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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON M. PARKS-BURNS et al.,

Defendant and Appellant.

D059348

(Super. Ct. Nos. FSB800199;
FSB703578)

APPEALS from judgments of the Superior Court of San Bernardino County,
Ronald M. Christianson and Bryan F. Foster, Judges. Affirmed.

Appellants Brandon Parks-Burns and Todd Jose Tibbs were jointly tried for the first degree murder of Charles Marshall (Pen. Code,¹ § 187, subd. (a); count. 1), and the premeditated attempted murder of Sequwan Lawrence (§§ 187, subd. (a), 664; count 2). In the first trial, the jury deadlocked on the murder count as to both appellants. Parks-Burns later pleaded guilty to premeditated attempted murder of Lawrence. The jury

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

convicted Tibbs of that charge. In October 2010, the court sentenced Tibbs to a determinate term of 20 years plus an indeterminate term of 15 years to life.

Appellants were tried for the murder of Charles Marshall a second time. Before the close of evidence, Tibbs pleaded guilty to the lesser included offense of voluntary manslaughter, in exchange for a six-year term to be served concurrently with his sentence from the first trial. Parks-Burns refused the prosecutor's offer that he plead guilty to a nine-year sentence for assault with a firearm instead of stand trial for murder. The second jury convicted Parks-Burns of first degree murder, and found true allegations that a principal personally and intentionally discharged a firearm, causing death (§ 12022.53, subd. (d)), and the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang (§186.22, subd. (b)). In September 2010, the court sentenced Parks-Burns to a total of 50 years to life in state prison as follows: 25 years to life on the murder conviction, and a consecutive 25 years to life on the gun enhancement. The court ordered him to pay fines, including \$7,500 for victim restitution. (§ 1202.4; Gov. Code, § 13967, subd. (c).)

On appeal Tibbs contends, (1) the court violated his constitutional right to a fair trial by denying his motion to sever the charges against him from those against Parks-Burns; (2) insufficient evidence supports his attempted murder conviction; (3) the court erroneously failed to instruct the jury on premeditation, deliberation and willfulness, and on the lesser included offense of attempted voluntary manslaughter.

Parks-Burns contends that the trial court erroneously (1) failed to instruct the jury about accomplice testimony, thus denying him due process and a jury trial under the

federal Constitution; (2) admitted irrelevant evidence of the attempted murder in violation of his constitutional rights; (3) sentenced him to a cruel and unusual term of 50-years to life instead of nine years, simply because he exercised his right to a jury trial; and (4) imposed a victim restitution award without making a finding that substantial evidence supported the amount. Tibbs joins in these contentions where applicable. We affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The First Trial—Attempted Murder of Sequwan Lawrence

Lawrence testified he was not a gang member. In the days before the underlying crime occurred, he became somewhat upset that 22-year-old Tibbs, whose gang moniker was "Mookie," was dating his 15-year-old sister. Lawrence told police his sister threatened to have Tibbs beat him up. Lawrence also testified Tibbs had confronted him with a gun approximately two weeks before the incident in this case.

The attempted murder occurred on September 7, 2007, when Lawrence was outside his San Bernardino, California residence with his girlfriend, Kianna Thomas, his brother, and a cousin called "CJ." Tibbs and Parks-Burns approached and pushed Lawrence's brother and CJ against a car. Parks-Burns held a gun to CJ's face and, after an exchange of words, pointed it at Lawrence's face. Lawrence grabbed the gun, but it fell to the ground. Immediately afterwards, Lawrence saw Tibbs pointing the gun at him. Lawrence restrained Parks-Burns, and used him as a shield to avoid getting shot. Lawrence heard gunshot fire. He eventually released Parks-Burns and went home.

That night, San Bernardino City Police Officer Jessie Ludikhuizen responded to the crime scene and interviewed Lawrence, who recounted that Parks-Burns and Tibbs had passed by his house at least twice that evening before confronting him and his companions. Lawrence reported that Parks-Burns later pointed a gun at Lawrence's head, saying, "[Y]ou're going to get killed now." Lawrence grabbed the gun and struggled with Parks-Burns. The gun fell. Lawrence heard a gunshot that missed him. He turned around and saw Tibbs pointing a gun at him. During the incident, Tibbs yelled, "18th Street," which is the name of Tibbs's gang. That night, Lawrence identified both Parks-Burns and Tibbs in a field showup.

San Bernardino Police City Officer Joseph Shuck also responded to the crime scene that night and interviewed Thomas, who said Parks-Burns had initially asked Lawrence and CJ "where they're all from." Parks-Burns next pointed a gun to CJ's head, but Tibbs told him to shoot Lawrence first. Parks-Burns and Lawrence got into a tussle, the gun fell, and Tibbs shot at Lawrence. Thomas also identified Parks-Burns and Tibbs in a field showup that night.

A gang expert testified Tibbs was a member of the 18th Street gang, and his shooting at Lawrence served to further the gang, as indicated by Parks-Burns' question, "where they're all from," referring to which gang Lawrence and his companions belonged. Additionally, Tibbs yelled his gang's name upon firing the gun.

The court denied Tibbs's new trial motion brought on grounds the court had erroneously declined to sever his case from Parks-Burns's, and insufficient evidence supported the attempted murder conviction.

