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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ADAN MARTINEZ,

Defendant and Appellant.

G049801

(Super. Ct. No. SWF10001480)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Albert J. Wojcik, Judge. Affirmed.

Patricia J. Ulibarri, 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, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Adan Martinez appeals from a judgment after a jury convicted him of first degree murder and being an active gang member carrying a loaded firearm in public and found true a gun use enhancement. Martinez argues insufficient evidence supports his conviction for being an active gang member carrying a loaded firearm in public, the trial court erred in denying his motion to bifurcate, the court erred in admitting gang evidence, he received ineffective assistance of counsel, and there was cumulative error. None of his contentions have merit, and we affirm the judgment.

### FACTS

Adrian Jurado<sup>1</sup> lived at home with his parents, siblings, girlfriend, Maria Semental, and extended family. Jurado was a member of “Old Town Trece” (OTT), a criminal street gang, and Semental was an OTT associate. Martinez too was a member of OTT. Jurado’s gang moniker was “Menace,” and Martinez’s was “Ghost.” Jurado and Martinez were not only members of the same gang, they were childhood friends, and Martinez respected the older Jurado and spent much time in his home.

In June 2010, there were two factions of OTT, the older gang members (OGs) and the younger gang members (YGs). The YG’s were becoming resentful of the OGs because the YGs felt the OGs were taking advantage of them by requiring them to commit crimes. If an OG told a YG to commit a crime, the YG must obey the OG. To disobey or criticize an OG would result in punishment for the YG.

Osiel Garcia, an OTT OG, was trying to “call[] the shots” from Mexico. Garcia was working with Eisiderio Ayala, who went by the name “Chile,” and previously sold drugs to OTT gang members. A couple years before, a few OTT gang members failed to pay Ayala for drugs, Ayala assaulted them, and the OTT gang members tried to murder Ayala. Since that time, OTT gang members considered Ayala an enemy. At some point, Jurado learned Garcia was working with Ayala.

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<sup>1</sup> Jurado testified pursuant to an immunity agreement.

A few days before the incident at issue here, Jurado, Semental, Martinez, and Nicolas Rangel, an OTT gang member who went by the gang moniker “Tank,” had a telephone conversation with Garcia. The cellular telephone was on speaker function so everyone could hear the conversation. During the call, Jurado and Rangel confronted Garcia about his relationship with Ayala. Jurado told Ayala that “[he] was gonna [*sic*] do [his] own thing.” Semental told Garcia that he was “double-crossing” and “backstabbing” them because he was working with Ayala. She also told Garcia he was “no good.” Martinez did not say anything to support Jurado, Semental, or Rangel.

On the morning of the incident, Jurado and Semental saw Martinez parked outside their home at about 4:00 or 5:00 a.m. Jurado went outside and spoke with Martinez, who seemed worried and sad; Jurado and Martinez had been smoking methamphetamine for a number of days. After they talked, Martinez drove away. Later that morning, Martinez called Elijio Cervantes, a newer member of OTT with the gang moniker “Travie,” and asked him “if [he] wanted to hang out.” Cervantes agreed and Martinez picked him up in his black Honda and drove to pick up another OTT gang member, to Martinez’s house, to drop off the gang member, and to run errands. Cervantes thought Martinez was uncharacteristically quiet but not under the influence of drugs or alcohol.

Around noon, Martinez suggested they go to Jurado’s house. Martinez parked his car at the end of Jurado’s cul-de-sac on the opposite side of the street from Jurado’s home. Cervantes followed Martinez, who was wearing a tank top and exposed his gang tattoos, as he walked up the left side of Jurado’s house, the opposite side of the front door, to a gate. Martinez seemed nervous.

Martinez opened the gate and walked through to the first window where he peeked through the window. Semental was in the bedroom sitting on a bed using a computer. Cervantes stood at the gate. Martinez stepped back and pulled out a gun, the same gun Cervantes saw earlier that day when they were at Martinez’s house. Martinez

fired at least six shots through the window screen. After the first shot, Cervantes walked to the front of the house. Four of the shots hit Semental, and she died.

