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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN TYRON STANFORD,

Defendant and Appellant.

E052846

(Super.Ct.No. FWV802989)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stephan G.

Saleson, Judge. Affirmed.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

Kevin Tyron Stanford, defendant and appellant (defendant), appeals from the judgment entered after a jury found him guilty of first degree murder in violation of Penal Code section 187, subdivision (a)¹ (count 1), discharge of a firearm with gross negligence in violation of section 246.3, subdivision (a) (count 2), and second degree robbery in violation of section 211 (count 4).² In connection with all three counts, the jury also made true findings on the special allegations that the crimes were hate crimes within the meaning of section 422.75, subdivision (a), and that in connection with counts 1 and 4 defendant personally used, discharged and caused death with a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (d). On January 14, 2011, the trial court sentenced defendant on count 1 to serve 25 years to life on the first degree murder conviction and a consecutive term of 25 years to life on the gun use enhancement, plus a total of 22 years four months on the other counts, hate crime, and gun use enhancements.

Defendant raises three claims of error in this appeal. First, he contends the trial court committed a prejudicial abuse of discretion by allowing the prosecutor to present evidence that a bloodhound had picked out defendant from a group of male subjects after the dog was exposed to scents on a bicycle defendant allegedly stole (theft of the bicycle is the basis for the robbery charged in count 4). Next, defendant contends the trial court

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

² The jury acquitted defendant of assault with a deadly weapon as alleged in count 3.

abused its discretion by permitting the prosecutor to present what defendant describes as “gang evidence.” Finally, defendant contends the trial court committed error when it instructed the jury according to both CALCRIM No. 370, which told the jury in pertinent part that the prosecutor is not required to prove defendant’s motive to commit any of the crimes charged, and CALCRIM No. 1354, which told the jury that in order to find the hate crime allegation true the prosecutor had to prove that a substantial motivating factor in the crime was the victim’s actual or perceived nationality, race, or ethnicity.

We conclude, as we explain below, that the trial court did not commit any error. Therefore, we will affirm.

SUMMARY OF FACTS

On November 6, 2008, around 7:00 p.m., someone shot and killed 16-year-old Carlos C. as he was riding his skateboard on Virginia Street in Ontario. He was on his way home from his sister’s house, where he had just eaten dinner. Ontario Police Officer Louis Mena responded to the dispatch call, which included a description of the shooter—a Black male wearing a black hooded sweatshirt and khaki shorts. Officer Mena was the first to arrive at the scene of the shooting. He found Carlos alive but not responsive. When the paramedics arrived a few minutes later, Carlos was not breathing and did not have a palpable pulse. Carlos was pronounced dead at a hospital emergency room a short time later.

According to Dr. Steven Trenkle, the forensic pathologist who performed the autopsy, Carlos had two gunshot wounds, one in the back of his upper right arm and the

other in his back on the lower left, just above the buttocks. The bullet that killed Carlos entered the back of his upper right arm near the top of his armpit, passed into the chest cavity, pierced his right lung and heart, and lodged in the lower part of his left lung. This bullet travelled downward, from right to left, in a slightly forward trajectory. The other bullet entered Carlos's lower left back, slightly above the buttocks, in a straight back-to-front trajectory, and hit the pelvic bone. Dr. Trenkle extracted both bullets from Carlos's corpse.

Between 6:00 p.m. and 7:00 p.m. on November 6, 2008, Jair Monares, was taking trash out to the dumpster in front of his apartment on Parkside in Ontario when a man whom Monares later identified as defendant walked up, pulled out a long gun or rifle he had concealed in his shorts, and pointed it at Monares. Defendant asked Monares where he was from. When Monares answered, "Nowhere," defendant said, "This is Evilside Pomona." Defendant then walked away, and as he did so, he fired a single shot up in the air. After firing the shot, defendant continued to walk toward Flora Street. Monares described the gun as black and about 12 inches long. Monares identified defendant in a lineup and at trial and testified that on the night in question defendant was wearing checkered shorts and a dark-colored "hoodie," with the hood down.

