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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.

JORDON DARRELL COOPER,

Defendant and Appellant.

G049916

(Super. Ct. No. SWF1102257)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Michael J. Rushton, Judge. Reversed.

Patricia L. Brisbois, 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, Natasha Cortina and
Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Jordon Darrell Cooper guilty of first degree murder (Pen. Code § 187, subd. (a))¹ and found it to be true that he accomplished the murder with a firearm (§ 12022.53, subd. (d)). The court sentenced defendant to a prison term of 25 years to life for the murder conviction, plus a consecutive 25 years to life for the gun use enhancement, for a total sentence of 50 years to life.

On appeal, defendant contends the court erroneously admitted evidence that, upon arriving at jail after his arrest, in response to standard intake questions, he identified himself as a member of a gang and had tattoos related to the gang. This evidence was admitted pursuant to Evidence Code section 1103, subdivision (b), on the issue of self-defense, ostensibly as evidence of defendant's violent character (in response to evidence of the victim's violent character). There was no evidence admitted concerning the nature of the particular gang. Nor did the People proffer any evidence of defendant's gang activities, or even that he was active in the gang at the time of the shooting. The sole evidence was defendant's self-admission during the jail intake.

We hold it was error to admit this evidence. To be admissible, the prosecution needed to present evidence that the gang itself was violent, and that defendant personally engaged in the violent gang lifestyle. Without those foundational requirements, mere evidence of gang affiliation is too speculative and too inflammatory. Here, there was no evidence that defendant's gang was violent, nor was there any evidence linking defendant to a violent lifestyle. Additionally, the evidence was particularly unreliable in the context of a jail intake: a person may identify with a gang in jail as a survival tactic. To assume it was indicative of a violent character is purely speculative.

We further find the error was prejudicial. As the evidence discussed below shows, this was a close case, turning largely on the credibility of defense witnesses and

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All statutory references are to the Penal Code unless otherwise specified.

the defendant's own statements during a police interview. Evidence of gang affiliation is inflammatory by nature, and the prosecutor extensively exploited the evidence of defendant's gang affiliation in closing argument. Finally, the prosecution discovered and disclosed this evidence at nearly the close of the trial, despite that the evidence was available well before trial. The defense had little opportunity to prepare a response.

Defendant also contends there was insufficient evidence of premeditation to support the verdict. If defendant were correct, there could be no retrial on the first degree murder charge. However, we find there was substantial evidence. Accordingly, we reverse and remand for a new trial.²

FACTS

Prosecution Evidence

On September 3, 2011, Humberto Alarcon (the victim), who was then residing in Wyoming, was visiting Angel Fafutis's house in Hemet, California. Fafutis lived with several family members in a house across the street from defendant's house. Defendant lived with his mother and his siblings, and his friend Markkis Sonier would live with them off and on. Fafutis had not met defendant, but had interacted with Sonier on a regular basis and was friendly with him.

That day, Fafutis and Alarcon approached Sonier and offered him a cigarette. They also asked for a ride to go and buy some beer. Alarcon and Sonier exchanged some words, but because Fafutis does not speak English, he does not know what was said. Later that day, Fafutis approached Sonier and handed him a beer. Fafutis was alone for that interaction and no words were exchanged. In a third interaction later that day, Fafutis and Alarcon approached Sonier again to give him a beer. Again, there

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Given this disposition, we do not reach defendant's contention that the \$240 restitution fine was improper.

were no words exchanged. Alarcon's attitude was normal and relaxed. Finally, later that day, Sonier asked Fafutis for another cigarette and another beer, but Fafutis did not have any more.

Fafutis and Alarcon were drinking Bud Light beer together throughout the day, though Fafutis testified that Alarcon did not appear drunk. Fafutis estimated that Alarcon had five beers over the course of the afternoon.³

Some time later, Fafutis and Alarcon were in their backyard drinking beer. Alarcon excused himself to use the restroom, walking from the back of the house towards the front. Fafutis remained in the backyard with his daughter. Approximately five minutes later, Fafutis went to look for Alarcon and saw him in front of defendant's house speaking with Sonier, standing approximately four or five feet from Sonier. Fafutis was standing across the street from them at his front door. It was dark out at the time. The only light was from a small light bulb at defendant's house. Fafutis began to approach Alarcon and Sonier with his daughter in his arms. Fafutis described Alarcon as appearing "tranquil" and "normal."