The Second Trial—Murder of Charles Marshall

Coasa Harvey testified that August 17, 2007, was the eve of what the 18th Street gang regarded as "hood day," when its members, including Parks-Burns and Tibbs, got together and reminisced about those who had died, and planned their next moves. That night, Harvey heard Parks-Burns and Tibbs discussing a fellow gang member's murder. Tibbs said he would retaliate against the rival gang for the killing. A few minutes later, Harvey saw Tibbs using a rag to load bullets for a handgun. Parks-Burns left carrying a sawed-off shotgun and was accompanied by Tibbs, who carried the handgun. According to Harvey, they said they were going to "put in work" for the gang. Harvey interpreted that to mean they were going to shoot and try to kill someone. After Harvey saw them drive away, he ran to a spot from which he could see an apartment complex called the Dorjils, which was considered a rival gang's territory. Harvey saw Parks-Burns and Tibbs climbing a gate, entering, and running into the Dorjils. Harvey next heard gunshots and saw Parks-Burns and Tibbs leaving the Dorjils the same way they had entered. Harvey next ran to Tibbs's house. Parks-Burns and Tibbs arrived there and they were excited, saying they had shot at individuals at the Dorjils.²

² Harvey testified he was a former gang member and a confidential police informant. He previously was incarcerated for residential burglary, possession of drugs for sales, and possession of stolen property. He stated he had testified in other murder cases in exchange for reduced charges. He also had written the police and the district attorney seeking benefit for his testimony in this case, but the prosecutor had not promised him leniency this time.

Because he did not hear any police cars or helicopters, Tibbs concluded nobody had been shot. Therefore, he sent Parks-Burns to retrieve their hidden guns, and they later discussed how many bullets remained. They both returned to the Dorjils. Harvey positioned himself at the same spot as before, and saw both Parks-Burns and Tibbs fire shots into a group of people. Parks-Burns and Tibbs ran from the scene. Harvey denied owning a shotgun or ever holding or shooting one.

San Bernardino Police City Detective Pete Higgins investigated the crime scene and found shotgun waddings, but found no evidence that a handgun had been fired there that night. The jury was informed through a stipulation that Charles Marshall died that night from a gunshot wound to the chest.

Justin Monroe testified that in August 2007, he asked Tibbs for help in buying marijuana. During that conversation, Tibbs showed him a handgun and asked if he knew anyone who wanted to buy it. Monroe asked Tibbs if the gun had been used to shoot anyone, and Tibbs said someone had been killed with it. Thereafter, Monroe met Tibbs while in jail on unrelated charges, and Tibbs, thinking Monroe would be released that day, asked him to locate a handgun and a shotgun before police found them. Tibbs said the guns were being held by an acquaintance of his who lived near Tibbs's house, and whose whereabouts were unknown. Tibbs surmised his acquaintance was passing information to police, and insinuated that, as a result, he wanted Monroe and Monroe's friend to harm the acquaintance. In exchange for them doing so, Tibbs offered Monroe 10 pounds of marijuana, and the guns for Monroe's friend. Tibbs admitted committing

the attempted murder with Parks-Burns, and using the same gun in both that crime and the murder.

San Bernardino City Police Officer Travis Walker testified as a gang expert in response to a hypothetical by the prosecutor: "[A]ny time you have a gang member that is killed by a rival gang—and it was widely publicized who the killer of Edward Griffin was—we expect and anticipate retaliation from the victim gang on the gang that committed that act. . . . So it is completely done for the benefit not only of the individual gang member's status or an attempt to elevate their status, but it's done to benefit the gang as a whole in retaliation for the death of their member. The prosecutor next asked Officer Walker a different hypothetical about two gang members, one of whom was "well established and one who was trying to become established." Officer Walker responded: "[O]ne of the methods of getting into a criminal street gang is having to commit or put in work for that gang. The act of going out and shooting a rival gang member or shooting at a rival gang is a significant act of putting in work for a particular street gang. And that would elevate a person's status within their gang and their reputation on the street for committing that act."

Willie Fannin, Harvey's stepfather, testified that Harvey's mother took a sawed-off shotgun to Fannin's home in August 2007, approximately two weeks before Marshall's murder. Fannin took it outside and told Harvey's mother to have Harvey retrieve it, and it was removed the next day. Fannin presumed Harvey took it.

DISCUSSION

Tibbs's Appeal

I

After the court had granted the People's motion to consolidate the cases against Parks-Burns and Tibbs before the first trial, Parks-Burns's counsel moved to sever them, arguing that Parks-Burns had already pleaded guilty to the attempted murder charge: "My objection is, in fact, that this would deny [Parks-Burns] due process of law and he wouldn't be able to have a fair [trial]; essentially based on the fact that I believe the People are seeking joint motive. Motive is not an element of the crime. In fact, if the jury hears that he was involved in another shooting with the same defendant a couple weeks after this particular incident, they're likely not to focus on the relevant testimony in the [murder charge]. And in fact rather be skewed by the fact that we have two shootings within a month of each other. [¶] But there is not . . . a sufficient showing that there is a certain degree of similarities by which any prejudicial outcome would be overcome." Tibbs joined in the motion to sever.

The court denied the motion, finding no showing of undue prejudice. It reasoned that common evidence relevant to both crimes included their gang involvement, the weapons the defendants had used, and the fact that the incidents occurred in the same general area. The court concluded that such evidence could "show common plan, scheme, or design. In addition to that [there] also would be sufficient similarity for purposes of establishing the identity of the victim that was involved."

Tibbs contends the trial court violated his constitutional right to a fair trial by denying his motion to sever his trial from Parks-Burns's. Specifically, he maintains the court prejudicially admitted evidence about the Marshall murder during his trial for the attempted murder of Lawrence. Tibbs also claims the jury likely would interpret the murder and attempted murder cases as a continuation of his ongoing criminal behavior; Justin Monroe's testimony placed greater culpability on him than on Parks-Burns; and the case was close as indicated by the jury deadlock on the murder charge.

Under section 954, "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

"For purposes of joinder, offenses are deemed to have been 'connected together in their commission' where there was a common element of substantial importance in their commission, even though the offenses charged did not relate to the same transaction and were committed at different times and places and against different victims. [Citations.] Similarly, within the meaning of section 954, offenses are 'of the same class' if they possess common characteristics or attributes." (*Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722; *People v. Lucky* (1988) 45 Cal.3d 259, 276.) The language "connected together in their commission" in section 954 reflects legislative intent for a

broad test for joinder of offenses. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1217-1218.)

