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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN ANTHONY PACK et al.,

Defendants and Appellants.

F061140

(Super. Ct. No. 1232853)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.

A.M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant Steven Anthony Pack.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant Jose Tito Barajas.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and George M. Hendrickson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Steven Anthony Pack and Jose Tito Barajas of second degree murder, two counts of assault with a firearm, and negligent discharge of a firearm. Appellants allege (1) the trial court's instruction on imminent peril was erroneous and warrants reversal; (2) the prosecutor committed error pursuant to *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), and the trial court erred in not granting a new trial on this ground; (3) there was error in admitting gang evidence and in denying the motion for new trial on this basis; (4) the murder conviction was not supported by substantial evidence; (5) cumulative error; and (6) the victim restitution order must be amended to reflect joint and several liability. We disagree and affirm the judgments.

FACTUAL AND PROCEDURAL SUMMARY

On the evening of August 18, 2007, Daniel Oseguera, Miguel Oseguera, Julio Amezcua, Moises Garcia Barragan, Juan Ruiz Garcia Barragan,¹ Bayron Gutierrez, Marvin Lopez Madrid,² and Kevin Argueta were at a pizza parlor dancing and socializing. Sometime after 1:00 a.m., Miguel, Daniel, and Julio left in Miguel's car. On the way home, they decided to stop at a taco truck. Daniel called Kevin on his cell phone to let the others know their plan.

When Miguel, Daniel, and Julio walked over to the taco truck to order food, Pack, Barajas, and Nicholas Castaneda, Jr. (collectively, defendants), shouted insults at them and called them "scraps," a derogatory term for Sureno gang members. Miguel and Julio

¹At trial, Moises and Juan gave their full names as noted above. The court interpreter, however, advised the trial court that Moises and Juan should be addressed as "Mr. Garcia." Moises and Juan are identified throughout the record as Garcia rather than Barragan.

²At trial, Marvin gave his full name as noted above. The court interpreter, however, advised the trial court that Marvin should be addressed as "Mr. Lopez." Marvin is identified throughout the record as Lopez rather than Madrid.

started arguing with defendants. At this point, Kevin, Moises, Juan, Bayron, and Marvin arrived in another car. They walked over to try and calm the situation.

As the argument continued, the groups moved toward a white van. Efrain Armenta, who was eating near the white van, heard one of the defendants say, "Hold this." Castaneda pulled a gun from his waistband and pointed it at Miguel and Kevin and their group of friends, telling them to back up. Someone in the group with Miguel and Kevin said in Spanish, "No, wait. Wait. We are all friends right here." Kevin told defendants to calm down. Miguel said, "We don't bang." Castaneda responded, "You should have said that since the beginning."

Kevin and Miguel and their friends then began backing away and walking toward the taco truck. Defendants walked to a white Honda Civic and got into the car. The Civic then drove slowly past the group standing near the taco truck and Pack, who was standing in the open passenger door, stated, "We got you."

Barajas, who was leaning out the rear passenger door of the Civic, fired a couple of shots from a small revolver toward where Miguel, Kevin, and the others were standing. The first bullet hit the ground a few feet from Daniel. After the last shot, Kevin fell to the ground, bleeding from the head, fatally wounded by a .22-caliber bullet.

Kevin and his friends were over 40 feet away from the Civic when the shots were fired toward them. Neither Miguel nor Kevin, or any of their friends, had a weapon or pretended to have a weapon. The Civic sped away after the shots were fired.

Moises gave chase in his own car, a green Honda, with Marvin as a passenger; Marvin tried to call 911. As they came within approximately 37 feet of the Civic, Pack shot at the Honda. Moises took evasive action and gave up the chase when the Civic turned down a dark alley. He then drove back to the parking lot where the taco truck was located and spoke with police.

Pack was arrested the morning of August 22, 2007, pursuant to a warrant. Initially, Pack gave officers the name of his brother, Michael Pack. Pack also told a false

story about the other two people in the car. Barajas turned himself in to the police shortly after a news story appeared naming him as a suspect. Castaneda was located and arrested the morning of August 29, 2007.

