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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN ORTIZ,

Defendant and Appellant.

F060792

(Super. Ct. No. F08901577)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Philip M. Brooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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Chrisna Long was killed in a shootout between gang members of the Floradora Street Bulldogs and the Asian Boyz. A jury found defendant Ruben Ortiz guilty of second degree murder. The jury found true enhancement allegations that he committed

the offense for the benefit of a criminal street gang (Pen. Code,¹ § 186.22, subd. (b)(1)); personally discharged a firearm causing Long’s death (§ 12022.53, subd. (d)); and “was a principal in the murder, and any other principal to the murder did personally discharge ... a firearm, which proximately caused death” to Long (§ 12022.53, subds. (b), (c), (d), (e)(1)). Ortiz filed a motion for new trial, which was denied.

On appeal, Ortiz contends that the trial court erred by instructing the jury on two legal theories that were not supported by the evidence. Ortiz also contends that the trial court abused its discretion by excluding certain proposed testimony from his experts. He argues that these errors effectively deprived him of his right to present a defense. In addition, Ortiz claims that the prosecutor made an improper argument in his rebuttal statement to the jury. Finally, he contends that reversal is required because a juror engaged in misconduct, and the trial court failed to timely disclose ex parte communications between the juror and the court.

We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

Around 5:45 p.m. on March 5, 2008, Fresno police officers were dispatched to North Rowell Avenue (Rowell), north of Olive Avenue (Olive), on a report of a possible shooting. In the parking lot and garage area behind an apartment complex at 4336 East Hammond Avenue (Hammond apartment complex), they found a victim lying face down with a nine-millimeter Beretta handgun that had an extended-capacity magazine in his right hand. Expended cartridge cases and live cartridges were found in the garage area and a walkway that connected the apartments to the garage and parking area. The officers observed multiple bullet holes through two garage doors and a bullet strike mark on a garage door hinge. They found three deformed copper-jacketed bullets and bullet fragments inside one garage and another deformed copper-jacketed bullet inside a second

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

garage. Across the street from the victim, on Rowell, north of a building at 4407 Olive, the officers found five expended nine-millimeter cartridge cases. Also on the east side of the street, they found a bullet and bullet mark on the wall of an apartment complex at 4417 Olive.

The victim was identified as 15-year-old Chrisna Long. He had a tattoo of the words “Asian Boyz” on his chest. Long had suffered gunshot wounds to his head and right shoulder. The cause of death was the head wound.

On July 23, 2008, the Fresno County District Attorney filed an information against Ortiz and a codefendant, Jesus Vargas, charging both defendants with murder (§ 187, subd. (a)). It was further alleged that Ortiz personally discharged a firearm, which proximately caused death to Long (§ 12022.53, subd. (d)); the principal personally discharged a firearm, which proximately caused death to Long (§ 12022.53, subds. (d), (e)(1)); and the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)).

On August 5, 2008, Ortiz entered a plea of not guilty. On November 20, 2008, the district attorney filed a first amended complaint removing Vargas as a defendant.

A jury trial began on March 4, 2010. The parties explained their opposing theories of the case in their trial briefs. The People posited that Ortiz, a Bulldog gang member, personally shot and killed Long, an Asian Boyz gang member, with premeditation and deliberation because Long had disrespected him by flashing his gang signs. The defense theory was that, although Ortiz discharged a nine-millimeter firearm, his shots did not hit Long. Instead, Long was shot from behind by a .25-caliber firearm by a fellow gang member. The defense also argued that if it was proved that Ortiz did shoot and kill Long, then he was acting in self-defense or, at least, imperfect self-defense. Anticipating the defense’s theory, the People argued that, even if the shots that killed Long were “friendly fire” from one of his own gang members, Ortiz was still liable for

murder because he engaged in a mutual gun battle, which brought about the death. In that case, Ortiz and whoever actually shot Long were both equally guilty of the murder of Long.

A gang expert testified that gang territory or turf is very important in gang culture. He explained that an Hispanic gang would not “want rival gangs or other races coming into that area and taking that from them.” The members of the Bulldogs wear the color red, and the Asian Boyz are associated with the color blue. Flashing a gang sign or waving a gang color could be a sign of disrespect or a challenge. There was also testimony that the Bulldogs control the area where the shooting occurred. Defense counsel stipulated that the Floradora Street Bulldogs is a criminal street gang and Ortiz was a member of the gang.

Josie Canel testified that, on the afternoon of the shooting, she and her friend Lulu, along with Ortiz and Vargas, were hanging out at Lulu’s house. Lulu’s daughter, C.C., who was around nine years old, wanted something from Walgreen’s, and Vargas and Ortiz gave Canel and C.C. a ride to the store in Vargas’s car. Vargas was driving. As they were driving to the store, they saw an Asian male wearing a blue hat and blue shirt standing outside the Hammond apartment complex. He was “[t]hrowing up gang signs” and “mad-dogging” them. Josie described mad-dogging as “looking at you ugly” and understood the gesture to be threatening. Canel thought he was a member of the Asian Crips.

Canel testified that Ortiz did not respond to the “mad-dogging” in an aggressive manner, but he was somewhat upset that “they want[ed] to start stuff” when there was a child in the car. On the return trip from the store, they took the same route on East Hammond Avenue (Hammond). The Asian male was still in front of the Hammond apartment complex, now accompanied by a few more Asian males. Canel testified that she saw the same Asian male on the street the next day, so this person was Long. Vargas

and Ortiz dropped Canel and C.C. off at Lulu's house, and Ortiz returned to the house after about 15 minutes.

C.C. was 11 years old at the time of the trial. She testified that, on the ride to the store, she saw some "Chinese people that live in the apartments" (referring to the Hammond apartment complex). They were playing dice and stared at the car. On the way home from the store, the Asian males stared at the car again and one picked up his shirt and showed his tattoo. This seemed to bother Ortiz and Vargas. The Asians "were flashing their gang sign." She recognized gang signs from watching movies. C.C. testified at trial that nobody in the car waved anything out the window. In an earlier interview, however, C.C. reported that Ortiz waved a red flag out the window. At trial, she said she had been confused earlier and it was Vargas, not Ortiz, who had put something on his shoulder.

