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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN A. ENGLEBRECHT,

Defendant and Appellant.

D058075

(Super. Ct. No. SCN228485)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

A jury convicted defendant Martin Englebrecht of three counts of premeditated attempted murder (Pen. Code,¹ §§ 664/187, 189, counts 1-3) in connection with an assault on a rival gang, and one count of attempting to dissuade or intimidate a witness (§ 136.1, subd. (a)(2), count 4). The jury found true as to all counts that he committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)), and a variety of

¹ All further statutory references are to the Penal Code unless otherwise specified.

enhancing allegations appended to the attempted murder counts. In a bifurcated proceeding, the jury found true Englebrecht suffered three prior strike convictions within the meaning of sections 667, subdivisions (b) through (i), 1170.12 and 668, and two prior prison terms within the meaning of sections 667.5, subdivision (b), and 668. On appeal, Englebrecht argues there were errors of omission and commission in the instructions given to the jury, and the court erroneously admitted certain evidence from an informant and from a gang expert.

FACTUAL BACKGROUND

A. The Beating and Subsequent Shooting

On April 15, 2007, Englebrecht was an "OG" (original gangster) affiliated with an Oceanside gang called Posole. On that day, he drove his car to Fireside Park in Oceanside, California to buy drugs. Several members of two Crip-affiliated gangs, ICG (Insane Crip Gang) and CMG (Crook Mobster Gangsters), were attending a barbeque at the park when Englebrecht arrived. The CMG is a rival to Englebrecht's Posole gang.

As Englebrecht sat in his car, he engaged in a verbal confrontation with a Crip member. The Crip taunted Englebrecht, who responded by telling the Crip that Englebrecht was an "OG" from Posole and the Crip was merely "a homie." The Crip punched Englebrecht, and several Crips joined in the assault and punched Englebrecht and battered his car. Englebrecht was able to drive away.

Darieux Berry, Englebrecht's neighbor, saw the attack. After Englebrecht escaped, Berry went home and told his mother and grandmother what he had seen. They told him

to stay inside for a while. However, he instead went to an apartment building in Oceanside and eventually met up with several friends, all of whom were African-American. Berry's group decided to walk to a nearby store. As they were walking, an SUV pulled alongside them and stopped. Four Hispanic males with shaved heads, one of whom was Englebrecht, got out and confronted Berry's group, asking, "Where you fools from?" The members of Englebrecht's group were armed with handguns and opened fire at Berry and his friends, who began running away.

Berry was shot through the thigh and shin, and fell to the ground. Englebrecht ran up, straddled Berry, and pistol-whipped him in the head, telling him to "shut the fuck up." Berry struggled for the gun, and yelled, "You are my neighbor," but Englebrecht cocked the gun and started to place it against Berry's head. Berry grabbed the gun and moved it away and Englebrecht fired the gun, shooting Berry through the hand. Berry believed Englebrecht would have shot him in the head had Berry not grabbed and moved the gun. Englebrecht then fled.

Two other members of Berry's group were also wounded by the gunfire. Mr. Chatmon suffered a relatively minor grazing wound to his foot that did not prevent him from running home. Mr. Richardson was shot through the buttocks and the bullet exited through his stomach. He was transported to the hospital by life-flight and ultimately underwent two surgeries. The other two members of Berry's group, Messer's Pride and Settrini, ran when they saw Englebrecht's group issue gang challenges and begin to pull up their shirts, and were able to avoid being struck by gunfire. Police found

25 expended cartridges at the scene, and a forensic examination showed the cartridges had been fired from four different handguns.

B. Corroborative Testimony

Three witnesses, testifying under grants of immunity, provided evidence corroborating Englebrecht's involvement in the shootings.

