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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ESEQUIEL CONTRERAS et al.,

Defendants and Appellants.

B233109

(Los Angeles County
Super. Ct. No. TA107579)

APPEALS from judgments of the Superior Court of Los Angeles County.

Larry Knupp, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant Esequiel Contreras.

Paul Richard Peters and Lawrence R. Young for Defendant and Appellant Victor M. Zermeno.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendants Esequiel Contreras and Victor M. Zermeno guilty of first degree murder in violation of Penal Code section 187, subdivision (a).¹ The jury found that the murder was committed for the benefit of, at the direction of, and in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1)(C).

In Contreras's case the jury found that a principal personally and intentionally discharged a firearm in the commission of the murder, causing great bodily injury or death within the meaning of section 12022.53, subdivisions (b), (c), and (e)(1). With respect to Zermeno, the jury found that, in the commission of the murder, Zermeno personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (b), (c) and (d). The trial court sentenced both Contreras and Zermeno to state prison for 25 years to life plus 25 years on the firearm use enhancement.

Zermeno appeals on the grounds that: (1) there was insufficient evidence that he was guilty of first degree murder; and (2) the testimony of the gang expert was hearsay and should have been suppressed. Contreras appeals on the ground that the trial court's erroneous admission of hearsay evidence of a jail phone call infringed upon his right to due process and a fair trial. Contreras also joins in the arguments made by Zermeno to the extent those arguments apply to him and affect the judgment in his case. (Cal. Rules of Court, rule 8.200(a)(5).)

FACTS

Prosecution Evidence

In March 2008, a prosecutor from the Los Angeles County district attorney's hardcore gang unit in Compton was assigned to a murder case in which Kenny Taylor, an African-American, was the victim. In May 2008, a preliminary hearing was held that resulted in Richard Dominguez and Ubaldo Lozano² being charged with Taylor's murder.

¹ All further references to statutes are to the Penal Code unless stated otherwise.

² We will refer to Ubaldo Lozano and his brother, Ramiro Lozano, by their first names to avoid confusion.

Raul Gonzales, the shooting victim in the instant case, testified at that preliminary hearing. Gonzales identified Dominguez and Ubaldo as the shooters.

Karla Briones worked at the Nueva Italia Bar in Compton on September 6, 2008, the night of Gonzales's shooting. She remembered Gonzales entering and exiting the bar at least once that night after he first arrived. At one point, Briones heard the sound of firecrackers and saw Gonzales enter the bar and fall on the floor.

Deputy Sheriff Timothy Lee responded to an "illegal shooting" call on September 6, 2008, at 1:16 a.m. at the Nueva Italia Bar. He observed the victim lying face-up on the floor, bleeding from the mouth, chest, and the back of his head. Paramedics pronounced the victim dead shortly thereafter. Gonzales died of multiple gunshot wounds. His autopsy revealed he suffered four such wounds.

Detective Martin Rodriguez recognized Gonzales at the shooting scene. He knew Gonzales had been a witness at the preliminary hearing in the case against Dominguez and Ubaldo, in which Detective Rodriguez had been one of the lead investigators. At that hearing, Detective Rodriguez saw that there were Compton Varrio Tijuana Flats (CVTF) gang members in the audience. One of them was Ramiro Lozano, Ubaldo's brother, and a CVTF gang member. Detective Rodriguez had arrested Ramiro on September 1, 2008, for making threats to Gonzales. The threats were made at the Nueva Italia Bar approximately a month before Gonzales was shot (on August 10, 2008). Ramiro was still in custody at the time of Gonzales's shooting.

Detective Rodriguez arranged to have Ramiro's phone calls recorded while he was in custody. One of the recorded calls was to a person Detective Rodriguez identified as Jesus Cortez. Cortez was an admitted member of the CVTF gang. Cortez and Zermeno had been stopped together by police in the past. In the phone call, Ramiro complained that the police had arrested him for intimidating a witness in the bar. Ramiro said he "guessed" it was someone from the bar, and Cortez told Ramiro, "we've got to get this mother' fool. Who was it the homie?" A recording of the phone call was played for the jury.