Defendants were charged with one count of murder, nine counts of attempted murder, two counts of assault with a firearm, one count of discharge of a firearm, and participation in a criminal street gang. Various enhancements also were charged.

The white Honda Civic was located in a garage; the tires and wheels had been removed. A live .22-caliber cartridge was found under the front passenger floor mat and a spent .22-caliber shell casing was found under the front passenger seat.

Detective Francisco Soria testified as a gang expert. Soria explained his reasons for concluding that Pack, Barajas, and Castaneda were Norteno gang members. Previously, there had been testimony that Castaneda had claimed that at the age of 14 he was a Norteno. Soria opined that the shootings were for the benefit of the Nortenos and were intended to punish the victims for not backing down when confronted. There was no indication Kevin or anyone else in his group was a gang member.

During the gang testimony, the jury was given a limiting instruction on the use of gang evidence. The jury was cautioned that “You may not conclude from this evidence that the defendant is a person of bad character, or that he has a disposition to commit crime.”

Defendants testified and each denied being in a gang. They claimed that on the evening of the shooting they had been watching football and had gone to the taco truck to get something to eat. Pack recognized Daniel and Miguel and called out, “When are you going to pay my boy his money[?]” Pack testified he knew someone in the Oseguera family had been in a car accident with the Barajas family. There was no answer from Miguel, Daniel, or their friends.

Defendants claimed they bought their food and were returning to their car when Daniel, Miguel, and Julio approached them and started yelling. Another group began

approaching from the other direction. Castaneda testified the combined group acted in an aggressive manner and one of them rushed him; he pulled out his .22-caliber revolver and told the group to get back.

Defendants then got into their car and began driving away when Barajas fired two shots. Barajas testified he fired the first shot into the ground and then saw someone make a motion “like he was going to lift his shirt up,” at which point Barajas fired a second shot into the group.

The jury returned verdicts finding all three defendants guilty of (1) murder in the second degree, (2) two counts of assault with a firearm, and (3) one count of negligent discharge of a firearm. Only Castaneda was found guilty of active participation in a criminal street gang. The jury returned not guilty verdicts on two attempted murder counts, one count of intentionally shooting at an occupied vehicle, the gang enhancement appended to the murder charges, and the gang participation offense. The jury deadlocked on the other gang enhancements and seven of the attempted murder counts.

On September 17, 2010, the trial court denied a motion for new trial. Pack and Barajas appealed but Castaneda did not.

DISCUSSION

Pack contends (1) the aiding and abetting instruction was misleading, and the instruction on the defense of imminent peril was erroneous; (2) *Doyle* error requires reversal; (3) the trial court should have granted a new trial based on admission of inflammatory gang evidence; (4) the murder conviction was not supported by substantial evidence; (5) the cumulative errors require reversal; and (6) the victim restitution order must be modified to reflect joint and several liability. Barajas makes the same contentions.

I. Instructional Error

Appellants challenge CALCRIM No. 400, the aider and abettor instruction, and the instruction on imperfect self-defense and imminent peril found in CALCRIM Nos. 505 and 571.

A. Aider and abettor instruction

Pack contends the trial court erred by instructing on aider and abettor liability with CALCRIM No. 400, which, at the time of appellants' trial, contained a sentence that read: "A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." (Judicial Council of Cal., Crim. Jury Instns. (2009-2010) p. 167.) Pack argues this sentence erroneously states that an aider and abettor is equally guilty with the perpetrator. Pack claims this statement is erroneous because an aider and abettor's liability is determined by his or her own mental state, not the mental state of the perpetrator.

No objection was raised to this instruction at the time it was given in the trial court. Pack contends no objection in the trial court is necessary to preserve the issue for review. Current case law, however, is to the contrary, and an objection to CALCRIM No. 400 must be asserted in the trial court in order to preserve any objection for purposes of appeal. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*).

