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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE RAMON LOPEZ,

Defendant and Appellant.

D059375

(Super. Ct. No. FWV901942)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Stephan G. Saleson, Judge. Affirmed.

A jury convicted appellant Jose Lopez of first degree murder (Pen. Code, § 187, subd. (a), count 1), carrying a loaded firearm in association with a criminal street gang (former Pen. Code, § 12031, subd. (a)(1), count 2), and possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1), count 3). The jury found true the allegations appended to count 1 that Lopez personally and intentionally discharged a firearm causing great bodily injury and death (Pen. Code, §§ 12022.53, subds. (b), (c) & (d), 1192.7, subd. (c)(8) & 667.5, subd. (c)(8)), and found true the allegation appended to count 3 that

Lopez committed the offense for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)). In a bifurcated proceeding, the trial court found true Lopez suffered a prior strike conviction within the meaning of Penal Code sections 667, subdivisions (b) through (i), 1170.12 and 668; a prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a)(1); and had suffered two prison priors within the meaning of Penal Code sections 667.5, subdivision (b), and 668. Lopez was sentenced to a 91-year-to-life prison term.

I

FACTS

A. Prosecution Evidence

The Offenses

On July 24, 2009, Lopez (a member of a criminal street gang) went grocery shopping with his girlfriend (Christina Pena) at a Stater Brothers store in Montclair, California. After buying groceries, they returned to their car around 9:30 p.m.

The victim, George Salsgiver, was walking in the street near the Stater Brothers parking lot. He had his cell phone in his hand and was flipping the cell phone as though trying to call someone. He was walking at a rapid pace, looking nervous and frantic. He then walked into the parking lot.

Lopez, who was driving, prepared to leave the parking lot, but stopped to wait for oncoming traffic. While Lopez and Pena waited for traffic, Salsgiver walked by their car on the passenger's side. Salsgiver then took the phone away from his ear, looked at Pena through the passenger window, and began cursing. Salsgiver then walked around and

behind the car and went near the driver's side window, which was down, and a verbal argument began between Salsgiver and Lopez in which they cursed at each other.

Salsgiver said "what the fuck" and "fuck you," and Lopez said, "Is he talking to me . . . who is he talking to?" Lopez cursed at Salsgiver, who walked away from Lopez's car. Lopez ordered Salsgiver to "come back here," but Salsgiver continued walking away.

Lopez then turned his car around, parked in a red zone near a fire hydrant, and got out of his car. Pena was crying and, in a voice that sounded scared, yelled, "Babe, stop, stop," but Lopez nevertheless walked towards the back of the car carrying a chrome-plated handgun that appeared to be a .357 magnum in his right hand. Although Salsgiver continued walking away from Lopez's car, Lopez (now several feet from his car) put both hands on his gun, went into a "firing stance" with the gun pointed at Salsgiver, and fired two or three rounds in rapid succession. Lopez then quickly returned to his car and drove away.

Passersby tried to render assistance, but Salsgiver was pronounced dead at the scene by paramedics. A passerby also wrote down the first six characters of the license plate of Lopez's car and reported it to police. About four hours later, a police officer saw a car parked in front of Lopez's house; the car's license plate matched that of the reported plate of the shooter's car. Police obtained a search warrant and searched the home. They recovered a chrome .357 handgun containing three expended casings. Ballistics tests determined the gun fired the bullet recovered from Salsgiver's body. A forensics test also confirmed Lopez had gunshot residue on his hands. The medical examiner concluded

that, because there was no soot or stippling on Salsgiver's body or clothing, he was at least two to two and one-half feet away from the shooter at the time he was shot.

Gang Evidence

A gang expert testified Lopez was a member of a gang known as Ontario Varrio Sur (OVS), based on his gang tattoos and his admissions to police, and related the primary activities of OVS as well as the predicate crimes by OVS members.

The expert explained the important role that respect and intimidation play in gang culture. When gang members are treated with disrespect by others, they are expected to retaliate with violence to show their strength and to create fear in the public to dissuade the public from cooperating with police. A gang member who is disrespected and does not react with violence may himself face violence from his own gang as a disciplinary measure. In the opinion of the expert, Salsgiver's conduct demonstrated "disrespect" toward Lopez, and gang mores required Lopez to react violently toward Salsgiver to show Lopez's strength and to avoid having Pena report Lopez if he did not react. The expert illustrated this concept with an example, occurring just two days before the charged offenses, in which Lopez had been told by a man to leave the man's property. Lopez reacted by assaulting the man. The significance of the example was to show that Lopez reacted "with such violence to such a menial . . . incident" involving an incident of perceived disrespect. The expert testified the murder, and the weapons possession charges, benefitted OVS by sending a message to the public that if you crossed OVS you could be murdered, and it created fear in the public of gang retaliation.