Fafutis saw a person suddenly come from the side of defendant's driveway and fire five or six shots at Alarcon. Fafutis immediately went back to his house to take his daughter to safety. Sonier ran to defendant's house. By the time Fafutis dropped his daughter off, Alarcon had managed to make his way to Fafutis's backyard, where Fafutis found him lying face up, bleeding from a hole in his neck. At no point did Fafutis see a gun on Alarcon, nor did he see anyone remove a gun from Alarcon's person. He did not see Alarcon make any move towards his pants, such as going for a weapon, just prior to the shots being fired.

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Later blood tests of Alarcon revealed his blood-alcohol content was 0.29, which we have a hard time reconciling with Fafutis's testimony that Alarcon did not appear drunk and drank only five Bud Light beers over the course of the afternoon.

Fafutis's neighbor, James Pina, heard the gunshots, followed by a commotion at Fafutis's house. When he went outside, he saw two or three African-American men entering a car. It was too dark to see who it was. Pina described the lighting across the street as "really dark, especially that block, very poor lighting." There were no streetlights, only porch lights. Before the car drove away, Pina saw one of the individuals who entered the car arguing back and forth with approximately 25 adults at Fafutis's house. They were yelling at the individual, screaming, "saying they were going to get him." The individual responded by saying "What? What?" in a challenging manner. Fafutis was threatening to burn down defendant's house.

Pina had seen Fafutis and Alarcon talk to defendant and another African-American individual that day, and the interactions seemed friendly from his standpoint. Pina had seen Fafutis and Alarcon drinking throughout the day and noted that they were loud and seemed intoxicated.

By the time the paramedics arrived, Alarcon had stopped breathing, and he was later pronounced dead at the hospital. Alarcon had sustained seven gunshot wounds. The gunshot wounds were on the right wrist, left and right hip, neck, chest, and abdomen. The shot through the neck passed downward through his body, hitting the pulmonary artery and exiting through his armpit. Alarcon was most likely "bent at the waist" when that bullet was fired.

Investigators at the scene interviewed witnesses, including defendant's mother. Defendant's mother provided defendant's phone number to an investigator. The investigator called defendant approximately three hours after the shooting, and defendant initially claimed he was in Los Angeles and had no idea why the investigator was calling. Approximately three to four hours later, defendant called back and indicated he was ready to be picked up and interviewed.

Investigators picked defendant up, thinking he may be a witness or victim of the shooting. During the interview, defendant initially denied any involvement. Later

in the interview, he admitted that his fingerprints or DNA would be found on the gun used in the killing because he had touched it at some point (still not admitting he was involved). A short time later, defendant admitted shooting Alarcon. He claimed Alarcon had been making Sonier nervous, so he armed himself for protection. He claimed Alarcon came over asking for alcohol and marijuana, and when defendant and Sonier claimed they did not have any, Alarcon called them liars. Defendant then cocked his gun, to which Alarcon allegedly replied, "Fuck your heat fool." Alarcon then made a motion to pull out a gun. Defendant shot him twice and saw that it did not phase Alarcon. Defendant then "emptied" his gun, meaning he shot Alarcon until the bullets ran out. Defendant called Alarcon a "bitch as he was falling," then ran away. He later stated, "I felt my life was threatened." But he also acknowledged he was insulted when Alarcon called them liars and that he was "on point," meaning ready to use his weapon. He further acknowledged that he never actually saw a gun on Alarcon. No gun was ever found on Alarcon or in his residence.

Posthumous testing revealed hydrocodone in Alarcon's blood as well as marijuana (though it was unclear whether Alarcon had consumed marijuana that day). Alarcon had a blood-alcohol content of 0.29 percent.

A .32 caliber pistol was recovered from defendant's yard. The slide was locked to the rear, indicating all of the ammunition had been fired from the gun. Testing revealed it to be the weapon used to shoot Alarcon.