Regardless, after carefully examining the record, we conclude the asserted instructional error was harmless beyond a reasonable doubt and reject Pack's argument.

1. An aider and abettor's mens rea is personal

In *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*), the California Supreme Court held an aider and abettor sometimes "may be guilty of greater homicide-related offenses than those the actual perpetrator committed." (*Id.* at p. 1114.)

In *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), the Second District Court of Appeal examined *McCoy*'s reasoning and determined that, while our Supreme Court did not expressly hold that an aider and abettor may be guilty of lesser homicide-related

offenses than those committed by the actual perpetrators, it “nonetheless suggests it.” (*Nero*, at p. 513.) The *Nero* court explained that *McCoy*’s holding was based on the premise that one person’s mens rea may not always be equal to another person’s. (*Nero*, at p. 514.) The aider and abettor is liable for his own mens rea. Guilt is based on a combination of the direct perpetrator’s acts and the aider and abettor’s own acts and own mental state. An aider and abettor’s mens rea is personal and may be different than the direct perpetrator’s mens rea. (*Ibid.*) After explaining *McCoy*’s reasoning, the *Nero* court examined the pattern instructions on aider and abettor liability. It determined, in relevant part, that “even in unexceptional circumstances,” CALCRIM No. 400 “can be misleading.” (*Nero*, at p. 518.) *Nero* characterized the pattern instructions on aider and abettor as confusing and suggested they be modified. (*Ibid.*)

Nero’s suggestion concerning modification of the pattern instructions was adopted by the Judicial Council of California. In April 2010, CALCRIM No. 400 was revised and the phrase “equally guilty” was eliminated. CALCRIM No. 400 now provides, in relevant part: “A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.” (Judicial Council of Cal., Crim. Jury Instns. (2012) p. 167.) The Bench Notes to CALCRIM No. 400 currently provide, in relevant part: “An aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator if the aider and abettor and the perpetrator do not have the same mental state. [Citations.]” (Judicial Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 400, p. 167.)

2. The asserted misinstruction was harmless beyond a reasonable doubt

The applicable test for assessing prejudice in this instance is the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Samaniego*, *supra*, 172 Cal.App.4th at p. 1165; *Nero*, *supra*, 181 Cal.App.4th at pp. 518-519.) “Under that test, an appellate court may find the error harmless only if it determines beyond a reasonable

doubt that the jury verdict would have been the same absent the error. [Citation.]” (*Samaniego, supra*, 172 Cal.App.4th at p. 1165.) After examining the record in this case, we are convinced that inclusion of the sentence in CALCRIM No. 400 now objected to by Pack did not contribute to the verdict.

The jury also was instructed with CALCRIM No. 401, which instructed that Pack could not be guilty of aiding and abetting a crime unless (1) the direct perpetrator committed the crime, (2) Pack knew of the perpetrator’s intent to commit the crime, (3) Pack intended to aid and abet the perpetrator in the commission of the crime, and (4) Pack did in fact aid and abet the commission of the crime. Although the jury asked whether it must find all four elements present before finding Pack guilty on a theory of aiding and abetting, and indicated that element No. 2 was “stalling” the jury, the trial court responded to the first question after consulting with counsel. The court responded, “The answer is that you must consider all of them.”

The jury’s second question was “Can you amplify the instructions on number two? How can one know the intent of another?” The trial court’s response was “Please refer to instruction number 225 for further instructions on intent.”³

³CALCRIM No. 225 reads: “The People must prove not only that the defendant did the acts charged, but also that (he/she) acted with a particular (intent/ [and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/ [and/or] mental state) required. [¶] A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence. [¶] Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/ [and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/ [and/or] mental state) was not proved by the

Pack does not contend that CALCRIM No. 401 was in any way misleading or an inaccurate statement of the law. We consider the instructions as a whole and ““assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” [Citation.]” (*People v. Holmes* (2007) 153 Cal.App.4th 539, 545-546.) “Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation. [Citations.]” (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

Here, the jury clearly was reading the instructions as a whole and applying CALCRIM No. 401, as demonstrated by their question. The trial court’s unequivocal answer that all factors set forth in CALCRIM No. 401 must be found before a defendant can be held liable as an aider and abettor assures that the jury understood and applied the correct standard before imposing aider and abettor liability on Pack.