Alan Roach knew Englebrecht socially and knew him to be a member of the Posole gang. On the day of the shootings, Englebrecht and other Posole gang members were at Roach's house for a barbeque. Englebrecht left the barbeque after arguing with his girlfriend, and when he returned to Roach's house it was apparent he had been in a fight. He had marks on his face and was upset and angry. After 20 or 30 minutes, Englebrecht and other Posole gang members left. When Englebrecht returned much later that evening, he was in "panic mode." He implied something bad had happened, and also said they "took care of what needed to be taken care of." Roach heard nothing from Englebrecht for several weeks until he called Roach. He then showed up at Roach's house on June 12 for Roach's birthday party. Englebrecht stayed only 20 to 30 minutes before leaving. Later that night, someone brought Englebrecht back to Roach's house; Englebrecht was unconscious so Roach called 911. When Roach later visited him in jail, Englebrecht's cellmate was Mr. Quintero, another Posole member. Quintero held up a

paper for Roach to read that related to an alibi they wanted Roach to furnish for Englebrecht.²

Quintero also testified under a grant of immunity. In the summer of 2007, he was in jail, and Englebrecht asked to be housed with him. Englebrecht told Quintero about his case, stating he had gone to Fireside Park to buy drugs from members of the ICG and CMG gangs but became involved in an argument that devolved into a fight. Englebrecht then went back to his neighborhood to collect some "homies," and obtained a 9-millimeter or a .45 weapon from "Big C." Englebrecht then met up with "Stomper," "Sapo" and some others, and they went to Roach's house before the group got in a car and went looking "for the kids [who had] jumped" Englebrecht. When they saw a group of young black men, they stopped, got out of the car, said something about Posole, and began shooting. Englebrecht told Quintero that he had approached and began beating one of them with the gun when the young man yelled, "I'm your neighbor, I'm your neighbor." Englebrecht then tried to "dome" him (shoot him in the head), and then took off. Englebrecht went back to Roach's house, and then left for New Mexico.

Englebrecht asked Quintero to take some "kites" (jailhouse letters) with him on his release. Englebrecht directed Quintero and three others to write the letters for him. He also wanted Quintero to enlist Roach's help to provide Englebrecht with an alibi and, as part of that process, to read a letter to Roach when he visited the jail.

² Roach later told Quintero that Roach had disposed of a gun. Although this was false, Roach was not a member of Posole and wanted to be accepted by the gang. He was arrested as an accessory but was granted immunity for his testimony.

Quintero gave police two letters authored by Englebrecht. In one of the letters, Englebrecht described an alibi. The letters also outlined methods or ruses for finding Berry,³ noting "[Berry] cannot show up to prelim or trial, the future prelim. That's the only way I can win. If Darius sounds shaky, I want to send mom and Jaime to talk from the heart to God."

The third person who aided police and testified against Englebrecht in the hope of improving his standing regarding pending criminal charges was Jesse Moreno. On July 31, 2007, Moreno (also known as "Fly") violated his parole when he did not yield at a traffic stop. To avoid returning to prison, he told police he knew a gun used in the shootings was at Mr. Jaime's house. Moreno cooperated with police by calling Jaime and telling him to take the gun and sell it to raise Moreno's bail money. Police then did a traffic stop of Jaime's car and found a Tec-9 semi-automatic pistol with a 50-round magazine in Jaime's car.

By the time of trial, Moreno had pleaded guilty to robbery charges and was facing a potential 20-year sentence. He agreed to cooperate with the prosecution in hope of obtaining more lenient treatment on his pending charges. He testified that he saw

³ For example, one passage asked his sister to try to get Englebrecht's paperwork at the courthouse because "the address might not get covered up" if she obtained the court papers. Another passage asked Englebrecht's brother to "set up the prelim Pay some people to follow [Berry] home." Another passage asked "Fly to help out on finding people for this" and "we will pay them to follow." Quintero explained that "Fly" referred to Jesse Moreno, Englebrecht's cousin. Another passage asked Englebrecht's girlfriend to "get at [Rhianna] and tell her if her family lawyer is going to look over the case, if he will be willing to give us the address of [Berry] ASAP." Rhianna Holmes testified Englebrecht wanted to know if she knew how to find people and asked if she could help find Berry for him.

