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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL KENRIC KARLSON,

Defendant and Appellant.

D060134

(Super. Ct. No. INF062749)

APPEAL from a judgment of the Superior Court of Riverside County, Stephen J. Gallon, Judge. Affirmed.

A jury convicted Daniel Kenric Karlson of second degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)); shooting a firearm in a grossly negligent manner (§ 246.3); being a felon in possession of a firearm (§ 12021, subd. (a)(1)) and in possession of ammunition (§ 12316, subd. (b)(1)); and participation in a criminal street gang (§ 186.22, subd. (a)). The jury found true allegations that as to the murder conviction, Karlson personally and intentionally discharged a firearm, causing death (§ 12022.53, subd. (d)); and as to the

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

negligent discharge of a firearm conviction, he personally used a firearm (§ 12022.5, subd. (a)). The court sentenced Karlson to a 44-year-four-month-to-life prison term.

Karlson challenges his conviction for actively participating in a criminal gang, alleging: (1) because the court erroneously denied his section 995 motion to dismiss the charge, extensive gang evidence was admitted against him thus violating his federal due process right to a fair trial; and (2) there was insufficient evidence to support that conviction. He further contends his conviction for discharging a firearm in a grossly negligent manner must be reversed because uncontroverted evidence showed he was acting in self-defense. We affirm.

#### BACKGROUND

On the night of July 12, 2008, several members of the Barrio Cathedral City (BCC) street gang including Karlson, Johnny Godinez, Alex Torres, Jose Garcia and Cain Hermillo held a party in Thousand Palms, California. Karlson was showing off his new revolver to fellow BCC members, commenting that it used special bullets. Afterwards, Karlson went to the table where Godinez and his girlfriend were sitting, and asked for hard liquor, but Godinez explained it was only for the women, and beers were available for the men. Karlson called Godinez a "bitch," and threw a drink at him. Godinez removed his gun from his person, and got into a fist fight with Karlson. Garcia also got into a fight with Godinez while trying to defend Karlson. Hermillo tackled Karlson and managed to subdue him momentarily. After a while, Karlson was released from Hermillo's grip.

Karlson did not end his fight with Godinez by shaking hands or otherwise reconciling. Rather, Karlson got angry, fired his revolver in the air about three or four times while taunting Godinez and the other partygoers by saying something like, " 'Do you want some of this?' " At that point, Godinez did not have any weapon in his hands. Several BCC members tried to intervene, but Karlson kept his revolver raised, backed away, and eventually entered his waiting car driven by Miguel Caronna, who was accompanied by Steve Rubio. As they were driving away, they heard gunshots fired at them.

Minutes afterwards, Karlson realized he had left Garcia behind, and told Caronna to take them to pick up Garcia. Back at the party venue, Godinez approached Karlson's car and extended his hand to reconcile with Karlson, who refused the handshake, telling Godinez, " 'Get the fuck out of my face.' " Godinez walked away. Garcia approached the car and asked for Karlson's revolver, saying other BCC members had attacked him. Karlson left his car and fired four or five shots at Godinez. Karlson returned to his car, urging Carmonna to speed away. Karlson appeared happy and told Carmonna and Rubio, " 'I got that fool. He's been acting like a punk.' "

Approximately two hours after the incident, Godinez died from multiple shotgun wounds to his head and torso.

At trial, Cathedral City Police Department Officer Lawrence Sanfillippo provided expert testimony regarding gangs. He identified Karlson, who was approximately 31 years old at the time of the incident, as one of the oldest BCC members. Officer Sanfillippo testified that quarrelling gang members commonly set aside their weapons

and have fistfights among themselves, and afterwards shake hands and have a drink together. He testified that if a gang member threw a drink at another gang member and his girlfriend, it would be a sign of disrespect. Therefore, the disrespected gang member would generally need to gain back his respect by fighting the aggressor or risk appearing weak to the BCC.