B. Imperfect self-defense and imminent peril

Pack and Barajas contend CALCRIM Nos. 505 and 571 misstate the concept of imminent peril. We disagree.

The jury was instructed, as to both reasonable and unreasonable self-defense, that the actual or apparent danger must be imminent, rather than future danger. Pack and Barajas argue that the instructions erroneously eliminated the right to act “in self-defense against immediate future peril” and thus the instruction was erroneous.

“In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant’s rights. In making this determination we consider the specific language under challenge and, if necessary, the instructions as a

circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”

whole. [Citation.]” (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585; accord, *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Jablonski* (2006) 37 Cal.4th 774, 831; see also *People v. Rogers* (2006) 39 Cal.4th 826, 873 [applying reasonable likelihood standard to both ambiguous and conflicting instructions].) “‘Finally, we determine whether the instruction, so understood, states the applicable law correctly.’ [Citation.]” (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) We independently assess whether instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

The relevant law is settled. For either perfect or imperfect self-defense, the defendant’s fear must be of imminent harm. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) “Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant’s fear must be of *imminent* danger to life or great bodily injury.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783 (*Christian S.*)) The essence of this legal principle is contained in CALCRIM Nos. 505 and 571 by virtue of their requirement that the defendant must have believed “the immediate use of deadly force was necessary to defend against” the danger.

In *People v. Lopez* (2011) 199 Cal.App.4th 1297, this court held that perfect or imperfect self-defense required a fear of imminent harm; future harm would not suffice. (*Id.* at pp. 1305-1306.) We also held that the trial court was not required to define “imminent harm” because the jurors’ common understanding of the term was all that was required for an understanding of the relevant legal principles. (*Id.* at p. 1307.) We concluded in *Lopez* that CALCRIM Nos. 505 and 571 correctly stated the law. (*Lopez*, at p. 1307.)

Consequently, we reject the contention here by Pack and Barajas that CALCRIM Nos. 505 and 571 misinstructed the jury. Likewise, there is no reasonable likelihood jurors would fail to understand the difference between imminent danger and future harm, one being immediate and the other not. “In the absence of a specific request, a court is not required to instruct the jury with respect to words or phrases that are commonly

understood and not used in a technical or legal sense. [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 503.) We conclude there was no reasonable likelihood the jury found the instructions self-contradictory or understood them to foreclose application of the theory of imperfect self-defense. (*Lopez, supra*, 199 Cal.App.4th at p. 1306.)

II. *Doyle* Error

Citing the decision in *Doyle, supra*, 426 U.S. 610, Pack and Barajas contend the prosecutor erred by asking Barajas on cross-examination if he had told his version of events to police. Pack and Barajas also contest the cross-examination of Castaneda on this point. They also claim the prosecutor again erred by commenting during rebuttal argument that the testimony at trial was the first time defendants’ versions of events had been told and there was no evidence Barajas “was the shooter in that car chase until he took the stand.”

We conclude this issue has been forfeited.

When Barajas was cross-examined, Castaneda’s attorney objected in response to the prosecutor’s query whether Barajas had told law enforcement his version of events. After a bench conference, the trial court sustained the objection. No other party joined in the objection. During the prosecutor’s rebuttal argument, neither Pack nor Barajas objected to the prosecutor’s remarks. They raised an objection only after argument had concluded, contending cross-examination and rebuttal argument were violations of *Doyle*.