In *People v. Soper* (2009) 45 Cal.4th 759 (*Soper*), the California Supreme Court addressed the legal principles relevant to severance of properly joined criminal charges. (*Id.* at pp. 771-772.) In this context, the prosecution is entitled to join offenses, and the burden is on the party seeking severance to clearly establish that there is substantial danger of prejudice requiring that the charges be separately tried. (*Id.* at p. 773.) To establish error in a trial court's ruling declining to sever properly joined charges, the defendant must make a clear showing of prejudice to establish that the trial court abused its discretion, that is, that its ruling falls outside the bounds of reason. (*Id.* at p. 774.) " "[A] party seeking severance must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." ' ' (*Ibid.*) In particular, the party must deal with the countervailing considerations of conservation of judicial resources and public funds, considerations that often weigh strongly against severance of properly joined charges. (*Ibid.*)

In determining whether the trial court abused its discretion under section 954, we consider the record before the trial court when it made its ruling (*Soper, supra*, 45 Cal.4th at p. 774), and undertake the following analysis as outlined in *Soper*: "First, we consider the cross-admissibility of the evidence in hypothetical separate trials. [Citation.] If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges. [Citation.] Moreover, even if the evidence

underlying these charges would *not* be cross-admissible in hypothetical separate trials, that determination would not itself establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges." (*Id.* at pp. 774-775.) The latter rule is codified in section 954.1. (*Id.* at p. 775.)

"If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.'" [Citations.] In making *that* assessment, we consider three additional factors, any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state." (*Soper, supra*, 45 Cal.4th at p. 775.)

Here, we agree with the trial court's assessment of the issue of cross-admissibility. The attempted murder and the murder crimes occurred within approximately three weeks of each other, and both crimes were gang related. Both crimes show the defendants' common intent to gain respect for themselves and their gang. The court also noted the

crimes occurred in the same general area. Further, according to Monroe's testimony, Tibbs and Parks-Burns used the same weapons in both crimes. Tibbs concedes in his opening brief that the attempted murder charge was gang related.³

Tibbs can establish error requiring severance of the charges only on "a '*clear showing of prejudice* to establish that the trial court *abused its discretion*' " (*Alcala v. Superior Court, supra*, 43 Cal.4th at p. 1220), meaning that its ruling falls outside the bounds of reason in denying the severance motion. (*People v. Ramirez* (2006) 39 Cal.4th 398, 439.) Tibbs has failed to convince us that the court's ruling meets this stringent standard. The trial court carefully analyzed the issue of severance in light of the relevant law, and we find no basis for considering its ruling as whimsical. "Having concluded the trial court correctly determined the issue of cross-admissibility, we need not analyze the other factors described above." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1317.)

Although we find the trial court's denial of Tibbs's severance motion proper at the time it was made, "[b]ecause the issue is raised on appeal following trial [and Tibbs asserts he was denied a fair trial by the denial of his severance motion], we must also consider whether 'despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law.'" (*People v. Sandoval* (1992) 4 Cal.4th 155, 174.) On the issue of prejudice, Tibbs argues, "[T]he inflammatory nature of the 'gang-related' murder, in addition to the strength of the evidence in support of the 'gang-related' attempted murder, was likely

³ Tibbs states in his opening brief that the attempted murder charge "had no similar characteristics to the charged murder in count 1 other than it was a 'gang related' crime."

prejudicial to the determination of guilt on the attempted murder charge." But Tibbs's concession that the gang-related evidence was cross-admissible undermines his prejudice claim. " 'One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient.' [Citation.] We conclude, therefore, that defendant has failed to show that denial of severance deprived him of a fair trial." (*Sandoval*, at p. 174.)

II.

Tibbs contends his due process rights under the Fourteenth Amendment of the federal Constitution were denied because insufficient evidence supported his conviction for attempted, willful, deliberate, premeditated murder.

" 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . . " ' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; see also *People v. Stewart* (2004) 33 Cal.4th 425, 495.)

Faced with a challenge to the evidence of deliberation and premeditation on appeal, the test is whether a rational juror could, on the evidence presented, find the essential elements of premeditation and deliberation beyond a reasonable doubt. (*People v. Stewart, supra*, 33 Cal.4th at p. 495, citing *People v. Sanchez* (1995) 12 Cal.4th 1, 31-32 (*Sanchez*), overruled on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390.) To undertake this analysis, we consider all evidence and logical inferences relevant

to the question, including general factors of planning activity, and motive as established by a prior relationship or conduct with the victim. (*Sanchez, supra*, 12 Cal.4th at p. 32; *People v. Perez* (1992) 2 Cal.4th 1117, 1126; *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*).)

In making our determination, we focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We will not reverse unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to support the jury's verdict. (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Stewart*, at p. 790.)

Tibbs relies upon *People v. Anderson, supra*, 70 Cal.2d 15, in which the California Supreme Court identified the types of evidence that are indicative of premeditation and deliberation.⁴ However, *Anderson's* guidelines "are 'descriptive, not normative,' and

⁴ *Anderson* points to "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson, supra*, 70 Cal.2d at pp. 26-27.)

reflect the court's attempt 'to do no more than catalog common factors that had occurred in prior cases.' [Citation.] In developing these guidelines, the court did not redefine the requirements for proving premeditation and deliberation." (*People v. Young* (2005) 34 Cal.4th 1149, 1183.) Instead, *Anderson's* "goal . . . was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*People v. Perez, supra*, 2 Cal.4th at p. 1125.) "The categories of evidence identified in *Anderson* . . . do not represent an exhaustive list of evidence that could sustain a finding of premeditation and deliberation, and the reviewing court need not accord them any particular weight." (*People v. Young*, at p. 1183.)

