

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW CERVANTES,

Defendant and Appellant.

G046036

(Super. Ct. No. 10 CF1684)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed in part, reversed in part.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gary W. Brozio and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

An information charged Andrew Cervantes with murder while an active participant in a criminal street gang (Pen. Code, §§ 187, 190.2, subd. (a)(22); count 1)¹ and active participation in a criminal street gang (§ 186.22, subd. (a); count 2). It alleged he committed the murder in association with, at the direction of, and for the benefit of a criminal street gang (§ 186.22, subd. (b)) and intentionally and personally discharged a firearm, which proximately caused the death of another person (§ 12022.53, subd. (d)).

A jury found Cervantes guilty of second degree murder and active participation in a criminal street gang, and found true the gang and firearm enhancement allegations. The trial court sentenced Cervantes to a total term of 40 years to life, consisting of an indeterminate term of 15 years to life for second degree murder, a consecutive term of 25 years to life for the firearm use finding (with a 15-year minimum term for parole eligibility based on the criminal street gang finding), and a concurrent middle term of two years for street terrorism, which was stayed pursuant to section 654.

Cervantes appeals on the following grounds: (1) the trial court erred by overruling defense counsel's objections to a photograph purportedly of Cervantes and other criminal street gang members on grounds of inadequate foundation; (2) there is insufficient evidence to prove Darkside is a criminal street gang as required for the conviction of active participation in a criminal street gang in count 2 and the gang enhancement; (3) there is insufficient evidence to prove Cervantes willfully committed a crime to further felonious criminal conduct by gang members, had more than a nominal association with Darkside, or had knowledge of the gang's criminal activities as required for a conviction on count 2, and the trial court erred in its modification of the standard instruction for active participation in a criminal street gang (CALCRIM No. 1400); (4) the trial court erred by instructing the jury with CALCRIM No. 3472 (a standard instruction prohibiting the right of self-defense from those who provoke a quarrel for the

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

purpose of claiming self-defense); (5) the prosecutor committed prejudicial misconduct by denigrating defense counsel during rebuttal argument; and, (6) the sentence of 40 years to life constitutes cruel and unusual punishment because it is disproportionate to the nature of the offense and the offender; and disproportionate to sentences for more serious crimes committed in California and other jurisdictions.

We reverse the conviction on count 2 for insufficiency of the evidence based on the California Supreme Court's decision in *People v. Rodriguez* (2012) 55 Cal.4th 1125 and the Attorney General's concession and decline to address other issues Cervantes's asserted with respect to count 2. In all other respects, the judgment is affirmed.

FACTS

During the early evening of June 22, 2010, Cervantes, who was then 14 years old, shot Manual Orozco while both of them were standing in front of Orozco's Santa Ana home. A neighbor saw Cervantes riding his bicycle on the sidewalk in front of the house, heard the passenger of a parked car yell at him to come back, and watched Cervantes turn his bicycle around and head back to the car. He did not see the shooting that followed, but he did see a gun in Cervantes's hand when he fled the area on his bicycle. The neighbor rushed to Orozco's aid, but Orozco succumbed to injuries caused by a single gunshot wound before emergency personnel could attend to him.

According to the neighbor, Orozco did not have any weapons on his person and there were none visible within his reach. Police investigators later came to the same conclusion. However, the investigators did find a single .380-caliber shell casing that had most likely been ejected from a semiautomatic handgun.

Seven days after the shooting, police officers arrested Cervantes in Stockton, California, at the home of a gang member with ties to the Darkside gang.

Pretrial Statements

a. Jorge Rivera

After the shooting, Orozco's good friend, Jorge Rivera, told investigators he and Orozco were sitting in Rivera's parked car when they saw two young men ride by on bicycles. One of the young men stared at Orozco and he stared back at him. Orozco got out of Rivera's car and the two young men turned their bicycles around. One of them, later identified as Jose Moreno, continued on his journey after a brief conversation with Orozco, but Cervantes confronted Orozco and then shot him.

b. Jose Moreno

Within a couple of days, the police had sufficient information to question then 14-year-old Jose Moreno. Moreno initially denied any knowledge of or involvement in the shooting. Eventually, he told investigators Cervantes shot Orozco because Orozco stared at, or "mad dogged," Cervantes, which in the world of criminal street gangs is perceived as an act of disrespect and a challenge.

Moreno explained he and Cervantes had been riding their bicycles on the sidewalk when they rode by a parked car. Orozco, who was sitting in the car with another person, starred at them and they returned his stare. Cervantes turned his bicycle around and rode back to Orozco, who had gotten out of the car and was standing on the sidewalk. The two of them started arguing. Moreno said they were "hitting each other up" and making "gang-related" comments. Orozco yelled "18th Street" and Cervantes said something like "side." Cervantes then reached into his waistband, pulled out a semiautomatic handgun, and shot Orozco in the chest.

Trial Evidence

a. Rivera's Testimony

Rivera testified he met and developed a friendship with Orozco when they were both attending school and living in the same Santa Ana apartment complex. Rivera,

who was 21 at the time of trial, was three years older than Orozco. Orozco later moved to a house in Santa Ana, and it was there that he had been killed.