Donovan Pullen lived on Olive near Rowell. He was out on the landing of his second-story apartment smoking a cigarette when he observed the shooting. He saw two people talking, an Asian male in a parking lot on the west side of Rowell (the garage area of the Hammond apartment complex) and an Hispanic male on the east side of the street.² The Asian male said something like, "[What's] up Cuz?" and the Hispanic male said, "I'm not a Crip, I'm not a cuz" or words to that effect.

Pullen thought the Asian male was being confrontational with the Hispanic male. The Asian male made gestures and pulled out a firearm and then "a whole lot" of shots were exchanged. Pullen testified that it appeared the gunshots first came from where the Asian male was and then the Hispanic male fired back.³ The shots sounded like nine-

²During the confrontation, Pullen could only see the back of the man on the east side of the street and therefore could not identify his ethnicity. Later, the man ran down Olive Avenue, and Pullen was able to see that he was Hispanic.

³In contrast with his trial testimony, however, in an earlier taped interview—which was played for the jury—Pullen said it was like a "gun duel" and "like a draw ... like they almost simultaneously draw weapons and like the Mexican guy beat the Asian

millimeter and .22-caliber gunshots. He explained that a .22-caliber shot sounds like a firecracker and nine-millimeter shots sound like loud gunshots. It appeared to Pullen that the Asian male had a nine-millimeter or .40-caliber Glock and the Hispanic male had a “machine gun, pistol, a TEC-9 or something like that” After the shooting, the Hispanic male ran away and the Asian male lay on the ground. A group of Asian males came out from the apartment complex and saw Long lying on the ground. They had guns in their hands. They piled into a car and left.

James Tep testified that he had known Long since childhood. Tep and Long were associated with the Asian Boyz, or ABZ, which is a gang. On the day of the shooting, Tep was hanging out at the Hammond apartment complex. A car passed by at least three times and he became aware of an “exchange of looks,” apparently between someone in the car and a person or persons in front of the apartment complex. Tep saw a red bandana come out of the car, but he did not remember whether it was from the driver or passenger side. Someone in the car said, “This is my block.” Tep identified Ortiz as one of the men in the car.

Tep was in the courtyard of the Hammond apartment complex when he heard gunshots. He ran to the back of the complex through the walkway to the garage area and saw Long on the ground. About four individuals ran by him toward the courtyard. He recognized two of them to be ABZ gang members; he did not know the others. Tep saw Ortiz and another male across the street on the east side of Rowell. Ortiz was shooting. Tep ran back to the courtyard to hide and then left the apartment complex in his friend’s car.

guy to a punch.” He could tell that the Hispanic male was firing his weapon based on his position and stance. In the interview, Pullen said that he heard several shots and saw the Asian male collapse. Pullen maintained that the Asian male was the aggressor, “[v]erbally and with his actions,” but he did not mention that some shots sounded louder than others. Rather, he said he heard only one gun.

Wendy Montoya lived on Olive near Rowell. Around 5:00 p.m. on March 5, 2008, Ortiz knocked on her door and then entered her house through a sliding glass door. Ortiz and Montoya's boyfriend were family friends. Ortiz was nervous and jumpy. He asked her for a ride and she gave him a ride to his mother's house, which was on the same block as Lulu's house. According to Montoya, Ortiz told her "they were arguing," presumably referring to himself and Long. Ortiz said, "He tried to cap me," which Montoya explained meant that someone tried to shoot him.

After the shooting, police officers found a Taurus nine-millimeter semiautomatic handgun, a Glock nine-millimeter semiautomatic handgun, a high-capacity magazine, and another magazine with 14 live cartridges in the garage of Montoya's home. The police also received witness reports that an individual who had been seen with Long ran into a particular apartment unit in the Hammond apartment complex, and they subsequently found a Bryco nine-millimeter semiautomatic firearm in a search of an apartment in the complex.

A senior criminalist test fired the firearms found by the police. He determined that the five expended cartridge cases found on the east side of Rowell were fired from the Glock handgun found in Montoya's garage. He compared the expended cartridge cases collected in the garage area and walkway of the Hammond apartment complex and found that they shared class characteristics with the Bryco firearm found in a unit of the Hammond apartment complex.⁴ The criminalist also tested the Beretta handgun that was found with Long and concluded that none of the ballistic evidence recovered from the scene had come from that firearm.

⁴The criminalist could not eliminate the Bryco as the source of the expended cartridge cases that were found in the Hammond apartment complex and called his results with respect to the Bryco "inconclusive." He was, however, able to eliminate the Taurus found in Montoya's garage and the Beretta found with Long as possible sources of the cartridge cases.

A forensic pathologist conducted an autopsy of Long. He testified that Long had suffered gunshot wounds to the head area and the right shoulder area. With respect to the head area, the entrance wound was on the left side, in the temple region, and the exit wound was in the right cheek area. On the right shoulder, the gunshot entrance wound was on the front of the shoulder and the corresponding exit wound was on the back of the shoulder. The entrance wound on the front shoulder was slightly higher on the body than the exit wound on the back of the shoulder, indicating that the bullet traveled slightly downward. The physical evidence did not indicate whether Long was shot first in the head or in the shoulder.

From examining the wound to the head, the pathologist determined that the shot was fired from a distance greater than 32 inches. The head wound was a “through-and-through gunshot wound,” and the bullet that caused the wound was not recovered. The entrance wound on the left temple was one-quarter inch in diameter. The pathologist testified that it is “very difficult to accurately determine caliber from the size of a wound,” but opined that the bullet was in the “larger-caliber range” based on the injuries to the brain and the entrance and exit wounds. It was more likely that a smaller-caliber bullet shot from a distance would have stayed within the head. He considered .38-caliber, nine-millimeter, .40- and .45-caliber to be large-caliber bullets, while .22- to .25-caliber bullets were in the small-caliber range.

The shoulder wound was also a through-and-through wound. The entrance wound on the front right shoulder was three-eighths inch in diameter. In the pathologist’s opinion, both the head and shoulder entrance wounds were more consistent with having been caused by a nine-millimeter bullet than a .22-caliber bullet. A higher velocity .22-caliber bullet could have caused the head wound; also, it was possible that a .22-caliber bullet shot at a distance of five feet from Long could have caused the head wound.