Maricela Sierra testified that she was in the laundry room at her apartment complex in the evening on November 6, 2008, when she heard a man yell "Black Crips." When she looked outside, she saw a Black man holding an object in his hands. The object appeared to be eight to 12 inches long. The man, whom Sierra could not identify,

was wearing a black sweater with a hood and brown khaki shorts. Sierra followed the man. When she got to the corner of Flora and Virginia, she saw him chasing a guy riding a bicycle.

About 7:00 p.m. on November 6, 2008, Raul Ramirez was riding his bicycle north on Virginia Street, heading in the direction of a Baptist church, when he heard gunshots. About four minutes after he heard the gunshots, a Black man wearing a loose black hooded sweatshirt, whom Ramirez identified at trial as defendant, confronted Ramirez and asked, "What the hell are you looking at, fucken [*sic*] Mexican? Go back to Mexico, fucken [*sic*] wetback." When Ramirez rode off, defendant chased after him. Defendant caught up to Ramirez because the bike's chain derailed and Ramirez fell against the curb. Defendant pointed a gun at Ramirez, took his bicycle, and rode off in the direction of Virginia Street. Ramirez called 911. Maricela Sierra had seen defendant confront Ramirez, take the bike, and head off in the direction of Virginia Street. Sierra helped Ramirez talk to the 911 operator.

On November 6, 2008, Jessica Villalobos (Jair Monares's girlfriend) was at home in the second floor apartment where she lived with her parents and siblings. Villalobos and Maricela Sierra lived in the same apartment complex. In the early evening, Villalobos heard someone yelling outside. She looked out a window to see what was going on, and saw an African American man in a dark hoodie (his back was toward Villalobos so she could not identify him) walking toward Virginia Street. Villalobos kept watching defendant and saw him take Ramirez's bicycle. She also heard defendant say,

“This is my hood, Nigga.” Later she heard what sounded like gunshots coming from the direction of the Baptist church. Villalobos looked out her bedroom window and saw a body on the sidewalk and a skateboard rolling down the sidewalk. She also saw defendant pick up the bicycle and head toward the church. A brick wall separated the church property from an adjacent alley, but there was a large opening in the brick wall that provided access between the alley and the church parking lot.

Villalobos called Monares and told him about the shooting. After talking with Villalobos, Monares headed outside. As he was coming out the door, he saw defendant walking quickly through the alley toward a nearby apartment where Monares had seen him earlier that day. Defendant had his hands in the pockets of his hooded sweatshirt; he did not look at or speak to Monares.

Between 6:30 and 7:30 on the evening of the shooting, Britney Bolden returned to the apartment on North Parkside in Ontario where she lived with Ava Stone, Stone’s two young sons, and Stone’s aunt. The apartment was near the Baptist church on Virginia Street. Defendant, a relative of Bolden’s³ and a cousin by marriage to Stone, had been sleeping at the apartment for the past week. About 15 minutes after she arrived home, defendant asked Bolden if he could put his things in her car and if she would drop him off at a friend’s place. Bolden told defendant where he could find her car keys. As she did so, Bolden heard sirens and helicopters in the area.

³ The exact relationship between defendant and Bolden is not clear from the record, and is irrelevant in any event.

About that same time, Ava Stone was returning to the apartment after shopping. A police officer stopped her as she was walking toward her yard. The officer told Stone there had been a murder in the area, and that witnesses had seen the murderer run into her apartment. The officer asked Stone to have all males in the apartment over the age of 18 go outside. Stone complied with the officer's request. She also knocked on the door of the upstairs bathroom to tell defendant, who was inside. Defendant said okay but did not open the door. When defendant did not come out, Stone and Bolden both went upstairs. Bolden knocked on the bathroom door, but defendant again would not open the door or come out. Stone went downstairs and reported to the police what was going on.