The trial court pointed out that neither Pack nor Barajas had objected to the cross-examination or to the rebuttal comments at the time they were made; defense counsel acknowledged this was correct. The trial court inquired if any defendant was moving for a mistrial based on the prosecutor’s alleged *Doyle* violation; all acknowledged they were not seeking a mistrial. Castaneda’s counsel asked the prosecutor be admonished in front of the jury. The trial court denied the request for an admonishment in front of the jury,

noting that the prosecutor's comments in rebuttal were made to explain a late amendment to the information.

In *Doyle, supra*, 426 U.S. at page 618, the United States Supreme Court held that “it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.” “A similar process of reasoning supports the conclusion that comment which penalizes exercise of the right to counsel is also prohibited. [Citations.]” (*People v. Crandell* (1988) 46 Cal.3d 833, 878.)

Any claim of *Doyle* error, however, is forfeited if a defendant fails to make a timely objection in the trial court and request a curative admonition. (*People v. Hughes* (2002) 27 Cal.4th 287, 332; *People v. Riel* (2000) 22 Cal.4th 1153, 1212.) Pack and Barajas thus forfeited this claim by failing to make a timely objection to the remarks at trial. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

We also decline the invitation to find ineffective assistance of counsel based upon a failure to object. The record before us shows that the question on cross-examination put to Barajas was objected to, albeit by Castaneda's counsel, and the objection was sustained. The trial court found that the remarks in rebuttal were not objectionable; they were merely an attempt to explain a late amendment to the information. In any event, “‘The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on direct appeal.’ [Citation.]” (*People v. Padilla* (1995) 11 Cal.4th 891, 940.)

We also are not convinced this brief and mild reference in rebuttal prejudiced Pack or Barajas. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 66.) If Pack or Barajas wishes to pursue ineffective assistance of counsel, he will need to do so by way of a writ petition. It has been said on numerous occasions that a claim for ineffective assistance of counsel is more properly addressed in a petition for writ of habeas corpus. “[N]ormally a claim of ineffective assistance of counsel is appropriately raised in a petition for writ of

habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform the two-pronged inquiry of whether counsel's 'representation fell below an objective standard of reasonableness,' and whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 111.)

Finally, we are not expressing an opinion on the standing of Pack to make this objection concerning the testimony of Barajas and Castanada, or Barajas's standing to make this objection concerning the testimony of Castanada.

III. Gang Evidence

Pack and Barajas argue that the gang evidence admitted at trial was irrelevant and inflammatory and the motion for a new trial based upon admission of this evidence should have been granted. We disagree.

The prosecution charged Pack and Barajas with the offense of active participation in a criminal street gang and gang enhancements were appended to the other charged offenses. When the trial court struck the gang offense and gang enhancement allegations before trial, this court granted the prosecution's writ seeking their reinstatement.

Ultimately, the jury acquitted Pack and Barajas of the offense of active participation in a criminal street gang. The jury found the gang enhancement appended to the murder charge not true; the jury deadlocked on the other gang enhancement allegations.

Evidence Code section 352 addresses the admissibility of evidence: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Under Evidence Code section 352, the trial court enjoys broad discretion in

assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

“[A]s [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant’s motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. [Citations.]” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-224 (*Albarran*)). “[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.]” (*Id.* at pp. 224-225.) The trial court has broad discretion to determine whether evidence of gang membership is relevant. (See *People v. Champion* (1995) 9 Cal.4th 879, 922, abrogated on other grounds by *People v. Combs* (2004) 34 Cal.4th 821, 860.)

The case here is readily distinguishable from *Albarran*, relied on by appellants, where much of the gang evidence “was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran’s actual guilt.” (*Albarran, supra*, 149 Cal.App.4th at p. 228.) The gang evidence was presented in this case because both Pack and Barajas were charged with the offense of active participation in a criminal street gang and also were facing gang enhancement allegations. All of the gang evidence was relevant to prove the substantive offense or the gang enhancement. Thus, the gang evidence logically was relevant to prove a material issue in the case and therefore admissible. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 (*Hernandez*)).

“Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury.” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) As previously discussed,

for Evidence Code section 352 purposes, “‘prejudicial’ is not synonymous with ‘damaging,’ but refers instead to evidence that “‘uniquely tends to evoke an emotional bias against defendant’” without regard to its relevance on material issues. [Citations.]” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121 (*Kipp*).) We review the admission of gang testimony for an abuse of discretion, and will uphold the trial court’s ruling unless it results in a miscarriage of justice. (*Avitia*, at p. 193.)

The People were entitled to present evidence of gang offenses and gang affiliation in order to prove the charges. Gang evidence unquestionably is admissible when it serves to establish motive or intent, or to establish the criminal offense, and is not highly inflammatory, even if it may prove prejudicial to the defendant. (*Hernandez, supra*, 33 Cal.4th at pp. 1048-1051; *People v. Williams* (1997) 16 Cal.4th 153, 193 [motive and identity]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 [motive and intent].) The trial court did not err in admitting the gang evidence.

That the jury acquitted Pack and Barajas of active participation in a criminal street gang, and then deadlocked on gang enhancements, undercuts appellants’ argument that admission of gang evidence was unduly inflammatory. If, as apparently occurred, the jury was not convinced of Pack’s and Barajas’s gang affiliations, the jury would have no reason to allow gang evidence to influence its assessment of appellants’ guilt of other charged offenses. The acquittals and failure to reach a verdict on multiple offenses belies any emotional bias against Pack or Barajas based on gang evidence. (*Kipp, supra*, 26 Cal.4th at p. 1121.)

“‘Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion “must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” [Citation.]’ [Citations.] It is appellant’s burden on appeal to establish an abuse of discretion and prejudice. [Citation.]” (*Albarran, supra*, 149 Cal.App.4th at p. 225.) Pack and Barajas have failed

to establish it was an abuse of discretion to admit the gang evidence. They also have failed to establish any undue prejudice from admission of gang evidence.

The claim the gang evidence was highly inflammatory also is diminished by the jury's finding Pack and Barajas guilty not of first degree murder as charged but the lesser included offense of second degree murder. The jury also acquitted the appellants of two attempted murder charges and failed to decide others, as well as many enhancements.

We thus conclude the challenged evidence here did not uniquely tend to evoke an emotional bias against Pack and Barajas, as a matter of law. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118-1119 [regarding the "prejudice" referred to in Evid. Code, § 352].)

The denial of a new trial motion is subject to an independent standard of review. (*People v. Ault* (2004) 33 Cal.4th 1250, 1262.) When, as here, the motion for new trial was based upon an assertion that admission of gang evidence was an abuse of discretion or highly inflammatory, and we have concluded it was neither, then it follows there was no error in denying the motion for new trial.

IV. Substantial Evidence of Murder

Pack and Barajas contend their murder convictions were not supported by substantial evidence because the record evidence established they acted on reasonable provocation in the heat of passion or to defend themselves against a perceived threat of imminent death or great bodily injury. They claim the evidence conclusively established, at most, voluntary manslaughter. Essentially, they are asking us to reweigh the evidence and to conclude as a matter of law that they are not guilty of murder. This we will not do.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*)). "““““If the circumstances reasonably justify the trier of fact's findings, the

opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” [Citation.]” (*Ibid.*, quoting *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

“‘Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact’s verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.’ [Citation.]” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.) Generally, the testimony of a single witness is sufficient to prove a disputed fact unless the testimony is inherently improbable or physically impossible. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Scott* (1978) 21 Cal.3d 284, 296.) The trier of fact makes credibility determinations and resolves factual disputes. (*People v. Estrella* (1995) 31 Cal.App.4th 716, 724-725 (*Estrella*)). An appellate court will not substitute its evaluation of a witness’s credibility for that of the fact finder. (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352.)