On the day of the shooting, the two friends met at an apartment complex near Orozco's home shortly before 5:30 p.m. They decided to go play soccer, and Rivera drove Orozco home to change clothes. Rivera parked on the street in front of Orozco's next door neighbor's home, and he waited in his car while Orozco went inside his own home to change clothes. Orozco returned a short time later, and he and Rivera decided to sit in Rivera's car and smoke some marijuana.

About 15 minutes later, two kids rode their bicycles past on the sidewalk adjacent to where Rivera had parked his car. One of the kids raised his hand into the air and made some sort of gesture, and both of the kids stared at Rivera and Orozco. Rivera and Orozco stared back. After the kids rode by Rivera's car, Orozco became angry and got out of the car. Rivera tried to stop him, but to no avail.

Orozco moved to the back of Rivera's car. While Rivera watched in his rear view mirror, one of the kids, Moreno, stopped his bicycle while the other initially kept going, but later also turned around. Moreno rode away from Orozco moments later, but by now Cervantes had come up to Orozco and dropped his bicycle.

Rivera saw Orozco and Cervantes exchange words, although he could not hear exactly what they said. Less than 10 seconds later, Cervantes stepped back from Orozco, pulled a gun from the waistline of his pants, and fired a single shot. He quickly regained his bicycle and fled. Rivera, in a panic and fearful of being shot, drove his car into a nearby driveway and told someone to call the police. Rivera testified Orozco did not have a gun before the shooting, and denied defense accusations he had disposed of a weapon afterward. He acknowledged that his friend had "anger problems," but denied Orozco was aggressive with other people. Moreover, Rivera testified smoking marijuana usually relaxed Orozco.

Rivera knew Orozco claimed membership in the 18th Street criminal street gang, and that his moniker, or gang nickname, was Downer. Rivera denied affiliation with any criminal street gang, and there was no evidence contradicting his testimony.

b. Moreno's Testimony

Moreno, who was 15 years old at the time of trial, testified under a plea agreement with the prosecution. In exchange for his truthful testimony, the prosecution agreed to dismiss murder charges and allow him to plead guilty to being an accessory after the fact.

Moreno met Cervantes six to eight months before the shooting. At the time, Moreno claimed membership in the Southern Homies criminal street gang, which is also known as SH and Sickheads, and his gang moniker was Silent. He had lived for about 11 years in a mobile home park near Sullivan Street in Santa Ana, and it was in a nearby park where he met and befriended Cervantes. His association with the gang began just a few months before the shooting. He had never gotten into trouble before the shooting, and had limited his gang activities to spray painting Southern Homies's graffiti around his mobile home park.

Moreno testified he understood the importance of respect within gang culture, and that he knew what it meant to "mad dog" someone prior to establishing his gang allegiance. If he encountered a member of a rival gang, Moreno felt he would "have to do something about it."

On the day of the shooting, Moreno met Cervantes at a city park near his mobile home park. They decided to ride their bicycles and left the mobile home park together. As they were on their way back, Moreno noticed a parked white car with two people sitting inside. They rode by the car on the sidewalk, with Moreno in the lead and Cervantes following him. The occupants of the parked car stared at him, but he kept going and crossed the street. When he looked back, he saw that Orozco had gotten out of the car. He heard Orozco yell at Cervantes, and he saw Cervantes turn around and go

back to him. They started to argue about something Moreno could not clearly understand. However, Moreno did hear Cervantes ask Orozco “where you from,” and Orozco respond in kind. He also heard Orozco say “18th Street” and Cervantes say “Darkside.”

Within seconds, Cervantes pulled out a gun and shot Orozco. Moreno claimed to be unaware Cervantes possessed a gun until he saw him use it, but he was ready to come to provide back up if need be.

c. Gang Expert Testimony

Santa Ana Police Detective Clinton Achziger testified as the prosecution’s gang expert. His primary responsibility is to investigate gang-related murders in Santa Ana, and he acted as lead detective in the investigation of Orozco’s death. He explained the habits, culture, and behavior of traditional Hispanic street gangs. Achziger explained the “turf oriented” nature of these gangs by testifying the typical Hispanic criminal street gang “will claim a certain section or area of their city.” He also stated the term “turf” often equates with a particular neighborhood claimed by the gang. The gang often marks its turf or neighborhood with graffiti, usually with the gang’s name or other identifying symbols. He also testified to the pivotal role of turf in gang culture, namely that the control of a large area allows the gang to control criminal activity within that area, to victimize innocent citizens within the area, and to defend it against rival gangs. As he explained, there is “a direct correlation between the size and the status of the gang.” And, gang members protect their claimed turf through physical violence up to and including murder.

Achziger discussed the importance of respect in gang culture. As he explained the concept, “respect is . . . the ultimate level that they’re seeking. The gang subculture, it’s a dog eat dog world[,] . . . survival of the fittest [T]he more respect you have, the greater citizens and your rivals fear you So the more fear you can instill in rivals or citizens, the more respect you gain.”