A private investigator and firearms instructor, Myrl Stebens, testified for the defense. The trial court determined that he was qualified as an expert to give an opinion

on entrance and exit gunshot wounds. Stebens examined photographs from Long's autopsy and came to the conclusion (in accord with the forensic pathologist) that the head wound in the left temple was the entrance wound. With respect to the shoulder wound, however, Stebens determined that the upper wound at the front of the shoulder was the exit wound. He explained that the skin flares out as a bullet exits, and he observed skin that had flared or pushed out in the upper wound. He also observed that the opposing shoulder wound was smaller, indicating an entrance wound. In addition, Stebens examined the shirt Long was wearing when he was shot. He concluded that the smaller hole on the back of the shirt was caused by the entrance of the bullet and the larger hole on the front of the shirt was caused by its exit. In other words, Stebens believed that Long had been shot in the back.

The defense also hired a ballistics and firearms expert, Ken Zachary, to investigate the shooting. He testified that firing a nine-millimeter bullet produces a louder sound than firing a .22-caliber bullet. On a scale of one to 10 (10 being loudest), a .22-caliber gunshot is a one and a nine-millimeter is a five.

On February 12, 2009, Zachary and Stebens went to the scene of the shooting. Stebens explained that numerous witnesses had indicated that the first shots they heard were small pops, and for this reason, he was looking for a .22-caliber bullet. Standing in the garage area of the Hammond apartment complex where Long's body was found, Zachary viewed the surroundings through a range finder and saw a dark spot on a building. This turned out to be the apartment building where Pullen had lived. They walked over to the building, and Stebens recovered a .22-caliber bullet from an exterior wall. Zachary opined that a .22-caliber bullet shot from the garage area of the Hammond apartment complex could have reached the building where they found the bullet, as there was a clear line of sight between the two locations.

Stebens measured the heights of the bullet holes on the garage doors of the garages of the Hammond apartment complex. He used dowel rods and measuring tape to

attempt to chart the path of the bullets from approximately where Ortiz was standing on the east side of Rowell to the bullet holes on the garage doors across the street. Based on where the five expended cartridge cases were found on the east side of Rowell,⁵ the heights of the five bullets as they hit the garage doors on the west side of Rowell, the location where Long was found, and the locations of the gunshot wounds on Long's body, Stebens opined that Long was not hit by any bullets shot by Ortiz. In addition, Stebens thought that if Ortiz's shots had hit Long, there would have been evidence of "either blood spatter or skin material attached to at least one of those bullet holes" on the garage doors, but there were no reports of such evidence. He further concluded, based on the entrance and exit wounds on Long, the locations of the bullet mark found by the police at 4417 Olive, and the bullet found by Zachary in the wall of Pullen's apartment, that Long was shot from behind. Stebens testified that he believed both shots that hit Long were fired from the walkway connecting the garage area to the apartments of the Hammond apartment complex.

Esteban Garcia testified for the defense. He is Vargas's brother and they lived together in an apartment at the corner of Rowell and Olive. On the day of the shooting, he saw Vargas and Ortiz pull into the parking lot of Garcia and Vargas's apartment building, which was on Rowell. Two or three Asian males approached from across the street screaming things like, "What's up? We got funk." He saw one of the Asian males hand a gun to another one. Garcia heard weapon fire from across the street. It sounded like .22-caliber gunshots. He hid behind a minivan near his car and "heard all these shots go off." He testified that the first shots sounded softer and were from farther away and

⁵Stebens assumed Ortiz was standing within about a three-foot radius of the expended cases. Zachary previously testified that if a person about Ortiz's height fires a Glock nine-millimeter handgun, the cartridge case would be ejected and fall around five or six feet away, landing behind the shooter.

the later shots were louder. Garcia then ran to his apartment. He saw Ortiz lying on the ground and thought he had been shot.

The defense also called Luis Cordova, who lived on Rowell at the corner of Hammond and was friends with Ortiz. He testified that he was a member of the Bulldogs. On the day of the shooting, as he was driving north on Rowell, he saw five or six Asian males on the south side of the Hammond apartment complex, which was across the street from his house. One of them picked up his shirt and grabbed for a gun in his waistband. He pulled the gun halfway out. Cordova thought the gesture meant, "Don't mess with me." Cordova drove to his house and parked in the back on Hammond. He heard gunshots that sounded like they were coming from the Hammond apartment complex. He heard two kinds of shots, one was softer and the other was louder; the first shots were softer. After the shooting, Cordova saw that the shooting victim was the Asian male who had pulled up his shirt and showed him a gun earlier.

The defense presented numerous percipient witnesses. One witness testified that, on the day of the shooting, he was installing tile in an apartment near the corner of Olive and Rowell. Around 5:00 p.m., he heard some pops that sounded like firecrackers and then he heard shots that were louder than firecrackers. Another witness lived in the same apartment building as Vargas and Garcia at the corner of Olive and Rowell, and her west-facing window looked out on Rowell. She testified that she heard a gunshot, got up and looked out the window, and saw people shooting toward her apartment building's parking lot; the shots were coming from the garage area of the Hammond apartment complex. She saw two men across the street shooting but could not see what they were shooting at. The first shots sounded softer than the last shots.

Additional defense witnesses testified in a similar vein. One heard gunshots, first softer and then louder. Another said that the first shot came from the parking lot area of the Hammond apartment complex, and she saw men running in the walkway of the

complex. Ortiz also presented his own gang expert, and at defense counsel's request, the jury went to view the scene of the crime.

The jury reached a verdict on April 12, 2010. It found Ortiz not guilty of first degree murder and guilty of the second degree murder of Long. The jury found the gang and firearm-enhancement allegations to be true.

Following the guilty verdict, Ortiz twice petitioned for an order disclosing personal juror information, and the trial court denied both petitions. On July 26, 2010, Ortiz filed a motion for new trial based on (1) alleged juror misconduct, (2) the trial court's alleged violation of its duty of impartiality, and (3) alleged prosecutorial misconduct. After hearing testimony from nine witnesses over the course of two days, the trial court denied the motion for a new trial on August 10, 2010.