Bolden knocked on the bathroom door again, and this time defendant opened the door. He was wet, apparently from having just taken a shower. Bolden repeated the police officer's request that all men in the apartment come outside. Defendant complied, but only after changing his clothes and lying down on the bed in Bolden's bedroom for a bit.

The police separately brought Monares and Ramirez to where a group of about six African American men were gathered outside the apartment. Monares identified defendant. Although he recognized defendant, Ramirez was too frightened to actually identify him. In addition, the Ontario Police Department brought in a bloodhound trained to track people. The dog followed a path from Ramirez's abandoned bicycle to defendant as he stood with the group of men outside the apartment. We will recount below additional details of the evidence as pertinent to the issues defendant raises in this appeal.

DISCUSSION

1.

BLOODHOUND TRACKING EVIDENCE

We first address defendant's claim that the trial court abused its discretion by allowing the prosecutor, over defendant's objection, to present evidence that shortly after Carlos was shot and killed a bloodhound tracked defendant to a group of men and picked him out based on a scent the dog had picked up from Ramirez's bicycle.

A. Pertinent Factual and Procedural Details

The trial court, at the prosecutor's request, conducted a hearing under Evidence Code section 402 to determine the admissibility of what defendant calls in this appeal the "dog identification" evidence. At that hearing, Pomona Police Department Officer Cesar Rivera testified in pertinent part that he had been a sworn peace officer for 19 years, and a K-9 handler for over 14 years. On November 6, 2008, he was employed by Pomona Police Department as a K-9 handler. On that date, around 7:30 or 8:00 p.m., Ontario Police Department contacted him to assist in the investigation of Carlos's murder. Rivera's dog at that time was a purebred bloodhound named Willow that Pomona Police Department had acquired in 2006 at Rivera's urging.⁴ Before Willow, Rivera had handled two patrol and narcotics detection dogs both of which had been Belgian Malinois. Rivera explained the difference between a bloodhound and a patrol dog—the

⁴ Rivera testified that he wrote the proposal for the police department to acquire a bloodhound.

former is trained to pick up and track one specific scent; the latter sniffs the air and follows whatever scent it picks up.

Rivera also testified at the hearing that Pomona Police Department obtained Willow from a foundation in Florida that has a training facility in Georgia. Willow had been trained to track for almost a year by a trainer at the foundation and had also been used in the field by law enforcement agencies before Pomona Police Department acquired her. In her work for the other law enforcement agencies, Willow had done approximately six or seven finds, i.e., where she actually tracked and located someone. Rivera trained with Willow at the Georgia facility for a week before bringing her back to Pomona. Rivera described the training, which involved the use of a training track and keeping a log of the dog's performance. After he brought Willow back to Pomona from Georgia, Rivera spent two to four hours a day for two months training her to do hard surface tracking before putting her in the field. Rivera kept logs and only put Willow out into the field when "she was very reliable where she actually stayed on the track and located the decoy."

Rivera explained that there is no test or certification for bloodhounds; as long as they are reliable they are considered good for tracking. According to Rivera, Willow has bad days and does not perform well about 5 percent of the time, but she is on target 95 percent of the time. Rivera provided Willow's training logs to the court and counsel.

Rivera described for the court how he gets Willow to track, a process that involves taking her to where the subject was last seen, having her sniff an object that contains the

subject's scent, and then telling her to "go find him." Willow then sniffs around, finds the direction of travel, and "once she finds the direction of travel, then she's on the go, she's tracking." Rivera trains Willow every day he works with her, which is about 16 hours each month, and once a year he goes back to Florida to meet with other handlers and exchange information.