Unquestionably, the evidence on this question is circumstantial for the most part and rests on inferences. In such cases, we must be careful not to substitute our judgment for the jury's; "[e]ven if we might have made contrary factual findings or drawn different inferences, we are not permitted to reverse the judgment if the circumstances reasonably justify those found by the jury." (*People v. Perez, supra*, 2 Cal.4th at p. 1126.)

Here, we conclude that a trier of fact could reasonably infer, based on all of the evidence presented, that Tibbs deliberated and premeditated before attempting to murder Lawrence. That is, he acted as "a result of 'preexisting reflection rather than unconsidered or rash impulse.'" (*Sanchez, supra*, 12 Cal.4th at p. 33.) We summarize the relevant facts, and rational inferences therefrom, supporting the jury's findings: Tibbs and Lawrence had a dispute because Tibbs dated Lawrence's sister, who was a minor. Approximately two weeks before the attempted murder, Tibbs had displayed a gun while

confronting Lawrence. The night of the attempted murder, Tibbs and Parks-Burns had twice passed the area where Lawrence was located before deciding to confront Lawrence and his party. At the start of the incident, when Parks-Burns aimed his gun at someone else first, Tibbs instructed him to aim at Lawrence instead. When the gun fell from Parks-Burns's hands, Tibbs got it and fired it at Lawrence. At several junctures during that chain of events, Tibbs had an opportunities to reflect and deliberate, and each time he elected to proceed with targeting Lawrence. The logical conclusion is that Tibbs intended to shoot at Lawrence, and thus his attempted murder was deliberate, willful and premeditated.

Tibbs argues, "[T]he shooting of Lawrence was more consistent with a random, spontaneous act than anything else. The timing of the shooting is instructive. [Tibbs] only picked up the gun after [Parks-Burns] dropped it. If [Tibbs] had the requisite 'specific intent' to kill, he, not [Parks-Burns], would have approached Lawrence in front of his house. However, [Tibbs] shot Lawrence after [Parks-Burns's] unsuccessful struggle." Tibbs, in effect, asks us to reweigh the evidence, but we may not do so.

III.

Tibbs contends the court's failure to instruct the jury on premeditation, deliberation, and willfulness in specific reference to attempted murder requires reversal of his conviction.

The court instructed the jury regarding the definitions of the terms "willfully," "deliberately" and "premeditation" with CALCRIM No. 521, in connection with the murder count: "A defendant is guilty of first degree murder if the People have proved

that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before committing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection. The length of time alone is not determinative."

The court did not instruct on premeditation regarding the attempted murder charge with CALCRIM No. 601, but that instruction defines the terms "willfully," "deliberated" and "premeditation" in identical terms as they are defined in CALCRIM No. 521. Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095.) Here, we presume the jury applied the definitions of the terms from the instruction on first degree murder (CALCRIM No. 521), to this attempted murder count, under the reasonable assumption the definitions would be no different. And in fact the terms are defined the same in CALCRIM No. 601.

We note that the presumption regarding the jury's use of the instructions is further confirmed by the jury's verdict that affirmed the finding of deliberation: "We the jury in

the above-entitled action having found the defendant, Todd Jose Tibbs, guilty of the offense of Attempted Murder as charged in Count 2 of the Complaint[,] *we further find the special allegation that the attempted murder was committed willfully, deliberately and with premeditation to be: True[.]*" (Italics added.) Therefore, we can only conclude that the instructions, taken as a whole, adequately informed the jury that the prosecution was required to prove each element of the charged crime beyond a reasonable doubt.⁵

In light of the abundant evidence set forth above that Tibbs deliberated before committing attempted murder, and based on the presumption the jury correctly followed the court's instruction, we conclude any error was harmless under any standard of review. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320; *People v. Simon* (1995) 9 Cal.4th 493,523.)

IV.

Tibbs contends his attempted murder conviction should be reversed because the court erroneously refused to instruct the jury about the lesser included offense of attempted voluntary manslaughter. Tibbs contends sufficient evidence supported the

⁵ The court also instructed the jury regarding premeditated attempted murder with CALCRIM No. 600: "To prove that [Tibbs] is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt."

instruction because Lawrence and Parks-Burns struggled over the gun, and it was only after it fell that Tibbs picked it up and fired it. Tibbs claims this evidence "could reasonably be interpreted as a mutual combat situation wherein [Tibbs] and [Parks-Burns] were not necessarily the provocateurs as to Lawrence." Tibbs also notes the case was close, as shown by the jury deadlock on the murder charge.

In declining to instruct on voluntary manslaughter, the court ruled: "[M]y recollection of the testimony is that the altercation did not take place until after the gun was pulled and pointed and that any fist fight that occurred at that time would not be heat of passion since the . . . actuating incident was the pulling of the gun and basically a threat to blow him away or kill him As such heat of passion, I don't think, applies."

Even if a defendant does not request it, a trial court must instruct on lesser included offenses whenever substantial evidence raises a question that the elements of the lesser included offense are present. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Substantial evidence in this context is evidence from which a jury could conclude that the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Conversely, if there is no substantial evidence to support the lesser included offense instruction, the trial court has no duty to instruct on it. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

On appeal, we review independently the question of whether the trial court failed to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215 (*Cole*.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Lewis, supra*, 25 Cal.4th at p. 645.) One form of voluntary manslaughter is defined as the

unlawful killing of a human being without malice aforethought "upon a sudden quarrel or heat of passion." (§192, subd. (a).) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or b[y] conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' " (*People v. Lee* (1999) 20 Cal.4th 47, 59.) "Adequate provocation and heat of passion must be affirmatively demonstrated." (*Id.* at p. 60.)