Englebrecht earlier on the night of the shooting; Englebrecht appeared to have been beaten up. Englebrecht told Moreno he had tried to buy some "rock" from some "black dudes" but they asked where he was "from," and he responded "Posole." One of the group replied "CMG" and started hitting him. After Englebrecht escaped, he collected some people (including Jaime), obtained a Chevy Tahoe truck from Angelica Ibanez,⁴ and drove to Fireside Park. When they saw a group of black men, Englebrecht and his group started shooting. Englebrecht told Moreno he tried to shoot a black man who was "on the floor." Englebrecht tried to shoot him in the head even though the target said, "I live behind you. It wasn't me." After the shooting, Englebrecht left town and, when he returned, he claimed to have been in New Mexico.

C. Gang Evidence

A gang expert, Sergeant Knowland, explained why Posole qualified as a street gang, and its rivalry with CMG. He explained the concept of "respect," and the need to retaliate when a gang member is assaulted, and concluded the attack here was a gang-related retaliatory attack. He described the predicate crimes committed by Posole members, and stated Englebrecht, Jaime and others identified as participants in the assault were members of Posole.

⁴ Mr. Ibanez testified his daughter, Angelica, has a Tahoe SUV she occasionally loans to someone named Luis. On April 15, Mr. Ibanez went to pick up his daughter's truck and met with Luis, who seemed jumpy. Luis directed them to a location in front of some residences a couple of miles away, where they found the truck.

D. Defense Evidence

Englebrecht testified on his own behalf. He admitted telling Quintero he had been attacked when trying to buy drugs, but denied he was involved in the retaliatory shooting or told Quintero or Moreno he had been involved. He did not write the letters ascribed to him, but surmised Quintero did. The defense also called a gunshot wound expert and an expert on eyewitness identification.

ANALYSIS

A. The "Kill Zone" Instruction

The court instructed, using language that largely tracked CALCRIM No. 600, Englebrecht could be found guilty of three counts of attempted murder if the jury found he intended to kill the specific three named victims and intended to kill everyone within a particular zone of harm or kill zone. Englebrecht complains the instruction was erroneous because (1) it did not define the "zone of harm" or "kill zone" and (2) because it altered CALCRIM No. 600 by substituting the word "and" for the word "or" at an important juncture of the standard instruction.

People v. Bland (2002) 28 Cal.4th 313 and the So-Called "Kill Zone"

The concept of a "kill zone" is derived from *People v. Bland, supra*, 28 Cal.4th 313, in which the court examined the intent element of attempted murder. The court's primary focus in *Bland* was whether the doctrine of "transferred intent" could be applied to the crime of attempted murder, with the court concluding the doctrine of "transferred intent" could not be so applied because of the specific intent required for attempted

murder. (*Id.* at pp. 326-330.) However, *Bland* went on to conclude the fact that *transferred* intent could not support a conviction for attempted murder did not preclude convictions for attempted murder under circumstances in which a finding of *concurrent* intent was supported by the evidence, explaining, "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them. . . . [T]he person might still be guilty of attempted murder of everyone in the group, although not on a transferred intent theory." (*Id.* at p. 329.) *Bland* explained that "although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.'" (*Bland, supra*, 28 Cal.4th at p. 329.)⁵ Quoting *Ford v. State* (1993) 330 Md. 682, 716, the *Bland* court clarified that "[t]he intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.'" (*Bland, supra*, 28 Cal.4th at p. 329.) The court went on to provide examples of concurrent intent:

⁵ The jury's ability to convict a defendant of multiple attempted murders when the defendant indiscriminately sprays bullets into a crowd is not limited to the scenario of when the defendant has a *specific* victim whom he or she is targeting, but can also be applied when the defendant shoots into a group "even if [he or she] has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific victim." (*People v. Stone* (2009) 46 Cal.4th 131, 140.)

" 'For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.' " (*Id.* at pp. 329-330.)

The Court's Instruction

The court in this case, using a modified version of CALCRIM No. 600, instructed:

"A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or kill zone. In order to convict the defendant of the attempted murder of Dareius Berry, or Kyle Chatmon or Devin Richardson, the People must prove that the defendant not only intended to kill a specific victim or group of victims, and intended to kill . . . everyone within the kill zone. I will read that—the People must prove that the defendant not only intended to kill a specific victim or group of victims, and intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill a specific victim, or a group of victims, by killing everyone within the kill zone, then you must find the defendant not guilty of the attempted murder of Dareius Berry, Kyle Chatmon, or Devin Richardson."

