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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JIMMY NAVARRO, Defendant and Appellant.	C063940 (Super. Ct. No. 07F08201)

After defendant Jimmy Navarro exchanged words with Adrian Hutchins, he fatally shot Hutchins. An information charged defendant with first degree murder and discharge of a firearm from a motor vehicle. (Pen. Code, §§ 187, subd. (a), 12034, subd. (c).)[1] A jury found defendant guilty on both counts, and the court sentenced him to life in prison without the possibility of parole plus 25 years to life. Defendant appeals,

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[1] All further statutory references are to the Penal Code unless otherwise designated.

contending the court erred in admitting gang evidence and impeachment evidence, committed instructional error, and erred in denying defendant's motion for a hearing on confidential juror information. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of May 8, 2007, defendant rode in a car driven by his friend, Curtiss Young. The duo passed a park, where defendant and the victim, Adrian Hutchins, exchanged words. Defendant shot and killed Hutchins.

Defendant was charged with first degree murder and discharge of a firearm from a motor vehicle. The information alleged the special circumstance of discharging a firearm from a vehicle with the intent to inflict death, and that defendant intentionally and personally discharged a firearm, proximately causing great bodily injury or death. (§§ 190.2, subd. (a)(21), 12022.53, subd. (d).) Defendant entered a plea of not guilty.

A jury trial followed. The following evidence was introduced at trial.

The Scene at the Park

Officers arrived at the park and found an African-American man lying on the ground. Joshua Spivey approached and began going through the man's pants pocket. When one of the officers grabbed his hand, Spivey assumed a fighting stance.

Officers found a cell phone on the grass and 11 bullet cases in the street. Officers did not find a gun.

Dominick Novoa's Testimony

Dominick Novoa belonged to the Flat Dog Crips gang along with Spivey and Hutchins. The park was part of their neighborhood. Members of the Flat Dog Crips have obligations to other members. An unknown car in the neighborhood would pique their curiosity.

According to Novoa, Flat Dog Crips defend themselves by fighting, but they do not start anything -- they finish it. If someone starts something, "We are not going to be no punks." Novoa would not want to be caught "slipping," which means not having a gun.

The night of the incident, Novoa had a barbeque at his house with Hutchins, Spivey, and Conrad Johnson. Later that evening they went to the neighborhood park. Novoa and Spivey returned to the house; Hutchins remained in the park. Hutchins returned to Novoa's house later, drunk, and began to walk home. Novoa told Spivey to go with him.

When Novoa went into the kitchen, he heard gunshots. As he ran outside, Novoa saw a black car zoom past with its headlights off.

Joshua Spivey's Testimony

Spivey also lived near the park and belonged to the Flat Dog Crips. He attended Novoa's barbeque and went to the park with the others. Hutchins was drinking and smoking marijuana. Hutchins was "pretty drunk."

A black Mercedes drove down the street, slowing for the speed bumps. Hutchins threw his hands up toward the car, but Spivey did not remember if Hutchins said anything.

As the car made a U-turn, Hutchins asked Spivey for a gun. Spivey told him he did not have one. As the car approached, an occupant said, "What's up, homey?" Hutchins stepped toward the car, "did the hand thing," and said, "What's up, homey." As Hutchins leaned forward, the Hispanic passenger began shooting. Spivey heard eight shots.

Spivey jumped into the grass and saw Hutchins wobble backwards and fall to the sidewalk. After the shooting ended, Spivey ran over to Hutchins, who was struggling to breathe.

Following the shooting, Spivey searched for Hutchins's marijuana and cell phone so he could take them before the police arrived. Spivey was trying to prevent Hutchins from getting into trouble. Spivey did not hide a gun or try to get someone else to hide a gun.

Curtiss Young's Testimony

Curtiss Young stayed with defendant and helped him around the house. Anna Hernandez was defendant's girlfriend.

The day before the shooting, Young accompanied defendant to a car dealership, where he picked up a black Mercedes-Benz. Young drove the new car and helped defendant, who was in a wheelchair, get in and out of the vehicle. The duo drove around, making several stops. Although Young did not see a gun in defendant's possession, he had seen defendant with a gun before; defendant "always has a gun."