No evidence supports giving the voluntary manslaughter instruction, or Tibbs's claim that Lawrence might have provoked the confrontation that night, or that Tibbs acted out of heat of passion. First, we note that the antagonism between Tibbs and Lawrence had started earlier, and had resulted in a gun confrontation between the two approximately two weeks before the attempted murder. But even if we focus only on the night of the crime, the evidence shows that Tibbs passed the area twice before deciding to approach Lawrence and provoke him by asking him about his gang membership. When Parks-Burns aimed his gun at someone else, Tibbs instructed Parks-Burns to shoot Lawrence instead. As a result of Lawrence's struggle with Parks-Burns, the gun fell, and

Tibbs picked it up, and elected to shoot at Lawrence. On this record, there was no basis for an attempted voluntary manslaughter instruction.

Parks-Burns's Appeal

I.

Parks-Burns contends the court's failure to instruct the jury regarding accomplice testimony deprived him of his rights to due process and a jury trial under the Sixth and Fourteenth Amendments of the federal Constitution. He contends that Harvey's testimony was prejudicial because it was uncorroborated. Parks-Burns moreover argues Harvey's own involvement in the crime is shown by his inconsistent testimony about how the weapons were delivered to Parks-Burns and Tibbs, thus evincing Harvey's consciousness of guilt. Parks-Burns adds, "Harvey's own step-father testified that Harvey was in possession of the sawed-off shotgun a few days before the homicide occurred, and Harvey admitted that he was present both when the offense was planned and when it was carried out." Parks-Burns sums up: "[A] jury could have reasonably concluded that not only did Harvey affirmatively assist the homicide by furnishing the murder weapons . . . but that he was physically present as part of a criminal compact, and encouraged and enabled the homicide by providing 'moral support' and protecting their backs and route of escape, but also by acting as a lookout."

We outlined the law regarding accomplice testimony in *People v. Verlinde* (2002) 100 Cal.App.4th 1146. A conviction cannot stand on the uncorroborated testimony of an accomplice (see § 1111), and a jury must be instructed to view with caution the testimony of an accomplice presented by the prosecution. (See *People v. Williams* (1997) 16

Cal.4th 635.) Trial courts have a sua sponte duty to give accomplice testimony instructions. (*People v. Gordon* (1973) 10 Cal.3d 460, 468-469, disapproved on other grounds in *People v. Ward* (2005) 36 Cal.4th 186, 212.)

Accomplice liability is " 'derivative,' " resulting from an act by the perpetrator to which the accomplice contributed. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

Put another way, " '[a]n accomplice' is one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of the crime."

(*People v. Jones* (1967) 254 Cal.App.2d 200, 213.) For purposes of determining whether accomplice witness instructions are necessary, an accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111; see also CALCRIM No 334.)

"In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33)." (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) Aiders and abettors are included in the category of principals. (§ 31.) An aider and abettor is one who aids, promotes, encourages or instigates a crime with knowledge of the unlawful purpose of the perpetrator and the intent to assist in the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Since aider and abettor liability is based on principles of vicarious liability, an aider and abettor is liable not only for the offense he intended to facilitate or encourage but also for "any reasonably foreseeable offense committed as a consequence by the perpetrator." (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

A witness's status as an accomplice "is a question for the jury if there is a genuine evidentiary dispute [on knowledge and intent] and if 'the jury could reasonably [find] from the evidence' that the witness is an accomplice." (*People v. Howard* (1992) 1 Cal.4th 1132, 1174, quoting *People v. Hoover* (1974) 12 Cal.3d 875, 880.) In such cases, the defendant is entitled to instructions on accomplice testimony, and the failure to instruct may be reversible error. (*People v. Fauber* (1992) 2 Cal.4th 792, 833-834.) When the facts are not in dispute, the issue is a legal one to be determined by the trial court. (*People v. Daniels* (1991) 52 Cal.3d 815, 867.) "Where such witness is an accomplice as a matter of law, the court should so charge. . . . Conversely, where, as a matter of law, the witness is not an accomplice, the court does not err in refusing to charge that he is or in refusing to submit the issue to the jury.'" (*People v. Hoover*, at p. 880, quoting *People v. Jones* (1964) 228 Cal.App.2d 74, 94-95.)

"Any issues of fact determinative of the witness's factual guilt of the offense must be submitted to the jury. Only when such facts are clear and undisputed may the court determine that the witness is or is not an accomplice as a matter of law." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 759.)

During the first trial, Tibbs's counsel argued for an accomplice instruction: "I was requesting the accomplice instructions, maybe not accomplice as a matter of law, but certainly allowing the jury to decide whether Coasa Harvey is an accomplice and meets corroboration. He testified that he was present and the crime was discussed before it took place; that he saw the delivery of the guns; that he saw the loading of the guns; that he saw the first attempt; that he then met with the assailants a second time, discussed it some

more, watched a second time. [¶] If somebody had been watching Coasa Harvey and that had occurred, he'd be charged as an accomplice. He'd be—the People would be arguing that he was a lookout. I've certainly seen many cases where someone's charged as a lookout on less evidence. So my position is there was enough evidence to charge [Harvey;] unfortunately he's the star witness for the prosecution so he wasn't charged[d], but I believe his testimony meets corroboration" Parks-Burns's counsel joined in requesting an accomplice instruction.

The court declined to give the instruction because no evidence supported it: "My analysis of the evidence is that there is no factual support for an accomplice testimony at this point. No facts have been developed that indicates Mr. Harvey in any way assisted or aided in the commission of the alleged offense." The court cautioned defense counsel, "You cannot argue that [Harvey] needs corroboration. One witness worthy of belief is sufficient to prove a fact. You can argue as far as how much weight they should give to [Harvey's testimony]; that he's speaking on his own and that . . . nobody else is confirming what he said, things of that nature, but to argue to the jury they cannot give him [credibility] because he needs corroboration would be inappropriate."