By the same token, criminal street gangs and their members can be “disrespected.” According to Achziger, “[a]n individual [gang] member can get disrespected [in] several ways. Most common way is what we call a hit-up. A hit-up is a street term where a rival will ask what gang you’re from. If you – being the gang member, if you don’t respond to promote your gang or to identify your gang, it’s a form of disrespect. So that’s how – that’s the most common way as an individual member.” In Achziger’s opinion, one gang member asking a rival gang member “where he’s from” is perceived as disrespect. “Hit-ups” happen regularly and they frequently result in violence.

Achziger also testified to the importance of guns to criminal street gangs. He stated, “Guns are revered as a tool. That’s kind of the highest level, having a gun. It kind of evens the playing field. For example, if you take a 90-pound skinny kid that’s a gang member and he wants to fight you, you may not be that intimidated, but you put a gun in that kid’s hand, all bets are off. It changes the game.” In fact, gang members gain respect by simply possessing a gun.

He discussed the fact that street gangs form bonds with other gangs that are then considered their allies. Allied gangs work together to protect their claimed turf and to foster their “shared interest in a criminal enterprise.” And, witnesses to gang crimes are reluctant to report them because they fear retaliation from the gang.

Achziger stated Moreno identified himself with the Sickheads criminal street gang, which is also known as the Southern Homies or SH. This gang started as a tagging crew, or group of individuals who write gang-related graffiti. It had its origins in Moreno’s neighborhood, and had formed ties to the Darkside criminal street gang. Moreno had no prior arrests or contacts with the police. However, he had admitted writing Sickheads graffiti near his home.

Achziger also explained the origins of the Darkside criminal street gang, testifying that the gang originated in the 1980’s and claimed a certain area of Santa Ana

as its turf. He further testified the gang had approximately 20 active members in Santa Ana and around 80 members throughout Orange County. The symbols for the Darkside criminal street gang include the letters DSK or DSSA, which means Darkside Santa Ana, and X3. Gang members frequently get tattoos of the letters DS or the word Darkside.

As part of his job, Achziger had talked to various Darkside gang members, both in their neighborhood and as a result of an arrest, and stated he had worked on other murder cases involving the gang. He explained these duties as follows: “part of my job is to maintain gang intelligence, and we need – in a gang investigation, a lot of times we need to work backwards. Gang members will commit a crime and they might throw out a name or a gang. So it’s our job to kind of figure out the pieces of the puzzle and figure out who that person is. So we will do [*sic*] during our patrol time or our time out in the field, ‘Hey what’s your name? What do they call you?’ We’ll look at tattoos. We’ll look at who they’re with, other gang members, non-gang members, vehicles. [¶] When that crime happens later on, we know it to be a blue truck and the guy had Darkside above his left eye. Those are all identifying marks that can lead us to identify that suspect later.”

Achziger opined Darkside’s primary activities at the time Orozco died were “felony firearms violations as well as possession of marijuana for sale.” Darkside was an ally of the Sickheads gang and several other identified criminal street gangs, and it had numerous rival gangs, including the 18th Street gang. Achziger testified the 18th Street criminal street gang is a large Hispanic gang with international gang ties. Although it does not have a specific claimed territory in Santa Ana, it does claim small areas of Anaheim and Garden Grove. Although there were no records of Orozco having police contacts, his family admitted he claimed the 18th Street gang, and officers found some drawings and graffiti representing the gang in his home.

With regard to Cervantes, Achziger testified he had reviewed probation department records and those of the La Habra Police Department and considered the facts

of the instant case in coming to the opinion Cervantes was a Darkside gang member. He also relied on People's exhibit No. 28, a photograph of 18 individuals, including Cervantes and other Darkside and SH gang members, which he said had been discovered as a result of a separate murder investigation. In addition, Moreno identified Cervantes as a member of the Darkside criminal street gang, and stated he heard Cervantes say something that sounded like the word Darkside during the shooting.

Achziger also testified to two other crimes involving Darkside gang members, a December 2009 felony conviction for possession of a firearm and a November 2009 felony conviction for possession of marijuana for sale.

d. Other Evidence

A La Habra police officer testified that in March 2010 he initiated a car stop on a car in which Cervantes was a passenger. A cell phone found on Cervantes's person had a particular wallpaper screen with a picture of a letter "D" and the word "Darkside." The officer recorded his contact with Cervantes on a field identification card. He testified that field identification cards document his contacts with people and contained information about gang activity. He checked a box noting his belief Cervantes was a gang member, but he also admitted Cervantes did not claim gang membership, nor did the officer see any gang-related tattoos on his body.

An Orange County deputy probation officer testified Cervantes told her "his moniker was Tank and he was from the gang Darkside" when he was detained by authorities for failing to appear at a probation violation hearing.