Sometime after dark, defendant told Young to drive by the park. As they drove by, Young saw a group of people "kicking it" and "party[ing]" on the other side of the park. As Young drove toward the group, he saw a "bunch of youngsters," 18 to 21 years old, in the street, so he slowed down.

An African-American man ran up to the side of the car and started yelling. The man began arguing with defendant, and the argument was loud and angry. Young kept driving, but defendant angrily told him to turn around.

Young testified defendant pulled out a gun and "cocked it back." As Young stopped the car, the man defendant had been arguing with approached the vehicle with his hand in "his waist line by his belt." At that moment, Young heard between 10 and 12 gunshots.

Young could not recall telling detectives that the pair exchanged expletives prior to the shooting. Young did not see a gun in the other man's hand and did not see a gun pointed at the car. According to Young, "[I]f he didn't have a gun, he was acting like he had one," and "If he didn't have something, he was bluffing." The man pulled a dark object from his waistband.

Young ducked and "hit the gas." As he drove away, he ran up over the curb. Defendant asked Young why he was messing up his car. They drove back to defendant's house but did not discuss the incident. A couple of days later, Young drove defendant to a paint shop, where defendant had the Mercedes painted white.

A few months later, Young wrote the district attorney a letter stating he had heard that members of defendant's family had put a $20,000 to $50,000 hit on Young. Young feared for his safety.

Both defendant and Young had similar "m-o-b-b" tattoos; Young's meant "me and him" and indicated his respect for defendant, who had helped him when he was homeless. Young testified he did not fear defendant, "but I do value my safety." Defendant had not made any threats against him.

Three months after the shooting, a detective interviewed Young. Young denied any knowledge of the shooting until the detective told him he had been identified as the driver.

Young told the detective a person walked up and leaned into the car with his right hand in his waistband or jacket pocket area. According to Young, "He ran up on me. He ran up on [defendant]." The shooting had not been planned. In a later interview, Young told a criminal investigator that he had seen the man reach into his waistband but had not seen a gun.

Subsequent Car Chase

The shooting occurred in May 2007. In August 2007 an officer conducting surveillance on defendant saw a man, a woman, and defendant with his wheelchair get into a white Mercedes at defendant's house. Defendant sat in the back. Later that afternoon, officers saw the Mercedes and attempted a stop. The car sped away and officers saw the rear passenger throw something out the window. Subsequently, an officer found a handgun in a driveway in the area where the object was thrown.

A search of defendant's house revealed a loaded magazine for the same type of handgun that had been thrown from the Mercedes. Forensic analysis established that the bullets which killed Hutchins and the shell casings found at the scene of the murder came from the handgun thrown from the Mercedes.

Gang Expert Testimony

Detective Donald Schumacher testified as an expert specializing in Hispanic street gangs. He stated that the primary activities of criminal street gangs are crimes like murder, drug dealing, and shootings.

The Norteño gang color is red; the Sureño gang favors blue. Sacramento has more Norteño than Sureño gang members. The Varrio Diamond is a subset of the larger Norteño gang.

Schumacher considers numerous criteria in ascertaining whether a person belongs to a gang: possession of gang graffiti, gang clothing, gang tattoos, participation in gang crimes, and any correspondence that identifies a person as a gang member.

A person has to meet a minimum of two criteria to be validated. Such validation is not automatic, but is subjective. Schumacher noted defendant had been involved in three qualifying gang-related crimes. Defendant sports a red northern star tattoo and a Sacramento Kings tattoo, which could be code for SK, or Sureño Killer.

In addition, defendant had repeated associations with known gang members, another validating criterion. Also, when jailed, defendant requested housing on the "northerner side." Finally,

defendant's possession of multiple weapons contributed to Schumacher's opinion that defendant was a validated gang member. Given all of these factors, Schumacher determined that defendant was a validated Norteño gang member.

Schumacher also testified about the Flat Dog Crips street gang. The Flat Dog Crips claim the area around the park. Both the Flat Dog Crips and the Norteños hang out in the same neighborhoods and generally coexist peacefully.

Gang members value the concept of respect to the point that killing can result from perceived disrespect. One way of gaining respect is through violence. In the gang milieu, if a gang member suffers disrespect, such disrespect must be answered or the reputation of the gang will suffer. Among gang members, verbal arguments can escalate into violence.