B. Defense Evidence

A bartender at a bar located in the same complex as the Stater Brothers store testified Salsgiver had been drinking shortly before he was killed. Salsgiver was on his cell phone talking too loudly. Salsgiver went to the pool table area and the bartender later approached and asked everyone if everything was okay. Salsgiver lifted his arms, as though saying "whatever," and walked out.

Two bystanders testified they saw Salsgiver walking briskly while yelling profanities into his cell phone. He appeared to be challenging the person on the other end of the phone call. Moments later, one of the bystanders heard shots and the other bystander saw Lopez's car leaving the area quickly.

II

ANALYSIS

A. The Instructional Claim

Lopez argues the court erred when it rejected his request for a jury instruction on the lesser included offense of voluntary manslaughter.

Background

At trial, Lopez requested an instruction on the lesser included offense of voluntary manslaughter. He argued the evidence, viewed most favorably to him, showed that Salsgiver initiated the confrontation and provoked Lopez, and that Lopez reacted quickly to Salsgiver's provocation. The court, although acknowledging that Lopez did nothing to provoke Salsgiver's profanity-laced tirade, concluded the only evidence of provocation was that Salsgiver may have directed some profanities toward Lopez and Pena, but there

was no evidence Salsgiver threatened Lopez or Pena or made any physical contact with them or the car in which they were riding. The court also noted that the evidence showed Salsgiver had ceased cursing toward Lopez and was walking away, and Lopez could have driven away without further incident, but instead chose to turn the car around, park, and pursue Salsgiver before shooting him. Under those circumstances, the court concluded there was no evidence from which a reasonable jury could have concluded Lopez shot Salsgiver while acting under heat of passion, warranting a voluntary manslaughter instruction.

Legal Standards

A trial court has a duty to instruct on all necessarily included lesser offenses for which there is substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154; *People v. Birks* (1998) 19 Cal.4th 108, 112.) "Substantial evidence" is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on other grounds by *In re Christian S.* (1994) 7 Cal.4th 768, 777.) Stated differently, substantial evidence is evidence "sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) But any evidence, no matter how weak, will not give rise to a sua sponte duty to instruct on a lesser included offense. (*People v. Flannel*, at p. 684, fn. 12.) "[S]peculation is not evidence, less still substantial evidence." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The trial court properly refuses to instruct on a lesser included offense when there is insufficient evidence to support the instruction. (*People v. Daniels* (1991) 52 Cal.3d 815, 868.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. (*People v. Barton, supra*, 12 Cal.4th at p. 199.) Generally, the intent to unlawfully kill constitutes malice. (*In re Christian S., supra*, 7 Cal.4th at pp. 778-780.) "But a defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' [citation], or when the defendant kills in 'unreasonable self-defense'—the unreasonable but good faith belief in having to act in self-defense [citations]." (*Barton*, at p. 199.) Because heat of passion can reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide, voluntary manslaughter is considered a lesser necessarily included offense of intentional murder. (*People v. Breverman, supra*, 19 Cal.4th at p. 154.)

The "heat of passion" form of voluntary manslaughter has both an objective and a subjective component. The objective component examines whether such a passion would naturally be aroused in the mind of an *ordinarily reasonable person* under the given facts and circumstances, because no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1015-1016.) Accordingly, there must be evidence from

which a reasonable jury could have found the facts and circumstances include provocation sufficient to arouse the passions of the ordinarily reasonable man. (*Ibid.*) "[T]he fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear and never, of course, the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" (*People v. Valentine* (1946) 28 Cal.2d 121, 139.) The subjective component requires that the actor be "under the actual influence of a strong passion at the time of the homicide." (*Sinclair*, at p. 1016.)

The test for adequate provocation is objective. (*People v. Lee* (1999) 20 Cal.4th 47, 60.) "'A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter.'" (*People v. Wells* (1938) 10 Cal.2d 610, 623, disapproved on other grounds by *People v. Holt* (1944) 25 Cal.2d 59, 87-88.)