As Martinez and Cervantes walked towards the car, Jurado and his mother went outside and saw Martinez. Martinez and Cervantes got into the car and drove away. Cervantes appeared to put his head down as Martinez drove away. Martinez asked Cervantes to wipe down the gun, but he refused. When Martinez stopped at a stop sign, Cervantes got out of the car.

A few hours later, Martinez drove to Rangel's house. Martinez gave Rangel the gun, and Rangel put the gun in his house. The two men then drove around. Martinez candidly discussed "shooting a wila," which meant sending a message, and "proving a point." Martinez told Rangel he had to drop off Cervantes because he was "tripping" and "crying like a little bitch." It was not until later when Rangel learned of Semental's death that he realized what Martinez was referring to.

Police later arrested Martinez after finding him sitting in his car. When officers asked Martinez where the gun was, he told them he had gotten rid of it. Two days later, Rangel gave the gun to the police. Forensic testing later established the bullets recovered from Semental's body were fired from Martinez's gun.

An information charged Martinez with first degree murder (Pen. Code, § 187, subd. (a))<sup>2</sup> (count 1), and being an active gang member carrying a loaded firearm in public (former § 12031, subd. (a)(2)(C), repealed by Stats. 2010, ch. 711, § 4; reenacted without substantive change as § 25850 by Stats. 2010, ch. 711, § 6, eff. Jan. 1, 2012) (count 2). As to count 1, the information alleged Martinez personally and intentionally discharged a firearm and caused death (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8)). Finally, the information alleged an on-bail enhancement (§ 12022.1).

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<sup>2</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

Before trial, the prosecutor filed a motion stating he intended to offer evidence concerning the culture and habits of criminal street gangs, OTT, and Martinez's gang history to prove count 2. The motion listed nine predicate offenses the prosecutor sought to admit. Finally, the prosecutor argued count 2 should not be bifurcated<sup>3</sup> because the gang evidence was relevant to prove intent, knowledge, and motive and the offenses were intertwined.

At a pretrial hearing when the trial court mentioned the prosecutor's motion to admit gang evidence, Martinez's defense counsel indicated his client was considering pleading guilty to count 2. Counsel argued that if Martinez pled guilty, the gang evidence would be inadmissible. The prosecutor argued the gang evidence was intertwined with the homicide and counsel was attempting to remove the motive from the case. Counsel stated he did not believe motive was an issue in part because there were no rival gangs. Counsel added the evidence was voluminous and unduly prejudicial. The prosecutor argued it was an inter-gang dispute that explained the motive for the shooting. The court indicated that if Martinez pled guilty to count 2 it would admit "some gang testimony" on the issue of motive. Counsel stated it was concerned about all the predicate offenses. The prosecutor argued that even if Martinez pled guilty to count 2, she intended to establish the relationships between the involved individuals and that OTT was a criminal street gang. Counsel stated that if Martinez pled guilty to count 2, evidence concerning OTT was irrelevant and evidence concerning the predicate offenses was unduly prejudicial. Counsel argued, "Typical gang expert testimony is certainly relevant if count 2 still exists. I don't believe it's relevant if count 2 doesn't exist." The

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<sup>3</sup> Severance, not bifurcation, is the proper term for disengaging substantive counts for separate trials. (See *People v. Burnell* (2005) 132 Cal.App.4th 938, 946, fn. 5.) A gang enhancement alleged pursuant to section 186.22, subdivision (b), may be bifurcated. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, citing *People v. Calderon* (1994) 9 Cal.4th 69.)

court reasoned that “with or without count 2,” the prosecution has the right to offer gang evidence on the issue of motive and that would include two predicate crimes because the prosecutor has the burden of proof. The court denied the motion to bifurcate because the gang evidence was relevant on the issue of intent, motive, and bias. The court concluded the probative value of the evidence was not substantially outweighed by the probability of any undue influence. The court added any prejudice resulting from the gang evidence “pales in comparison” to the evidence concerning the shooting.