According to Schumacher, the statement "[W]hat's up homey" can be a gang expression for "is there a problem, and if so, what are we going to do about it?" "[W]here are you from" is almost like a challenge.

Often after a gang-related incident, retaliation follows. Drive-by shootings are a typical gang activity. Gangs are motivated by two factors: self-preservation and not being the weaker party in a particular situation.

The defense posed a hypothetical: someone was in a car stopped near a park. A person outside the car acted as if he had a gun in his waistband. That person yelled the name of a gang, asked "where [are you] from," and approached the car. Based on his experience, Schumacher, assuming the person was a

gang member, would deem it likely the person was armed. Schumacher then agreed with the prosecutor that a gang member would not wait to be the victim, but would take control of the situation.

Defense Case

Defendant's Testimony

Defendant testified in his own behalf. At the outset, defendant admitted shooting Hutchins.

In 1998 defendant became paralyzed, losing the use of his legs. At the time of the Hutchins shooting, defendant lived at a residence where he grew marijuana. To protect himself and his crop, defendant owned a number of guns.

Although defendant sold his marijuana to gang members, he denied he belonged to a gang. He denied belonging to the Varrio Diamond gang. He knew gang members but did not "hang out with them." Defendant admitted some gang graffiti was found in his house but denied it was his. When he was jailed, defendant requested housing with the northerners because he was from Northern California and believed if he was put in the southern housing unit he might be viewed as a northern gang member.

Defendant and Young drove around in his Mercedes the day of the shooting, delivering marijuana to some of defendant's customers. Around midnight, defendant and Young went out again. Defendant tucked a gun under and to the right of his seat to protect himself because "[y]ou never know what could happen in the streets." Defendant's paralysis makes him an easy target.

Defendant felt the car jerk to the left and saw two people by the right front of the vehicle. The duo, whom defendant's car had almost hit, did not say anything. Defendant did not know the two people, so he told Young to turn around.

Young turned the car around, and defendant noticed two individuals, who might or might not have been the same two defendant's car almost hit, huddled with their backs turned toward the car. Young pulled up and stopped; defendant rolled his windown down and said, "What's up?" The pair responded by throwing gang signs and saying "Flat Dog Crips."

Defendant said the person on his left put his right hand into his waistband. The two men approached the car, and the man with his hand in his waistband pulled out a black semiautomatic handgun. Frightened, defendant pulled out his gun, cocked it, and began shooting. Defendant feared for his life and told Young to "get out of here."

Defendant told Young, "the dude was about to kill us man." According to defendant, he was angry because Young could just have driven away. Defendant's paralysis made him vulnerable.

After the shooting, defendant painted the Mercedes because he was scared. Defendant felt terrible about the shooting but believed his life was in danger. He admitted fleeing the police and throwing the gun out the window. He admitted lying to police about the gun and "all those sorts of things." Defendant denied threatening Young.

During cross-examination, defendant admitted carrying a gun "all the time" for protection. Defendant testified he became

paralyzed when he was suddenly shot while fishing. The day he was shot, defendant did not have a gun and did not see who shot him.

Defendant admitted the gun he threw out of the window was the murder weapon and that the white Mercedes was formerly the black Mercedes. He also admitted lying to detectives.

At the time of the shooting, defendant did not hear any gunshots other than his own. Defendant did not know how many times he pulled the trigger that night.

Rebuttal

Francisco Cervantes testified he was with defendant the day he became paralyzed. According to Cervantes, defendant had been shooting along the river. Defendant tossed the gun "into like the side of the car." The gun discharged, striking defendant and paralyzing him.

Verdict and Sentencing

The jury found defendant guilty on both counts and found the special allegations true. The court sentenced defendant to life in prison without the possibility of parole and to an additional term of 25 years to life for violation of section 12022.53, subdivision (d) on count one. The court sentenced defendant to the midterm of five years on count two, stayed pursuant to section 654. In addition, the court ordered defendant to pay $10,000 in restitution and a $10,000 parole revocation fine, suspended unless parole is revoked. (§§ 1202.4, 1202.45.) Defendant filed a timely notice of appeal.

