) never moved from his parental home despite having graduated high school eight years previously; (4) was unemployed and previously employed as a coffee shop barista and video store clerk; (5) listed Game Informer Magazine (a video game magazine) as the only magazine to which he subscribes; and (6) responded to the questionnaire in a way that suggested A.B. "was trying to get on the jury" by, for example, touting his patience and attention to detail.

In summarizing his reasons for striking A.B., the prosecutor said it appeared that A.B. "has never made a real decision in his life. He has worked for basically dead-end jobs, has no formal college and, as of yet, not moved out of his parents' house and is content to play videogames. [¶] This is not somebody that I want making an extremely important decision that requires real world, real life experience." The prosecutor said he intended to ask the jurors "to disbelieve a significant part" of defendant's police statement and needed "jurors who can critically analyze the evidence and make decisions. I don't need juror[s] who have zero life experience, haven't attended college of any sort, and have yet to move out of their parents' home and apparently are video enthusiasts.

This is not the kind of person, regardless of race, color, creed, religion, ethnicity, that I want on this jury.”

Substantial evidence supports the trial court’s finding that the prosecutor had race-neutral reasons for striking A.B. “A potential juror’s youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge.” (*People v. Lomax* (2010) 49 Cal.4th 530, 575. “Limited life experience is a race-neutral explanation” (*People v. Perez* (1994) 29 Cal.App.4th 1313, 1328), and an attorney may reasonably conclude that a potential juror’s “immaturity and inexperience with assuming weighty decisions and responsibilities” makes one unsuitable (*People v. Sims* (1993) 5 Cal.4th 405, 431).

Defendant argues that the prosecutor failed to engage A.B. in anything more than “desultory voir dire” before striking him, which may suggest that the strike was based on group bias rather than individual assessment. (*Wheeler, supra*, 22 Cal.3d at p. 281.) But A.B.’s lack of life experience was apparent from the questionnaire and required no probing. His responses to the questionnaire established that he graduated from high school about eight years prior, had no employment for two years following graduation, worked one year as a video store clerk and less than four years as a coffee shop barista, and at the time of trial had been unemployed for over two years. The questionnaire also established that A.B. never left home. Defendant disputes this fact but A.B. stated that his only residence since 1998, when he was 13 years old, was his parents’ home in Hercules.

Defendant offers no comparative juror analysis for A.B. Our comparison discloses no juror or alternate who was selected matching the youth and inexperience of A.B. The youngest person selected was 39 years old and most were over age 50. No disparate treatment appears on the record.

II. *The trial court properly admitted limited evidence that the vehicle used in the Perez shooting was under surveillance for suspected involvement in a prior crime.*

Defendant contends the trial court erred in admitting evidence that the van used in the Perez shooting had been used in a prior crime because this evidence improperly suggested to the jury that “defendant must have known that by driving this van he was

going to be participating in a drive-by shooting because that is what his acquaintances did in this van.”

In fact, the court precluded the police from revealing that the prior crime was a drive-by shooting. The police testified that the van was under surveillance because the police were investigating a crime that occurred on the highway near the Carquinez Bridge but the crime itself was not described. The evidence was properly admitted to explain why the police were tracking the vehicle with a GPS device and to support police testimony that they were closely observing the van. Minutes before the shooting, which occurred from the van’s open sliding door, a police officer following the van saw the sliding door repeatedly open and close, which supported the inference that the shooting was planned and that defendant was a knowing participant in the shooting. The police observation contradicted defendant’s claim, made to the police shortly after his arrest, that the van door opened and closed just once, and then only because Nguyen wanted to speak to a nearby girl. Defendant repeated that claim when he testified at trial and on cross-examination defense counsel questioned the officer’s ability to see the van and the surrounding area. Evidence that the police were investigating a prior crime involving the van and therefore had reason to carefully observe its every movement was relevant to a disputed fact and properly admitted.

III. The trial court properly admitted evidence of prior violent crimes committed by Sureño gang members.

Defendant was charged with active participation in a “criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” (§ 186.22, subd. (a).) It was further alleged that defendant committed murder and other crimes “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) To establish a “pattern of criminal gang activity,” the prosecution must prove the commission of two or more recent criminal offenses by the gang. (§ 186.22, subd. (e).)

Defendant offered to stipulate that he was a member of the Sureños, a criminal street gang, and that any crimes committed were committed in furtherance of the gang. The prosecution did not accept the proposed stipulation. The court permitted the prosecution to introduce evidence of two predicate acts establishing a pattern of gang activity — testimony by Officer Brady about two recent cases in which Sureños were convicted of killing rival Norteños to benefit the Sureño gang.