We conclude that Fannin's testimony regarding the sawed-off shotgun does not compel the conclusion that Harvey was an accomplice as a matter of law. To the contrary, that conclusion is too attenuated because it is not supported by anything more than speculation that Harvey removed that same sawed-off gun from Fannin's house and provided it to Parks-Burns, who used it in committing the murder. Moreover, Harvey testified he did not own a shotgun, and never held or fired one. Parks-Burns's other claim

that Harvey was a lookout likewise fails to support the assertion Harvey was an accomplice as a matter of law, because the facts surrounding Harvey's observation of the codefendants' actions was not undisputed, but rather strongly support the alternative conclusion Harvey was motivated by nothing more than mere curiosity. Similarly, Harvey's testimony he overheard the discussions between Parks-Burns and Tibbs does not, without more, lead to an inference Harvey was involved in the crime as an accomplice.

In short, the evidence does not show Harvey was, as a matter of law, an accomplice of murder. Therefore, the court did not err in failing to so instruct. An instruction that a witness is an accomplice as a matter of law "could be given only if undisputed evidence established the complicity." (*People v. Davis* (1954) 43 Cal.2d 661, 672.) We reject Parks-Burns claims of constitutional error. Generally, "the application of the ordinary rules of evidence under state law does not violate a criminal defendant's federal constitutional right to present a defense, because trial courts retain the intrinsic power under state law to exercise discretion to control the admission of evidence at trial." (*People v. Abilez* (2007) 41 Cal.4th 472, 503.)

II.

The prosecutor moved in limine to admit evidence regarding Parks-Burns's attempted murder conviction, arguing: "These two crimes were committed within a block of each other. They were committed in furtherance of and to promote the 18th Street Gang. In the subsequent shooting [']18th Street['] was yelled out. The confrontation was due to statements made against 18th Street or against gang

members. . . . It was close in time. The same or similar weapon was used in both shootings. And based on motive and intent to promote, further or defend their gang, [identification,] and planning . . . the People should be able to utilize this evidence."

In granting the motion, the court ruled: "[A]lthough probably not admissible on the issue of identity because [this is] not a signature crime, the evidence is admissible on issues of intent, common design and motive. In the current case the shots coming from the distance that have been indicated to the court in our pre-trial conferences do lead to a question of [the] intent of the shooter and any aider and abettor of the actual shooter. As to the common design issue, what we have is the second count of the shooting of another person within approximately three weeks in a location that was approximately one block from the charged account. Also done for the benefit of a gang and done by the same two perpetrators. And also relevant as to the issue of motive which ties back into the common design and gang issues. I do believe that the incident is relevant in the case. [¶] Under [Evidence Code, section 352,] balancing probative value versus prejudicial effect, my first comment is both incidents were presented in the first trial and resulted in a conviction on Count 2 and a hung jury on Count 1. So [it] can't really be argued that the evidence of Count 2 is such that [it] would automatically result in the jury convicting on Count 1. It didn't happen in the first trial. [¶] Beyond that, however, here we have a situation in this uncharged event that both defendants have had their guilt as to the uncharged count established either by jury verdict or juvenile adjudication. The jury therefore would not be inclined to convict on the charged count in order to punish either of the defendants for the conduct in the uncharged incident. [¶] Also, the fact that there

has been adjudication on both defendants as to count 2 means that that evidence can be put on without an undue consumption of time. The jury will not be confused as to the issues because they will not be required to determine whether or not either of the defendants committed the uncharged offense. [¶] The court finds the probative value does outweigh the prejudicial effect and will allow evidence on that."

Accordingly, Lawrence testified that Parks-Burns and Tibbs attempted to shoot him in front of his residence on September 7, 2007.⁶

⁶ The court instructed the jury regarding the attempted murder conviction: "The People have presented evidence that the defendant, Brandon Parks-Burns, committed another offense with Todd Tibbs that was not charged in this case. That offense occurred on September 9th, 2007[,] [*sic*] and involved Sequwan Lawrence. [¶] On November 13th, 2007, in a separate court proceeding regarding this uncharged offense, Defendant Brandon Parks-Burns admitted that he committed the offense of assault with a firearm against Sequwan Lawrence. [¶] On March 30th, 2009, in a separate proceeding regarding this uncharged offense, Todd Tibbs was convicted of the uncharged offense against Sequwan Lawrence. [¶] You may consider the evidence about the uncharged offense only if the People have proved by a preponderance of the evidence that [Parks-Burns] in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden 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. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that [Parks-Burns] committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not [Parks-Burns] acted with the intent to kill in this case; or [Parks-Burns] had a motive to commit the offense alleged in this case; or [Parks-Burns] acted with the intent to aid and abet Todd Tibbs in this case; or [Parks-Burns] acted for the benefit of or in association with a criminal street gang in this case; or [Parks-Burns] had a plan or scheme to commit the offense alleged in this case. [¶] Do not consider this evidence for any other purpose. If you conclude that [Parks-Burns] committed the uncharged offense, that conclusion is only one factor to consider . . . along with all the other evidence. It is not sufficient by itself to prove that [Parks-Burns] is guilty of the offense and allegations charged in this case. The People must still prove the charge and allegations beyond a reasonable doubt."

Parks-Burns contends the trial court abused its discretion by admitting testimony regarding his attempted murder conviction that was separately adjudicated, arguing, "In this case, the prosecution used irrefutable proof that [he] had used violence in a gang context as a proxy for solid credible evidence of the charged offense, and managed to persuade jurors that they need not be unduly concerned about [his] guilt or innocence of the specific charged offense." He further argues admission of the testimony violated the First Amendment of the federal Constitution because he was put on trial for his personal association with gang members, and his Eighth Amendment rights because he was punished based on his "bad character."