Defense Evidence

Defendant's principal percipient witness was Sonier, who had a very different account of the interactions between himself and Alarcon that day. At approximately 2:00 p.m., Sonier approached defendant's house and noticed Fafutis and Alarcon. Fafutis called Sonier over. Alarcon greeted Sonier with, "Hey, where you from? You know, what's your name?" And shook Sonier's hand "really hard." Alarcon

then said, "I'm from South-Side Where you from?" Alarcon then asked Sonier for drugs and alcohol but Sonier denied having any. Sonier walked away feeling "really uncomfortable." As he was doing so, Alarcon was telling him, "Come here. Come here," and calling him a liar because Sonier denied having alcohol. Sonier went to defendant's house and told defendant what had occurred. Defendant brushed the incident off.

Later that day Sonier went outside to smoke a cigarette and saw Fafutis outside, but without Alarcon nearby. Sonier approached Fafutis and expressed his discomfort with Alarcon's attitude, but Fafutis blew him off.

Later Sonier again went outside to smoke a cigarette and saw Fafutis and Alarcon standing outside their house. Fafutis called Sonier over and offered him a beer, which Sonier interpreted as a "peace offering." Instead of handing Sonier the beer, however, Fafutis handed the beer to Alarcon, who approached Sonier and gave him the beer but started acting aggressively, saying things like, "You are a liar. You are a fuckin' liar, dog." "This is South-Side." At this point Sonier saw that Alarcon had a "bulge" on his right hip that he was clenching. Sonier was again worried and walked away. Sonier told defendant what happened, but defendant just told Sonier to go relax in his room.

Sonier took a nap and woke up that evening to an empty house. He went outside to smoke a cigarette and saw defendant on the left side of the yard waiting for his mother to return from the store. It was dark outside. Suddenly Alarcon emerged from Fafutis's house yelling at Sonier many of the same things he said earlier: "You are a fuckin' liar." "This is South-Side." "I'm going to get down with you." He was throwing gang signs as he was coming across the street towards Sonier. As Alarcon was crossing the street he apparently saw the gun in defendant's hand and said, "Fuck your gun." He continuing yelling and got within six inches of Sonier's face. Alarcon was red-faced and smelled of alcohol. Sonier was in fear for his life.

Alarcon then took a few steps back and said, “All right dog. All right dog.” “Fuck you. All right. All right.” Suddenly his hands moved towards his back pocket and started pulling something out that appeared to Sonier to be a gun—he saw something metallic that he thought was the back part of a firearm, but never saw the whole gun. Defendant then fired what Sonier believed were two warning shots, but Alarcon continued trying to pull something out of his back pocket, which had apparently gotten caught on Alarcon’s pants. Sonier then heard four more shots. People started pouring out of Fafutis’s house, and Alarcon limped across the street back towards Fafutis’s house. Defendant fled. Sonier ran back into defendant’s house and saw defendant enter through the back door. They both then fled through the backyard. As they were fleeing, Sonier could hear people from Fafutis’s house saying “[f]uckin’ get them.” After Sonier arrived at a friend’s house a few houses down, he called his mom and she agreed to pick him up.

Defense counsel played a video of an interview between a detective and Fafutis where Fafutis stated that Sonier had earlier approached him asking what was up with Alarcon and if Alarcon was going to create problems. When the investigator asked Fafutis why Sonier made those statements concerning Alarcon, Fafutis responded, “I don’t know, maybe they didn’t like each other”

Next, defendant called a forensic scientist with the Los Angeles County Coroner who specializes in gunshot residue analysis. She had analyzed Alarcon’s hands and clothing for gunshot residue. On his hands, she found no residue on his left hand, but two particles on his right hand. On his clothing, she found many particles on Alarcon’s shirt. She also surveyed the waistband, inside the pockets, and outside of Alarcon’s pants and found several gunshot residue particles. She could not determine, however, whether the particles came from Alarcon having a gun on his person or from being shot.

Defendant called multiple witnesses to Alarcon’s violent character under Evidence Code section 1103. A Long Beach police officer testified that in 2007 he pulled over a vehicle with several occupants. The driver was Alarcon. Under the right

front passenger seat was a loaded .38 special handgun. Upon questioning, Alarcon admitted to being a member of the Compton Varrio Tortilla Flats gang. He acknowledged his moniker was “Oso,” which means bear. He also had a tattoo of three dots below his eye, which can indicate allegiance to the Mexican Mafia.