Here, the evidence showed that when Kevin and his friends went to the taco truck to order food, defendants shouted insults at them. Castaneda pulled a gun from his waistband and pointed it at Kevin and his group of friends, telling them to back away. Kevin and his friends began backing away. Castaneda, Pack and Barajas then went to their car, got in, and drove slowly by Kevin and his friends. Pack shouted out, “We got you,” and Barajas leaned out the rear passenger door, pointed a revolver at Kevin and his friends, and fired shots toward them. When the shots were fired, Kevin and his friends were about 40 to 50 feet away from the car carrying defendants. No one in the group of victims had a weapon or pretended to have a weapon.

Although the evidence shows that there were insults thrown and an altercation between the two groups, the altercation clearly was instigated by Pack, Barajas, and Castaneda. There is no evidence suggesting Kevin or any of his friends provoked a quarrel. The provocation that “incites the defendant to homicidal conduct in the heat of passion must be caused by the victim” or reasonably believed by the defendant to have

been caused by the victim, and it must be sufficiently provocative that it would cause an ordinary person to act rashly and without due deliberation. (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.) We do not view the evidence as establishing, let alone conclusively establishing, provocation that would incite an ordinary person to homicidal conduct. (*Id.* at pp. 550-552.)

There also is little to no evidence defendants acted in the actual, but unreasonable, belief in the need to defend themselves. Kevin and his friends were unarmed, and no one in the group pretended to be armed, and they were standing 40 feet or more away from defendants, while defendants were in a car and driving away at the time the shots were fired. (*Christian S., supra*, 7 Cal.4th at pp. 771, 773; see *People v. Lewis* (2001) 25 Cal.4th 610, 645.)

Moreover, the jury was instructed on unreasonable self-defense and heat of passion or sudden quarrel. That there may have been conflicting evidence does not mean appellants' contention must prevail. The jury resolved the factual issue of whether defendants acted in the heat of passion, upon a sudden quarrel, or in unreasonable self-defense adversely to defendants. (*Estrella, supra*, 31 Cal.App.4th at pp. 724-725.) The evidence does not warrant a reversal of the jury's determination. (*Rodriguez, supra*, 20 Cal.4th at p. 11.)

V. No Cumulative Error

Pack and Barajas contend reversal of the judgments against them is required because prejudicial error arose from the cumulative impact of individual errors. Since they have failed to persuade us that any error occurred, their cumulative error argument fails. (*People v. Heard* (2003) 31 Cal.4th 946, 982.)

VI. Victim Restitution

Pack and Barajas contend the abstracts of judgment must be amended to reflect that the amount ordered paid to the Victim Compensation and Claims Board, pursuant to

Penal Code section 1202.4, subdivision (f), is the joint and several responsibility of all defendants and not their sole responsibility individually.

Once again, no objection was made in the trial court. By failing to object to the restitution as ordered by the trial court at sentencing, Pack and Barajas have forfeited the ability to object in this appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 303.)

Even if the issue had been preserved, the claim fails on the merits. In *People v. Madrana* (1997) 55 Cal.App.4th 1044, the codefendants were ordered to pay, jointly and severally, a restitution fine pursuant to Penal Code section 1202.4 and a penalty pursuant to Health and Safety Code section 11374.5. We determined that a joint and several restitution order pursuant to Penal Code section 1202.4 “is proper.” (*Madrana*, at pp. 1050, 1052.) In reaching this conclusion, we relied in part on *People v. Arnold* (1994) 27 Cal.App.4th 1096 (*Arnold*). In *Arnold*, the appellate court held that a defendant could be ordered to pay the full amount of victim restitution, even though a codefendant had been ordered to reimburse the same loss. (*Id.* at p. 1099.)

Penal Code section 1202.4 does not refer to joint and several liability, either to compel such an order or to prohibit it. We are unaware of any case in which the reviewing court determined that the sentencing court was compelled by law to order joint and several liability. *Arnold* even mentions that “joint and several liability may not be preferable in all cases involving codefendants.” (*Arnold, supra*, 27 Cal.App.4th at p. 1100.) We conclude, therefore, that the decision whether to order a restitution fine as a joint and several liability is a discretionary sentencing choice.

DISPOSITION

The judgments are affirmed.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

KANE, J.