Defense Evidence

a. Expert Testimony

Cervantes called a professor of psychology and social behavior from the University of California, Irvine to explain the neurophysiological and developmental psychology of adolescents. Dr. Elizabeth Cauffman testified that with respect to concepts like responsibility, identity, perspective, and impulse control, adolescents, like Cervantes,

do not think and react in the same way as adults. Adolescents tend to take more risks and act more irresponsibly than mature adults. This is due in part to emotional immaturity, but it is also related to brain development. According to her research and other studies of which she was aware, Cauffman testified, “adolescents’ brain development makes it more difficult for them to be able to inhibit their responses.” In short, adolescents react instinctively rather than logically.

b. Cervantes’s Testimony

Cervantes, who was 15 years old at the time of trial, testified on his own behalf. At the time of the offense, he lived in a Buena Park mobile home park with his mother, sister, an older brother named Brian Mendez, and a younger brother. Cervantes’s father had been deported when Cervantes was about nine years old. As a child, Cervantes spent a majority of his time with his older brother, Mendez, who was an admitted Darkside gang member. Mendez often invited his fellow gang members to their home, and approximately six months before the shooting, Cervantes started to associate with his brother’s friends on a regular basis. Cervantes claimed to have never heard his brother or his friends talk about crimes they committed, nor had he ever seen any of them with a gun, although he admitted his brother had once stolen a car.

A mere week before the shooting, Cervantes graduated from eighth grade and he was preparing to go to high school. He claimed to have received A’s and B’s during the past school year. He denied membership in Darkside, but admitted associating with the gang. With respect to the cell phone found in his possession in March 2010, he claimed the cell phone actually belonged to his older brother. He admitted the phone’s wallpaper had the Detroit Tigers logo “D” but he denied the word Darkside appeared anywhere on the phone, claiming instead that it had the word “Assassins” on its screen.

Cervantes knew what it meant to “mad dog” someone, which he testified occurs when you stare at someone, or that person stares at you, “with an angry face, in a bad way.” He also knew “mad dogging” and “hit ups” can lead to violence, and

explained he learned this from Mendez and his friends. Mendez encouraged him to not back down from someone who was “mad dogging” him, something he knew was called “ranking out” and would reflect poorly on his brother. He testified that to “back up” someone meant to help the person out if you were in trouble.

According to Cervantes, Mendez told him the streets were dangerous, and Cervantes was scared when he traveled to Moreno’s home in Santa Ana because he knew the area was claimed by the Darkside gang. He also knew the Darkside gang was allied with the Southern Homies gang, and that the 18th Street gang was a Darkside rival.

Cervantes’s attorney showed him People’s exhibit No. 28, the photograph depicting him and several other young men. He identified a few of the other people in the photograph and described them as his friends. In fact, Cervantes identified one young man, Adrian Rodriguez, and admitted he fled to Rodriguez’s Stockton home after the shooting. He also testified the picture had been taken during a March 2010 graveside birthday party for someone who had been the victim of a shooting. He did not remember the name of the deceased, and he denied knowing a majority of the other people in the photograph, but Cervantes did not question the authenticity of People’s exhibit No. 28.

Cervantes admitted shooting Orozco with a “small gun,” and not a semiautomatic weapon. He testified that he found the gun in his brother’s dresser drawer. He carried this loaded gun with him whenever he went out to ride his bicycle because it made him feel safe, and he knew the gun was loaded on the day of the shooting.

Cervantes denied having the specific intent to use the gun on the day Orozco died, but admitted he would “probably” use it if someone threatened him. In fact, he had been “hit up” on Sullivan Street near Moreno’s home once before. On that occasion, he had been without a gun and alone, and he decided to just laugh at the person and walk away.

As for the events of the day of the shooting, Cervantes said he had grabbed his gun and bike and boarded a bus to Moreno’s home. He met up with Moreno, but did

not disclose the fact that he had a gun with him. They decided to ride to a food truck to buy some candy. He bought candy and started to ride back to Moreno's house. He knew he was in a rival gang's territory. He testified this fact did not concern him because he was with Moreno and not alone, and because he had a gun.

Cervantes testified he and Moreno saw Rivera's parked car during their trip back to Moreno's home. They were riding their bikes on the sidewalk, one behind the other, with Moreno in the lead. Moreno turned onto the street while Cervantes remained on the sidewalk. When he approached Rivera's car he noticed two men inside, one in the driver's seat and the other in the front passenger's seat. As he got closer to the car, Cervantes noticed the two men were staring at him. They were "staring pretty heavy," and he "mad dogged" them in return. He admitted he could have simply looked away, but he decided to "act tough" instead. Mendez had taught him to "not back down, [or] show weakness" whenever someone "mad dogged" him. Despite the attempt to act tough, Cervantes testified the encounter scared him. Neither he nor Moreno raised an arm or made any kind of gesture at the men.

Cervantes claimed he and Moreno had already passed by the car when Orozco got out of the car and called him back. Orozco yelled, "Get the fuck over here." Cervantes described Orozco's tone as "mad and demanding." Despite Orozco's demeanor, Cervantes complied with his demand "just to see what he wanted." At the time, Moreno was just up the street, but by then he had crossed the street to the opposite sidewalk. Orozco and Cervantes squared off on the sidewalk, just behind Rivera's car. Cervantes was within three feet of Orozco with the bicycle still between his legs when he asked Orozco, "What's up?" Orozco asked Cervantes where he was from in an "aggressive and demanding" voice. Cervantes knew this was a "hit up," and he told Orozco that he "kicked it" with Darkside. Orozco responded, "'this is 18th street'" and reached for his waistband. Cervantes believed Orozco was reaching for a gun, which

prompted him to retrieve his gun from his front pants pocket. He fired a single shot and did not wait to see what happened before quickly fleeing the scene.