The Nueva Italia's owner employed two security guards to check people from top to bottom for weapons before entering. Deputy Lee determined that the two security guards, Juan Hernandez and Freddy Agreda, were witnesses to the shooting, and he spoke with them by means of an interpreter. Hernandez testified that his job was to direct patrons where to park, to walk around inside and out when possible, and to check people for weapons before they entered. He remembered a black pickup truck arriving around 11:00 p.m. that night. One of the four individuals who got out of the truck was carrying a Corona beer bottle. Hernandez later identified this man as Zermeno. Hernandez personally searched Zermeno for weapons before he entered the bar. Hernandez told Zermeno that he could not drink the beer there and he had to throw it away or finish it. Hernandez saw Zermeno put the bottle down on the ground.

Hernandez described Zermeno as short with a shaved head. He was Hispanic, neither heavy nor skinny, and was between 25 to 30 years old. He wore a white T-shirt and a white shirt. Hernandez saw that the driver of the black pickup was a light-skinned Hispanic who was a few inches taller than five feet five. He was not heavy, and he wore a moustache. He was between 25 and 30 and wore a blue baseball cap and a hooded sweatshirt. Hernandez later identified the driver as Contreras. Hernandez remembered that the other two occupants were Hispanic males but could not remember anything about them.

During the evening the four men went in and out of the bar, some of them to smoke. Finally, three of them got back in the truck. Zermeno got a beer from the truck and started drinking it near the trash can close to their parking space. The same driver, Contreras, began driving the truck out of the lot. Hernandez stepped out of the gate and looked down the street to make sure there were no cars coming. Hernandez motioned to Contreras to pull out, and the black truck exited and parked along the street beside the fence.

After the black truck pulled out, Hernandez began walking back toward the entrance of the bar. As he was doing so, the person who had left the Corona beer bottle in the lot, Zermeno, was coming out. He was walking side-by-side with "the person that

got shot.” Hernandez heard some “bangs” and looked back towards the black truck because the bangs came from that side of the lot. Hernandez saw Zermeno run toward the truck and get in the open passenger door. The truck then drove away “very fast.” Hernandez saw the person who was shot running toward him and toward the bar. Hernandez went into the bar and the bleeding victim came in right after him and fell. Hernandez did not see who shot the victim. Hernandez pointed out to the police the Corona beer bottle he had seen the man from the black truck put down.

The Sheriff’s crime scene investigator, Susannah Baker, responded to the shooting scene at approximately 3:40 a.m. She collected a beer bottle that had been pointed out to her in the parking lot. It was a 12-ounce Corona bottle and the only one in the lot. The Nueva Italia’s owner testified that the parking lot was swept clean every night and every day. Baker also developed 14 latent fingerprint lift cards from inside the bar.

Freddy Agreda, the other security guard, saw the black Ford truck drive into the parking lot. There were three or four people in the truck who went into the bar. He and Hernandez checked them. Agreda said he did not see them that well. Later, Agreda saw two men from the truck leave the bar and walk to the truck and get in. The truck left the lot and turned right and parked on Rosecrans Avenue near the parking lot entrance.

After Agreda saw the truck stop, Agreda saw the victim leave the bar. The victim was walking between two other people. One of the three took the truck out of the parking lot. The other two—the one who got shot and a second person—went toward the side of the wall. According to Agreda, this was where the black Ford truck was parked on Rosecrans Avenue. Then the victim got shot. One of the men who was with him shot him. Just before the shooting, the victim was with just one person. After the shooting, Agreda saw the shooter step into the truck, and the truck left.

At trial, Agreda did not recall if he told police the shooter was wearing a white T-shirt. Agreda’s recorded interview was played for the jury. On the recording, Agreda said the shooter had a light complexion, was about 20 years old, and was short and stocky with no facial hair and no hair on his head. He wore a white T-shirt and black baggy pants. The four men from the truck had Corona beer in the parking lot, but Modelo beer

inside the bar. The shooter held the gun in his right hand and shot towards the victim. The victim began to run. Agreda heard four shots.