DISCUSSION

Admission of Gang Evidence

Defendant argues the trial court erred in admitting gang evidence, since there were no gang counts or gang allegations. In addition, defendant contends, although the court admitted the evidence as relevant on motive and intent, the evidence at best only supported defendant's "propensity" to commit violence.

Background

Defendant filed a motion in limine to exclude evidence of his alleged gang membership, arguing such evidence was irrelevant or extremely prejudicial. The prosecution opposed the motion, stating it intended to introduce evidence through a gang expert regarding defendant's gang membership, the victim's gang membership, and the gang culture in general. The trial court held a hearing under Evidence Code section 402.

Detective Schumacher, the prosecution's gang expert, testified at the hearing. Schumacher had been working for two and a half years as a gang detective specializing in Hispanic street gangs. He testified the primary Hispanic gang in Northern California is the Norteño street gang. The Sureños are their primary rivals.

Specific criteria are utilized in validating gang members. According to Schumacher, an individual must meet at least two of these criteria to be validated as a gang member.

Schumacher stated that in 1995 defendant had been involved in a residential burglary. The following year defendant had been involved in a robbery. Both offenses fall within the

category of gang crimes. Defendant was also arrested for possessing a firearm and possessing marijuana for sale, which Schumacher would consider valid criteria for validating a gang member.

Schumacher considered the crime at issue in this case, a drive-by shooting, a hallmark gang crime, as is murder. Respect is extremely important in gang culture. If a gang member is disrespected in front of other gang members, violence often results. Defendant was known to associate with known members of the Norteño gang: Larry Abeyta, Victor Lopez, and Steven Garcia.

Schumacher described defendant's red northern star tattoo as indicative of the Norteño street gang. Some of defendant's other tattoos were gang related, but not all.

Based on these factors, Schumacher had enough information to reach a conclusion as to whether defendant belonged to a gang. However, Schumacher did not give that opinion. He did not believe defendant had been officially validated and did not know if defendant was on a police list of known gang members.

One witness stated Hutchins had said "Flat Dog Crip" prior to the shooting. Schumacher testified the Flat Dog Crips are a gang that hangs around the park; there was no documented rivalry between the Norteños and Crips in that neighborhood. However, if someone shouts out a "set," it is usually a challenge, whether or not that person is in a rival gang. If a Flat Dog Crip challenged a Norteño and the Norteño replied "What's up, homey," that would further the dispute.

The trial court found the evidence of potential gang affiliation to be relevant on the issue of motive. Defendant argued there was no gang element in the case and that the evidence was prejudicial. The trial court stated that the evidence "clearly goes to the issue of motive," and that "the jury should clearly be allowed to hear about that potential theory and the jury should then be able to weigh the evidence . . . ."

The prosecution argued the evidence was relevant to intent and motivation based on defendant's status as a gang member. Defense counsel pointed out that defendant was not charged with being a gang member or acting for a gang. The trial court responded that defendant's crimes "are qualifying crimes under the STEP Act" (Street Terrorism Enforcement and Prevention Act; § 186.22) and "they are relevant for purposes of validation or association with gangs," which is relevant to motive and intent.

At the end of trial, the court instructed that the jury could only consider the gang evidence for the purpose of motive to commit the charged crimes or for the purpose of determining whether defendant actually believed he needed to defend himself. (CALCRIM No. 1403.)

Discussion

Gang evidence, inflammatory in nature, tends to allow the jury to improperly infer that the defendant is criminally disposed and guilty of the charged offense. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) In cases that do not include a gang enhancement, such potentially prejudicial

evidence should not be admitted if it possesses minimal probative value or is only tangentially relevant. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*); *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.)

Gang evidence is admissible if otherwise relevant, but it must be carefully scrutinized prior to its admission. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Perez* (1981) 114 Cal.App.3d 470, 477-478.) Such evidence may be relevant and admissible in connection with identity, motive, modus operandi, specific intent, or other issues pertinent to guilt. (*Hernandez*, *supra*, 33 Cal.4th at p. 1049.) We review the trial court's admission of such evidence for an abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230.)