Ortiz was sentenced to an indeterminate term of 15 years to life for murder, plus a consecutive term of 25 years to life for personally discharging a firearm and proximately causing death in the commission of the felony. (§ 12022.53, subd. (d).) The court imposed and stayed a 10-year term for the gang enhancement. (§ 186.22, subd. (b)(1).) The court also imposed and stayed terms of 10 years for personally using a firearm and 20 years for the discharge of a firearm. (§ 12022.53, subds. (b), (c) & (f).)

DISCUSSION

I. Jury instructions

Ortiz contends that the trial court erred in instructing the jury on two legal theories—aiding and abetting and transferred intent—because neither theory of liability is supported by the evidence. We conclude there was no instructional error.

A. Aiding and abetting

The trial court gave the jury CALCRIM Nos. 400 and 401 on aiding and abetting.⁶ The jury was told, in part, that “[a] person is guilty of the crime whether he or she

⁶Defense counsel initially requested these instructions but later withdrew the request. Although defense counsel did not object when the trial court indicated that the

committed it personally or aided and abetted the perpetrator who committed it.” The jury was also instructed:

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

“[One,] The perpetrator committed the crime;

“Two, the defendant knew that the perpetrator intended to commit the crime;

“Three, before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

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

“Someone aids and abets a crime if he or she knows of the perpetrator’s unlawful purposes and he or she specifically intends to and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.”

Ortiz argues that there was insufficient evidence to support a finding that other persons intended to kill Long or that Ortiz intended to aid and abet them in carrying out that intent. The People respond that a defendant may be considered an aider and abettor of a rival gang member where the defendant and his rival engage in a public gun battle that leads to death.

We review de novo the trial court’s decision to give a particular jury instruction. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

The People rely on our Supreme Court’s decision in *People v. Sanchez* (2001) 26 Cal.4th 834 (*Sanchez*) and out-of-state authority that the court cited with approval. In *Sanchez*, rival gang members Sanchez and Gonzalez “engaged in a gang-related gun

instructions would be given, we will address Ortiz’s contentions on the merits. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

battle in front of Gonzalez’s house, during which Estrada, an innocent neighbor who was working on his car with his sons a few doors down, was shot in the head and killed by a single stray bullet.” Sanchez and Gonzalez were each charged with, and convicted of, first degree murder, even though the victim was killed by a single bullet, and thus only one of the defendants could have fired the shot that killed him. (*Id.* at pp. 838-839.)

Our Supreme Court upheld appellant Sanchez’s conviction, concluding that, while it could not be determined who fired the fatal shot, each defendant’s commission of “life-threatening deadly acts” in connection with a gun battle was a proximate cause of the victim’s death. (*Sanchez, supra*, 26 Cal.4th at pp. 848-849.) In reaching its conclusion, the court expressly agreed with similar decisions of sister states, including the New York high court’s decision in *People v. Russell* (1998) 91 N.Y.2d 280. (*Sanchez, supra*, at pp. 847-848.) The *Sanchez* court wrote:

“The New York high court’s decision in *People v. Russell* [citation] is also instructive, as it turned on facts similar to those before us in several important respects. In *Russell*, one defendant engaged in a gun battle with two others in a city housing project. During the course of the gun battle, an innocent passerby was killed by a single stray bullet. Although ballistics tests were inconclusive in establishing which defendant was the actual shooter of the fatal bullet, the prosecution theorized that each of them had acted with sufficient mental culpability required for commission of the crime of depraved indifference murder (N.Y. Penal Law § 125.25[2]), and that each ‘intentionally aided’ the defendant who fired the fatal shot. [Citation.]

“The defendants in *Russell* ‘urge[d] ... that the evidence adduced at trial did not support a finding that they—as adversaries in a deadly gun battle—shared the “community of purpose” necessary for accomplice liability. [Citation.]’ [Citation.] The New York high court disagreed: ‘The fact that defendants set out to injure or kill one another does not rationally preclude a finding that *they intentionally aided each other to engage in mutual combat that caused [the innocent bystander’s] death.*’ [Citation.]” (*Sanchez, supra*, 26 Cal.4th at pp. 847-848, italics added.)

The *Sanchez* court also cited with approval *People v. Kemp* (1957) 150 Cal.App.2d 654 (*Kemp*). (*Sanchez, supra*, 26 Cal.4th at p. 846.) In *Kemp*, defendants

Kemp and Coffin were racing their cars on a public street and Coffin struck another car, killing a passenger. (*Kemp, supra*, at p. 658.) A jury found both defendants guilty of voluntary manslaughter, and appellant Kemp appealed, arguing that since his car struck nothing, he did not cause the passenger's death. (*Id.* at pp. 656, 658.) The court rejected his argument, explaining: "The evidence here strongly indicates that Kemp and Coffin were inciting and encouraging one another to drive at a fast and reckless rate of speed on a residence street and as they closely approached a blind intersection. It was by the merest chance that Kemp was able to avoid hitting the other car, and that Coffin was not. Only the matter of a split second and a few inches made the difference. They were both violating several laws, the acts of both led directly to and were a proximate cause of the result, and the fact that the appellant happened to narrowly escape the actual collision is not the controlling element." (*Id.* at p. 659.)

Following the reasoning of *Sanchez, supra*, 26 Cal.4th at pages 847-848, and *Kemp, supra*, 150 Cal.App.2d. at page 658, we conclude that, where rival gang members engage in mutual combat,⁷ each gang member's conduct may be viewed as inciting and encouraging the other's (or others') conduct. Consequently, each gang member may be liable as an aider and abettor for any death caused by the mutual combat.

We observe that, in *Kemp*, the jury was instructed on aiding and abetting. The *Kemp* court addressed a challenge to the instructions as follows:

"Finally, it is contended that the court erred in giving an instruction upon aiding and abetting, in the absence of supporting evidence. It is argued that in giving this instruction the court failed to also tell the jury that one who aids and encourages the commission of an offense is not deemed by law to be guilty unless what he did was done knowingly and with criminal intent. Not only was this element covered in other instructions,

⁷The court gave CALCRIM No. 3471 on mutual combat, instructing the jury, in part, that "[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 of self-defense arose."

but the instruction in question was limited in its application to persons ‘who knowingly and with criminal intent aid and abet in its commission.’ Most of the argument in this connection is based upon appellant’s basic contention that he struck nothing, and that nothing that he did personally could be said to have proximately resulted in this death. We are unable to see how anything in this instruction could have been sufficiently prejudicial to justify a reversal.” (*Kemp, supra*, 150 Cal.App.2d at p. 662.)