On direct examination of Officer Sanfillippo, the prosecutor set forth a hypothetical substantially mirroring the facts of this case: "There's a gang party that's outside. A number of gangsters are there, having a good time. One of the male gangsters walks up to another and throws a cup of alcohol on his shirt and on his girl. [A] [f]ight breaks out. Then another gang member comes in and starts fighting with the man that threw the drink. After some fights, the man that threw the drink on the original guy walks over, pulls out his [revolver] and fires a number of shots in the air so everybody can see it and says, 'Who has problems here? Who wants any of this?' [¶] Soon thereafter he gets in a car and drives away. [A] [c]ouple minutes later he returns and essentially ends up shooting the man that he had originally disrespected by throwing the drink at and ends up killing him."

Based on that hypothetical, the prosecutor asked whether the shooting would be gang related and the shooter acting to promote, further and assist felonious criminal contact by the gang. Officer Sanfillippo answered both questions in the affirmative, elaborating, "The violent acts as such [*sic*] you described in the hypothetical are very common violent acts that gang members commit in the gang community as a whole. Gang members commit such violent acts to instill fear and intimidation not only in the

gang community itself but . . . within the community as a whole. It's a way for gang members to earn respect. [¶] These violent acts promote the gang by instilling fear in the community and it assists the gang by having a reputation of being a violent [sic]. In return victims will not come forward and assist law enforcement in committing [sic] crimes. And as a result of that, gang members are not prosecuted for the crimes and get away with crimes they're committing."

### *Defense Case*

Karlson testified he joined BCC when he was 15 years old, and had been close friends with Godinez for approximately 14 years. At the party, Godinez had collected money to buy hard liquor. Karlson later asked Godinez for some liquor for a girl, but Godinez refused; therefore, Karlson became angry and threw a drink on Godinez. Godinez punched Karlson. Several gang members gathered around, demanding that he and Godinez settle their differences in a fight according to BCC rules. Karlson tried to avoid showing weakness but also wanted to calm the situation with Godinez, and therefore he enlisted Garcia's help. Hermillo punched Karlson and held him in a headlock. After being released from that position, Karlson was surrounded by many BCC members, who appeared to be spurring Karlson to leave the gang definitively. Karlson retreated to the yard's exit. He pulled out his revolver and fired it in the air three times because he was afraid of the BCC members, who appeared like an angry lynch mob. Carmonna, Rubio and Karlson drove off in Karlson's car. But shortly afterwards they returned to pick up Garcia, because he had come to Karlson's defense earlier.

At the party venue, Godinez approached and apologized to Karlson, who was dismissive towards him. Garcia came over to Karlson's car, upset, bloody, and saying that some BCC members had "jumped him." Garcia asked to borrow Karlson's revolver, but Karlson refused. A crowd of BCC members approached Karlson's car and Hermillo said, " 'Blast him.' " Karlson saw Torres pull out a gun and point it at Karlson. Therefore, Karlson fired his revolver. Torres fired his gun after Karlson had fired his. Karlson testified he had not intended to kill Godinez and did not know his gunshots had hit him. Karlson got in his car and Caronna drove away. Karlson denied saying that he "got that fool." Karlson telephoned Godinez to find out what had happened, but no one answered. Later, when Karlson learned police were looking for him, he left for Arizona and Texas. He did not report the incident to police because previously police had wrongfully accused him of criminal conduct.

## DISCUSSION

### I.

Karlson contends insufficient evidence supported his conviction for active participation in a gang under section 186.22, subdivision (a). He concedes there was sufficient evidence supporting the first and second elements of the statute, but he claims the third element was not satisfied.

The jury was instructed regarding the elements of section 186.22, subdivision (a): "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant actively participated in a criminal street gang; [¶] 2. When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in

a pattern of criminal gang activity; [¶] AND [¶] 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang by: [¶] a. directly and actively committing a felony offense. [¶] Active participation means involvement with a criminal street gang in a way that is more than passive or in name only. [¶] The People do not have to prove that the defendant devoted all or a substantial part of his time or efforts to the gang, or that he was an actual member of the gang."