The Absence of a Definition for "Kill Zone"

Englebrecht argues the trial court sua sponte was required to instruct the jury with the definition of the terms "zone of harm" or "kill zone." As a general matter, " 'a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) "Although trial courts, generally, have a duty to define technical terms that have meanings peculiar to the law, there is no duty to clarify, amplify, or otherwise instruct on commonly understood words or terms used in statutes or jury instructions." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022.) Where a phrase is commonly understood by speakers of the English language and is not used in a technical sense peculiar to the law, the trial court is under no duty to instruct the jury on the meaning of the phrase in the absence of a request. (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575.) "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning." (*Id.* at p. 574.)

Here, the terms "zone of harm" or "kill zone" do not describe legal theories or doctrines on which sua sponte instructional obligations are required. Instead, those terms merely articulated the *Bland* court's rationale for concluding that, under some circumstances, a jury could find a defendant guilty of multiple charges of attempted murder if it found he or she concurrently intended to kill multiple victims as part of an assault on a group. Importantly, *Bland* expressly stated that "[t]his concurrent intent

theory *is not a legal doctrine requiring special jury instructions*, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland, supra*, 28 Cal.4th at p. 331, fn. 6.)

Moreover, these terms do not have technical legal meanings distinct from their everyday usage. The commonsense meaning of "zone of risk" or "kill zone" is the vicinity around which the defendant unleashed his lethal attack. The instruction employed terms conveying this concept,⁶ and therefore we do not agree with Englebrecht's claim that these were technical legal concepts the court was required to define sua sponte. (See, e.g., *People v. Rodriguez* (2002) 28 Cal.4th 543, 547 [no sua sponte duty to instruct on meaning of "recurring access" as used in offense of continuous sexual abuse of a child]; *People v. Estrada, supra*, 11 Cal.4th at pp. 574, 581 [no sua sponte duty to instruct on meaning of "reckless indifference to human life"]; *People v. Rowland* (1992) 4 Cal.4th 238, 270-271 [no sua sponte duty to instruct on meaning of "while engaged in"].)

⁶ We note Englebrecht has not on appeal suggested what language *should* have been given by the court. Indeed, we apprehend that if the court *had* further instructed on the facts the jury could have considered to delineate the "kill zone" (such as the nature of the guns employed, the number of shots fired, the proximity of the victims both to each other and to Englebrecht's group, etc.), the defendant may have well contended reversal was required because the court improperly gave an argumentative pinpoint instruction favoring the prosecution. (See, e.g., *People v. Campos* (2007) 156 Cal.App.4th 1228, 1244 ["An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. [Citation.] 'A jury instruction is [also] argumentative when it is ' 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " ' "].)

The Use of Conjunctive Rather Than Disjunctive Language

Englebrecht alternatively argues the instruction was erroneous because it substituted the word "and" in place of the word "or" in the pertinent part of CALCRIM No. 600. Englebrecht notes the *correct* instruction should have read that to convict the defendant of the attempted murder of Dareius Berry, Kyle Chatmon, or Devin Richardson, "the People must prove that the defendant not only intended to kill a specific victim or group of victims, *or* intended to kill everyone within the kill zone," but the instruction instead read "the People must prove that the defendant not only intended to kill a specific victim or group of victims, *and* intended to kill everyone within the kill zone."

Englebrecht argues, and the People concede, the instruction was erroneous because it had the net effect of requiring the jury to find Englebrecht intended to kill a specific victim or group of victims *and* intended also to kill everyone in the kill zone, rather than finding only an intent to kill a specific victim or group of victims *or* that he intended to kill *everyone* in the kill zone. Although this was error, it was harmless beyond a reasonable doubt because it imposed on the prosecution a *heavier* burden of proof than required by the law. "At worst, the erroneous . . . instruction might have led the jury to believe it had to find a mental state more culpable than that required Because the instruction at most could have been understood as imposing a burden on the prosecution more onerous than the law required, defendant could not have been prejudiced under any standard." (*People v. Rogers* (2006) 39 Cal.4th 826, 875.)