We acknowledge that the *Kemp* court did not hold explicitly that the aiding and abetting instruction was correctly given, instead finding any potential error harmless. Nonetheless, we believe our conclusion that the aiding and abetting instructions were proper is a reasonable application of *Sanchez, supra*, 26 Cal.4th 834, and *Kemp, supra*, 150 Cal.App.2d 654. (See also *People v. Canizalez* (2011) 197 Cal.App.4th 832, 845, 850-852 [finding no error in giving CALCRIM No. 400 on aiding and abetting where two drag racers found guilty of second degree murder and vehicular manslaughter although one defendant may not have hit victims’ car].)

Even assuming the instructions were given in error, we do not see how this instruction could have prejudiced Ortiz. (*Kemp, supra*, 150 Cal.App.2d at p. 662.) Ortiz argues that the instructions on aiding and abetting were prejudicial because the jury could have found this sequence of events: (1) Long and his fellow ABZ gang members began firing at Ortiz; (2) Long was shot by his fellow gang members, while Ortiz had not yet done anything; (3) after Long fell to the ground, the ABZ members continued to fire at Ortiz; and (4) *after Long suffered the fatal gunshot*, Ortiz fired back. He posits, “[I]f the jurors applied the court’s instructions on aiding and abetting, they could erroneously conclude that appellant could be found guilty as an aider and abettor of the ABZ member who fired the fatal shot.”

This argument is without merit. It is not possible the jury found the sequence of events as Ortiz suggests because the jury specifically found true the allegation that he personally discharged a firearm, which proximately caused Long’s death. If, as Ortiz

posits, Long had already been fatally shot by a fellow gang member, then Ortiz's subsequent discharge of a firearm could not proximately have caused Long's death.

B. Transferred intent

The trial court also gave the jury an instruction on transferred intent (CALCRIM No. 562):

“If the defendant intended to kill one person but by mistake or accident killed someone else instead, then the crime, if any, ... is the same as if the intended person had been killed.

“For purposes of applying this rule of transferred intent, it does not matter whether the defendant himself fired the fatal shot or if a principal to the crime fired the fatal shot as long as the defendant's conduct was a proximate legal cause of the death.”

Under the doctrine of transferred intent, “if *A* shoots at *B* with malice aforethought but instead kills *C*, who is standing nearby, *A* is deemed liable for murder notwithstanding lack of intent to kill *C*.” (*Sanchez, supra*, 26 Cal.4th at pp. 850-851, fn. 9.) Ortiz objects to this instruction, asserting that this was not a case where Ortiz intended to kill one person but ended up killing another person.⁸ He argues, “The person intended to be killed, if anyone, was Long; and it was Long, and no one else, who was killed.”

There was evidence, however, from which the jury could find that Ortiz intended to kill ABZ members other than Long. Pullen said it appeared that the gunshots first came from the west side of the street (that is, the garage and parking area of the Hammond apartment complex), and Garcia testified that he first heard weapon fire from

⁸Again, defense counsel did not object to this instruction at trial. Since we address Ortiz's claims of instructional error on the merits, we do not reach his claim of ineffective assistance of counsel, which he raised in a supplemental opening brief. (*People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

across the street. Other witnesses who were on the east side of Rowell testified that they heard gunshots and the first shots were not as loud as the later ones. No ballistic evidence was found at the scene that matched the firearm found with Long, but another weapon recovered from the Hammond apartment complex shared class characteristics with the expended cartridge cases found in the garage area and walkway of the Hammond apartment complex. From this evidence, the jury could have found that ABZ members on the west side of the street started shooting first, and the first shooter was not Long but another ABZ member who was in or near the walkway. The jury further could have found that Ortiz fired back at the first shooter but hit Long instead.

The People contemplated this scenario. In their trial brief, they wrote, “It is anticipated the Defense would argue that these ABZ’s were shooting at Mr. Ortiz and accidentally hit Mr. Long. They could argue that *the shots fired by Mr. Ortiz were directed at these ABZ’s and not at Mr. Long....* [¶] ... Even if the jury assumes Mr. Ortiz only fired after the ABZ’s fired at him and even if they assume the ABZ’s actually shot Mr. Long [the jury] can still find Mr. Ortiz guilty of 1st degree murder.” (Italics added.) The prosecutor also argued in closing:

“The defense would like you to believe that he was shot by one of the Asians, but no evidence supports this. But does it even matter?”

“Chrisna Long wants to kill Mr. Ortiz for gang reasons. Other ABZ’s, apparently, want to kill ... Mr. Ortiz for gang reasons. And Mr. Ortiz wants to kill either Mr. Long *or the other ABZ’s* for gang reasons. So we’ve got a gang warfare situation. Everybody wants to kill the guys on the other side.... Everyone has an intent to kill and it is an illegal intent to kill and they’re all guilty of first degree murder. Every single one of them.” (Italics added.)

Since the evidence and argument at trial support the possibility that Ortiz intended to shoot someone other than Long, the trial court properly gave the jury the instruction on transferred intent.

II. Excluding proposed expert evidence

Ortiz contends that he was unfairly denied the opportunity to present expert testimony that Long was killed by a .22-caliber weapon. He contends the error violated his constitutional right to present a defense. We disagree.

Defense experts Stebens and Zachary conducted experiments by shooting at pigs' heads with .22-caliber and nine-millimeter firearms in order to show the size of entrance wounds created by different caliber weapons. Based on these experiments, Stebens planned to testify on his expert opinion that Long's entrance wounds were more consistent with having been shot by a .22-caliber weapon than a nine-millimeter weapon. Before trial, the People requested an evidentiary hearing under Evidence Code section 402 to exclude the evidence under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).⁹ The trial court heard testimony from Stebens, Zachary, and a criminalist called by the People.

The trial court ruled that evidence of the pig-head experiments and the expert opinions based on those experiments would not be admitted. The court found that Stebens and Zachary had failed to show that their testing method on pigs was generally accepted within the scientific or technical community. The court explained, “[T]hey could not point out any particular study that allowed and discussed the similarities between ... the pig heads and skins and other attributes and human beings.... [N]either of them had testified previously as an expert to determine ... the size of a caliber of a weapon based on the bullet hole left in the head of a pig.”