Rivera explained that in this case he met up with an Ontario police officer and that officer took him to where Ramirez's bicycle had been left near a church. Rivera eliminated Ramirez as a tracking subject by having Willow sniff Ramirez.⁵ Rivera then had Willow smell the bicycle. Willow sniffed various parts of the bike, and then proceeded on her own track. Willow followed her nose through a hole in the brick wall between the alley and the church, down the alley to Parkside, through Stone's apartment complex, and straight to six or seven men who were lined up in the middle of the street, shoulder to shoulder. After sniffing each of the men, Willow sat down in front of defendant, which Rivera explained means she had matched the scent she picked up from the bike with defendant. Officer Rivera walked Willow away from the area briefly while the men moved to stand in different positions. Rivera then returned with Willow and gave her the command to go find him. Willow again sniffed each person and alerted on defendant by sitting down behind him.

⁵ Rivera explained that Willow would know not to track Ramirez because by sniffing him, she had "found" him and therefore could eliminate his scent from other scents found on the bike. Willow would only track a scent she did not already know.

At the conclusion of the Evidence Code section 402 hearing, defendant raised a “Kelly-Frye type argument,”⁶ which the trial court immediately rejected. Instead the trial court relied on *People v. Mitchell* (2003) 110 Cal.App.4th 772 (*Mitchell*), which confirmed that neither dog tracking nor dog trailing evidence involves a scientific technique subject to *Kelly*. (*Mitchell*, at p. 790.) Therefore, the trial court found the evidence admissible.

The issue here is whether the process by which Willow identified defendant involved tracking or trailing, neither of which is subject to *Kelly*. Although defendant contends otherwise, the process Willow engaged in is tracking, as we explain below.

B. Analysis

We begin our analysis by first noting that this case does not involve scent identification through the use of a scent transfer unit—a vacuum-cleaner like device that extracts scent from an object and transfers it to a sterile gauze pad—like that at issue in *Mitchell*. (*Mitchell, supra*, 110 Cal.App.4th at p. 779.) And while the outcome in this case resulted in Willow selecting or identifying defendant from a group of men, this case also does not involve a scent identification lineup in which a dog matches the scent on an object to the scent of a person and thereby identifies that person. For example, in *Mitchell*, a dog that had been trained in “scent discrimination” matched the defendant’s

⁶ *People v. Kelly* (1976) 17 Cal.3d 24, and *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013. The federal *Frye* analysis has been superseded by adoption of the Federal Rules of Evidence, “and our state law rule is now referred to simply as the *Kelly* test or rule.” (*People v. Bolden* (2002) 29 Cal.4th 515, 545.)

scent that had been transferred to a gauze pad by a scent transfer unit with similar pads that contained scents obtained from the victim's shirt and from shell casings found at the murder scene. (*Mitchell*, at pp. 779-780.) The so-called scent identification lineup in *Mitchell* occurred a month after the crime and involved the transfer of scents extracted from the various objects at an unspecified time with a scent transfer unit. (*Id.* at pp. 780-781.)

As recounted above, Rivera brought Willow in within an hour or so of the shooting and took her to where Ramirez's stolen bicycle had been abandoned near the hole in the brick wall that separated the church from the alley. After smelling various parts of the bicycle, Willow followed her nose on a path that led her to defendant. Those facts establish Willow tracked or trailed defendant based on the scent she picked up from the bicycle. (See *People v. Craig* (1978) 86 Cal.App.3d 905, 911 (*Craig*) [Robbery victims pursued their robbers to an apartment complex. When the police arrived, they detained three men who matched the descriptions of the robbers. A robbery victim identified the defendant as one of the robbers. The police then searched the robbers' car where they found items connected to a different robbery committed earlier the same day. An officer and a trained police dog "were ordered to track from the interior of the vehicle. After being allowed to smell inside the [car], the dog followed the path of the suspects from that point to the point where the detention occurred."].)