Cervantes next rode his bike to a nearby restaurant parking lot and threw up. He testified the entire incident “happened quick.” After he cleaned up and threw away one of his two T-shirts, he went inside the restaurant and asked for a cup of water. Eventually, he went to Stockton, but he denied telling anyone about the shooting. He explained that he shot Orozco out of fear “[t]hat he was gonna do something to me,” not out of any desire to help the Darkside gang or at the direction of any Darkside gang member. He admitted he knew that shooting someone could result in serious injury or death. Neither the prosecution nor the defense explained what happened to the gun.

DISCUSSION

1. Evidentiary Ruling – Photograph

The prosecutor showed a photograph to Achziger during his direct examination and asked, “You obtained I’m not sure how, but you obtained a photograph that the defendant was in with a number of other individuals, some of whom have been identified actually in the photograph as being associates or being involved with Darkside and S.H., would you agree with that?” Achziger replied, “Yes, sir.”

Defense counsel objected to the prosecutor’s question, asserting, “lack of foundation for the identity and gang affiliation of all those [18] people depicted in the photo.” The court sustained the objection, but on grounds the question was compound. The prosecutor then marked the photograph as People’s exhibit No. 28, projected it on an overhead screen, and asked several questions of Achziger related to the photograph, including the identities of several of the 18 people depicted. People’s exhibit No. 28 was later admitted into evidence.

Achziger testified Cervantes was among the people in the group photograph, and that his gang name, or moniker, was Tank. Achziger admitted he did not know who took the photo, nor did he know the location where it was taken, but he

testified it “was obtained during a different murder investigation” The trial court overruled defense counsel’s repeated challenges to the photograph on the basis of insufficient foundation. Achziger said he used this photograph in forming his expert opinion that Cervantes was a Darkside gang member.

Cervantes claims the trial court erred by overruling “foundational objections and motions to strike which enabled detective Achziger to base his opinion on misstated and inaccurate testimony.” He cites Evidence Code sections 801 subd. (b) and 803,² and asserts Achziger “had no information or knowledge regarding the origin or provenance of the photograph beyond its apparent presence in a police file related to an entirely ‘different murder investigation’ conducted . . . in the past In the modern era, when computer programs make the manipulation and doctoring of photographic images a relatively simpl[e] task, the absence of any basis for validating the authenticity or genuineness of the photograph rendered it unreliable as an indicia of gang membership.” Thus, he concludes, Achziger could not reasonably rely on the photo in forming his expert opinion.

With respect to whether the photograph had a proper foundation for admission into evidence, we note one simple fact and a conclusion based on the totality of the evidence. First, Cervantes identified the photograph during his direct examination,

² Evidence Code section 801 provides, “If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, *whether or not admissible*, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.” (Italics added.)

Evidence Code section 803 states, “The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.”

and he testified the picture had been taken when he and a few people he knew had gathered for a graveside birthday party for an acquaintance who had been shot. He did not question its authenticity. Rather, he denied knowing the majority of the individuals depicted and that it had any relationship to a criminal street gang. But the jury was free to place greater weight on Achziger's testimony to the contrary, i.e., that Cervantes knew and associated with the other gang members depicted in the photograph.

But most importantly, even assuming the trial court erred by admitting the photo (as distinguished from allowing Achziger to rely upon it as a basis for his opinions), Cervantes fails to establish the admission of this evidence resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) The prosecutor presented other, more persuasive evidence of Cervantes's gang membership, and the photo was not the sole piece of evidence on which Achziger relied. Furthermore, Achziger personally identified some of the individuals in the photograph, and he was able to identify others using Santa Ana Police Department records, which included records of arrests and criminal convictions. Consequently, even assuming error, Cervantes fails to demonstrate a reasonable possibility of a more favorable outcome absent the error. (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

2. *Sufficiency of the Evidence – Active Participation*

Cervantes first challenges the sufficiency of the evidence to prove Darkside is a criminal street gang within the meaning of section 186.22, subs. (e) and (f), for purposes of count 2, active participation in a criminal street gang (§ 186.22, subd. (a)) and the gang enhancement under section 186.22, subdivision (b)(1).

“When an appellant challenges the sufficiency of the evidence to support a conviction, the appellate court reviews the entire record to see “whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.”

[Citation.] We view the facts in the light most favorable to the judgment, drawing all reasonable inferences in its support. [Citations.] We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citations.]’ (*People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13, overruled on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.)

Section 186.22, subdivision (f) defines the term “criminal street gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the [33] criminal acts” specified in subdivision (e), has “a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

Subdivision (e) of section 186.22 defines a “pattern of criminal gang activity” as “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more” enumerated offenses, “provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.”

Cervantes focuses on the “primary activities” element of the statutory definition of a criminal street gang, asserting Achziger’s testimony lacked specificity with respect to the two predicate crimes relied on by the prosecution. As noted, Achziger testified about two crimes, possession of a firearm by a probationer and possession of marijuana for sale, both committed by Darkside gang members and within the statutory time guideline. While Achziger’s testimony about these individual crimes was not extensive, the prosecution also submitted certified court documents in support of his testimony.