On March 25 and October 8, 2008, Hernandez viewed photographic lineups (six-packs). Hernandez identified defendants Contreras and Zermeno in the six-packs shown to him by the police. He also identified them in court. Hernandez feared for his safety because of his testimony. He identified Contreras as the truck's driver and Zermeno as the man with the Corona beer bottle. Hernandez also identified the black truck from photos the police showed him.

DNA recovered from the Corona beer bottle matched that of Zermeno. DNA recovered from a Modelo beer bottle located inside the bar also matched Zermeno.

Agreda identified photograph No. 3 (Contreras) in one six-pack he was shown (Peo.'s exh. No. 135), but at trial he insisted he did not know "exactly if that is or is not the person." On cross-examination by Contreras's attorney, Agreda was asked who told him to circle picture No. 3, and he answered, "No one. No one." Shortly thereafter, he was asked if the officers told him to circle No. 3, and he answered "Yes. Yes." In another six-pack (Peo.'s exh. No. 133), he admitted that he identified "one person, but no, no. I don't know." He denied looking at another six-pack (Peo.'s exh. No. 115). With respect to the six-pack in People's exhibit No. 134, Agreda denied that he pointed at someone before expressing fear for his safety. He testified that he did fear for his safety. Agreda identified a photograph of a black pickup from a photographic lineup. He chose a truck and said it looked similar. He pointed out features of the truck that he recalled.

Sergeant Jorge Valdez acted as a Spanish interpreter during Agreda's viewing of six-packs on October 6, 2008. He noticed that Agreda became fixed on the right-hand corner of the six-pack numbered People's exhibit No. 135. Sergeant Valdez asked Agreda what he was looking at in People's exhibit No. 135, and Agreda replied, "No. 3." Agreda said No. 3 looked like one of the four (or was one of the four) that entered the bar on the night of the shooting. Agreda circled the photograph. He wrote a statement in Spanish on the six-pack and signed it.

Gilbert Carrillo, a retired Sheriff's homicide detective, served as interpreter for Agreda on March 26, 2009. He showed Agreda a photo lineup (Peo.'s exh. No. 134) and Agreda placed his finger on No. 3. Agreda then asked, "what happens if I identify him?" Agreda was concerned about his safety if he identified anyone. After Deputy Carrillo explained Agreda's options, Agreda did not make identification from that lineup. Agreda identified photo No. 2 in exhibit 133 as one of the four males who got into a Ford F-150 and left. This person was neither of the defendants. He was identified as another self-admitted CVTF member, Jesus Gonzalez, and his DNA was found inside the Nueva Italia Bar.

Lydia Alvarez, Contreras's girlfriend and the mother of his child, owned a black Ford F-150 truck. She identified the truck in People's exhibit Nos. 118 and 119 as hers. She let Contreras drive it sometimes. She and Contreras would go to Compton to visit Contreras's mother. Alvarez denied that Contreras was a member of a gang. She knew he had tattoos and identified photographs of them in court. Contreras would not talk about them and told her they were from his past. Contreras was about 5' 9" tall and weighed about 185 pounds. Alvarez said that she downloaded her telephone bills in December 2008 or January 2009, and they refreshed her memory that she and Contreras were playing scrabble on her telephone on the night of the shooting from 10:50 p.m. to 11:17 p.m. Deputy Robert Gray testified that Contreras was not informed that he was a suspect in the murder until March 9, 2009.

Deputy Max Fernandez arrested Contreras on October 3, 2008, when Contreras was driving his girlfriend's truck. Contreras admitted being a member of the Compton Varrio Tortilla Flats (CVTF) gang. He had CVTF tattoos and a tattoo of his gang moniker, "Pirate."

Detective Albert Carrillo was a gang investigator assigned to the Sheriff's Department task force targeting the CVTF gang. He had personally investigated CVTF gang crimes and spoken with hundreds of CVTF members. He had prepared and executed hundreds of search warrants on CVTF gang members. He testified about the criminal activities engaged in by gang members and the importance of respect and fear in

the gang culture. He said that “snitching,” is a very disrespectful act to the gang. He stated that CVTF is a territorial gang with approximately 500 members. The Nueva Italia Bar was within the CVTF gang boundaries and a hangout for the gang’s members.