Defendant called a gang expert who explained that Compton Varrio Tortilla Flats is engaged in, for example, murder, robberies, extortion, and arson. He also explained that “South Side” indicates an association with gang activity. He further explained that when someone says, “I want to get down with you,” it can mean anything from “lets fight, to let’s see who pulls first.” He further opined, based on hypothetical facts matching Sonier’s testimony, that Alarcon’s actions suggested there was about to be a gun battle.

Defendant called a police gang investigator from Rock Springs, Wyoming. In May 2011, the investigator responded to a residence where a homeowner was being threatened by his stepsons, who turned out to be Alarcon and his brother. Alarcon was intoxicated. After calming the situation, the investigator left but was later called back to the residence. Alarcon and his brother were outside causing a disturbance. Alarcon was arrested, and when he was patted down, he had a eight-inch long steak knife on his person.

Defendant called Nathaniel Zimmerly, a resident of Rock Springs, Wyoming. In October 2008, his girlfriend was having some of her girlfriends over when four or five Hispanic males came into her house uninvited, started acting rude and disrespectful, and would not leave. Zimmerly’s girlfriend asked him to come with other male friends to get them out. As Zimmerly arrived with friends, he saw three Hispanic males leave, but two remained, including Alarcon. Zimmerly and his friends ordered them to leave, but Alarcon and his friend refused, and a fistfight ensued. Zimmerly broke his hand during the fight. Alarcon and his friend “were very intoxicated.” Zimmerly and his friends managed to eject them from the house. But later Alarcon and his friend

returned, entered the house, and rushed at Zimmerly. Zimmerly managed to fend them off with a baseball bat. During both altercations, Alarcon and his friend were yelling things such as, “We’re Mexican Mafia. We’re going to kill you, white boy.” “We’re going to shoot your house up.”

The next morning, Alarcon and a different male kicked in the door where Zimmerly and his girlfriend were staying, ripping the door off its hinges, and started making similar threats. Zimmerly’s girlfriend called the police, and when Alarcon and his friend realized it, they left.

Prosecution’s Rebuttal Evidence

On February 6, 2013, the second to last day of trial (the trial lasted from January 29 through February 8, 2013), the prosecutor revealed in a sidebar that he had evidence that after defendant was arrested, during the jail classification interview, defendant admitted to being a member of a gang. In explaining why he had just now discovered the evidence, the prosecutor claimed his investigator had looked into any gang affiliations of defendant prior to trial. “He didn’t find any [Field Identification] cards, anything. That’s why, you know, the gang investigation part of this kind of stopped.”

Ultimately, the court allowed the evidence, and the prosecution called Marcus Schultz, who was an officer assigned to the Southwest Detention Center jail in the classifications department. Schultz described his job as “basically you’re a liability filter. You house [inmates] accordingly to safely put them in a unit with inmates of similar sophistication or psychological or medical concerns.” “Q. [W]hat’s the purpose for trying to determine whether or not someone is a gang member? [¶] A. To house them for their safety and the safety of other inmates, keep them away from any enemies they may have.”

In September 2011, Schultz performed a classification interview of defendant. During that interview, defendant admitted to being a member of the Tragview

Park Crips gang out of Compton. This conversation stuck out to Schultz because defendant was the only person he had ever talked to from that specific gang, and Schultz had to ask defendant to spell it out a couple of times. Schultz also observed a tattoo stating “Park Life” on defendant’s abdomen, and a tattoo stating “Compton” on one of his wrists. Defendant said “Park Life” was his gang affiliation. Defendant said the Tragniew Park Crips gang had rival gangs, and listed two of them, but he did not claim to have any individual enemies. There was no evidence proffered concerning the nature of the Tragniew Park Crips gang.

During closing argument, the prosecutor made extensive use of defendant’s claimed gang membership in arguing the shooting was motivated not by self-defense, but because defendant felt disrespected. The prosecutor argued the defense “call[ed] their own defense expert up here, ha[d] the defense expert talk about how violent gang members are, what a threat they are to society, how they are more prone to go and walk across the street, cause trouble with the neighbors, throw up gang signs, pretend to reach for a gun.” “The defendant, by his own admission to the classification deputy . . . is a gang member too. He is violent too, just like his expert talked about.”