Cervantes ignores the documentary evidence supporting the jury’s conclusion Darkside meets the statutory definition of a criminal street gang, the

foundational information Achziger provided about the gang's origins and culture, his expert testimony concerning other drug and firearm's related activity by the gang, and his expert opinion on the subject. Moreover, Cervantes engaged in classic gang behavior and yelled "Darkside" before he shot Orozco.

As the Attorney General asserts, this is not a case where the expert provided conclusory testimony on the matter as in *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612, nor a case where the prosecution sought to rely on a single offense committed years before the current crime (*People v. Perez* (2004) 118 Cal.App.4th 151). In short, substantial evidence demonstrates Darkside is a criminal street gang and the primary activities of Darkside include the commission of two of the crimes listed in section 186.22, subdivision (e).

3. *Active Participation*

In a further challenge to his conviction on count 2 of active participation of a criminal street gang, Cervantes argues the evidence does not show his involvement in Darkside was more than nominal or passive, or that he acted to further the criminal purposes of other gang members or had knowledge of the gang's criminal activities. In addition, he faults the trial court's modification of CALCRIM No. 1400, the standard instruction for the crime.

The elements of a section 186.22, subdivision (a) offense are "(1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 56.)

As the Attorney General concedes, the conviction on count 2 must be reversed based on the recent California Supreme Court case *People v. Rodriguez, supra*, 55 Cal.4th 1125. In that case, the court held the third element, i.e., the willful promotion,

furtherance, or assistance in any felonious criminal conduct by members of that gang, is not satisfied when a lone gang member commits a crime. (*Id.* at pp. 1132, 1139.) Based upon the California Supreme Court’s pronouncement and Attorney General’s concession, we reverse the conviction on count 2 while expressing no opinion on the issue.

Furthermore, in light of our disposition on count 2, we need not address Cervantes’s challenge to the sufficiency of the evidence to prove his knowledge of the Darkside gang’s criminal activities as required under the second element of the offense and whether he nominally participated in the gang, nor the claim the trial court erred by including murder and/or voluntary manslaughter as one of the crimes used to establish the primary activities element in CALCRIM No. 1400. With respect to the last point, we simply note the trial court gave CALCRIM No. 1401, a standard instruction on the gang enhancement that also defines the relevant terms and phrases, and Cervantes raised no challenge to this instruction.

4. CALCRIM No. 3472

CALCRIM No. 3472 states, “A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.” The court gave this instruction at the People’s request and over a defense objection, stating, “I think the fact that [Cervantes] stopped, turned around and came back is sufficient.” Cervantes does not assert the instruction is legally incorrect. Rather, he claims the evidence did not support giving the instruction, and the trial court’s contrary conclusion denied him a meaningful opportunity to present a defense, lessened the prosecution’s burden of proof, and deprived him of his state and federal constitutional rights to due process of law and a fair trial. We disagree.

“A party is entitled to a requested instruction if it is supported by substantial evidence. [Citation.] Evidence is ‘[s]ubstantial’ for this purpose if it is ‘sufficient to “deserve consideration by the jury,” that is, evidence that a reasonable jury could find persuasive.’ [Citation.] At the same time, instructions *not* supported by

substantial evidence should not be given. [Citation.] ‘It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]’ [Citation.]” (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.)

The trial court gave a series of standard instructions on homicide, including CALCRIM Nos. 500 (general principles of homicide) and 505 (justifiable homicide, self-defense, defense of another). Following the instruction on justifiable homicide and self-defense, the court gave CALCRIM No. 3472, which is a standard instruction limiting the right of self-defense to the genuinely threatened and removing it where there is evidence the person claiming self-defense actually provoked a fight or quarrel “with the intent to create an excuse to use force.”

Although Cervantes claims the evidence does not support giving this instruction, this assertion would be true only if we accept his narrow interpretation of the facts, i.e., that it was Orozco who started and escalated the argument. But the jury was not limited to such a narrow interpretation. When the totality of the evidence is considered, sufficient evidence to justify the court’s decision is readily apparent. Thus, the trial court’s decision to include CALCRIM No. 3472 was proper as an aid to the jury’s factual findings and legal conclusions. We find no error, nor any deprivation of Cervantes’s state or federal constitutional rights.

5. Prosecutorial Misconduct

Cervantes claims “the prosecutor committed misconduct by impugning defense counsel’s integrity and disparaging his role in a criminal trial as a zealous advocate on his client’s behalf” during closing argument. His argument focuses on a portion of the prosecutor’s rebuttal, which is set forth below with the purportedly objectionable portions italicized. The Attorney General asserts Cervantes forfeited the claim by failing to object at trial, but even assuming an appropriate objection, none of these contentions have merit. We disagree with the Attorney General’s forfeiture argument, but agree with the Attorney General’s assessment of the claim on the merits.