Defendant contends that the court should have compelled the prosecution to accept the stipulation and excluded evidence of those two murders. However, the prosecution generally “ ‘may not be compelled to accept a stipulation where the effect would be to deprive the state’s case of its persuasiveness and forcefulness.’ ” (*People v. Valdez* (2012) 55 Cal.4th 82, 130.) Defendant asserts that the only probative value of the gang evidence was to establish the gang offense and enhancement, but this evidence was also relevant to show defendant’s motive and intent to kill. Defendant’s claim that he did not want revenge against Perez and knew nothing of his fellow gang-members’ intention to punish Perez for being an informant is undermined by evidence that defendant is a long-standing member of a gang known for, and proud of, killing snitches.

For similar reasons, defendant’s separate contention that the court should have excluded evidence of his brother’s murder of a rival Norteño also fails. Evidence of the murder was highly probative of defendant’s motive and intent to kill Perez in retaliation for Perez informing on Victor. Contrary to defendant’s assertion, the murder was not described in undue, inflammatory detail. The prosecutor asked a police officer to “briefly” describe the murder, and the officer complied: “It was in Davis Park in San Pablo, 2003, I believe. [Victor Cerda] was in Davis Park with other gang members, fellow gang members. He saw two perceived rival Norteños walking through the park. There was a verbal confrontation between Victor and the other two subjects. He pulled out a gun, and the two Norteños turned to run. One of them was shot in the arm. The other was shot in the back and killed.” The only other information provided by the testifying officer was that Perez was present at the shooting, Perez gave a statement to the police describing the events, and Cerda gained respect among Sureños for the killing. The

court did not abuse its discretion in admitting this limited evidence, which was directly relevant to the prosecution's theory that defendant intentionally participated in the killing of Perez to revenge the perceived betrayal of defendant's brother, a respected gang member.

As evidence of Sureño intolerance for police informants, the court also properly admitted evidence of the planned killing of another Sureño accused of informing on the gang. The gang expert, Officer Brady, testified about a Sureño murder in which a fellow gang member "snitched" and a Sureño nicknamed "Whisper" was ordered to retaliate but was killed by the informer's friends before he could punish the informer. Defendant bears a tattoo commemorating Whisper that reads "RIP Whisper." Defendant argues that this evidence has only "minuscule probative value" because the informant was not actually killed. We disagree. The evidence shows that Sureños target informants and that defendant felt an affinity for the intended gang enforcer.

IV. The trial court properly admitted a letter defendant wrote in custody awaiting trial.

Defendant wrote a letter from jail relaying to the victim of a shooting the names of the shooters so the victim could "handle" the job, which a gang expert interpreted to be a directive for a retaliatory gang shooting. Defendant argues that evidence of the letter was impermissible character evidence and more prejudicial than probative.

The evidence was neither admitted nor argued by the prosecutor to show propensity to commit criminal acts. In his police statement, defendant said he did not want revenge on Perez and "was trying to change" his life and leave the gang. At trial, defendant denied any intention to facilitate the killing of Perez and denied that when driving the van he knew that Alejandro and Nguyen intended to shoot him. He testified that, at the time of the shooting, he wanted out of the gang and was "not as committed" as he had been previously. Defendant also said it "[d]idn't bother [him] at all" that the man who "snitched" on his gang and his brother was living in the neighborhood. Defendant denied that the Sureños are an organized group. He testified that the Sureños are not like "a corporation or something" and he did not "take orders from people" in the

gang. Defendant's letter tended to impeach much of this testimony. It tended to refute his professed desire to remove himself from the Sureños and his disavowal of any intention to participate in a retaliatory shooting. The trial court could rightly regard the probative value of the letter to far outweigh any possible prejudicial impact from its admission. Indeed, although we conclude that the letter was properly admitted, in view of the overwhelming evidence of defendant's guilt, any conceivable error in this respect was plainly harmless.

V. Stayed sentence enhancements were improperly imposed.

The trial court imposed 10-year sentence enhancements for defendant's commission of two violent felonies (murder and conspiracy to murder) for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) but stayed those enhancements under section 654. The People concede that the sentence enhancements are unauthorized and should be stricken.

Section 186.22, subdivision (b) "establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) . . . imposes a 10-year enhancement when such a defendant commits a violent felony. Section 186.22(b)(1)(C) does not apply, however, where the violent felony is "punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004; cf. *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1283 [parole ineligibility inapplicable when § 12022.53, subd. (e)(1) enhancement is imposed, absent personal firearm use].)

Defendant was sentenced to life terms for the violent felonies of murder and conspiracy to murder and, thus, the section 186.22, subdivision (b)(1)(C) sentence enhancement is inapplicable. (*People v. Lopez, supra*, 34 Cal.4th at p. 1004.) We shall modify the sentence to delete, rather than to stay, those terms.

DISPOSITION

The judgment is affirmed but modified to delete the 10-year sentence enhancements imposed under section 186.22, subdivision (b)(1)(C) on counts one and two. The clerk of the superior clerk shall prepare an amended abstract of judgment to delete those sentence enhancements and send a copy of the amended abstract to the Department of Corrections.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.