B. The Aider and Abettor Instruction

Englebrecht argues the court prejudicially misinstructed the jury because it did not sua sponte modify the then-current version of CALCRIM No. 400 to delete the word "equally" from a sentence in that instruction.

The Instructions

The court, based on CALCRIM No. 400, instructed as follows:

"A person may be guilty of a crime in two [different or separate] ways. One, he or she may directly commit the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly commits the crime. A person is *equally* guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." (Italics added.)

Next, the court, based on CALCRIM No. 401, instructed as follows:

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

"Number one, the perpetrator committed the crime;

"Number two, the defendant knew that the perpetrator intended to commit the crime;

"Number three, before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

"And number four, the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

Argument

On appeal, Englebrecht contends the trial court prejudicially erred when it instructed on aiding and abetting under CALCRIM No. 400 without sua sponte deleting

the word "equally" from it. Relying on *People v. McCoy* (2001) 25 Cal.4th 1111, and *McCoy's* progeny (*People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*), and *People v. Nero* (2010) 181 Cal.App.4th 504), Englebrecht essentially argues the court had a duty to instruct the jury regarding applicable legal principles because the use of the term "equally" could have inadequately clarified for the jury that it could find him guilty of a lesser offense than attempted murder if they found he had a less culpable state of mind than the actual perpetrator. Because the court did not do so, Englebrecht asserts the court committed federal constitutional error.

Analysis

McCoy and its progeny stand for the proposition that, under limited circumstances, the use of the term "equally" could potentially be misleading. However, as a preliminary matter, Englebrecht neither objected to nor complained about the wording of CALCRIM No. 400 as given and there was no discussion at all regarding the "equally guilty" language of CALCRIM No. 400 below. As such, Englebrecht (like the defendant in *Samaniego*) has forfeited this claim on appeal. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163.) Generally, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Hart* (1999) 20 Cal.4th 546, 622.) As *Samaniego* explained, CALCRIM No. 400 is generally an accurate statement of law regarding an aider and abettor's liability, but should be modified in those "most exceptional circumstances" in which the jury could be misled because various

codefendants may have acted with different mental states in committing the charged crimes. (*Samaniego*, at pp. 1163-1165.) In *Samaniego*, in which two victims were killed in a gang-related shooting and there was no evidence as to who fired the fatal shots, the court held it could potentially be misleading under those particular facts to give the jury CALCRIM No. 400 without modification or clarification of the words "equally guilty" to properly assess each defendant's individual mental state. (*Samaniego*, at pp. 1164-1165.) In so holding, the *Samaniego* court reviewed *People v. McCoy*, *supra*, 25 Cal.4th 1111, which made clear that in cases involving accomplices charged with specific intent offenses, the jury must separately determine each codefendant's mental state and may convict an accomplice of a greater offense than the actual perpetrator under an aiding and abetting liability. (*McCoy*, at pp. 1116-1119.) By parity of reasoning, the court in *Samaniego* determined an accomplice may be convicted of a lesser offense than the perpetrator as well, "if the aider and abettor has a less culpable mental state." (*Samaniego*, at p. 1164.)

We agree with the reasoning in *Samaniego* and conclude the "equally guilty" language of CALCRIM No. 400 is essentially a correct statement of law. Even assuming this case involved unique circumstances that might have rendered use of the term "equally" to be potentially misleading, Englebrecht was required to object to or request a modification of the standard instruction at trial to preserve the issue for appeal. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.) Englebrecht has forfeited this claim.