Tracking evidence is admissible and is not subject to *Kelly*, which is directed at establishing that a particular scientific technique is generally accepted in the relevant

scientific community. (*Craig, supra*, 86 Cal.App.3d at pp. 915-916.) As the *Craig* court observed, the issue with animate objects, such as dogs which presumably are all different, is whether the specific dog in question has the necessary training and ability to track a human. (*Id.* at p. 915) “This testimony should come from a person sufficiently acquainted with the dog, his training, ability and past record of reliability. If the testimony comes from an expert in the area of training, trailing, and operational performance of such dogs, that expert is qualified to state an opinion as to the ability of that particular dog in question to trail a human.” (*Craig*, at pp. 915-916.) In addition, the proponent of tracking evidence must show that the circumstances under which the tracking occurred “make it probable that the person tracked was the guilty party.” (*People v. Malgren* (1983) 139 Cal.App.3d 234, 238.) Therefore, in order for tracking or trailing evidence to be admissible it must be shown that “(1) the dog’s handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated. [Citations.]” (*Ibid.*)

The necessary foundation was established in this case, and therefore the trial court did not abuse its discretion by admitting evidence that Willow tracked defendant from the bicycle to where defendant stood in a group of men. In arguing otherwise, defendant first cites the purported absence of a log documenting Willow’s success rate. In defendant’s view, the “hundreds of pages of reports” Officer Rivera produced did not constitute a

“log” and therefore did not establish Willow’s reliability in tracking humans. Defendant concedes that Officer Rivera testified to Willow’s reliability, i.e., she is on the mark 95 percent of the time. If, as defendant contends, that figure was a “guestimate” on the part of the officer, that is a circumstance that goes to the weight the jury should give the tracking evidence, but it does not affect the admissibility of the evidence. (See, e.g., *People v. Fulcher* (2006) 136 Cal.App.4th 41, 54 [Fourth Dist., Div. Two] [any erroneous factual assumptions by expert could be addressed through cross-examination by showing there was no evidence to support the conclusion and therefore the objection goes to the weight not the admissibility of the expert’s opinion].)

Defendant also contends that the tracking evidence was inadmissible because Officer Rivera had no formal training, was not an expert, and there is no licensing agency for bloodhounds.⁷ Officer Rivera testified to his training and that of Willow. Although defendant takes issue with the extent of that training, he does not identify the specific deficiencies or recount the additional training Officer Rivera should have had in order for the tracking evidence to be admissible. Defendant also claims that the absence of licensing or certification affects the validity of Officer Rivera’s testimony regarding

⁷ Defendant also contends the tracking evidence was inadmissible because there was no showing Willow had successfully tracked a person in a situation comparable to that in this case. In defendant’s view, “Searching for a lost child or the like is different from taking someone’s freedom.” Defendant’s purported distinction is based on the purpose for which the tracking was undertaken; he has not shown that the tracking process is different. Whether the purpose is to find a lost child or to locate a criminal suspect, the process by which Willow tracks a subject is the same.

Willow's reliability because Willow's performance has not been independently evaluated. Defendant's claim assumes that if a licensing organization existed, it would require independent assessment. The claimed deficiencies, if any, go to the weight of the evidence and not whether it is relevant and therefore admissible.

Defendant also challenges the evidence showing Willow was placed on a track where defendant had been. As recounted above, Rivera testified at the Evidence Code section 402 hearing that he was informed the suspect had stolen the bicycle, and had abandoned it by the opening in the brick wall, which is why he and Willow were taken to that location. Defendant contends that evidence does not establish the necessary foundation because the evidence did not show the suspect went through the hole in the wall. Defendant does not dispute that the suspect had been on the bicycle and that he must have taken a path from that location after abandoning the bike. That is all that is required to establish the foundation for admissibility of the tracking evidence. Whether Willow tracked the actual path defendant took was a question for the jury to decide.

Defendant also claims the necessary foundation was not established because Willow did not follow defendant's track to Stone's apartment and instead went straight to the group of men gathered outside. Again, defendant's argument goes to the weight rather than the admissibility of the evidence. Moreover, it occurs to us that, by going directly to the group of men, Willow followed the most recent or strongest scent of the person she was tracking. But in any event, Willow's purported failure to follow

defendant's every step after he abandoned the bicycle does not affect the admissibility of the tracking evidence.