On appeal, Ortiz argues that the trial court wrongly excluded the proposed expert evidence because the pig-head experiments did not amount to a “new technique” and therefore the proposed expert evidence was not subject to *Kelly, supra*, 17 Cal.3d 24. We

⁹Under *Kelly*, admission of expert testimony based on a new scientific technique requires the proponent to show that the new technique is “‘sufficiently established to have gained general acceptance in the particular field in which it belongs.’” (*Kelly, supra*, 17 Cal.3d at p. 30, quoting *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013, 1014.)

need not address this particular argument, however, because the court also excluded the evidence under Evidence Code section 352.

Although the parties did not point this out, the trial court revisited the issue of the pig-head experiments during the trial and again precluded any reference to them. This time, the court explained:

“[T]he Court believes that ... basically would confuse the issues for the jury. The issue would then become what is the similarity or differences between a pig head and the tissues and bones of the pig head as opposed to a human. The Court believe[s] that would consume an undue amount of time. And under [Evidence Code section] 352, the Court is prohibiting that testimony, in addition to the earlier ruling that the Court made on that same issue before trial.”

“A party who seeks to introduce experimental evidence must show as foundational facts that the experiment was relevant, that it was conducted under conditions the same as or substantially similar to those of the actual occurrence, and that it ‘will not consume undue time, confuse the issues, or mislead the jury [citation].’” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 565; see also Evid. Code, § 352.) Here, the admission of testimony on the pig experiments easily could have sidetracked opposing counsel into a time-consuming mini-trial on issues pertaining to the similarity of pigs and humans with respect to skin, tissue, bone, and so on. The trial court acted well within its discretion in excluding the proposed expert evidence based on the risk of undue consumption of time and jury confusion.

Ortiz also claims that the trial court’s evidentiary ruling infringed upon his constitutional right to present a defense. We are not persuaded. His claim is premised on the assumption that he could not be convicted of murder if Long’s fellow gang members fired the fatal bullet, but as demonstrated by *Sanchez, supra*, 26 Cal.4th 834, and our discussion above on aiding and abetting, this assumption is incorrect. To the contrary, determining whether Ortiz fired the fatal shot was neither necessary nor sufficient for a murder conviction—he could be found guilty where his bullets did not kill Long if his

conduct was found to be a proximate cause of the death, and he could be found not guilty where his bullets did kill Long if he was found to have acted in self-defense.¹⁰

“Ordinarily a criminal defendant’s attempt ‘to inflate garden-variety evidentiary questions into constitutional ones [will prove] unpersuasive. ‘As a general matter, the ‘[a]pplication of the ordinary rules of evidence ... does not impermissibly infringe on a defendant’s right to present a defense.’ [Citations.] Although completely excluding evidence of an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused’s due process right to present a defense.” [Citation.]” (*People v. Thornton* (2007) 41 Cal.4th 391, 443.)

In this case, defense counsel cross-examined the People’s witnesses, presented three expert witnesses and numerous eyewitnesses, and was granted a jury view of the scene of the crime. Most important, defense counsel elicited Stebens’s expert opinion that none of Ortiz’s gunshots hit Long. This opinion was based on bullet trajectory, not the pig-head experiments. Under these circumstances, Ortiz’s claim that he was deprived of his constitutional right to present a defense is without merit.

III. Prosecutor’s closing statement

In his rebuttal statement to the jury, the prosecutor said:

“Motive. Motive is not an element of the crime charged and need not be shown, however, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. We’ve got motive out the wazoo. Evidence—absence of motive may tend to show the defendant is not guilty. And there is absolutely no reason for the defendant to have done this other than gang.

“The *defendant* won’t address the gang-related conduct. And that is the issue in this case. If it is not gang-related conduct, then the defendant’s

¹⁰Defense counsel recognized the latter point in his closing statement. He said, “I agree with [the prosecutor], I mean, it doesn’t really make any difference who killed Mr. Long.... The real question is, does the evidence that we present support, or not, the defense theory that Ruben acted in self-defense.”

actions were fully justified self-defense, because Long was bringing his gun up and he [Ortiz] killed him because he had to. Plain and simple.” (Italics added.)

At this point, defense counsel raised an objection based *Griffin* error,¹¹ which defense counsel described as “[i]nadvertent” but error nonetheless. After a brief discussion outside the presence of the jury (which was not recorded by the court reporter), the court told the jury:

“The Court would like the record to reflect that throughout the closing arguments, both by the People and the defense, there have been Power Point presentations presented for the jurors’ convenience. The current slide shown by the People reads at the top, ‘Why won’t defense address if D’s conduct was gang-related.’

“When [the prosecutor] spoke of that ... display a moment ago, he misspoke. I want to make it very clear to the jury by rereading the instruction that applies, as I had given it to you earlier in this case.

“A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider for any reason at all the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.”

The prosecutor then continued his rebuttal argument. He corrected his previous statement saying, “Rebuttal is addressing *counsel’s* closing argument. Counsel made no reference to the defendant’s gang conduct ...” (Italics added.)

On appeal, Ortiz contends that reversal is required based on the prosecutor’s initial statement that “defendant won’t address the gang-related conduct.” We disagree. “*Griffin* holds that the privilege against self-incrimination of the Fifth Amendment prohibits any comment by the prosecution on a defendant’s failure to testify at trial that invites or allows the jury to infer guilt therefrom.” (*People v. Roybal* (1998) 19 Cal.4th

¹¹*Griffin v. California* (1965) 380 U.S. 609.

481, 514.) On the other hand, a prosecutor is permitted to comment on the state of the evidence and on “the failure of the defense to introduce material evidence or to call logical witnesses.” (*People v. Vargas* (1973) 9 Cal.3d 470, 475, citations omitted.) “We apply a ‘reasonable likelihood’ standard for reviewing prosecutorial remarks, inquiring whether there is a reasonable likelihood that the jurors misconstrued or misapplied the words in question.” (*People v. Roybal, supra*, at p. 514.)