“You heard from . . . the Long Beach officer. . . . And he talked about the role that respect plays within the gang culture. How, if a gang member feels like he has been disrespected, he is expected to take action on that.

“And what type of action is that? It’s violence. It’s a foreign world to a lot of us. You know, we see it portrayed on TV, but we don’t live it every day.

“This gang world is a deadly, it’s a dangerous, it’s a violent world, where it means, if you are walking in the wrong neighborhood, if you’re walking on the wrong street, and someone asks you where you are from and you say the wrong thing, the consequences can be deadly.

“This case is about respect. Humberto Alarcon walked over to defendant’s house. He asked defendant for beer, for weed. This is all by the defendant’s own statement to the officers.

“When they said, get out of here, we don’t have any of that stuff, [Alarcon] was upset. He called them a liar. He disrespected them. Nobody goes over to [defendant’s] house, asks for that kind of stuff, and then calls him a liar.

“And because of that disrespect, [defendant] took deadly action. He wasn’t going to let anybody talk to [Sonier] like that. So he fired that gun seven times.

“Defense talks about there being no motive whatsoever for this crime, that you can consider that as evidence that this was done in self-defense. There is a motive for this crime. One that dates back as long as time. The motive is that he was disrespected. He didn’t like this guy’s attitude. He didn’t like the fact that this guy was a gang member, that he was a Hispanic gang member, let alone a Hispanic gang member out of Compton, the exact area where he grew up, the exact area where he made an allegiance, he made a commitment to this gang lifestyle, and to that dangerous and deadly world.” At this point defense counsel objected to this line of argument, but the objection was overruled.

DISCUSSION

Admission of Evidence of Defendant’s Gang Affiliation was Prejudicial Error

Evidence Code section 1103 states, “(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by [Evidence Code] Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to

rebut evidence adduced by the defendant under paragraph (1). [¶] (b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by [Evidence Code] Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)." This section permits a defendant claiming self-defense to put on evidence of the victim's violent character to support defendant's claim that the victim was the aggressor. But it also opens the door to the prosecution putting on evidence of defendant's violent character to support its claim that the defendant was the aggressor.

The issue here is whether evidence that defendant admitted to being in a gang during a jail classification interview, without any information about the criminal activities of that particular gang, nor any evidence about defendant's role within the gang, if any, is "evidence of the defendant's character for violence or trait of character for violence" under Evidence Code section 1103, subdivision (b). We conclude it is not and that the court abused its discretion in admitting the evidence. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195 ["We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352"].)

While it is undoubtedly true that, on the whole, gang members have a higher incidence of violence than the general population, it would be unfair to presume that, for any particular person, mere affiliation with a gang proves that person's violent character. For example, in *People v. Memory* (2010) 182 Cal.App.4th 835 (*Memory*), the prosecution introduced evidence of defendants' gang membership to prove motive and intent in a killing that occurred in the context of a bar fight. The court reversed for

various reasons, including the following: “Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, *unreasonable* inferences to be made by the trier of fact that the [defendant] was guilty of the offense on the theory of “guilt by association.”” (Id. at p. 859.)

We agree that guilt by association is a real concern. As defendant’s gang expert testified in this case, there are various roles one might play in a gang, not all of which necessarily demonstrate a propensity for violence: “[Y]ou have some of the older homies, the OGs that they pay respect to, that they listen to, or they should be listening to for some advice. You have what’s called like a Shock Collar [*sic*], someone who’s in charge, someone who makes decisions, someone who you must follow their existing orders. Within the gang, you find individuals who play different roles. Some drug runners, gun runners. Some that are in the introduction stage of being taggers. Some get down and fight, you know, with other youngsters on the way to school, on the way to the park, whatever the case may be.” The expert also explained that there are different reasons why someone might join a gang, not all of which indicate a propensity for violence: “Based on my experience, there are different reasons why individuals join gangs. There’s definitely not a one way and one motive to join a gang. And I’ve seen the spectrum from, from the lost child who had to find a group where they can fill a part of, and they find a connection. To an individual who may have come from a good home and may have got caught up in drugs, may have got into the drug habit, getting caught up in the neighborhood. May actually gang bang, may commit crimes, or may fulfill the drug habit. Others may falsely fall into the trap of this glorified lifestyle, they may realize, down the road, that may not be the case. Different factors that gravitate individuals to the lifestyle. A big factor that, when I look at Compton, it’s a rough neighborhood, it’s a rough city. Part of the reality is, when youngsters go from one school to another, they cross boundaries, they come across some sorts of conflict with