According to defendant, the prosecution used the evidence concerning gang membership to basically tar and feather him as a violent gang member. In support, defendant quotes copiously from the prosecutor's closing argument, in which he described defendant as "a literal killing machine ready to rock and roll." The prosecutor argued defendant "has lived a lifestyle that he has premeditated and thought about this moment all of the time. . . . He always thinks of the scenario where he might have to lay someone down . . . ." The prosecutor also argued: "Gangster[']s mind-sets are, I'm going to roll around strapped and it's not about defending myself, it's about me getting over on you."

The trial court properly admitted the gang evidence as relevant to defendant's motive in killing Hutchins.

The prosecution sought to prove that defendant shot Hutchins because he showed defendant disrespect in their initial encounter. The evidence supported the prosecution's theory. Schumacher, the gang expert, testified about the importance gang members place on respect and the violence that flows from perceived disrespect. Young testified the two men exchanged words, then Young drove away. Defendant demanded Young drive back to the park. As Young drove, defendant prepared his weapon, and when Hutchins approached the car a second time, defendant shot him.

While the prosecutor's closing argument contained some inflammatory rhetoric, the trial court instructed the jury that it could only consider the gang evidence for the purpose of determining defendant's motive in committing the crime. We presume the jury understood and was able to correlate all of the court's instructions. Jurors are well equipped to analyze evidence and reach a rational conclusion. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131; *People v. Scott* (1988) 200 Cal.App.3d 1090, 1095.)

Impeachment Evidence

Defendant faults the trial court for allowing the prosecution to impeach him on a collateral matter: how defendant became paralyzed. According to defendant, the prosecution elicited this evidence on cross-examination and the court erred in admitting it.

Background

Defense counsel, in his opening statement, discussed defendant's paralysis: "In 1998 . . . [defendant] was fishing on the river and . . . was shot and he became a paraplegic. Now, I don't say that so you feel sorry for Mr. Navarro, but in a few moments you will understand why that's important to the case when a person getting shot, losing the use of their legs may feel a little differently about defending himself than other people would."

During direct examination, defendant testified that he became paralyzed in 1998. Defendant stated he needed to carry a gun for protection following his paralysis. Defense counsel did not question defendant on the origins of his paralysis.

During cross-examination, the prosecutor asked defendant how he became paralyzed. Defendant testified he had been shot by an unknown assailant while fishing. He denied being shot while playing with a gun.

Prior to rebuttal, the prosecutor stated he intended to call two witnesses to rebut defendant's version of events. Defense counsel objected, noting: "What is the relevance other than it's impeachment on a collateral matter that I didn't raise, . . . as to how exactly he got shot. . . . [I]t just doesn't seem relevant."

The prosecutor pointed out that defense counsel discussed the circumstances of defendant's paralysis in his opening statement, and defense counsel "asked about the fact he was

shot, and Mr. Navarro, from my position, lied about it under oath."

The court responded: "It seems relevant to the Court as well. It was brought up in numerous ways, so the Court will allow it. It's not as if it's so collateral it's not relevant. In this case credibility is the entirety of this case in the end, so it does relate entirely to credibility."

On rebuttal, Cervantes testified that defendant had been shooting along the river. When defendant tossed a gun to the right of the driver's seat, the gun went off, striking defendant. As a result, defendant became paralyzed.

During closing argument the prosecutor stated: "And so I asked Mr. Navarro about that. Mr. Navarro, How was it that you became paralyzed? And he tells you, he looks at you under oath and says, I'm fishing, I have got a pole. What kind of pole was it? I don't know, it was a pole. Okay. Fly pole or bank pool [*sic*]? We were just on the river bank there. He is making this up as he goes. Okay. He testified under oath and lied about how it was he came to be paralyzed. [¶] To say that Mr. Navarro is a sociopathic liar is almost an understatement."

The court instructed the jury pursuant to CALCRIM No. 505 on self-defense. In part, the instruction states: "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have

believed. If the defendant[']s beliefs were reasonable, the danger does not need to have actually existed."

Discussion

Defendant contends the court erred in allowing impeachment evidence on a collateral matter, the source of his paralysis, given that it was the prosecutor who elicited the information originally. The admission of this evidence, defendant argues, led him to be labeled a "sociopathic liar."