Here, it is not reasonably likely the jury would have understood the prosecutor as inviting the jury to infer guilt based on Ortiz’s failure to testify. As the trial court noted, the PowerPoint slide that accompanied the prosecutor’s argument read, “‘Why won’t *defense* address if D’s conduct was gang-related.’” (Italics added.) This was a permissible comment on the state of the evidence. The prosecutor simply misspoke, referring to the “defendant” instead of “the defense” or “defense counsel.” Even defense counsel recognized that the statement was inadvertent. After defense counsel objected, the trial court immediately explained to the jury that the prosecutor had misspoken and admonished that the defendant had the right not to testify. The prosecutor then corrected himself. Under these circumstances, the jury would not have taken the prosecutor’s initial statement to mean that it could use Ortiz’s failure to testify as evidence of his guilt.

Further, even assuming the jury understood the prosecutor’s misstatement as a comment on Ortiz’s failure to testify, there was no prejudice. The trial court immediately admonished the jury that defendant had “an absolute constitutional right not to testify” and repeated¹² the instruction, “Do not consider for any reason at all the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.” We presume the jury followed these instructions. (*People v. Dement* (2011) 53 Cal.4th 1, 50 [finding no prejudice under any standard

¹²As the trial court noted, the jury had already been given this instruction before the prosecutor and defense counsel made their closing arguments.

where trial court instructed jury not to draw any inference from fact that defendant does not testify].)

IV. Cumulative error

Ortiz argues that the trial court's instructional and evidentiary errors combined to deprive him of his right to present a defense. He also argues that the alleged errors considered cumulatively require reversal. We disagree. Since there were no instructional or evidentiary errors, we reject his constitutional claim. Even considering the possibility that it was error to instruct the jury on aiding and abetting and the prosecutor engaged in misconduct, it is not reasonably probable that these alleged errors affected the outcome.

V. Juror misconduct and motion for new trial

Ortiz claims that his conviction must be reversed because of misconduct by a juror and by the the trial court. We reject this claim.

A. Background

One of the jurors, referred to as Juror No. 10, was also a judge on the Fresno County Superior Court. At a hearing called by the trial court on April 15, 2010 (three days after the jury had reached its verdict), the court informed counsel that it had received e-mail communication from Juror No. 10 during the trial:

“In this courthouse, my name appears on a number of mass e-mail lists which I and my colleagues use to facilitate communication. One such list is used to learn which if any of us is available to meet for lunch. On three occasions during Mr. Ortiz's trial, former Juror [No.] 10, when responding to a lunch request, replied to everyone on the judicial contact list, which included me. These communications were uninvited and unanswered by this judicial officer. Further, the communications in no way influenced this Court in its duty to ensure Mr. Ortiz a fair trial. This Court viewed each communication as nothing more than an innocuous attempt at humor. Since none amounted to a violation of the Court's admonition to not talk about the case, I simply ignored them. But because the e-mails were in fact a type of ex parte communication, I feel disclosure is warranted.”

The trial court then provided counsel with copies of the e-mails sent by Juror No. 10. Because only Juror No. 10's messages were provided and not the preceding messages from other correspondents, the trial court offered some context.

A series of e-mails dated March 15, 2010, began with a lunch inquiry and the presiding judge remarked that judicial officers must not discuss any aspect of the case with Juror No. 10. In response, Juror No. 10 wrote in part, "while it behooves us to be responsible and even to [err] on the side [of] caution, other subjects such as the process fall outside the admonishment but more importantly fall outside [the] scope of common sense."

An unidentified correspondent observed that Juror No. 10 had defended, prosecuted, presided over, and would now hear as a juror a homicide case and he needed to handle an appeal, commit a homicide, and be the victim of homicide to see all sides of such a case. In an e-mail dated March 16, 2010, Juror No. 10 responded in part, "here I am livin' the dream, jury duty with [defense counsel] Mugridge and [prosecutor] Jenkins!" In response to another lunch inquiry, a colleague mentioned that Juror No. 10 would be taking a "field trip," referring to the jury view of the scene of the crime. In an e-mail dated April 7, 2010, Juror No. 10 responded, "I am still watching you guys."

Finally, on April 12, 2010, Juror No. 10 sent an e-mail to an address list titled "Superior Court Judges." He wrote, "Does anyone have the 'top ten reasons that you know you have been on a jury [too] long when'" He asked that the list be sent to his clerk and explained, "My friends want a copy."

On July 26, 2010, defense counsel filed a motion for new trial. Among other arguments, defense counsel argued that Juror No. 10 engaged in three types of misconduct: (1) he concealed his bias during jury selection; (2) he engaged in ex parte communication with the trial court by sending e-mails to 22 superior court judges, including the trial court judge; and (3) he showed impatience and a lack of seriousness

when he slammed a book down loudly and dramatically during defense counsel's questioning of an expert witness.

In support of the claim of concealed bias, Josie Canel, a witness in the trial and a friend of Ortiz, provided a declaration. She stated that she was sitting outside the courtroom during jury selection when she saw a White man leave through the jury door. He was talking on a phone and said, "It was a Hispanic gang member with a gun, what do you expect. If a Hispanic gang member with a gun walked into a liquor store you would expect him to rob it. He said he's guilty." Later, when she testified in court, she saw the same man on the jury. On June 4, 2010, she identified a photo of Juror No. 10 as the juror she had overheard talking about Hispanic gangs.

The trial court heard testimony from nine witnesses, including Canel and Juror No. 10. On August 10, 2010, the court denied the motion for a new trial, concluding, "The Court is satisfied that Mr. Ortiz received a fair trial before 12 impartial jurors and before an impartial member of the bench."

B. Recusal

On appeal, Ortiz argues that the trial court should have recused itself on its own motion. As the People note, the statutory basis for disqualifying a judge is found in Code of Civil Procedure section 170.1. "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding." (Code Civ. Proc., § 170.3, subd. (d).) Since Ortiz did not follow the procedure provided in this scheme, he has forfeited any statutory claim. (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.) Instead, his claim must be premised on his due process right to a fair and impartial judge. (*Ibid.*)

Ortiz relies on *In re Murchison* (1955) 349 U.S. 133, 136, in which the Supreme Court wrote:

“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that ‘Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.’ [Citation.] Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’ [Citation.]”

“Nonetheless, the [Supreme C]ourt has also made it abundantly clear that the due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.] Less extreme cases—including those that involve the mere appearance, but not the probability, of bias—should be resolved under more expansive disqualification statutes and codes of judicial conduct.” (*People v. Freeman, supra*, 47 Cal.4th at p. 1005.)