Even had Englebrecht properly preserved the issue for review, we are unpersuaded he was prejudiced because the instructions as a whole show the jury was properly instructed. Even assuming CALCRIM No. 400 as given in this case may have misdescribed "the prosecution's burden in proving the aider and abettor's guilt of [the charged offenses] by eliminating its need to prove the aider and abettor's . . . intent," the error was "harmless beyond a reasonable doubt because the jury necessarily resolved these issues against [Englebrecht] under other instructions." (*Samaniego, supra*, 172 Cal.App.4th at p. 1165.) In *Samaniego*, as here, the court gave CALCRIM No. 401, which stated that to prove Englebrecht guilty based on the aiding and abetting theory, the prosecution must prove, among other things, that (1) "[t]he defendant *knew* that the perpetrator intended to commit *the crime*," and (2) "the defendant *intended* to aid and abet the perpetrator in committing *the crime*." (*Samaniego*, at p. 1166.) As *Samaniego* recognized, when aider and abettor liability is *not* based on a "natural-and-probable-consequences doctrine," but instead required the jury to determine that the defendant *knew* of the perpetrator's intent to commit the charged offense and *intended* to aid and abet the perpetrator in committing that crime, the equally guilty language used in the former version of CALCRIM No. 400 is not prejudicially misleading. (*Samaniego*, at pp. 1165-1166.) We conclude, consistent with *Samaniego*, any alleged ambiguity in the instruction was harmless because the jury necessarily was compelled to correctly resolve Englebrecht's intent as an aider and abettor under other instructions.

C. The Informant Testimony

Englebrecht next argues the trial court erred by rejecting his claim at trial that police violated his right to counsel by placing a police informant in his cell, and then manipulating that informant to elicit damaging statements from Englebrecht, in violation of his right to counsel under *Massiah v. U.S.* (1964) 377 U.S. 201.

Legal Framework

"In *Massiah [v. U.S.]*, *supra*, 377 U.S. 201, the United States Supreme Court held that once an adversarial criminal proceeding has been initiated against the accused, and the constitutional right to the assistance of counsel has attached, any incriminating statement the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against that defendant. [Citations.] In order to prevail on a *Massiah* claim involving use of a government informant, the defendant must demonstrate that both the government and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. [Citation.] Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements." (*In re Neely* (1993) 6 Cal.4th 901, 915; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 67; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247; *People v. Whitt* (1984) 36 Cal.3d 724, 742 ["if an informant interrogates an accused, but acts on his own initiative rather than at the behest of the government, the

government may not be said to have deliberately elicited the statements"], disapproved on other grounds by *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

"Where the informant is a jailhouse inmate, the first prong of the foregoing test is not met where law enforcement officials merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance. [Citation.] In order for there to be a preexisting arrangement, however, it need not be explicit or formal, but may be 'inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct' over a period of time. [Citation.] Circumstances probative of an agency relationship include the government's having directed the informant to focus upon a specific person, such as a cellmate, or having instructed the informant as to the specific type of information sought by the government." (*In re Neely, supra*, 6 Cal.4th at p. 915.)

The Evidence Below

Englebrecht moved to suppress the statements he made to Quintero while they were jailed together, arguing Quintero was an informant planted by police to obtain information from him in violation of *Massiah*. The prosecution opposed the motion, asserting Englebrecht could not show Quintero was acting as a government agent when Englebrecht made the incriminating statements or that Quintero had deliberately elicited the incriminating statements.

The court held a pretrial evidentiary hearing on Englebrecht's motion. At that hearing, the court obtained evidence from Sergeant Knowland and Quintero concerning

Quintero's relationship with police and the etiology of the information that he later supplied to police. Knowland testified Quintero was arrested on a drug charge in 2005 and entered into an agreement with police to "work off" the drug charge by cooperating with Knowland to gather intelligence. Knowland also occasionally paid him for his services, but he was not on the police payroll. Quintero was subsequently arrested in 2006 for violating his probation, and he again entered an agreement to "work off" that charge by continuing to cooperate with Knowland. However, Knowland "deactivated" Quintero as an informant in February 2007 and did not further use him as an informant or maintain contact with him after that time.