The primary activities of the CVTF gang are murder, assaults, robbery, carjacking, extortion, drug sales and hate crimes against Blacks. Carrillo believed Contreras was a CVTF gang member because he had self-admitted it to arresting officers. He was arrested in a CVTF area and had gang tattoos. Carrillo knew Zermeno, who also admitted to CVTF membership. Zermeno has CVTF tattoos all over his body, including the words “Tortilla Flats” on his stomach.

Detective Carrillo identified certified dockets in two cases where admitted CVTF gang members were convicted of certain felonies. Detective Carrillo investigated both crimes personally. In the case of Kenneth Taylor, Taylor and Gonzales were confronted by Richard Dominguez and Ubaldo. Taylor was killed. Based upon Detective Carrillo’s numerous contacts and Ubaldo’s admission of gang membership, it was the detective’s opinion that Ubaldo was a CVTF gang member. Dominguez was also a CVTF member.

Relying on his experience and training, and after being posed a hypothetical paralleling the facts of this case, it was Detective Carrillo’s opinion that Gonzales’s murder was committed for the benefit of the CVTF gang. There was no evidence that Gonzales was a member of any gang.

Defense Evidence

Zermeno called Martin Flores to give gang expert testimony. Flores testified that some people leave the gang life. He believed that the Nueva Italia Bar was not exclusively a CVTF hangout. Flores was aware that the owner of the Nueva Italia Bar was paying “taxes” to the CVTF gang.

DISCUSSION

I. Sufficiency of the Evidence

A. Zermeno’s Argument

Zermeno argues that there was no witness at trial who could demonstrate that Zermeno committed murder. There was no evidence that he did anything other than be

present on the night of the murder. We presume Contreras joins in this argument with respect to his role in the murder.

B. Relevant Authority

In reviewing a challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment, presuming in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Proctor* (1992) 4 Cal.4th 499, 528.) Although a reviewing court “may not ‘go beyond inference and into the realm of speculation in order to find support for a judgment’” (*People v. Memro* (1985) 38 Cal.3d 658, 695, disapproved on another point in *People v. Gaines* (2009) 46 Cal.4th 172, 181), “[i]f the circumstances reasonably justify the jury’s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

C. Proceedings Below

Before trial, Zermeno’s counsel filed a section 995 motion, arguing there was insufficient evidence of Zermeno’s involvement. The trial court denied the motion. After trial, Zermeno’s counsel filed a new trial motion and argued that there was “absolutely zero evidence” Zermeno did the shooting. Contreras also filed a new trial motion based in part on insufficiency of the evidence.

D. Evidence Sufficient

We believe the evidence was sufficient to sustain Zermeno’s conviction as the shooter and Contreras’s conviction as an aider and abettor. Although the convictions were clearly based on circumstantial evidence, “[c]ircumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.”” (*People v. Stanley* (1995) 10 Cal.4th 764, 792–793.)

First, security guard Hernandez identified Zermeno as the man he saw getting out of the black F-150 truck with a beer bottle. He saw Zermeno put it down on the ground. Hernandez testified that the same man who had the Corona bottle, Zermeno, left the bar with the other occupants of the black truck, but he did not get in the truck with them. The truck drove out of the lot and parked beside the street while Zermeno remained in the lot drinking a beer that he took from the pickup.

Hernandez guided the truck out of the parking lot and turned to see Zermeno walking away from the bar with the victim. They were the only two people in the parking lot. Hernandez then heard three or four loud bangs and saw the victim run toward Hernandez. Hernandez saw Zermeno run to the truck and get in the open passenger door

Based on this evidence, it was reasonable for the jury to conclude that Zermeno was the person who shot the victim. There were no other people in the parking lot, and Zermeno was actually walking beside the victim when the shots rang out. The fact that Zermeno then ran to the truck that was waiting for him with an open passenger door was further circumstantial evidence that Zermeno was the perpetrator.