At trial, Rangel, who had an immunity agreement, testified that based on what was said during the conversation, he knew there would be repercussions within the gang. When the prosecutor asked Rangel, “Is [Garcia] -- did you know if [Garcia] was ever calling any hits? Was he trying to?” Rangel replied, “No.” Rangel said neither he nor any OTT gang member he associated with would obey an order from Garcia. On cross-examination, Rangel admitted he did not associate with Martinez “towards the end.”

Cervantes testified regarding the shooting as described above. Cervantes admitted he was a member of OTT at the time of the shooting. He claimed he was in “shock” when Martinez pulled the gun out and started shooting. Although he had seen the gun earlier that day in Martinez’s garage, Cervantes testified he did not know Martinez had the gun with him in the car.

The prosecutor offered the testimony of nine law enforcement officers all of whom testified concerning their contacts with Martinez during the years 2006, 2008, 2009, and 2010. During each of those contacts, Martinez admitted to being a member of OTT and he was either with other OTT gang members or had indicia of gang membership or both.

The prosecutor also offered the testimony of gang expert, Officer Stephen Brosche. After detailing his background, training, and experience, Brosche testified concerning the culture and habits of traditional, turf oriented

Hispanic criminal street gangs. Brosche explained “‘putting in work’” for the gang meant committing crimes for the gang. He stated gang members establish their reputations by committing crimes and the more violent the crime, the greater the respect. He said almost all gangs have OGs, or a shot caller, who runs the gang by using fear and intimidation. He said disobeying an order or not listening to a shot caller would be a sign of disrespect and would lead to retaliation through violence. He said nongang members can also disrespect an OG and suffer retaliation.

Brosche testified concerning OTT, including its history, membership, claimed territory, rivals, symbols, uniform, and primary activities, which included narcotics sales, vehicle theft, assaults (with or without deadly weapons), felony vandalism, and illegal weapons possession. He testified concerning the connection between the Mexican Mafia and Hispanic street gangs, and OTT graffiti that threatened law enforcement officers.

Brosche testified about the statutorily required predicate offenses, including a July 15, 2006, incident involving Martinez and other OTT gang members that resulted in convictions for firearm possession and street terrorism. Martinez’s counsel requested a sidebar where he objected only to admission of Martinez’s convictions because it was improper character evidence. Counsel stated, “To clarify, your Honor, my only objection is not to any of the other evidence except that evidence offered to show that [Martinez] was convicted of a crime with respect to these predicates. To show that he knew these people and that [OTT] committed crimes -- these are all significant reasons to put that evidence before the court. [¶] However, when you start to talk about [Martinez’s] convictions in that package, you are -- you are admitting into evidence inadmissible character evidence. It is not necessary to prove up the [section] 186.22 portion of this case and is overwhelmingly prejudicial to my client.” The trial court overruled the objection and denied any motion to strike concluding the evidence was relevant to

count 2, and it was not unduly prejudicial because it would not evoke an emotional bias against Martinez.

When trial resumed, Brosche continued testifying about predicate offenses, including the following: (1) a November 9, 2006, incident that resulted in Martinez suffering a street terrorism conviction; and (2) a January 16, 2007, incident where three OTT gang members attempted to murder Ayala. He also testified about four additional predicate offenses involving OTT gang members. He discussed the conflict between the OGs and the YGs in OTT. Brosche opined OTT was a criminal street gang.

Brosche stated Garcia was one of OTT's primary "shot callers" and he resided in Mexico. He stated Semental was an associate of OTT. He explained that if a person said disrespectful things to an OG, such as accusing him of being a "double-crosser" or saying he was going to "do [his] own thing," the OG would have to regain his respect. He also stated gang members "hang out" with other gang members for a number of reasons, including that when a gang member commits a crime another gang member provides protection and witnesses the crime and informs other gang members garnering respect for the gang member who committed the crime.

Brosche opined that at the time of the offenses, Martinez was an active participant in OTT. Brosche based his opinion on Martinez's numerous contacts with police, his self-admissions and registration as a gang member, his gang tattoos, who he associated with, and his prior gang convictions. Brosche found it important Martinez was with other OTT gang members the day of the incident, he was armed with a gun, his gang tattoos were visible, and his statements to Rangel suggested he was putting in work for OTT.