It is improper to elicit otherwise irrelevant testimony on cross-examination merely for the purposes of contradicting it. (*People v. Mayfield* (1997) 14 Cal.4th 668, 748.) The trial court may exclude impeachment evidence if it is collateral, cumulative, confusing, or misleading. (*People v. Price* (1991) 1 Cal.4th 324, 412.) A collateral matter is one that has no relevancy to prove or disprove any issue in the case. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.)

However, when a defendant takes the stand, cross-examination need not be confined to a review of the matters, dates, or times mentioned in direct examination. Cross-examination of a testifying defendant may be focused on eliciting any matter that may tend to overcome or qualify the effect of the defendant's testimony during direct examination. (*People v. Zerillo* (1950) 36 Cal.2d 222, 228.) We will not disturb the trial court's ruling on the admissibility of rebuttal evidence unless we find the court abused its discretion in admitting the evidence. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1232.)

Defendant complains the prosecution was allowed to set up a "strawman" in cross-examination, knock the straw man down, and then label defendant a sociopathic liar. Defendant conveniently overlooks that his theory of self-defense rested in part on his assertion that "a person getting shot, losing the use of their legs may feel a little differently about defending himself than other people would."

Defendant testified he needed to carry a gun for protection. He explained people knew he sold marijuana and that he was paralyzed; therefore, they "may see me as an easy target." Defendant reiterated: "Because I'm paralyzed . . . a lot of people probably think I'm an easy target."

Defendant's paralysis and its cause were relevant to his claim of self-defense, his need to use deadly force to protect himself. It was not a "collateral" matter unconnected or irrelevant to the issues in the case. The trial court did not err in allowing the prosecution to cross-examine defendant on the origins of his paralysis, or in allowing rebuttal as to defendant's testimony on cross-examination.

Instructional Error

CALCRIM No. 3472

Defendant argues the court erred in instructing on pretextual self-defense since there was no evidence to support the instruction. In the alternative, defendant argues counsel was ineffective in failing to object to CALCRIM No. 3472.

Background

The court instructed pursuant to CALCRIM No. 505 on self-defense. In addition, the court gave CALCRIM No. 3472, which states: "A person does not have a right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

The court also instructed on imperfect self-defense with CALCRIM No. 571, which provides, in part: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. [¶] If you conclude that the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense if: [¶] 1. The defendant actually believed that he or Curtiss Young was in imminent danger of being killed or suffering great bodily injury; [¶] And 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] But 3. At least one of those beliefs was unreasonable."

During the jury instruction discussions conference, the trial court stated its intent to give CALCRIM No. 3472. Defense counsel found the instruction "appropriate" and a "correct statement of the law."

Discussion

The trial court must instruct, even in the absence of a request, on the general principles of law relevant to the issues raised by the evidence. These general principles refer to those principles closely and openly connected with the facts before the court, and necessary to the jury's understanding of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.) However, the court is under no duty to instruct on points of law not relied upon by the parties. Before giving an instruction, the court must find legally sufficient evidence in the record to support the finding or inference that the instruction permits. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.)

Defendant argues the evidence did not support the giving of an instruction on "pretextual self-defense" and the court erred in giving the instruction. In the alternative, defendant contends defense counsel performed ineffectively in failing to object to the instruction.

According to defendant, a contrived or pretextual claim of self-defense arises when an individual intends to goad another person into acting so that the individual can injure or kill that person and claim to have acted in self-defense. Pretextual self-defense does not arise because the person later lied about what happened in order to make it appear as though events justified acting in self-defense.

Defendant contends only speculation and guesswork supported the giving of CALCRIM No. 3472. We disagree.

Young testified that as he approached the park, he slowed down for a "bunch of youngsters." One of them, Hutchins, ran up to the car and started yelling. Defendant and Hutchins began arguing angrily. After Young continued driving, defendant told him to turn around. Defendant pulled out a gun and "cocked it back" before they stopped.

As Young stopped the car, Hutchins approached the car with his hand in his waistline. Young heard gunshots and saw defendant shooting. He could not remember telling the police that the pair exchanged epithets before the shooting started. Young never saw Hutchins with a gun.

After hearing 10 to 12 shots, Young ducked and sped away. Young drove up onto the curb and defendant asked: "Why are you fucking my car up?"