Evidence of a crime committed by the defendant that is not charged in the current case is not admissible to show criminal propensity, but it may be admitted to show some other material fact, such as intent. (*People v. Jones* (2011) 51 Cal.4th 346, 371.) To be admissible, there must be some degree of similarity between the charged crime and the uncharged crime, and the least degree of similarity is needed when the evidence is offered to prove intent. (*Ibid.*) The conduct during the current crime and the uncharged crime must be sufficiently similar to support an inference that the defendant probably harbored the same intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds, as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) We review the trial court's ruling on these issues for abuse of discretion. (*People v. Jones*, at p. 371.) Therefore, we do not reverse the conviction unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd

manner that resulted in a manifest miscarriage of justice. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.)

Here, the testimony regarding the attempted murder was admissible on the issue of Parks-Burns's intent to further the 18th Street gang. As noted, at the end of the attempted murder incident, he shouted out the name of the gang. In addition, the gang expert testified that both crimes were committed to further the status of the two codefendants within that gang, and the status of the gang as well. The crimes occurred within the same geographic area, and within weeks of each other. There was testimony the same weapons were used in both crimes.

Parks-Burns contends the court abused its discretion in not finding the evidence unduly prejudicial. We disagree. The record shows the court carefully exercised its discretion in applying the relevant criteria to evaluate prejudice set forth in Evidence Code section 352. We again reject Parks-Burns claims of constitutional error in light of the trial court's intrinsic power under state law to exercise discretion to control the admission of evidence at trial. (*People v. Abilez, supra*, 41 Cal.4th at p. 503.)

III.

A.

Parks-Burns contends the court erroneously sentenced him to 50 years to life instead of 9 years, because no physical evidence was recovered from the crime scene regarding use of a shotgun, notwithstanding Harvey's testimony Parks-Burns had used one in committing the crime. Moreover, the prosecutor conceded during closing arguments that Parks-Burns did not kill Marshall, but rather Tibbs did, as shown by the

fact only one bullet, from a handgun, caused the death.⁷ Therefore, Parks-Burns concludes, the court was punishing him for testifying instead of accepting the plea bargain. Referring to the disparate punishment he and Tibbs received for the murder conviction, Parks-Burns states that he "stands convicted of first degree murder and faces a term of [50] years to life imprisonment, while the actual killer, Mr. Tibbs, has been convicted of only voluntary manslaughter, and faces a mere [6-year] sentence, to be served fully concurrently with his prior conviction for attempted murder, in effect no penalty at all. [¶] It is evident that Mr. Parks-Burns is being punished by the Riverside County District Attorney's office and the California State judicial system for refusing the offer of a plea bargain, made during the midst of trial."

Parks-Burns relies on *People v. Superior Court (Feldmann)* (1976) 59 Cal.App.3d 270—a case involving the court's power to approve or disapprove plea bargains and provide indicated sentences—in which the court stated, "A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right." (*Id.* at p. 276.)

⁷ The prosecutor argued to the jury, "I don't think there's any dispute that Mr. Tibbs is the one that fired the gun that actually killed Charles Marshall[.] . . . So is Mr. Tibbs a principal is really what you have to determine here." The prosecutor added, "So your verdict as to Count 1 should be common sense and reasoning, determining credibility of these witnesses, guilty [*sic*]. Because everything shows that [Parks-Burns] was [Tibbs's] running mate. [Parks-Burns] was there at the time. [Parks-Burns] had a shotgun. [Parks-Burns] . . . may not have killed Charles Marshall with that shotgun, but he was there and he aided and abetted."

We conclude there is no evidentiary support for Parks-Burns's contention he is being punished for going to trial instead of accepting a plea bargain. Rather, having been convicted of first degree murder that he committed for the benefit of, or in association with a criminal street gang under section 186.22, and the jury having found true a section 12022.53 firearm enhancement for which a 25-year-to-life sentence is mandatory, his sentence was dictated by statute regarding convictions for multiple felonies and consecutive terms, which the court correctly applied. (§§ 669, 1170.1, subd. (a).)

B.

Parks-Burns alternatively contends his sentence was cruel and unusual punishment, noting he was 16 years old when he committed the crime.

A sentence is cruel or unusual under California law if it is so disproportionate to the crime as to shock the conscience and offend fundamental notions of dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Norman* (2003) 109 Cal.App.4th 221, 230.) Similarly, a sentence constitutes cruel and unusual punishment under the Eighth Amendment if it is grossly disproportionate to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20; *Rummel v. Estelle* (1980) 445 U.S. 263, 271.) Under both standards, the court examines the nature of the offense and the defendant, the punishment for more serious offenses within the jurisdiction, and the punishment for similar offenses in other jurisdictions. (*Solem v. Helm* (1983) 463 U.S. 277, 290-291; *In re Lynch*, at pp. 425, 431, 436.) Any one of these three factors can be sufficient to demonstrate that a particular punishment is cruel and unusual. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38.)

Parks-Burns relies on the United States Supreme Court's decision in *Graham v. Florida* (2010) 130 S.Ct. 2011, 2023 (*Graham*), which held that a juvenile's sentence of life without the possibility of parole was unconstitutional. After the parties had submitted briefing in this case, the United States Supreme Court decided *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2469 (*Miller*), which held that, in homicide cases, the prohibition of cruel and unusual punishment set forth in the Eighth Amendment to the federal Constitution prohibits the imposition of a mandatory sentence of life without the possibility of parole on a juvenile offender. (*Miller*, at p. 2469.) The *Miller* court explained that in homicide cases involving juvenile offenders, a sentencer is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 2469, fn. omitted.)