Martinez rested on the state of the evidence. His defense counsel argued the prosecutor failed to prove the offenses beyond a reasonable doubt and he suggested Cervantes could have been the shooter.

The jury convicted Martinez of both counts and found true the gun use enhancement. At a bifurcated bench trial, the trial court found true the on-bail enhancement. The trial court sentenced Martinez to 50 years to life in prison as follows: 25 years to life on count 1 and a consecutive term of 25 years on the gun use enhancement. The court stayed the sentences on count 2 and the on-bail enhancement pursuant to section 654.

## DISCUSSION

### *I. Sufficiency of the Evidence*

Martinez argues insufficient evidence supports his conviction for count 2. We disagree.

“Our task is clear. ‘On appeal we 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—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “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.]’ [Citations.] The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

In *People v. Robles* (2000) 23 Cal.4th 1106, 1115 (*Robles*), the California Supreme Court construed the language in former section 12031, subdivision (a)(2)(C),

“as referring to the substantive gang offense defined in section 186.22[, subdivision](a).” As a result, the court concluded possession of a loaded firearm in public is punished as a felony under former section 12031, subdivision (a)(2)(C), “when a defendant satisfies the elements of the offense described in section 186.22[, subdivision](a). Those elements are [(1)] ‘actively participat[ing] in any criminal street gang [(2)] with knowledge that its members engage in or have engaged in a pattern of criminal gang activity’ and [(3)] ‘willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.’ [Citation.]” (*Robles, supra*, 23 Cal.4th at p. 1115.) Thus, a violation of section 186.22, subdivision (a), is a prerequisite to elevating a violation of former section 12031 from a misdemeanor to a felony.

In *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), a case decided after the jury returned its verdicts in this case, a majority of the California Supreme Court held that to convict a defendant of the crime of active participation in a criminal street gang under section 186.22, subdivision (a), the prosecution must prove the defendant promoted, furthered, or assisted felonious criminal conduct by other members of the gang, not just the defendant himself. Thus, when a gang member acts alone in committing a crime, he cannot be convicted of violating the gang participation statute. (*Rodriguez, supra*, 55 Cal.4th at pp. 1128, 1138-1139.) A gang member does not have to be present to be guilty of the crime under aiding and abetting principles. (*Id.* at p. 1138.)

Martinez relies on *Rodriguez* to argue he acted alone. Not so. Here, there was evidence from which the jury could reasonably conclude OTT shot callers ordered the shooting and Cervantes provided backup while Martinez shot Semental.

The prosecutor offered evidence demonstrating Semental, an OTT associate, disrespected Garcia, an OTT OG, and Garcia had to retaliate to reclaim his respect within OTT. During the telephone call, after Jurado told Garcia he was going to “do [his] own thing,” Semental, in the company of Rangel, an OTT OG, and Martinez, accused Garcia of “double-crossing” and “backstabbing” them, and said he was

“no good.” There was testimony Martinez did not support Jurado, Semental, or Rangel during their conversation with Garcia. Brosche and Rangel testified Semental’s conduct was disrespectful. Brosche also testified disrespectful conduct requires retaliation, and Rangel testified he “knew” there would be retaliation. Although Rangel testified he was not aware of any “hit” and he did not believe a OTT gang member would carry out a hit ordered by Garcia, Rangel admitted he did not associate with Martinez at that time. Martinez had been a long time friend of Jurado. His conduct the day of the incident, worried, nervous, and sad, tends to establish OTT ordered him to murder his best friend’s girlfriend. Based on this evidence, the jury could reasonably conclude OTT shot callers ordered Martinez to murder Semental because she disrespected Garcia.

Additionally, the prosecutor offered evidence establishing Cervantes acted as backup. As Martinez peered through the window at Semental, Cervantes stood at the gate. After Martinez pulled out the gun and started firing, Cervantes walked towards the front yard. When Martinez stopped firing, he and Cervantes walked back to the car. Brosche testified gang members associate with each other because when a gang member commits a crime other gang members provide protection and later tell other gang members about the crime thereby earning more respect for the gang member who committed the crime. Although Cervantes claimed he did not know Martinez was armed, he did not know what Martinez was going to do, and he was in shock, Cervantes testified Martinez showed him the gun earlier that day. Based on this evidence, the jury could reasonably conclude, despite Cervantes’ insistence otherwise, he knew Martinez’s plan and acted as his backup.