Defendant concedes a reasonable jury could infer that the shooting was not self-defense, but murder. However, defendant, who insists that he fired in self-defense, argues a jury could not infer that he provoked a quarrel with Hutchins with the intent to create an excuse to use force. This argument overlooks the evidence that defendant initially engaged in a loud and angry argument with Hutchins before instructing Young to turn around. The sudden U-turn prompted Hutchins to ask Spivey if he had a gun as defendant approached with his own gun cocked and ready to fire. Though Spivey denies that either he or Hutchins was armed, as Hutchins leaned toward the car, defendant fired shots into him. Given this sequence of events, and in light of defendant's claim that he fired in self-defense,

the jury could reasonably infer that defendant provoked a quarrel with Hutchins with the intent to create an excuse to use force.

The court did not err in giving CALCRIM No. 3472. Since there was no error, defense counsel did not perform ineffectively in failing to object to the instruction.

CALCRIM No. 371

Defendant argues the court erred in instructing pursuant to CALCRIM No. 371 without giving a qualifying and ameliorative instruction. In addition, defendant again contends counsel performed ineffectively in failing to request the instruction.

Background

The prosecution brought a motion in limine seeking admission of Curtiss Young's letter to the district attorney in which Young stated, "From what I heard, Jimmy's family put a hit on my life. I have been told by someone who knows both of us that it's 20 to $50,000 on my head." Defense counsel objected to the admission of evidence that Young had been told defendant had put a contract out on him.

The trial court noted that if a threat was made it was "relevant with regard to consciousness of guilt," and "if . . . it's relevant on the issue of credibility, that is the jury's call and the jury gets to basically hear all of the evidence that might relate to Mr. Young's credibility." After considering the evidence under Evidence Code section 352, the court found the evidence more probative than prejudicial.

During testimony outside the jury's presence, Young stated he wrote the letter. He had been told by someone close to him that a price had been put on his head. The court again found the letter admissible.

The trial court instructed the jury based on CALCRIM No. 371: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." Defense counsel made no objection to the instructions as given.

Defendant argues the trial court erred in failing to give a further section of CALCRIM No. 371, which states: "If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of his/her guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself."

Discussion

Defendant concedes CALCRIM No. 371 was applicable based on the evidence, but contends the lack of evidence connecting defendant to the threats against Young "is precisely why the 'unauthorized threats' paragraph was required." The court erred, defendant argues, in not instructing the jury that it

could not infer consciousness of guilt based on third party attempts to intimidate a witness unless it found defendant authorized such conduct.

However, the trial court found that there was no specific link between defendant and the uncorroborated threat from defendant's family to put a "hit" on Young. The evidence supports the court's conclusion.

Young testified he heard that defendant's family had put a hit on him. However, Young did not implicate defendant in his family's activities. Moreover, defendant denied threatening Young. The court did not admit the letter as evidence of defendant's consciousness of guilt, but to explain Young's reluctance to testify. The evidence was thus probative on the question of Young's credibility. The court acknowledged that no evidence linked defendant to the threat against Young. Thus the court correctly declined to instruct with the unauthorized threat language of CALCRIM No. 371.

Defense counsel did not perform ineffectively in failing to request the additional portion of CALCRIM No. 371. The evidence did not support the instruction defendant argues should have been requested.

Confidential Juror Information

Finally, defendant contends the trial court erred in denying a defense motion for a hearing on confidential juror information. According to defendant, the court applied the incorrect standard in denying the motion.

Background

After jury deliberations began, the jury foreperson sent the court a note stating: "I would like to speak to you—the judge regarding an incident that happened between myself & a juror who has already stated her decision & does not want to keep an open mind regarding the trial."

The court met with the foreperson to discuss her note. The foreperson stated one of the jurors was not participating in deliberations, had stated her position, and would not participate in any further deliberations.

The trial court decided to address the entire jury and remind all members of their obligation to participate in deliberations. The court also urged the jury to review CALCRIM No. 3550, which outlines the jurors' duty to deliberate.

The jury returned to deliberations that morning and requested the rereading of testimony. The jury reached a verdict late that afternoon.