a. Factual Background

Cervantes's argument focuses on the following part of the prosecutor's rebuttal: "Mr. Cervantes convicts himself of, at a minimum, voluntary manslaughter, just from his own testimony. I don't need a single witness other than what he told you folks for him to be found guilty of voluntary manslaughter. I will tell you why when I put up a chart later, but his own testimony, his own self-admitted conduct convicts him of at least voluntary manslaughter. ¶ I'm not backing down from what I said in my opening remarks about whether or not he should be found guilty of murder, but, at a minimum, by his own testimony, he admitted to voluntary manslaughter. I will tell you why. But I have to comment first on some of the things that [defense counsel] said. ¶ The facts are not on his side [i]n this case, they just aren't. His client shot an unarmed 17-year-old because of some nasty words, and he, for the last three hours or so, has told you how that's not a crime. No crime. That's what he just said, no crime, and that's just preposterous. ¶ *What you heard here was the classic kitchen sink defense. He threw everything at you. He threw it all at you.* Not guilty of first-degree murder, not guilty of second, not guilty of voluntary manslaughter. *Heck, Darkside's not even a gang. Threw that at you. He wants something to stick.*" (Italics added.)

Defense counsel objected, arguing the prosecutor misstated his remarks. The court overruled the objection.

The prosecutor continued: "*The preposterousness of suggesting that Darkside isn't even a criminal street gang under the law or that we did not prove that. He's very theatrical, very animated, got some nifty stories, got some nifty little tricks, pulling the cork out of the bottle. All of that is designed to essentially throw you off track, to distract you from what really happened on June 22nd of [2010] when his client took it upon himself to shoot and kill somebody. ¶ He wraps himself in the Constitution and our founding fathers and talking about a hundred innocent people – or a hundred guilty people going free before one innocent. Where is the innocent person here? Where is that*

person? [¶] *Scaring you folks with this standard of proof of beyond a reasonable doubt. It is the same standard of proof that is used in every criminal trial in this building, in this state, in this country. It's the same standard of proof necessary in a traffic trial. It's used every day. It's beyond a reasonable doubt. It's not beyond all possible doubt. That's what it is. The judge described it to you. He's scaring you with it's a higher burden than it is for the government to take your children. That's true.*" (Italics added.)

Defense counsel interjected, "This is impugning the integrity of counsel, your honor. It's improper argument." The trial court again overruled his objection, and the prosecutor continued. "*That's true, that is the standard of proof. But, again, as I just mentioned, it's what happens in every criminal trial in every state in this country on a daily basis. And he is absolutely playing loose and fast with the law, and I'll give you an example. [¶] When [defense counsel] was talking about implied malice, that's second-degree murder, that's when you're doing something so inherently dangerous that it's likely to lead to somebody losing their life, like shooting them at close range. He's suggesting that his client has to have malice in his heart. Malice in his heart. Those were his words, folks, that's not the law. It's flat out not the law in this state.*" (Italics added.)

b. Analysis

"The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

In other words, closing argument is the time for both sides to argue their respective view of the evidence. Prosecutors are given wide latitude to comment on the evidence (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568), and make fair response to defense counsel's remarks (*People v. Young* (2005) 34 Cal.4th 1149, 1192).

Defense counsel did challenge the sufficiency of the evidence to prove Darkside met the statutory requirements of a criminal street gang, the statutory requirements for active participation in a criminal street gang, and Cervantes's knowledge of gang activity. Therefore, the prosecutor's remarks were a fair response to defense counsel's argument on these topics.

As for references to the prosecution's burden of proof and whether the doctrine of implied malice requires a finding of "malice of the heart," the judge told the jury he was responsible for explaining the law and their responsibility lay in determining the facts. We presume jurors are intelligent and follow the court's instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) In any event, we are not persuaded the jury misapplied the court's instructions on mental state.

With respect to the prosecutor's characterization of defense counsel's argument as "preposterous," his reference to the "classic kitchen sink defense," and his description of opposing counsel as "very theatrical, very animated" with some "nifty tricks" designed to "throw [the jury] off track," and that defense counsel was "absolutely playing loose and fast with the law," we are not pleased. While there is such a thing as permissible use appropriate of epithets (*People v. Wharton, supra*, 53 Cal.3d at pp. 567-568 ["A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'"']), the use of such personal attacks is unseemly and unnecessary. Nevertheless, when considered in light of the whole of the prosecutor's closing argument, these few inappropriate comments about defense counsel do not amount to a pattern of reprehensible conduct so outrageous as to result in a fundamentally unfair trial and miscarriage of justice.

6. *Cruel and Unusual Punishment*

Finally, Cervantes, who was 14 years old at the time of the crime, claims a sentence of 40 years to life constitutes cruel and unusual punishment in violation of both the California Constitution and the Eighth Amendment of the United States Constitution. He asserts the sentence is disproportionate to the nature of the offense and the offender, and disproportionate to sentences imposed in California and other jurisdictions for more serious crimes. As much as we appreciate the tragedy that such a sentence represents for Cervantes, we believe the sentence imposed here is neither cruel nor unusual within the meaning of the state or federal Constitution.

a. Offense and Offender

A sentence within a state Legislature's sentencing guidelines is considered cruel and unusual in only the rarest of circumstances. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) The judiciary has no cause to interfere in the legislative process unless a statute prescribes a penalty "out of all proportion to the offense." (*Robinson v. State of California* (1962) 370 U.S. 660, 676.) Accordingly, "a punishment may violate the California constitutional prohibition 'if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*)). To determine proportionality, California courts examine "'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' [Citation.]" (*Id.* at p. 479.)