Martinez contends Cervantes did not act as his backup relying on the fact he did not testify pursuant to an immunity agreement and the prosecutor argued Martinez “acted alone.” It is true that during closing argument the prosecutor said Martinez “committed a felony himself” and referred to Cervantes’ testimony disclaiming any knowledge of Martinez’s plan. But the prosecutor also argued Cervantes was there for a

gang purpose, i.e., backup and confuse witnesses as to who was the shooter. Thus, there was sufficient evidence Martinez did not act alone when he shot Semental.

## *II. Bifurcation*

Martinez contends the trial court erred in denying his oral motion to bifurcate count 2 from count 1 because the gang evidence was inflammatory and unduly prejudicial. He also argues admission of the gang evidence violated his due process rights. We will address each contention below.

Based on the record at the time the trial court ruled on the bifurcation motion, we cannot conclude the trial court's denial of the motion was ““arbitrary, capricious or patently absurd”” so as to constitute an abuse of its discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 304; accord, *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) As we explain above, in opposing bifurcation, the prosecutor represented the evidence would establish the shooting was the result of an inter-gang dispute. The prosecutor argued the gang evidence was relevant on this issue of motive and intent because it explained why Martinez shot Semental after Semental disrespected Garcia. Without the gang evidence, it would have been nearly impossible for the prosecutor to establish, and for the jury to understand, why Martinez murdered his childhood friend's girlfriend. The prosecutor's evidentiary proffer provided the trial court with a reasonable basis to deny the motion to bifurcate count 2 from count 1 because the gang evidence was intertwined with the shooting.

The question remains, however, whether the cumulative effect of all the gang evidence violated Martinez's due process right to a fair trial. This is a much closer question. Quite frankly, we have never seen a case where the prosecutor has offered nine separate witnesses to establish a defendant is a gang member. The Attorney General asserts the testimony of each witness was brief. Additionally, in establishing OTT engaged in a pattern of criminal gang activity, Brosche testified concerning seven predicate offenses, when just two are required (§ 186.22, subd. (e)).

The Attorney General defends the use of just three of the predicate offenses, two that involved Martinez and one that explained why OTT gang members despised Ayala and tried to murder him.

We recognize the prosecutor bore the burden of proof of establishing the section 186.22, subdivision (a), elements to prove former section 12031, subdivision (a)(2)(C). But much of the evidence seems cumulative. It did not take nine witnesses to establish Martinez was a self-admitted member of OTT. Nor did it take seven predicate offenses to establish OTT gang members engaged in a pattern of criminal gang activity. And needless to say, reference to the Mexican Mafia and graffiti threatening to kill law enforcement officers was inflammatory.

Yet we cannot conclude Martinez was prejudiced by the gang evidence. There was overwhelming evidence Martinez was the person who shot and killed Semental. Cervantes testified Martinez was the shooter, Jurado and his mother saw him walk away from the house immediately after the shooting, he gave the gun to Rangel after the shooting, and he made statements to Rangel indicating he had committed a crime for OTT. Indeed, Martinez does not contest the sufficiency of the evidence on count 1. And the prejudicial effect of any gang evidence pales in comparison to Martinez's conduct of shooting Semental in cold blood as she sat on her bed using her computer. The trial court instructed the jury on the limited use of gang evidence and that the jury could not rely on that evidence to conclude Martinez is a person of bad character. We presume jurors are intelligent people ““capable of understanding instructions and applying them to the facts of the case.”” (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Martinez relies on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), to support his claim he was denied his due process right to a fair trial. His reliance on *Albarran* is misplaced.