Defendant filed a petition for order disclosing juror addresses and telephone numbers "in order that counsel may determine whether there are grounds to prepare a motion for new trial based on jury misconduct." The petition stated that after the verdict, the prosecution and defense spoke with members of the jury, who described the difficult juror: "The jurors said nothing that would lead one to believe that the problem with that juror was resolved."

Defense counsel stated that he had attempted to identify and locate the juror but lacked enough specific information.

According to the petition: "If the problem in the jury room existed at the time of the verdict, Mr. Navarro would have been denied his right to a fair trial in that eleven, and not twelve, jurors decided the case. Mr. Navarro has no way to determine whether or not he received a fair trial other than to contact and interview jurors."

During the hearing on the motion, defense counsel argued: ". . . the fact that the jury was polled later and came to an agreement does not give any light on the issue of whether or not that juror deliberated. She may have decided that Mr. Navarro was guilty on the first day and never deliberated. There may have been other scenarios but either way we don't know if she deliberated or not. There was nothing to indicate later that she did, and so I think at the very least I would like the identifying information for juror number 9 before we talk about all of the other jurors to see if she, in fact, had problems in the jury room that we don't know about because she didn't tell us anything, it was juror number 6, and all we got was her view on it."

The court denied the motion: "Counsel and the Court . . . discussed the matter outside the presence of that juror and we all at least came to a conclusion that the best thing to do at that point in time would be to bring the entire jury in to admonish the jury with regard to their duty to deliberate and that was done . . . . Subsequently, the Court did not receive any further complaints from any juror with regard to a failure to deliberate. [¶] . . . [¶] There is nothing other than that

one juror's comment with regard to deliberation to indicate that the other jurors were not all participating and specifically that one juror was not participating. Once the Court gave the further admonition it is reasonable to assume that further participation did occur by all jurors because, again, there is no complaint by any juror with regard to any lack of participation or lack of deliberation between the time of the admonition and the following day when a verdict was ultimately reached. [¶] Court does consider the balancing test in Rhodes [*People v. Rhodes* (1989) 212 Cal.App.3d 541] and the Court does believe that, in fact, no good cause has been shown and that under the balancing test the Defense has failed to carry their burden on this matter."

Discussion

Code of Civil Procedure section 237 provides, in pertinent part: "(a)(1) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.

"(2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section.

"(3) For purposes of this section, 'sealed' or 'sealing' means extracting or otherwise removing the personal juror identifying information from the court record.

". . .

"(b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure."

Defendant centers his claim that the court erred in denying him a hearing on Code of Civil Procedure section 237's statement that "[t]he court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that

establish a compelling interest against disclosure." According to defendant, "'balancing' of interests is appropriate. However, that 'balancing' *under the statutory scheme* should occur at a later procedural point. If a *prima facie* showing is made, a hearing is scheduled, notice is given, and the jurors' views are solicited. Only then is the 'good cause' determination made through 'balancing' of interests."

Defendant's interpretation does not comport with the wording of Code of Civil Procedure section 237, subdivision (b). The statute requires the court to determine if defendant has established a *prima facie showing of good cause* for the release of the information. It does not require the court to determine first if defendant has made a prima facie showing, and then hold a hearing to determine whether defendant has established good cause for the release of juror information.

The court in the present case acted well within its discretion in finding defendant failed to present a prima facie case of good cause.[2] After one juror complained that a fellow juror was not participating, the court admonished the jury of

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[2] We reject defendant's claim that the abuse of discretion standard does not apply in the present case. Defendant argues we "should not defer to the trial court's 'good cause' determination, because it was the wrong determination to have been made and the wrong time to have made it." As noted, we reject defendant's strained interpretation of Code of Civil Procedure section 237; therefore, the court correctly determined whether defendant established a prima facie showing of good cause. We apply the abuse of discretion standard to the court's ruling. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1097.)

its obligation to deliberate. Following the admonition, no juror made any further comments about a reluctance to deliberate.

It was reasonable to assume, as the court did, that the jury resumed deliberations without any further problems. Although defense counsel speculated during oral argument that the reluctant juror might have reached her decision without deliberating, such speculation, which is not supported by the record, does not establish good cause. In addition, we presume the jury understood and followed the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

NICHOLSON, J.

MAURO, J.