others. Many times they need to find a support group, so they tend to hook up with their neighbors, their peers, whatever. But an innocent hookup, becomes a part of a gang set up. So it will very [*sic*]. Then you have the extreme. You have that one person who's hard-core, wants to commit all these crimes, wants to be a big time Shock Collar [*sic*]. You have that extreme as well. The most common are individuals who happen to be a member of the environment. And you kind of gravitate to it as a way of operating.”

We are also concerned, of course, about the inflammatory nature of evidence of gang membership. “Legions of cases and other legal authorities have recognized the prejudicial effect of gang evidence upon jurors.” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 231-232, fn. 17.)

Nonetheless, the gang lifestyle is undoubtedly a violent one in general, and thus evidence that a person is engaged in a violent gang lifestyle is relevant to a person's propensity for violence.

To address each of these concerns, we conclude evidence of gang membership is admissible under Evidence Code section 1103 to demonstrate a person's propensity for violence only if a foundation is laid to establish that the person is not only an active member of a violent gang, but also personally lives out the violent gang lifestyle.⁴ For example, in this case defendant put on evidence not only of Alarcon's gang membership and the fact that it was a violent gang, but also incidences of violent conduct demonstrating that Alarcon engaged in the violent gang lifestyle. Another example would be reputation evidence: evidence of a person's membership in a violent gang, together with evidence of a person's reputation for violence, would suffice to

⁴ We have purposefully avoided the term “criminal street gang,” as used in section 186.22, because not all criminal street gangs are violent. For example, a criminal street gang may have as its primary activity money laundering, credit card fraud, or wrongfully obtaining Department of Motor Vehicle documents, none of which necessarily indicate a propensity for violence. (§ 186.22, subds. (e)(14), (27), (30), & (g).)

connect the person to the lifestyle. Or if, in a given case, admission to a violent gang required one to commit a violent act, that may also suffice. These examples are just that; they are not meant to be an exhaustive list.

Here, there was inadequate foundation to establish that defendant's gang affiliation demonstrated a propensity for violence. There was literally no evidence at all concerning the nature of the Tragniew Park Crips gang. The court may not simply assume that any group labeled "gang" is violent. That concern is especially applicable here, where the classification officer — whose job is to collect this sort of information — had apparently never heard of the gang before. Also, the prosecutor's investigator was unable to find any indication that defendant was active in a gang, nor did they put on any evidence of specific instances of violent conduct. Again, this suggests defendant's membership in this gang does not necessarily indicate a violent character.

Additionally, defendant admitted gang membership in the context of a jail classification interview. As the classification officer testified, the whole purpose of doing such an interview and eliciting gang information is for the inmates' safety. Someone claiming gang membership in that context, therefore, may be doing so to *avoid* violence.

Accordingly, on the record before us, defendant's admission to membership in a gang during his jail classification interview was not indicative of a violent character, and it was an abuse of discretion to admit it.

The People's response is that it did exactly what defendant did when defendant proffered evidence of Alarcon's gang membership. However, there were important differences. Defendant put on a gang expert to testify to the violent nature of Alarcon's gang. Defendant also put on instances of violent acts that, together with Alarcon's gang membership, painted a nonspeculative picture of Alarcon living a violent gang lifestyle. None of that was present in the prosecution's evidence.