The *Miller* court elaborated: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." (*Miller, supra*, 132 S.Ct. at p. 2468.)

However, the *Miller* court also stated that in homicide cases, it was "not foreclos[ing]" the ability of a sentencer to impose "this harshest possible penalty" of life without the possibility of parole on " 'the rare juvenile offender whose crime reflects irreparable corruption.' " (*Miller, supra*, 132 S.Ct. at p. 2469, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 573.) On August 16, 2012, the California Supreme Court concluded that *Graham, supra*, 130 S.Ct. 2011, applies to juvenile non-homicide offenders who receive a term-of-years sentence that results in the functional equivalent of a life sentence without the possibility of parole, and stated, "We leave *Miller's* application in the homicide context to a case that poses the issue." (*People v. Caballero* (2012) 55 Cal.4th 262, 268, fn. 4.)

Here, the probation report noted Parks-Burns's crime involved "great violence, great bodily harm, threat of great bodily harm, and other acts disclosing a high degree of cruelty, viciousness and callousness." It also stated, "The manner in which the crime was carried out indicates planning, sophistication or professionalism." We note that the probation officer's assessment is supported by the fact that approximately three weeks before Parks-Burns's involvement in Marshall's murder, he had used a firearm in the attempted murder of Lawrence. This sequence of events indicates Parks-Burns was not deterred from violent conduct after he failed to shoot Lawrence; instead, he elected to associate with the same gang member, Tibbs, and again used a gun in the commission of the murder.

Successful challenges to sentences on the grounds of cruel and unusual punishment are rare. (*In re Nuñez* (2009) 173 Cal.App.4th 709, 735; *Rummel v. Estelle*,

supra, 445 U.S. at p. 272.) Appellant's sentence compares favorably with those in other cases rejecting cruel and unusual punishment claims involving serious crimes committed by young defendants with limited prior criminal records. (See, e.g., *People v. Murray* (2012) 203 Cal.App.4th 277, 282-285 [upholding LWOP sentence for 17 year old convicted of two counts of first degree murder]; *People v. Em* (2009) 171 Cal.App.4th 964, 972-977 [upholding sentence of 50 years to life for 15-year-old gang member who committed murder during a robbery and whose prior record was not extensive]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 14 [15-year-old's sentence of two consecutive terms of 25 years to life for two special circumstance murders did not violate state or federal Constitutions]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230-1231 [upholding sentence of 40 years to life for 17-year-old gang member who committed attempted murder with a firearm]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 17 [upholding sentence of 50 years to life for 14-year-old gang member who committed murder].) This is not one of the rare cases in which the sentence imposed should be reduced as cruel and unusual.

IV.

Parks-Burns contends no substantial evidence supported the award of direct victim restitution.

The California Constitution requires that restitution be ordered in every criminal action in which the victim suffers a loss, absent extraordinary circumstances. (Cal. Const., art. I, § 28.) As this constitutional provision is not self-executing, the Legislature has enacted implementing legislation. (*People v. Giordano* (2007) 42 Cal.4th 644, 652.)

Section 1202.4 authorizes restitution payments to victims and the imposition of restitution fines, which support the Victim Restitution Fund. (§ 1202.4, subds. (e), (f).) Under Government Code section 13957, the California Victim Compensation and Government Claims Board may direct the Victim Compensation Fund to compensate victims for enumerated losses due to crime, including up to \$7,500 for a funeral. (Gov. Code, § 13957, subd. (a)(9)(B).)

Pertinent here are the provisions of section 1202.4 regarding the amount of victim restitution. Subdivision (f) provides: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court." Subdivision (f)(1) further provides that "[t]he defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution."

Also pertinent are the provisions of section 1202.4 regarding the Victim Restitution Fund's entitlement to reimbursement from the defendant. Subdivision (f)(3) authorizes the trial court to order the defendant to pay victim restitution directly to the Victim Restitution Fund, to the extent it disbursed funds on behalf of the victim. On this matter, subdivision (f)(4)(B) provides: "The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the California Victim

Compensation and Government Claims Board reflecting the amount paid by the board and whether the services for which payment was made were for . . . funeral or burial expenses"

Here, the probation office recommended that Parks-Burns pay \$7,500 to the Victim's Compensation Board under section 1202.4, subdivision (f)(2). At sentencing, the court adopted that recommendation. Defense counsel stated, "With respect to the direct victim restitution which is proposed to be assessed at [\$7,500], I'm just not sure what that's based upon. I'm not saying—." At that point, the prosecutor clarified the restitution sought "is the maximum amount that the state Victim Compensation Board can pay for funeral and burial expenses. Most likely the funeral and burial expenses were over [that amount], but since [it is the maximum], that's the most that the state can pay. [¶] At this moment I do have the victim advocate calling our restitution specialist to insure [*sic*] that there's no other restitution that was paid out. If there wasn't [*sic*], then we will be submitting." The court ruled, "[\$7,500] is the figure I've seen in other cases for that burial expenses." The court asked if defense counsel had any other questions, and he replied, "No, submit."

In *People v. Brasure* (2008) 42 Cal.4th 1037, 1074-1075, the defendant challenged a victim restitution order on the ground that the victim's loss "was not shown by documentation or sworn testimony." In holding that the defendant had not preserved the contention for appeal, our Supreme Court stated: "[B]y his failure to object, defendant forfeited any claim that the order was merely unwarranted by the evidence, as distinct from being unauthorized by statute. [Citation.] As the order for restitution was within

the sentencing court's statutory authority, and defendant neither raised an objection to the amount of the order nor requested a hearing to determine it [citation], we do not decide whether the court abused its discretion in determining the amount." (*Id.* at p. 1075.) In light of *Brasure*, we reach the same conclusion, as the same circumstances are presented here.

DISPOSITION

The judgments are affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.