Knowland also testified that in June 2007 Quintero was again arrested, but Knowland was not involved in the arrest and made no effort to contact him. Instead, in mid-July 2007 Quintero initiated contact with Knowland, told him that Quintero was in the same housing unit as, and had information about, Englebrecht. Knowland did not (1) arrange to have Quintero housed with Englebrecht, (2) give Quintero any directions with regard to Englebrecht, or (3) direct Quintero to ask any questions of Englebrecht or obtain any letters from him. Quintero met with Knowland and relayed information to him, and also told Knowland that Quintero had letters authored by Englebrecht. After Quintero was released from jail, he gave the letters to Knowland.

Quintero testified he stopped working for Knowland after he had "worked off" his 2006 drug charge. In June 2007, Quintero was arrested and sent to the Vista jail. He did not immediately have any contact with Knowland. Englebrecht, whom Quintero had

known for over 10 years as a member of the gang to which Quintero belonged, was also housed at the Vista jail. At Englebrecht's request, he was moved into the same cell as Quintero. Quintero asked Englebrecht what he was "in here for," and Englebrecht told him that he had tried to shoot someone. Englebrecht likewise asked Quintero about his case, and asked when he expected to get out of jail. Englebrecht, who had tried to "pass kites" (send letters) through other gang members housed in the same unit, asked Quintero carry letters out with him when he was released. He gave two letters to Quintero, who later initiated contact with Knowland. Quintero told Knowland about Englebrecht's admissions to him, and ultimately delivered the letters to Knowland. Even after Quintero had initiated contact with Knowland and spoke to him, Knowland never asked Quintero to try to get information or letters from Englebrecht.

The trial court, crediting Quintero's and Knowland's testimonies, found that at the time Quintero obtained the information from Englebrecht, he was not working for police. Accordingly, the court denied the motion to suppress.

Analysis

The trial court's determination that Quintero was not acting as a government agent at the time Englebrecht gave his incriminating statements is a *factual* determination and, if supported by substantial evidence, is binding on appeal. (Cf. *People v. Mickey* (1991) 54 Cal.3d 612, 649.) Quintero's testimony, which was corroborated by Knowland, supports the trial court's ruling that Quintero was *not* acting "under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting

benefit or advantage" at the time Englebrecht made his admissions (*In re Neely, supra*, 6 Cal.4th at p. 915), which is fatal to Englebrecht's claim on appeal. The fact Knowland "merely accept[ed] information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance" (*ibid.*) does not offend *Massiah*, and we therefore are not persuaded by Englebrecht's assertion that the trial court erred when it denied his motion to suppress.

D. The Expert Testimony on Englebrecht's In-court Conduct

Englebrecht asserts the trial court erred by permitting the prosecution to provide testimony on the English translation for, and the import of, certain statements made by Englebrecht.

Background

The prosecution called Moreno, Englebrecht's cousin and a fellow Posole gang member, as a witness. Moreno had been "born and raised" as a Posole member, and part of the gang code was that a member is "never ever supposed to tell." However, Moreno was planning to testify (in the hopes of a more lenient sentence on pending charges against him) that Englebrecht had confessed his participation in the shootings to Moreno.

Moreno took the stand but immediately appeared to be exhibiting some distress.⁷ The court told him, "[I]f at any time you want to take a break and stop the proceedings, we'll do that. Indicate that to us. All right. Very good." Englebrecht then said, "God

⁷ Before the first question was even asked, the court asked, "Are you okay, Mr. Moreno? Take your time." After the prosecutor asked a few preliminary questions, the prosecutor also asked, "Are you okay?"

loves you, primo. I love you." The court then admonished Englebrecht that he must remain quiet or face removal from the court, but as the prosecutor started to ask her next question, Englebrecht interrupted the prosecutor, stating "I love you too, man. I love you." The court again warned Englebrecht that this was his "last warning" and "the next outburst you have to leave."

The following day, Englebrecht moved for a mistrial because his utterances contained a Spanish word that was not translated, and some of the jurors may have understood it while others had not. In the alternative, Englebrecht objected to any testimony by "anyone who is not shown to be a certified court translator or interpreter" to interpret the meaning of the Spanish word he used. The court noted the only Spanish word used by Englebrecht was "primo," and a certified expert could translate that word, but a mistrial could not be premised on Englebrecht's own actions. The following day, the prosecution moved to permit an expert to explain that "primo" is the Spanish word for "cousin," and that the testimony was relevant as showing Englebrecht was trying to dissuade Moreno from testifying. Englebrecht objected to the expert's testimony as hearsay, and that admission of the translation offended Evidence Code section 352 and various constitutional provisions. The court overruled the objection.