Analysis

We are convinced the trial court correctly rejected Lopez's proffered voluntary manslaughter instruction. The evidence showed Salsgiver directed profanities at Lopez and Pena, and may even have briefly engaged in a verbal altercation with Lopez while Lopez was sitting in the car, but that does not suffice to support a heat of passion instruction. In *People v. Manriquez* (2005) 37 Cal.4th 547, the court observed that:

"Although the provocative conduct may be verbal, as it may have been if Escamilla's testimony were to be credited, such provocation 'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.' [Citation.] That standard was not met here. Escamilla testified that [the victim] called defendant a 'mother fucker' and that he also taunted defendant, repeatedly asserting that if defendant had a weapon, he should take it out and use it. Such declarations, as recounted by Escamilla, comprised the only evidence of provocative conduct attributed to the victim, and plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment. [Citation.] Accordingly, the evidence of provocation was insufficient to suggest that defendant's killing of [the victim] amounted to voluntary manslaughter rather than murder. The trial court properly denied defendant's request for an instruction on voluntary manslaughter based upon the theory of a sudden quarrel or heat of passion." (*Id.* at pp. 585-586.)

There was even less evidence in this case to support a heat of passion instruction than was present in *Manriquez*. Here, unlike *Manriquez*, Salsgiver did not challenge Lopez to fight or employ force, but at most merely cursed at Lopez. Moreover, unlike *Manriquez*, Lopez did not immediately react to some challenge by Salsgiver by shooting him, but instead pursued Salsgiver after he had already walked away from the argument, and shot Salsgiver from some distance after time had passed *and* the provocative conduct had ended. Under *Manriquez*, the trial court here properly denied defendant's request for an instruction on voluntary manslaughter based on the theory of provocation resulting in a sudden quarrel or heat of passion.

B. The Sufficiency of the Evidence Claim

Lopez next asserts the evidence was insufficient to support the premeditation and deliberation necessary to support the conviction for first degree murder. He argues the evidence showed the killing was consistent *only* with Lopez engaging in a sudden

explosion of violence following a verbal altercation rather than a cold, calculated killing. Accordingly, he asserts there was no evidence from which a reasonable jury could have found him guilty of first degree murder.

Legal Principles

When the defendant challenges the sufficiency of the evidence on appeal, we "must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) In conducting this analysis, we view the record most favorably to the prevailing party. (*People v. Johnson* (1980) 26 Cal.3d 557, 562.) If there is any evidence substantial enough to support the judgment, even considering competing evidence, the judgment must be affirmed. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

In the context of first degree murder, " 'premeditated' [simply] means 'considered beforehand,' and 'deliberate' [signifies the decision to act was] 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) The courts have long recognized, however, that "[t]he 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 the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly' " (*Ibid.*)

In *People v. Anderson* (1968) 70 Cal.2d 15, the court identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. (*Id.* at pp. 26-27.) However, these three factors are not exclusive, and are not invariably determinative, but instead are simply " ' "intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]" ' " (*People v. Combs* (2004) 34 Cal.4th 821, 850.)

Analysis

Although not all of the factors identified in *Anderson* must be present for a court to conclude substantial evidence supports a finding of premeditation and deliberation (*People v. Pride* (1992) 3 Cal.4th 195, 247), there is some evidence of each factor here. First, there was evidence of "planning activity": Lopez carried a loaded firearm on an otherwise benign outing (e.g. grocery shopping with his girlfriend), which indicated "he had considered the possibility of a violent encounter." (*People v. Lee* (2011) 51 Cal.4th 620, 636.) Second, there was evidence of motive: an expert explained that a gang member must retaliate against a person who disrespects that gang member. Finally, the evidence of the manner of killing supports the verdict: as Salsgiver was walking away, Lopez ordered him to come back and, when Salsgiver ignored him, Lopez pursued him. Lopez made a U-turn and parked in a red zone and retrieved his weapon. Ignoring his girlfriend's pleas to stop, Lopez then got out of car, walked to the back of the car, assumed a firing stance using both hands to steady his aim, and fired multiple shots in

rapid succession. That evidence amply supports the conclusion the manner of killing was "calm and exacting, supporting a conclusion that it was the result of preexisting thought and reflection rather than an unconsidered rash impulse." (*Lee*, at p. 637.)

C. The Evidentiary Claim

Lopez contends the trial court admitted evidence of his propensity for violence in violation of Evidence Code¹ sections 1101 and 352.

Background

Prior to trial, Lopez moved in limine to exclude evidence that Lopez, while in the company of fellow gang members, had assaulted Mr. Patel after Patel told Lopez and his friends to leave Patel's property. Lopez argued it was highly prejudicial and was collateral to the issues at trial. The court concluded the evidence would be admissible under section 1101, subdivision (b), to show motive and possibly intent insofar as Lopez intended to act for gang-related reasons. The court then examined admissibility under section 352, and concluded its probative value on the issue of Lopez's motive for committing the charged crimes would not clearly be outweighed by its prejudicial effect, and therefore tentatively denied Lopez's in limine motion.