In short, we conclude the necessary foundation was established at the Evidence Code section 402 hearing and therefore the trial court properly admitted the bloodhound tracking evidence at trial.⁸

2.

GANG EVIDENCE

Defendant claims because there was no criminal street gang charge or allegation in this case, the trial court abused its discretion by allowing the prosecutor to present evidence that connected defendant with a gang called the Evil Side Crips. We disagree.

A. Pertinent Factual and Procedural Details

In a pretrial motion, defendant moved under Evidence Code section 352 to exclude statements he made during or near the time he committed the crimes that connected him to the Evil Side Crips. Defendant raised the same objection to the proposed testimony of a police officer whom the prosecution intended to call as a witness to testify about the Evil Side Crips in general and their rivalry with a Hispanic gang

⁸ Defendant asserts two claims regarding objections to aspects of Rivera's testimony at trial that he contends the trial court either sustained or overruled erroneously. We will not address either claim because even if the trial court erred, that error would require reversal only if it resulted in a miscarriage of justice, i.e., that but for those two errors it is reasonably probable the jury would have reached a result more favorable to defendant on any of the charges in this case. (Evid. Code, §§ 353, 354; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant cannot demonstrate prejudice.

called the 12th Street Sharkys. The trial court found the evidence was admissible to show defendant's motive and intent to commit the crimes charged, and that the probative value of the evidence outweighed its potential for undue prejudice.

Later, during trial, the prosecutor sought to introduce evidence to show that after his arrest defendant added three tattoos, or "distinguishing" marks,⁹ to his body: ES, which is the mark Evil Side Crips use; SGV, which means San Gabriel Valley, an area that includes Pomona and other areas frequented by the Evil Side Crips; and KK, which represents defendant's gang moniker, Killa K. The prosecutor argued that the markings are significant because defendant apparently acquired each of them in jail after his arrest. The prosecutor represented to the trial court that the gang expert would testify that gang tattoos have to be earned. Because defendant did not have these tattoos when he was arrested, the prosecutor argued that the timing suggests defendant earned them by committing the crimes at issue in this case. In the prosecutor's view, the tattoos confirmed defendant as an Evil Side Crip and also constituted circumstantial evidence of guilt in that before his arrest on the current charges, defendant had not done anything that would earn him membership in the Evil Side Crips, and thus the right to put their mark on his body. Over defense counsel's objection that the evidence was cumulative because defendant had admitted his gang affiliation when he was arrested, the trial court allowed the prosecutor to introduce the tattoo evidence at trial.

⁹ The prosecutor described the marks as "kind of like a scarring" rather than a tattoo.

B. Analysis

“Gang evidence is admissible if it is logically relevant to some material issue in the case other than [the defendant’s] character [], is not more prejudicial than probative, and is not cumulative. [Citations.]” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.)

“However, gang evidence is inadmissible if introduced only to ‘show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]’ [Citations.] In cases not involving a section 186.22 gang enhancement, it has been recognized that ‘evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]’ [Citations.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, ‘trial courts should carefully scrutinize such evidence before admitting it. [Citation.]’ [Citations.]” (*Id.* at pp. 192-193.) “A trial court’s decision to admit or exclude evidence is a matter committed to its discretion “and 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. Geier* (2007) 41 Cal.4th 555, 585.)

Defendant asserts various claims regarding the admissibility of the gang evidence, beginning with the claim that it was “unnecessary and cumulative” because the issue at trial was not what motivated the person who shot Carlos but rather the identity of that person. Defendant also claims the gang evidence had “no significant probative value”; it lacked relevance on the disputed issues; its probative value was substantially outweighed

by its potential for prejudice; the prejudice was compounded by hearsay evidence that defendant's gang moniker is Killa K; the evidence regarding defendant's jail tattoos added additional prejudice; the gang evidence was offered to show defendant's bad character and therefore was inadmissible under Evidence Code section 1101, subdivision (a); and evidence that defendant was a gang member infringed his First Amendment right. We disagree with each claim, and in doing so, find it unnecessary to engage in a lengthy discussion of each of defendant's arguments because defendant cannot demonstrate prejudice.