"The gravamen of the substantive offense set forth in section 186.22[, subdivision] (a) is active participation in a criminal street gang. We explained in *People v. Castenada* [(2000)] 23 Cal.4th 743, that the phrase 'actively participates' reflects the Legislature's recognition that criminal liability attaching to membership in a criminal organization must be founded on concepts of personal guilt required by due process: 'a person convicted for active membership in a criminal organization must entertain "guilty knowledge and intent" of the organization's criminal purposes.' [Citation.] Accordingly, the Legislature determined that the elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related." (*People v. Albillar* (2010) 51 Cal.4th 47, 55-56 (*Albillar*).

In sum, section 186.22, subdivision (a) does not require proof the defendant participated in a gang related offense; rather, it only requires evidence the defendant was an active member of a gang and participated in some manner in an offense committed by a member of the gang. (*Albillar, supra*, 51 Cal.4th at p. 55.) In *Albillar*, three gang members participated in the rape of a 15-year-old girl. In rejecting their contention their separate convictions under section 186.22, subdivision (a) required proof the rape was gang related, the court stated: "[T]here is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related. Gang members tend to protect and avenge their associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation. 'These activities, both individually and collectively, present a clear and present danger to public order and safety . . . .'" (*Albillar, supra*, 51 Cal.4th at p. 55.)

Karlson concedes *Albillar's* holding undermines his contention, but argues this case is distinguishable on its facts. He specifically contends the record showed he was "unassisted by any other fellow gang members, [and] did not in any way promote, further, or assist 'any' felonious criminal conduct by other members of [his] gang." Karlson claims that after he had shot Godinez, BCC members shot at his car as he drove away, thus raising a reasonable inference Karlson was no longer welcome in the gang from that time. Moreover, the BCC members were angry at him and had previously ordered him to leave the party because he had fired shots in the air.

"When the challenge is to the sufficiency of the evidence, ' "[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." ' [Citations.] We view the evidence in the entire record in the light most favorable to the respondent and we presume the existence of every fact in support of the judgment that the trier could reasonably deduce from the evidence. [Citation.] To be substantial, the evidence must be ' "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." ' " (*In re Jose P.* (2003) 106 Cal.App.4th 458, 465-466.)

The record shows that shortly before Karlson shot Godinez, he had showed off his revolver to the other gang members. Karlson provoked the incident with Godinez by throwing alcohol on him in front of his girlfriend. This led to Hermillo subduing Karlson. Therefore, the jury could infer that when a brawl broke out, Karlson took the opportunity to reassert his reputation and further show off his revolver by firing gunshots into the air, while threatening onlookers with using his revolver if they dared to challenge him further. Afterwards, Karlson left the party, but returned to pick up Garcia, who had defended Karlson during the earlier altercation. Garcia was bleeding and had asked for Karlson's revolver to continue avenging the attack on Karlson. It was in that context that Karlson fatally shot Godinez. In light of Officer Sanfillippo's testimony that Karlson, as an older gang member, had more authority in the gang, and that someone in Karlson's position might have lost respect when Hermillo subdued him, the jury reasonably could conclude that Karlson was actively participating with Garcia to further his reputation and the gang's reputation by firing shots in the air with his revolver and by shooting Godinez.

Karlson points out the California Supreme Court is presently reviewing the issue of whether one acting alone can promote further or assist criminal conduct by a gang where no other evidence indicates the crime had anything to do with the gang. (*People v. Rodriguez* (2010) 188 Cal.App.4th 722, review granted Jan. 12, 2011, No. S187680.) Two cases reached the opposite conclusion. (*People v. Cabrera* (2010) 191 Cal.App.4th 276, review granted Mar. 23, 2011, No. S189414; *People v. Gonzales* (2011) 199 Cal.App.4th 219, review granted Dec. 14, 2011, No. S197036.) In light of our conclusion Karlson acted in concert with Garcia, our resolution of this case does not turn on that issue.