In *Albarran, supra*, 149 Cal.App.4th at page 217, defendant was charged with, among other things, murder and attempted murder for the benefit a criminal

street gang. Defendant moved to exclude evidence of his gang affiliation under Evidence Code section 352. After conducting an Evidence Code section 402 hearing, the trial court concluded there was a sufficient factual foundation to support the gang allegation and the gang evidence was relevant to motive and intent. After the jury convicted defendant and found the gang allegations true, defendant moved for a new trial asserting there was insufficient evidence to support the gang allegations and admission of the inflammatory gang evidence warranted a new trial on all charges. The trial court agreed the gang enhancement was not supported by sufficient evidence. Nonetheless, the court denied the new trial motion finding the highly inflammatory gang evidence admitted to prove the subsequently dismissed gang allegations did not unfairly prejudice defendant's trial on the underlying charges. (*Albarran, supra*, 149 Cal.App.4th at p. 217.)

On appeal, the Court of Appeal reversed the conviction on the underlying offense and granted a new trial, finding the introduction of gang evidence under the circumstances violated due process. (*Albarran, supra*, 149 Cal.App.4th at p. 231.) Unlike the instant case, *Albarran* did not involve a motion to bifurcate, as the majority in *Albarran* took pains to point out. (*Id.* at p. 231, fn. 17.) Moreover, the gang evidence admitted in *Albarran* was lengthy, extensive and highly prejudicial, including repeated references to defendant's association with the Mexican Mafia, threats to kill police officers, and descriptions of criminal activities by other gang members. The evidence was not relevant to the underlying charges but instead was introduced to show defendant's criminal disposition. (*Id.* at p. 228.)

Here, in contrast, ample evidence linked Martinez to OTT and supported the inference the shooting was gang motivated. The gang evidence was offered to prove Martinez committed count 2 for OTT. Although some of the evidence is cumulative, this case does not "present[ ] one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered [appellant's] trial fundamentally

unfair.” Again, the evidence of Martinez’s guilt was overwhelming. (*Albarran, supra*, 149 Cal.App.4th at p. 232.) Thus, the trial court’s denial of the bifurcation motion was proper.

### *III. Admission of Gang Evidence*

Martinez continues to assert the trial court erred in admitting the gang evidence because it was not relevant to motive and intent and assuming it was relevant to those issues much of the evidence was irrelevant, cumulative and unduly prejudicial. Relying on the fact Jurado, Cervantes, and Rangel testified concerning OTT and the culture and habits of Hispanic criminal street gangs, Martinez claims much of the gang evidence was irrelevant. He cites to the following evidence: multiple law enforcement officers who testified concerning his numerous contacts with officers; the numerous predicate offenses; references to the Mexican Mafia; and OTT graffiti threatening to kill law enforcement officers. He also argues admission of this evidence violated his due process right to a fair trial.

Recognizing Martinez considered pleading guilty to count 2 to avoid the admission of any gang evidence, the Attorney General argues Martinez forfeited all but one of his claims. The Attorney General contends the only issue preserved for appellate review is the propriety of admission of the predicate offenses, evidence Martinez objected to during trial.

Martinez responds the issue is preserved for appellate review, relying on the fact he considered pleading guilty to count 2 in an attempt to prevent the admission of gang evidence, he sought bifurcation, and he argued the predicate offenses should be limited. He also cites to the fact the trial court engaged in the analysis of weighing relevance against prejudice. Alternatively, Martinez asserts we should address the merits of his claim because he also argues he received ineffective assistance of counsel because his defense counsel did not interpose more specific objections to the gang evidence.

While it is true Martinez considered pleading guilty to count 2 in an attempt to exclude gang evidence, we agree with the trial court's conclusion some of the gang evidence would have been admitted because it was intertwined with count 1, the shooting. The basis for the shooting was an inter-gang dispute that resulted in an OTT associate disrespecting a gang OTT shot caller. The shooting could only be understood in light of the culture and habits of Hispanic criminal street gangs and the schism within OTT. Although Martinez considered pleading guilty to count 2, he did not. His not guilty plea placed all count 2's elements at issue. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423.) One of the elements the prosecutor was required to establish was that OTT gang members engaged in a pattern of criminal gang activity (§ 186.22, subd. (e)). To satisfy this burden, the prosecutor had to establish OTT gang members committed two or more predicate offenses within a specific time. (*Ibid.*) And a prosecutor may rely on a defendant's prior convictions.