At the outset, we note that defendant's arguments do not take into account two significant aspects of the so-called gang evidence. First, the bulk of the so-called gang evidence presented at trial consisted of defendant's own statements. In particular, and as previously recounted, various witnesses testified at trial that while committing the crimes in this case defendant yelled Evil Side Crips, or Evil Side, and also referred to Evil Side Pomona. Defendant's argument also fails to take into account the allegation under section 422.75, subdivision (a), that defendant committed each of the crimes in this case as a hate crime. As pertinent here, a hate crime is one committed in whole or in part because of the victim's actual or perceived ethnicity or race. (§ 422.55.) As a result of that allegation, the prosecutor had to prove the shooter's motive. Evidence of defendant's self-proclaimed gang affiliation was probative both as circumstantial evidence of his identity as the shooter, and also to show his motive for committing the crimes and thus to prove the hate crime allegation. Because defendant created the gang

issue through his own acts of calling out the name of his gang during the commission of the various crimes, we cannot say the probative value of other evidence about the Evil Side Crips and their rivalry with the 12th Street Sharkys, a local Hispanic gang, was substantially outweighed by its potential for prejudice.

We also do not share defendant's view that the prejudice was compounded by Bolden's hearsay testimony regarding defendant's gang nickname. First, prejudice could not be compounded because, as we just explained, the gang evidence was not unduly prejudicial, i.e., prejudicial to an extent beyond the prejudice inherent in all evidence that connects a defendant with a crime and thereby tends to prove guilt. Moreover, Bolden's testimony that she had heard other people call defendant Killa K was not hearsay, which is defined in Evidence Code section 1200 as statements made by someone other than the witness testifying, and that are offered to prove the truth of the matter stated. Therefore, "out-of-court statements not offered to prove the truth of the matter stated are not regarded as hearsay [T]hey are not within the hearsay rule at all." (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 5, p. 684, italics omitted.) Thus, "[t]he hearsay rule is not implicated where the issue is whether certain things were said or done, and not whether those things were true or false. In such event, the out-of-court statement or conduct has independent legal significance (whether or not the content is true and despite the declarant's credibility) and is admissible nonhearsay to prove the words were spoken or the act was done. [Citations.] [¶] 'In these situations, the words themselves, written or oral, are "operative facts," and an issue in the case is whether they were uttered or

written.’ [Citations.]” (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2011) ¶ 8:1042, p. 8D-10, italics omitted.)

Bolden’s testimony was admissible not for its hearsay purpose but as a fact of independent significance, i.e., to show that people referred to defendant as Killa K. That evidence in turn was relevant to explain why defendant had the initials KK tattooed on his hand.

The tattoo evidence was not unduly prejudicial, given its relevance not only to defendant’s motive for committing the crimes but also as circumstantial evidence of defendant’s guilt. The jury could reasonably infer from the fact that defendant did not have the tattoos when he was arrested, which also was the day the crimes were committed, that by committing the charged crimes defendant had earned the right to display the tattoos on his body.

We will not address defendant’s claim that the gang evidence was inadmissible under Evidence Code section 1101, subdivision (a) because defendant did not object on that basis in the trial court. Defendant argues that the specific objection was not necessary because he did object under Evidence Code section 352 “which is the exception to section 1101 when a relevant purpose exists.” We will not discuss the inaccuracy of this assertion. Instead, we construe defendant’s argument as a concession that he did not assert the necessary objection and therefore has not preserved it for review on appeal. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.)

Finally, defendant is incorrect that the gang evidence violated his right under the First Amendment to freedom of association. *Dawson v. Delaware* (1992) 503 U.S. 159, which defendant cites to support his argument, is irrelevant because in that case evidence of the defendant's membership in the Aryan Brotherhood was not relevant to any issue in the penalty phase hearing, and therefore reflected nothing more than the defendant's constitutionally protected "abstract beliefs." (*Id.* at pp. 166-167.) Evidence of defendant's gang affiliation was relevant, as we have discussed, to various issues in this case including his identity as the shooter, and his motive for committing the crimes.