The evidence showed that Hernandez identified Zermeno's photograph in a six-pack and said he was the man whom he saw with the Corona beer bottle and with the victim. He also identified Zermeno in court. Analysis of DNA found on the Corona bottle matched Zermeno's DNA.

It is true that there were some discrepancies between the evidence from Agreda and that of Hernandez. Agreda said the victim left the bar with two men and that they all went toward the black truck. Agreda did say, however, that just before the shooting, the victim was with just one person and that person was the one who shot him. It is obvious even from the cold record that Agreda was a reluctant witness and attempted to avoid saying anything definitive. There was evidence that his statements to police prior to trial differed from his trial testimony. He described the shooter to police and even told them that he had searched the shooter and the driver. He identified Contreras in a six-pack and wrote that he was one of the four who entered the bar. At trial he claimed he did not

know what his written comments on the six-pack meant. The jury was instructed on facts for evaluating a witness's testimony, including how well the witness was able to remember and describe the events, the witness's behavior while testifying, the witness's attitude regarding testifying, and whether the witness made a prior consistent or inconsistent statement. (CALCRIM No. 226.) The jury presumably evaluated Agreda's testimony in accordance with these criteria.

With respect to Contreras, there was sufficient and substantial evidence that he was the driver of the truck and thus an aider and abettor in the shooting. Hernandez identified Contreras as the driver in court and in a six-pack. Agreda also identified Contreras. There was evidence that the exit from the parking lot was difficult, and Hernandez actually helped the driver exit by signaling when the traffic was clear. The evidence showed that Contreras not only drove the shooter to the bar, he prepared the shooter's getaway by driving the truck out of the lot and parking it alongside the road. Instead of driving away, Contreras waited with the passenger door open for Zermeno. These circumstances clearly show that Contreras possessed the required intent for his conviction as an aider and abettor. (CALCRIM No. 401.)

The jury was properly instructed with CALCRIM No. 223 that both direct and circumstantial evidence are acceptable to prove or disprove the elements of a charge. The jury was told that circumstantial evidence does not directly prove the fact, but is evidence of another fact or group of facts from which it could reasonably conclude the truth of the fact in question. (*Ibid.*) The jury was instructed with CALCRIM No. 224 that it had to accept only reasonable conclusions and choose the one pointing to innocence over one pointing to guilt. And, "[a]lthough 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.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The credibility of witnesses and the weight to be accorded to the evidence are matters within the purview of the trier of fact. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) The jury's

verdicts are supported by substantial evidence, and defendants' arguments are without merit.

II. Gang Expert Testimony

A. Zermeno's Argument

Zermeno contends that the gang expert's testimony regarding the predicate offenses used to support the gang allegation violated the confrontation clause of the United States Constitution and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). According to Zermeno, the witness "is required to base his opinions from his own knowledge of the facts of the predicate crimes and not based [*sic*] them on records. He must base his opinions on testimonial hearsay or statements made during police interrogation."

In what appears to be a claim of prejudice, Zermeno also argues that there is no substantial evidence that he committed the crimes with which he was charged for the benefit of the gang absent the testimony of the gang expert. The testimony led the jury to believe he would be the kind of person likely to have committed the crime. Therefore, the testimony should have been stricken. Presumably, Contreras joins in this argument.

B. Relevant Authority

To prove a gang enhancement allegation under section 186.22, the prosecution must prove that the crime for which the defendant was convicted had been "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) "In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subds. (e) and (f).)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

The testimony of an expert witness and documentary evidence may provide a basis from which a jury could reasonably find that the requirements of section 186.22, subdivision (f) were met. (*Gardeley*, at p. 625.)