## II.

Karlson contends the trial court erroneously denied his section 995 motion to dismiss because at the preliminary hearing the magistrate found insufficient evidence he had shot a firearm in a grossly negligent manner; therefore, the admission of expert testimony regarding gangs was erroneous, and the counts one, two and five convictions must be reversed.

This claim is forfeited because Karlson did not seek writ relief following denial of his section 995 motion. "The statutes have long provided that lack of probable cause at the preliminary hearing is waived *for all purposes* if not timely pursued prior to trial." (*People v. Alcalá* (1984) 36 Cal.3d 604, 628, superseded by statute on other grounds as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) At any rate, on appeal Karlson is required to establish not only that the denial of his section 995 motion was erroneous, but also that he was prejudiced by such error. Karlson cannot do so because, as noted,

the jury convicted him of the charge after a trial in which the prosecution presented sufficient evidence as to the elements of the crime. "Where the evidence produced at trial amply supports the jury's finding, any question whether the evidence produced at the preliminary hearing supported the finding of probable cause is rendered moot." (*People v. Crittenden* (1994) 9 Cal.4th 83, 137.) We therefore reject Karlson's contention.

### III.

Karlson contends there was insufficient evidence showing he shot a firearm in a grossly negligent manner; specifically, he maintains the evidence shows that after both he and Garcia had been beaten by BCC members, and because a lynch mob was approaching him, he fired his revolver in self-defense.

When sufficiency of the evidence is challenged on appeal our role in reviewing the evidence is limited. We do not reweigh the evidence and substitute our judgment for that of the jury. (*People v. Escobar* (1996) 45 Cal.App.4th 477, 481.) Instead, this court's authority begins and ends with a determination of whether any substantial evidence, disputed or not, supports the verdict. Thus, where the record discloses substantial evidence—that is reasonable, credible and of solid value—we accord due deference to the trier of fact. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] "[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289-1290, fn. omitted.)

The court instructed the jury with CALCRIM No. 970 regarding the elements of a violation of section 246.3.<sup>2</sup> The court also instructed the jury regarding self-defense with CALCRIM Nos. 3470,<sup>3</sup> 3471,<sup>4</sup> and 3472.<sup>5</sup>

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<sup>2</sup> CALCRIM No. 970 states in part: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant intentionally shot a firearm; [¶] 2. The defendant did the shooting with gross negligence; [¶] AND [¶] 3. The shooting could have resulted in the injury or death of a person; [¶] AND 4. The defendant did not act in self-defense. [¶] Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury. [¶] And [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act."

<sup>3</sup> The court instructed the jury with CALCRIM No. 3470: "Self-defense is also a defense to Negligent Discharge of a Firearm. The defendant is not guilty of that if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to himself. Defendant's belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death/bodily injury has passed. This is so even if safety could have been achieved by retreating. [¶] The People have the burden of proving beyond a reasonable doubt that the

The jury was properly instructed regarding self-defense and nonetheless elected to convict Karlson. The jury reasonably could decide that in light of the fact Karlson was a senior BCC member and knew the rules of the gang, he deliberately initiated the conflict by throwing alcohol on Godinez. Karlson never indicated he wanted to stop fighting. Instead, despite the fact the fight had not involved the use of weapons, Karlson elected to fire his revolver in the air in a grossly negligent manner, thus endangering the lives of several people at the party. Therefore, sufficient evidence supports the jury's conviction. Having been instructed with CALCRIM Nos. 3471 and 3472, the jury reasonably concluded Karlson's belief he acted in self-defense was unreasonable.

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defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of Negligent Discharge of a Firearm."

4 The court instructed with CALCRIM No. 3471: "A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if: [¶] 1. he actually and in good faith tries to stop fighting; [¶] AND [¶] 2. he indicates, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and that he has stopped fighting; [¶] AND [¶] 3. he gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose. [¶] If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting."

5 The court instructed with CALCRIM No. 3472: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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BENKE, Acting P. J.

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McINTYRE, J.