We further find the error was prejudicial because it is reasonably probable the defendant would have obtained a better result had the evidence been excluded. (See

People v. Watson (1956) 46 Cal.2d 818, 836; *People v. Fuiava* (2012) 53 Cal.4th 622, 671 [applying the *Watson* standard to the erroneous admission of evidence].) It is well recognized that evidence of gang affiliation is inflammatory by nature. “We have recognized that admission of evidence of a criminal defendant’s gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged.” (*People v. Williams* (1997) 16 Cal.4th 153, 193.) In *Memory, supra*, 182 Cal.App.4th 835 where gang membership was likewise improperly introduced in a homicide case involving defendant’s claim of self-defense, the court noted, “Here that taint was particularly prejudicial as the outcome of this case depended heavily on questions of defendants’ mental state.” (*Memory, supra*, 182 Cal.App.4th at p. 863.)

The prejudice was particularly acute here because the case largely turned on a credibility determination between defendant’s and Sonier’s testimony, on the one hand, and Fafutis’s testimony on the other. The prosecutor recognized this fact in closing argument: “The case boils down to who do you believe. Do you believe Angel Fafutis’s version of the evidence, or do you believe Markkis Sonier and his version of the evidence?”

How to resolve that question was far from obvious, as Fafutis had his share of weaknesses in his testimony. He testified at trial, for example, that the interactions between Alarcon and Sonier were calm, but in an interview on the day of the incident he acknowledged that the two may not have liked each other. Further, Fafutis’s testimony was inherently weak because he did not comprehend the exchanges between Alarcon and Sonier and saw the shooting in question from a distance on a dark night (and, if Pina is to be believed, while Fafutis was intoxicated). We have already noted above the implausibility of his testimony that Alarcon did not appear drunk, given that he had a blood-alcohol content of 0.29. To top it all off, even the prosecutor did not seem to fully believe Fafutis’s testimony. The prosecutor’s ultimate theory was that Alarcon insulted

defendant, calling him a liar, but according to Fafutis all of Alarcon's interactions were friendly and tranquil.

Additionally, as noted above, the prosecutor extensively exploited the evidence of defendant's gang membership, making it the cornerstone of his theory of what motivated defendant to shoot at Alarcon. Also as noted above, the prosecutor sprang this evidence on defense counsel at the last minute, leaving the defense little opportunity to prepare.

Finally, this is not a case where the jury had a binary decision between guilty or not guilty. In addition to first degree murder, the jury could have found defendant guilty of second degree murder, voluntary manslaughter, or simply not guilty. (See *Memory, supra*, 182 Cal.App.4th at pp. 838-839 ["This was not a case presenting a simple choice between guilty as charged or not guilty; the evidence would support various lesser offenses. The error in admitting irrelevant, inflammatory evidence harmed the defendants' credibility and provided evidence of their criminal disposition such that, absent the error, it is reasonably probable they would have received a better result on all counts"].) Given this record, in this context, we find it to be reasonably probable that defendant would have obtained a better result had the evidence of his gang affiliation been excluded.

The Verdict is Supported by Substantial Evidence

Next, despite our reversal of defendant's conviction, we must consider defendant's substantial evidence challenge to the verdict because, if we were to agree with defendant, double jeopardy would bar a retrial. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1038-1039, fn. 6.) Defendant contends the evidence was insufficient to prove premeditation and that defendant could at most have been convicted of second-degree murder. We disagree.

“In deciding whether substantial evidence supports a verdict, a court does not “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.” [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Lagunas, supra*, 8 Cal.4th at pp. 1038-1039, fn. 6.)

In deciding whether there is sufficient evidence of premeditation, courts have focused on three nonexclusive factors. “The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as ‘planning’ activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of ‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a ‘preconceived design’ to take his victim’s life in a particular way for a ‘reason’ which the jury can reasonably infer from facts of type (1) or (2).” (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Considered in the light most favorable to the prosecution, the evidence here fits that mold. Defendant felt insulted by Alarcon calling Sonier and himself a liar (category two). Defendant then armed himself (category one). When Alarcon approached, he pulled out his gun intending to use it (category one). He cocked it

(category one). Then he shot Alarcon seven times (category three). As Alarcon was falling, defendant called him a “bitch” and then fled the scene (category three).

These facts, if believed, and if the jury were to discredit all contrary evidence, would be sufficient to sustain a finding of premeditation. On remand, therefore, the People may retry defendant for first degree murder.

DISPOSITION

The judgment is reversed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.