As for the nature of the offense, a court must consider the totality of circumstances surrounding the offense, including such factors as motive, the method by which the act was committed, the extent of the defendant's involvement, and the consequences of his acts. (*Dillon, supra*, 34 Cal.3d at p. 479.) When contemplating the nature of the offender, the court considers factors such as age, prior criminality, and individual characteristics. (*Id.* at p. 480.)

Cervantes argues his sentence is grossly disproportionate because Orozco was older and the aggressor,³ and because the shooting was not premeditated. He emphasizes his own youth and minimal prior criminal record and certain hardships he faced as a child, including the deportation of his biological father, the unavailability of his mother due to financial circumstances, and the significant role played by his older brother, to assert this particular penalty exceeds constitutional limits.

While not discounting the difficulties of Cervantes's individual circumstances, we must be mindful that murder is a most serious crime, "and the use of a gun by a gang member in the commission of a crime present[s] a significant degree of danger to society." (*People v. Em* (2009) 171 Cal.App.4th 964, 972 (*Em*)). Because of the danger such crimes pose to the general public, the Legislature resolved to severely punish such crimes when committed by armed gang members and those who aid and abet them. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 19.) While the age of the defendant is important, sentences in the range imposed on Cervantes have been previously upheld by this court. (*Em, supra*, 171 Cal.App.4th at p. 976.)

In *Em*, this court upheld a sentence of 50 years to life imposed on an aider and abettor to a gang-related robbery and murder. In that case, as it is here, the defendant was a young teenager who had a minimal criminal record. (*Em, supra*, 171 Cal.App.4th at p. 975.) In this case, the trial court discussed *Em* when ruling on the defense's Eighth Amendment motion below, and the court noted some significant differences between the two cases, the most important of which is fact the defendant in *Em* was a "passive participant" as opposed to Cervantes being the actual shooter in a gang-related homicide. Nothing in Cervantes' background overcomes this distinction.

Cervantes's reliance on the United States Supreme Court's decision in *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011] is misplaced. The holding in

³ As we have noted above, this narrow interpretation of the evidence is not supported by the record.

Graham involved sentences of life without the possibility of parole for juvenile offenders convicted of *nonhomicide* offenses. The court stated, “This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile *nonhomicide* offenders who are not sufficiently culpable to merit that punishment.” (*Id.*, 560 U.S. at p. ___ [130 S.Ct. at p. 2030], italics added.) Nothing in *Graham* prohibits the imposition of a life sentence with the possibility of parole for juvenile murders. As recognized in *Harris v. Wright* (9th Cir. 1996) 93 F.3d 581, there is a real distinction between a sentence of life without the possibility of parole and one of life with the possibility of parole, even when imposed on youthful offenders. (*Id.* at p. 585 [even an LWOP sentence not unconstitutionally disproportionate to 15-year-old defendant convicted of murder].)

Here, as in *Em*, Cervantes committed a gang-related murder with a firearm. Not only was he carrying the gun, he used it simply because a rival gang member engaged with him in a verbal confrontation. Cervantes had the opportunity to ignore Orozco and continue riding his bicycle, or limit his use of force to words or fists. Instead, he opted to shoot Orozco after what can at best be described as minimally provocative conduct. Rather than revealing his acts to be the result of a youthful lapse in reasoning, the record supports the jury’s inference Cervantes packed a gun and used it to gain the acceptance and respect of his fellow gang members. Considering the facts and circumstances surrounding this crime, and those peculiar to Cervantes, a sentence of 40 years to life is not grossly disproportionate to the senseless, gang-related murder committed here. As the trial court noted when referencing the Legislature’s findings and declaration of intent contained in section 186.21,⁴ gang violence is “a wound that doesn’t

⁴ Section 186.21 states, in pertinent part, “The Legislature hereby finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, gender, gender identity, gender expression, age, sexual orientation, or handicap, to

heal.” And, with respect to the nature of the offense, the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995.)

b. Comparison with Other Jurisdictions

In his comparison of punishments between states, Cervantes laments the effect of firearms enhancements in the punishment imposed for murder, with the result that someone who used a knife rather than a gun will receive a less harsh sentence. He also cites statistics reflecting the lesser punishments imposed in other states for firearms-related offenses, and the limits on the trial court’s sentencing discretion allowed in California. He asserts these cruel facts resulted in a punishment disproportionate to his crime, citing *Harmelin v. Michigan, supra*, 501 U.S. 957. As stated above, the Eighth Amendment to the federal Constitution contains a narrow proportionality principle with respect to capital crimes. The fact Cervantes finds himself faced with many, many years of incarceration before he is given the opportunity for parole is lamentable, but it does not present the ““exquisite rarity”” of a sentence so harsh as to shock the conscience. (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The Legislature hereby recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to lawfully associate with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process. [¶] *The Legislature, however, further finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing.*” (Italics added.)

DISPOSITION

The conviction on count 2, active participation in a criminal street gang, is reversed, and the sentence previously imposed on that count and stayed pursuant to section 654 is vacated. The clerk of the Orange County Superior Court is directed to correct the abstract of judgment and to forward a copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.