C. Proceedings Below

Detective Albert Carrillo testified as a gang expert. During direct examination, the prosecutor introduced three certified court dockets. The first (Peo.’s exh. No. 173) showed that Omar Morales was convicted of violating section 246, shooting at an inhabited dwelling, on September 6, 2008. Detective Carrillo testified that he investigated Morales’s case and that Morales admitted to him that he was a CVTF gang member. Detective Carrillo next testified that the court dockets in People’s exhibit Nos. 174 and 17 showed that Richard Dominguez and Ubaldo Lozano were charged with murder. People’s exhibit No. 174 showed that Dominguez was convicted of murder. Exhibit No. 175 showed that Ubaldo was also convicted of murder. Detective Carrillo was familiar with that case because he had assisted the investigators. Detective Carrillo testified that he knew Ubaldo and Dominguez were members of CVTF because they had admitted their gang membership to him.

D. No Confrontation Clause Violation

Zermeno’s arguments are groundless. The convictions of the CVTF gang members were properly proved through the certified court documents and were relevant to prove a “pattern of criminal gang activity.” (Evid. Code, § 452.5; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460 (*Duran*) [“Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred.”].)³ “Evidence code section 452.5, subdivision (b) does not limit the statute’s

³ Evidence Code section 452.5, subdivision (b), provides, “An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.” “Evidence Code section 452.5 was enacted as part of the

purview to computer-generated court records, but broadly includes ‘an official record of conviction’ certified as specified in Evidence Code section 1530.” (*Duran*, at p. 1461.) Moreover, the record shows that Detective Carrillo had personal knowledge of all of the convictions and of the perpetrators’ gang affiliations. (See *Duran*, at p. 1464 [a certified copy of a minute order, coupled with the expert’s testimony based on his field experience, discussions with the defendant and the information in the minute order was sufficient to prove the predicate offense].)

In addition, we agree with respondent that the issue was forfeited by defense counsel’s failure to object to Detective Carrillo’s evidence on hearsay grounds. (*People v. Williams* (2008) 43 Cal.4th 584, 626.) Finally, the court records did not constitute testimonial evidence as described in *Crawford*. (*Crawford*, *supra*, 541 U.S. 36, at pp. 51-52, 68.) They were admissible as official records and hence not a confrontation clause violation. (See *id.* at p. 56.)

III. Admission of Telephone Call Evidence

A. Contreras’s Argument

Contreras argues that the trial court erred in admitting evidence of a jail telephone call under the hearsay exception of statements of coconspirators. He claims the prosecutor failed to establish the existence of a conspiracy or that Contreras was a participant in any such conspiracy at the time the call was recorded. Reversal is required because the evidence was irrelevant, and its probative value was outweighed by its inherent prejudicial effect.

B. Proceedings Below

Detective Martin Rodriguez testified that Ramiro was arrested on September 1, 2008, for threatening Gonzales on August 10, 2008. Detective Rodriguez told Ramiro

Criminal Convictions Record Act (CCRA). [Citations.] The Legislature’s stated purpose in enacting the CCRA was to ‘simplify recordkeeping and admission in evidence of records of criminal convictions by establishing a central computer data base of that data, and by authorizing admission in evidence of this computer data.’ [Citations.]” (*Duran*, *supra*, 97 Cal.App.4th at p. 1460.)

about Gonzales's accusations and then arranged for Ramiro's telephone calls to be monitored while in custody. The detective captured and recorded a call made by Ramiro to another man on the day of Ramiro's arrest. Later, after consulting with Detective Carrillo, Detective Rodriguez identified the male speaking with Ramiro as Jesus Cortez. A field information card showed that Cortez was contacted by police while with Zermeno and others on February 15, 1999. Cortez and Zermeno admitted being active "T-Flat" members and signed an FI card to that effect.

Before the prosecutor could play the recording of the telephone conversation, defense counsel asked for a sidebar. The prosecutor told the court that the evidence was admissible under the coconspirators exception to the hearsay rule, Evidence Code section 1223. The defense argued that no conspiracy was shown and the evidence was unduly prejudicial. The prosecutor argued that the gang evidence, which had not yet been heard, would substantiate the conspiracy theory. The trial court stated that it understood the People's theory and it found that the probative value of the evidence outweighed its prejudicial effect. The recording was played for the jury.