Lopez then requested a section 402 hearing to determine the content of the testimony by Mr. Patel and his brother. Those witnesses testified there were several gang members present when Patel was assaulted and struck, but the witnesses stated they could not identify Lopez as the person who struck Patel. To identify Lopez as the assailant, the

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

prosecution also called an officer who interviewed Patel and his brother the night of the assault and that officer indicated Patel's brother had told the officer Lopez was the attacker. The court concluded the Patels' testimony would be admitted because it had bearing on Lopez's motive and intent as well as the gang mentality that the gang expert would describe, which were issues because of the gang allegations and enhancements.

During trial, the court revisited its ruling because of new information. The court was informed the Patels' declination to identify Lopez as the assailant at the section 402 hearing, which in turn would have required the prosecution to "impeach" them with their prior statements to police that *did* indentify Lopez, could be attributable to newly discovered information that the Patels had been threatened by other gang members. The court recognized that introduction of this threat evidence could raise numerous problems under section 352, but such evidence would be unavoidable if the Patels were to testify to the assault. Accordingly, the court ruled that, instead of becoming mired in collateral inquiries associated with the Patels' testimony, the court would permit the gang expert simply to testify to the assault as one of the factors he relied on to form his opinion that a gang member retaliates against persons who "disrespect" the gang member.

The expert later testified about the Patel incident because it provided a factual basis for his opinion that Lopez (1) was involved with the gang at the time of the charged crimes,² and (2) adhered to gang mores by retaliating violently to trivial manifestations of disrespect against his gang to promote the reputation of the gang in the community.

² The assault on Patel occurred just two days before the murder, and Lopez was in the company of other OVS members when he assaulted Patel.

Legal Principles

Evidence of the defendant's misconduct not charged in the current case is generally inadmissible for purposes of showing the defendant's bad character or propensity to commit crimes. (Evid. Code, § 1101, subd. (a); *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017.) The rationale for excluding uncharged crimes evidence is based on the danger the jury will convict merely because of the defendant's criminal propensity or bad character regardless of whether guilt is proven beyond a reasonable doubt. (See *People v. Alcalá* (1984) 36 Cal.3d 604, 631.) However, uncharged crimes evidence may be admitted for the limited purpose of proving material facts apart from criminal propensity, including motive or intent or some other disputed fact germane to the prosecution. (§ 1101, subd. (b); *Scheer*, at p. 1017; *People v. Catlin* (2001) 26 Cal.4th 81, 146 ["The categories listed in section 1101, subdivision (b), are examples of facts that legitimately may be proved by other-crimes evidence, but . . . the list is not exclusive."].) A trial court's ruling on admission of evidence under section 1101 is reviewed for an abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.)

Even where the evidence is not made inadmissible by section 1101, subdivision (a), the court may nevertheless exclude the evidence under section 352 if its probative value on a defendant's intent or motive is outweighed by its prejudicial impact. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) A court need not, however, "expressly state for the record it engages in a weighing process every time it makes a ruling" as long as the record as a whole reflects the court was aware of and consistently performed such duty under section 352. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1053.) Our review of a

court's determination under section 352 is equally deferential: "A trial court's exercise of discretion in admitting or excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Analysis

The trial court concluded the evidence was relevant and admissible on Lopez's intent and motive for the killing of Salsgiver, which are proper uses for uncharged misconduct evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 22 [intent]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 14 [motive].) The prosecution's theory—that Lopez was motivated to kill Salsgiver to retaliate for disrespectful conduct toward a gang member rather than out of some heat of passion—was inferentially proved by his conduct of acting violently toward another person who "disrespected" his gang but had *not* engaged in any provocative conduct toward Lopez. The *Demetrulias* court approved admission of other crimes evidence under closely analogous circumstances. In *Demetrulias*, the defendant's intent at the time of the charged murder was in dispute (the prosecution claimed the defendant intended to rob the victim and killed him during that robbery), and his primary defense (that he committed the murder in self-defense) was also in dispute. The *Demetrulias* court, upholding the propriety of admitting evidence the defendant had robbed another victim (Wissel) shortly before he attacked and robbed the victim (Miller), noted that "[m]otive, though not itself an ultimate fact put at issue by the charges or the defense in this case, was probative of two ultimate facts, intent and lack of

justification. . . . [¶] As to motive, the Wissel evidence tended to show defendant felt a strong need for Wissel's money and property on the night in question and acted out of that motive rather than merely to defend himself against Wissel. A trier of fact could rationally infer that defendant had also felt a strong need for money a short time earlier on the same night, when he confronted Miller, and therefore that he stabbed Miller in order to take his money rather than to defend himself against Miller." (*Demetrulias*, at p. 14.)