Pursuant to that ruling, Detective Valdovinos testified he was present and saw Englebrecht say, "God loves you, primo" and, after a pause, then say "I love you," and testified that "primo" is Spanish for "cousin." The prosecutor asked Valdovinos to describe the "manner" in which Englebrecht made that statement, and Englebrecht

objected that it called for an "improper opinion." The court overruled the objection but cautioned the jury that, "You were here and you heard it. You may agree with [Valdovinos]; you may disagree. You may find this evidence to be of great value or no value." Valdovinos then testified Englebrecht "just kind of yelled it out." Valdovinos also testified he observed Moreno's reaction and that Valdovinos saw Moreno's "shoulders kind of slouch over, his head dip down. I believe that's when he started sobbing and, at times, shaking, not being able to catch his breath."

Knowland, testifying as the prosecution's expert on gangs, explained that intimidation is an important aspect of gang culture, internal gang discipline and loyalty is similarly important, and that Hispanic gangs generally are rooted in and identify with a neighborhood and will ask "where you from" to determine affiliations and loyalties. He noted that witness intimidation deters witnesses from cooperating with police against the gang, and that gang members sometimes attend trials to intimidate witnesses on the witness stand. The prosecutor asked Knowland, "[I]f you were told that the defendant made a statement in this case to an individual who was testifying, and the statement was 'God loves you, primo. I love you, too,' and the witness was his cousin, would you interpret that to just be an expression of his feelings toward that witness?" Knowland answered, "No. [¶]. . . [¶] I would interpret that as a reminder to the witness that, 'Hey, we are related. It's not too late. You can stop this. You need to stop this,' and a reminder of where you are from."

Analysis

Englebrecht argues that admitting the translation testimony of Valdovinos, as well as the expert testimony of Knowland, improperly introduced evidence that reflected on Moreno's credibility. Although admitting testimony reflecting on a witness's credibility is indisputably improper (*People v. Sergill* (1982) 138 Cal.App.3d 34, 38-40), we are unpersuaded there was error here. Valdovinos's testimony was limited to providing (1) an English translation of the Spanish word "primo," and (2) his observations of Moreno's demeanor following Englebrecht's comments. Valdovinos nowhere stated his opinion that Moreno was or was not credible.

Englebrecht's complaint about the testimony by Knowland faces two obstacles. First, he did not object to Knowland's testimony, and therefore his claim of error is waived. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1064.) Moreover, Knowland's testimony was limited to explaining to the jury that, in the specialized realm of gang culture, words ostensibly professing assurances of love for a fellow gang member can in fact be a reminder not to transgress the bonds of gang and familial loyalty by testifying against a member of the gang. Knowland commented on Englebrecht's *words*, not on Moreno's *credibility*. There was no erroneous admission of evidence concerning a witness's credibility.

E. The Confrontation Clause Claim

Englebrecht finally asserts the court admitted hearsay testimony against him in violation of his rights under the confrontation clause as discussed in *Crawford v.*

Washington (2004) 541 U.S. 36. Although Englebrecht cites Knowland's testimony as violating *Crawford*, he does not specify any particular hearsay statement offered by Knowland admitted for the truth of its contents against Englebrecht. Instead, he appears to argue that Knowland was permitted to form and express expert opinions about gang culture predicated on hearsay information, and that admission of those opinions therefore violated *Crawford*.

However, other courts have rejected the same claim. (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 ["[h]earsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned"]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 ["because the statements were not offered to establish the truth of the matter asserted, but merely as one of the bases for an expert witness's opinion, the confrontation clause, as interpreted in *Crawford*, does not apply"].) We agree with the reasoning in those cases, and conclude there was no *Crawford* error here.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.