In the conversation, Ramiro said to Cortez, "Some fool got intimidated and they're trying to put me in that place, fool." When Cortez asked who it was, Ramiro said, "I don't know—just some fool . . ." Cortez said, "you got to fight it though." Cortez asked who it could be, "somebody in the bar?" Ramiro said, "I guess. That's what they said, they said that I'd be at the bar, man, I've been at no fucking bar." Cortez said, "Oh man, we've got to get this mother', fool. Who was it the homie?" Ramiro warned him, "Hey . . . don't say nothing, fool. Don't say nothing, fool." Later, Cortez said, "It's not even gonna go in front of the judge. They ain't got to go to court." And, "No. They ain't going nowhere with this, fool."

C. Relevant Authority

"'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." (Evid. Code, § 1200, subd. (a).) Evidence Code section 1223 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay

rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.”

“A conspiracy is an agreement between two or more persons, with specific intent, to achieve an unlawful objective, coupled with an overt act by one of the conspirators to further the conspiracy. [Citation.] The conspiracy itself need not be charged in order for Evidence Code section 1223’s hearsay exception to apply to statements by coconspirators. [Citations.]” (*People v. Gann* (2011) 193 Cal.App.4th 994, 1005.) “In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a coconspirator’s statement under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made.” (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61, 63.) No particular order of proof is required. The trial court has the discretion to admit the hearsay statement before the foundation has been established, subject to the prosecutor’s offering evidence of the conspiracy. (Evid. Code, § 1223, subd. (c).)

“[T]he conspiracy may be shown by circumstantial evidence and the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute. [Citations.]” (*People v. Gann, supra*, 193 Cal.App.4th 994, 1005-1006; *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215.) We review a trial court’s admission of evidence under Evidence Code section 1223 for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

D. Sufficient Evidence of Conspiracy

The prosecution told the trial court its theory was that the moment Gonzales testified against Tortilla Flats, the conspiracy was born within members of that gang, the goal being to kill Gonzales for his act of “betrayal” against Tortilla Flats. When proffering the audio of Ramiro’s phone call, the prosecutor urged that the gang evidence that had yet to be presented would show that all of the “actors” were part of the same gang, and there was evidence of regular gang meetings. The prosecutor said it was up to the jury to decide whether there was sufficient evidence of a conspiracy. The prosecutor pointed out the dates of Gonzales’s testimony at the preliminary hearing (May 14, 2008), Ramiro’s phone call on September 1, 2008, and Gonzales’s return to the Nueva Italia Bar, where he was shot on September 6, 2008. The trial court exercised its discretion to admit the hearsay statements before the foundation had been established, subject to the prosecutor’s offering evidence of the conspiracy. (Evid. Code, § 1223, subd. (c).)

The gang testimony was provided by Detective Carrillo. The prosecutor asked him if cooperating with police about having witnessed a murder committed by a gang member would be considered snitching. Detective Carrillo said it would, and so would going to court and testifying in a preliminary hearing—identifying a gang member as the person the witness saw murdering someone. Detective Carrillo said that “snitches get stitches,” which meant the witness would be sent to the hospital or the morgue. He testified that the Nueva Italia was located in the territory of the CVTF. The CVTF is a subset of the Tortilla Flats gang, which has approximately 500 members. The prosecutor elicited that Ubaldo and Dominguez were Tortilla Flats gang members convicted of killing Kenneth Taylor, who was in the company of Gonzales when killed. Ramiro is also a Tortilla Flats member.

Detective Carrillo identified Cortez’s voice on the jail telephone call recording. He performed a parole search of Cortez’s residence and noted that Esther Lozano, the mother of Ubaldo and Ramiro, was present in the Cortez home. Carrillo also testified that the CVTF gang held regular meetings. In these meetings the gang talked about, *inter alia*, who is snitching, putting in work, and going out on missions. They corroborate who

is snitching by getting paperwork from the court or attending court proceedings. CVTF members, among them Ramiro, attended the preliminary hearing where Gonzales testified.