Similarly, Lopez's intent at the time of the murder was placed in issue by the gang enhancement (alleging Lopez committed the murder with the intent to promote gang activity) and by Lopez's defense to the murder alleging provocation by Salsgiver. Paraphrasing *Demetrulias*, a trier of fact could rationally infer from the attack two days earlier provoked only by Patel's disrespect toward Lopez and his fellow gang members that Lopez had also felt a strong need to retaliate a short time later, when he confronted Salsgiver, and therefore shot Salsgiver to retaliate rather than because he acted in heat of passion.

The prior conduct was also relevant to another disputed issue: Lopez's membership in OVS. In admitting the evidence, the court recognized Lopez's membership in OVS "is required to be proven . . . and . . . there's no admission of gang membership," but "[i]f that should change, my rulings [on the other crimes evidence] may change." Because the evidence of Lopez's attack on Patel showed Lopez was in the company of OVS members when he committed the offense, that evidence was admissible on his membership in OVS as well as his willingness to promote gang conduct.

Lopez argues that, even assuming the evidence was admissible under section 1101, subdivision (b), the court either ignored its obligation to engage in the weighing process under section 352 or, alternatively, abused its discretion by concluding the probative value of the evidence outweighed its prejudicial impact. Lopez's claim that the court did not engage in the weighing process is predicated on the absence of any express reference to a section 352 weighing process when the court revisited its ruling during trial and ultimately concluded the information could be introduced as a factor on which the gang expert relied to form his opinions that Lopez was a member of OVS and that a gang member retaliates against persons who "disrespect" the gang member. However, the court had already engaged in the section 352 analysis when it considered admission of the information through testimony from the Patels, and a court need not "expressly state for the record it engages in a weighing process every time it makes a ruling" as long as the record as a whole reflects the court was aware of and consistently performed its duty under section 352. (*People v. Carpenter, supra*, 21 Cal.4th at p. 1053.) The record as a whole shows the court was well aware of its duty to examine the evidence under section 352, and had done so with respect to the Patel evidence on a prior occasion; therefore there was no error from the absence of a restatement of that weighing process in its subsequent consideration of the same evidence.

Lopez also argues it was an abuse of discretion to admit the evidence under section 352. Relying on *People v. Leon* (2008) 161 Cal.App.4th 149, 169, he asserts the evidence had "minimal relevance" because it was "cumulative to the overwhelming evidence of gang association," and therefore its prejudicial impact far outweighed its

probative value. However, *Leon* merely held that, on a record of overwhelming evidence of the defendant's active membership in a criminal street gang, the admission of a prior juvenile adjudication was " 'merely cumulative regarding an issue that was not reasonably subject to dispute.' " (*Id.* at p. 169, quoting *People v. Ewoldt, supra*, 7 Cal.4th at p. 406.) *Leon* specifically emphasized that "the prosecutor had ample evidence apart from [the defendant's] juvenile offense to establish both that [the defendant's gang] was a criminal gang and that [the defendant] was a gang member." (*Leon*, at p. 169.)

However, *Leon* was apparently undermined by our Supreme Court's recent decision in *People v. Tran* (2011) 51 Cal.4th 1040. The *Tran* court observed that "defendant cites no authority for the argument that the prosecution must forgo the use of relevant, persuasive evidence to prove an element of a crime because the element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute. [Citations.] But the prosecution cannot be compelled to ' "present its case in the sanitized fashion suggested by the defense." ' " (*Id.* at pp. 1048-1049.) *Tran* concluded *Leon* was "distinguishable because the court in that case considered only if the evidence was admissible under . . . section 1101, subdivision (b), governing admission of 'other crimes' evidence to prove an intermediary fact. [Citation.] Here, evidence of defendant's offense was admitted to prove an ultimate fact necessary for conviction. Further, the court in *Leon* found the evidence unduly prejudicial because it was cumulative to other evidence that had already been admitted. [Citation.] *Leon* therefore provides no authority for the argument that

evidence of a defendant's separate offense must be excluded if the prosecution has the ability to develop evidence of predicate offenses committed by other gang members."

(*Tran*, at p. 1049, fn. 3.)

Tran provides room for prosecutors to prove the gang association elements through a defendant's own uncharged offenses, even when other evidence is available on the issue, subject to section 352. More importantly, the evidence was not merely to show "predicate offenses" on which it was cumulative, but was also relevant on other issues, i.e. Lopez's intent to promote OVS by acting violently to perceived insults, and to undermine his claim that he reacted out of heat of passion based on Salsgiver's provocative conduct. The trial court did not abuse its discretion under section 352 when it concluded the probative value of the evidence outweighed its prejudicial impact.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.