In *People v. Tran* (2011) 51 Cal.4th 1040, 1044 (*Tran*), the California Supreme Court stated: "We hold that a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion. Further, that the prosecution may have the ability to develop evidence of predicate offenses committed by other gang members does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity."

Before and during trial the focus of Martinez's objections seemed to be the predicate offenses that involved his prior convictions. Based on *Tran*, those prior convictions are admissible to establish OTT gang members engaged in a pattern of criminal gang activity. (*Tran, supra*, 51 Cal.4th at p. 1044.) Martinez does not cite to any other portion of the record where he objected the predicate offenses were irrelevant, cumulative, or unduly prejudicial. In fact, when arguing his trial counsel provided deficient performance, he admits counsel did not provide more specific objections to any of the gang evidence. Nor did he object to the numerous law enforcement officers who

testified concerning Martinez's law enforcement contacts, references to the Mexican Mafia, or graffiti threatening to kill law enforcement officers. Thus, his remaining evidentiary claims are forfeited. (*People v. Lewis AND Oliver* (2006) 39 Cal.4th 970, 1028; Evid. Code, § 353, subd. (a).)

#### *IV. Ineffective Assistance of Counsel*

Martinez contends he received ineffective assistance of counsel because he did not provide specific objections to the gang evidence. We disagree.

In order to establish ineffective assistance of counsel, a defendant has the burden to establish his counsel's performance was deficient under an objective standard of reasonableness and that it is reasonably probable that a result more favorable to defendant would have occurred in the absence of counsel's failing. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696 (*Strickland*); *People v. Bolin* (1998) 18 Cal.4th 297, 333.) To determine prejudice, "we must compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately. [Citation.]" (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1133.) If an ineffective assistance of counsel claim can be decided on the ground of lack of prejudice, the reviewing court need not determine whether counsel's performance was deficient. (*Strickland, supra*, 466 U.S. at p. 697; *In re Crew* (2011) 52 Cal.4th 126, 150.)

Here, Martinez cannot demonstrate there is a reasonable probability the result of the proceeding would have been different had his defense counsel not made the alleged errors. As the Attorney General notes, Martinez in his opening brief does not specify what specific evidence defense counsel should have objected to. In his reply brief, however, Martinez "incorporates his various arguments" concerning why count 2 should have been bifurcated and why the court erred in admitting the gang evidence. In making these arguments, Martinez cites to the following: multiple law enforcement officers who testified concerning his numerous contacts with officers; the numerous

predicate offenses; references to the Mexican Mafia; and OTT graffiti threatening to kill law enforcement officers.

Based on the record before us, we conclude it is not reasonably probable the result of the proceeding would have been different had the trial court excluded this gang evidence. As we explain above, there was overwhelming evidence Martinez shot and killed Semental and that he carried a loaded firearm for the benefit of OTT. Additionally, there was sufficient evidence from which the jury could reasonably conclude OTT shot callers ordered the shooting and Cervantes acted as Martinez's backup. In conclusion, we are convinced the result of the proceeding would have been the same even had the trial court excluded the complained of evidence. Thus, Martinez was not prejudiced by defense counsel's alleged deficient performance.

#### *V. Cumulative Error*

Martinez argues there was cumulative error. We have concluded there were no errors. Thus, his claim has no merit.

#### *VI. Abstract of Judgment*

The Attorney General asserts the abstract of judgment should be amended to reflect the sentence on the section 12022.53, subdivision (d), enhancement is 25 years to life instead of 25 years. The Attorney General is correct the proper sentence for violating section 12022.53, subdivision (d), is 25 years to life. At the sentencing hearing, after imposing 25 years to life on count 1, the trial court stated: "Pursuant to . . . section 12022.53, subdivision (d), [Martinez] shall serve an additional 25-year enhancement consecutive to 25 years to life. So Martinez will serve a life term with a minimum of 50 years in prison." Although the trial court did not say "25 years to life," it is clear the court intended to impose sentence pursuant to section 12022.53, subdivision (d). Thus, we agree with the Attorney General the abstract of judgment should be amended to reflect the correct sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.)

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment consistent with this opinion and forward it to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.