The prosecutor presented Carrillo with a hypothetical in which a person named Raul Gonzales witnessed two self-admitted Tortilla Flats gang members kill Kenny Taylor. The hypothetical assumed that on May 14, 2008, Gonzales testified in a preliminary hearing against these two gang members and identified them as the killers. In addition, while at the Nueva Italia Bar, a Tortilla Flats gang member threatened Gonzales. Carrillo was to also assume that on September 6, 2008, a black Ford truck with four male Hispanic occupants got out of the truck at the bar, three of them being self-admitted Tortilla flat gang members. After that, Carrillo was asked to assume the facts surrounding Gonzales's shooting and the truck's departure. Carrillo was of the opinion that the shooting of Gonzales benefitted the gang most obviously because it prevented Gonzales from testifying in Ubaldo's jury trial.

The trial court instructed the jury with CALCRIM No. 418 that it could not consider the statements made by Ramiro and Cortez during their phone call unless the People proved by a preponderance that there was "some evidence other than the statement itself" that established a conspiracy to commit a crime when the statement was made, that Ramiro and Cortez were participating in the conspiracy when they made the statement, they made it to further the goal of the conspiracy, and that the statement was made before or during the time Contreras and Zermeno were participating in the conspiracy.⁴ (CALCRIM No. 418.)

⁴ CALCRIM No. 418 was read as follows: "In deciding whether the People have proved the defendants committed the crime charged, you may not consider any statement made out of court by Ramiro Lozano and Jesus Cortez unless the People have proved by a preponderance of the evidence that: One, some evidence other than the statement itself establishes that a conspiracy to commit a crime existed from whether or not the statement was made; Two, Ramiro Lozano and Jesus Cortez were members of and participated in the conspiracy when they made the statement; Three, Ramiro Lozano and Jesus Cortez made the statement in order to further the goal of the conspiracy; and Four, the statement

We conclude that the gang evidence provided by Detective Carrillo provided the jury with the means to decide if there was some evidence in support of a conspiracy in existence at the time Ramiro and Cortez had their telephone conversation. As noted, circumstantial evidence is a proper method to establish a conspiracy. (*People v. Herrera, supra*, 83 Cal.App.4th at p. 64.) In particular, the conspiracy can “be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.) It is not necessary to show the party was a member of the conspiracy at the time the declaration was made. A party subsequently joining the conspiracy adopts previous declarations in support thereof. (Evid. Code, § 1223, subd. (b).) Even if it cannot be shown that the statements were made *during* defendants’ participation in the conspiracy, it is a logical conclusion that the statements were made *prior to* defendants’ participation in that the statements preceded defendants’ execution of their role in the conspiracy—the elimination of Gonzales. (Evid. Code, § 1223, subd. (b).) The criminal act at issue clearly did not occur before the statements were made or before defendants’ participation. Thus, Detective Carrillo’s testimony provided a sufficient foundation for admission of the evidence under Evidence Code section 1223. “The court should exclude the proffered [hearsay] evidence only if the ‘showing of preliminary facts is too weak to support a favorable determination by the jury.’” (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) Whether the foundational evidence is sufficiently substantial is a matter within the trial court’s discretion. (*Ibid.*) We conclude there was no abuse of discretion, and the trial court correctly ruled that the probative value of the evidence outweighed its prejudicial effect.

was made before or during the time that defendants were participating in the conspiracy. A statement means an oral or written statement or nonverbal conduct intended to be a substitute for an oral or written expression. Proof by a preponderance of the evidence is a different standard 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.”

In any event, we agree with the Attorney General that any error in the admission of this challenged evidence was harmless. The jury was properly instructed, and the prosecutor emphasized, that motive did not have to be proved. (CALCRIM No. 370.) The prosecutor told the jury during final argument that it did not have to find whether or not the defendants were guilty of a conspiracy even though it was instructed on the conspiracy theory. The prosecutor stated that Zermeno was charged because it was alleged that he fired the shot, and Contreras was charged because he was alleged to have aided and abetted Zermeno. As we have observed, there was sufficient evidence to support their convictions without the evidence of conspiracy. Contreras's arguments are without merit.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.