Here, the trial court explained that it initially believed the e-mails to be innocuous and only later, “on much further thought, the Court concluded that it had an obligation to disclose” the e-mails and did so. The trial court, however, never responded to Juror No. 10’s e-mails, and the e-mails themselves did not comment on the substance of the trial or demonstrate bias or prejudice by the juror. We see nothing in the record to indicate a probability of judicial bias. Ortiz offers no authority for the proposition that a trial court is precluded from deciding a motion for a new trial based on asserted improper ex parte communications between the court and a juror. (Cf. *People v. Clark* (2011) 52 Cal.4th 856, 985-986 (*Clark*) [trial court did not abuse its discretion in denying motion for mistrial based on alleged improper ex parte communications between itself and

jurors].) Under these circumstances, we agree with the People that the facts do not objectively suggest doubts as to the trial court's impartiality.

C. Ex parte communications

Ortiz claims that the e-mails sent by Juror No. 10, combined with the trial court's failure to disclose the existence of the e-mails during trial, deprived him of his right to counsel and his right to be present at all critical stages of the trial proceedings.

“‘[A] trial court should not entertain, let alone initiate, communications with individual jurors except in open court, with prior notification to counsel. [Citation.]’ [Citation.] The prohibition against ex parte communications is designed to ensure that the defendant has “‘an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection....’” [Citation.] ‘Although such communications violate a defendant’s right to be present, and represented by counsel, at all critical stages of his trial, and thus constitute federal constitutional error, reversal is not required where the error can be demonstrated harmless beyond a reasonable doubt.’ [Citation.]” (*Clark, supra*, 52 Cal.4th at p. 987.) “‘[N]ot every communication between the judge and jury constitutes a critical stage of trial,’” however. (*Ibid.*)

A trial court, for example, may properly engage in ex parte communications for scheduling or administrative purposes. In *Clark*, the court answered telephone calls from two different jurors who called about the scheduling of the penalty phase of trial. The trial court described the communications as “‘brief and nonsubstantive” and “‘just taking a message for administrative purposes.’” In those circumstances, our Supreme Court concluded that “‘the trial judge did not err when he spoke briefly to these jurors outside the presence of defendant and his counsel.’” (*Clark, supra*, 52 Cal.4th at p. 987.)

Here, the trial court did not even answer the phone; it simply received e-mails that were addressed to many recipients. Juror No. 10 testified that he did not realize his e-mails were being sent to the trial court, as he did not look at the list of recipients. He admitted, “I really didn’t take the necessary precautions there.” The People argue that Juror No. 10’s e-mails received by the trial court did not even constitute “communication” because they were not intended for the trial court and the trial court did not respond. It is questionable whether these e-mails should be considered ex parte communications, but assuming for the sake of argument that they are, we conclude that the e-mails were not a “critical stage of trial.” Like the telephone messages in *Clark, supra*, 52 Cal.4th at page 987, Juror No. 10’s e-mails were “brief and nonsubstantive.”

Finally, even if the e-mails were improper ex parte communications, Juror No. 10 did not intentionally attempt to contact the trial court, the trial court did not respond to the e-mails, the content of the e-mails was not related to the substance of the case, and there is nothing in the record indicating the e-mails had any effect on the trial court’s conduct of the trial or the outcome of the case. The purpose of the prohibition against ex parte communications is to ensure the defendant has an opportunity to evaluate any proposed judicial response, but here no judicial response was expected or made. (*Clark, supra*, 52 Cal.4th at pp. 987-988.) For these reasons, we conclude the e-mails were harmless beyond a reasonable doubt.

D. Other alleged juror misconduct

Ortiz raises two more allegations of juror misconduct. First, Juror No. 10 noisily placed his juror notebook down on the railing of the jury box during trial. Second, he allegedly made biased remarks about Hispanic gang members during jury selection. On the basis of this allegation, Ortiz claims that Juror No. 10 concealed his racial bias during jury selection.

Juror No. 10 admitted that he “forcefully” put down his jury book during what he considered “to be cross-examination that was meandering and unfocused.” He testified,

however, that his frustration did not affect his ability to be fair to defense counsel or “more importantly, to [Ortiz] in any manner.” The trial court recognized that jurors routinely become frustrated and this is not a problem “unless it was in such a way that they were indicating they were favoring one side or another or otherwise prejudiced to a defendant’s right in a case.” We agree with the trial court and conclude that this incident was not juror misconduct.

Juror No. 10 denied Canel’s accusation that he said anything outside the courtroom about Hispanic gangs. In deciding Ortiz’s motion for new trial, the trial court assessed the credibility of Juror No. 10 and Canel and found Canel’s testimony not very credible. The court relied on the facts that Canel was not consistent in describing what she overheard, she testified at trial that she wanted to help Ortiz, and it appeared that Canel may have been Ortiz’s girlfriend. In addition, the trial court observed that Juror No. 10 had no reason to speak on a cell phone; if he wanted to make a call, he could do so in the privacy of his own office in the building. Finally, Canel did not come forward with her accusation until June 4, 2010, although she allegedly became aware when she testified at trial (on March 16) that the person she had overheard during jury selection was on the jury. The trial court believed if Canel had recognized that the person she previously overheard making racist comments was on the jury, she would have told defense counsel immediately. In contrast, the trial court believed Juror No. 10’s testimony and observed that defense counsel probably agreed. “[F]rankly, I believe that counsel understands that [Juror No. 10 would not make such a statement], otherwise they would not have selected him as a juror in this case.”

Ortiz suggests that the reviewing court should give less weight to the credibility findings made in this case but offers no authority for his position. We decline his suggestion and defer to the trial court’s credibility determinations. (*People v. Allen* (2011) 53 Cal.4th 60, 75.) Consequently, we reject Ortiz’s claim that Juror No. 10 concealed racial bias during jury selection.

Finally, although Ortiz submits that his motion for access to the jurors' identifying information should have been granted, he offers no supporting argument or citation. We treat this issue as waived. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

DISPOSITION

The judgment is affirmed.

Wiseman, Acting P.J.

WE CONCUR:

Levy, J.

Gomes, J.