But even if we were to agree that the gang evidence should not have been introduced at trial, we would reverse the judgment only if introduction of that evidence resulted in a miscarriage of justice. (Evid. Code, § 353.) In this context, a miscarriage of justice occurs when this court is able to say, absent the erroneously admitted evidence, it is reasonably probable the jury would have reached a result more favorable to defendant. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Notwithstanding defendant's contrary view, the gang evidence was only a small part of the prosecution's case. We recounted above some of the other evidence that connected defendant to the crimes and thus proved his guilt on counts 1, 2, and 4. In addition to that evidence, there was evidence that gunshot residue was found on khaki shorts and a black hooded sweatshirt recovered from Bolden's bedroom where defendant changed his clothes after the shooting; after his arrest defendant called Bolden from jail to ask whether, in searching the apartment, the police had found that hoodie or had found

a shoe box that contained bullets; the police had recovered both items and additional evidence showed that the bullets in the shoe box were the same caliber and type as a shell casing found along the route defendant took in committing the crimes; and while the police searched the apartment following defendant's arrest, Bolden drove to a nearby convenience store where she disposed of defendant's gun by putting it under a trash dumpster.¹⁰

Because there was significant evidence that connected defendant to the commission of the crimes in this case, and to establish that his motive was hate, we must conclude it is not reasonably probable the jury would have reached results more favorable to defendant on any of the charges or special allegations if the gang evidence had not been introduced. Accordingly, although we conclude no error occurred, even if it had, we would conclude it was not prejudicial.

3.

MOTIVE JURY INSTRUCTIONS

Defendant's final claim is that the trial court committed reversible error by instructing the jury according to CALCRIM No. 370, which says, in pertinent part, that the prosecutor is not required to prove defendant's motive to commit any of the crimes charged, and CALCRIM No. 1354, which told the jury that in order to find the hate crime

¹⁰ The police did not find the gun even though Bolden told them where it was a short time after she left it under the dumpster and they immediately went to retrieve it. The prosecutor's theory was that defendant had arranged for someone to pick up the gun, otherwise, why would Bolden put it under, rather than in, the dumpster.

allegation true the prosecutor had to prove that a substantial motivating factor in the crime was the victim's actual or perceived nationality, race, or ethnicity. We disagree.

The trial court instructed the jury according to CALCRIM No. 370 which told the jurors that “[t]he People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive.” The trial court also instructed the jurors according to CALCRIM No. 1354 which pertains to the hate crime allegation and as given in this case told the jurors, in pertinent part, “If you find the defendant guilty of the crimes charged in Count 1 Murder, Count 2 Negligent Discharge of a Firearm with Gross Negligence, Count 3 Assault with a Firearm and Count 4 Robbery you must then decide whether the People have proved the additional allegation that the crimes committed by the defendant were hate crimes. You must decide whether the People have proved this allegation or [*sic*] each crime and return a separate finding for each crime. [¶] To prove this allegation for each crime the People must prove that the defendant committed that crime in whole or in part because of the alleged victim's actual or perceived nationality or race or ethnicity.”

The two instructions are not inconsistent. One clearly pertains to proof of the substantive crime charged; the other clearly pertains to the hate crime allegation. (See *People v. Snow* (2003) 30 Cal.4th 43, 98, which rejects a similar argument in the context of the general instruction on motive and the witness-killing special circumstance instruction.) Because we review jury instructions as a whole, rather than in isolation, we

must conclude there is no reasonable likelihood the jury would have misunderstood the instructions and as a result would have concluded, as defendant contends, that the prosecutor was not required to prove defendant's motive in order for the jury to find the hate crime allegation true. (*People v. Rundle* (2008) 43 Cal.4th 76, 149, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P.J.

RICHLI
J.