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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.

MARCUS ALLEN JEFFRIES,

Defendant and Appellant.

G050874

(Super. Ct. No. 13ZF0172)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Randell D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Marcus Allen Jeffries of assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))¹ and found he committed the crime for the benefit of the Mexican Mafia (§ 186.22, subd. (b)(1)). The court found he served three prior prison terms (§ 667.5, subd. (b)), and sentenced him to prison for nine years, consisting of a three-year term for his assault conviction, a consecutive three-year term for the gang enhancement, and three consecutive one-year terms for each prior prison term.

On appeal defendant contends the court erred by (1) allowing the prosecution to introduce, or to use, two inmate notes (also known as “kites”) to show he committed the assault for the benefit of the Mexican Mafia,² and (2) failing to instruct on the defense of duress. Defendant does not contend the gang expert’s reliance on the kites fell outside the guidelines for appropriate use of hearsay set forth in *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619. Accordingly, we conclude any error in admission of the kites was harmless. We also conclude the court did not err by failing to instruct the jury on duress. We affirm the judgment.

FACTS

In the fall of 2011, the victim, Raul Hernandez, was an inmate housed in module P of Theo Lacy Jail. Modules M and P of the jail were used to house gang members.

On the morning of November 4, 2011, a guard observed a fight in progress in the dayroom of module P. Three inmates (Jose Peralta, Joseph Diaz, and defendant)

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

² The jury heard testimony that a “kite” is a small piece of paper secretly used by inmates to relay messages to one another.

were pushing and punching Hernandez.³ Hernandez did not punch them back and was trying to defend himself. At the guard's order, the inmates stopped fighting and laid down on the ground.

The guard saw blood throughout the dayroom. He observed that Hernandez's head and chest were lacerated, he had two black eyes, his face was red and swollen, his nose was swollen, and his neck and shoulder were red and abraded. Defendant, Peralta, and Diaz did not appear to be injured.

Four days later, on the evening of November 8, 2011, Deputy Sheriff Leith Chacon saw inmate Luis Sanchez take a small piece of paper from a plumbing tunnel behind his cell in module M and put it in his property box. Chacon opened Sanchez's property box and found a kite (the November kite). Chacon gave it to a deputy who booked it into evidence.

On February 6, 2012, Deputy Sheriff Mark Vandekreeke searched inmate Jose Gomez upon his return from court and found a kite in his waistband (the February kite). Vandekreeke gave it to a deputy in the jail's special handling section.

Gang Experts' Testimony

Two gang experts — Rene Enriquez and Seth Tunstall— testified for the prosecution at trial as follows.

1. Rene Enriquez

Enriquez, a former member of the Mexican Mafia, testified about the culture and operations of the Mexican Mafia.⁴

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Peralta was defendant's codefendant at trial.

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At the time of defendant's trial, Enriquez was a confidential human resource for the Federal Bureau of Investigation, specializing in evaluating gang

The Mexican Mafia imposes a clear hierarchy on Hispanic inmates in the jail system. At the top of the hierarchy are the Mexican Mafia members, also known as “carnales,” an elite and exclusive class in the Hispanic criminal subculture. Only carnales may bear the tattoo of the black hand of death.

Directly below the carnales are “camaradas.” Camaradas are entrusted “associates” of the Mexican Mafia.

The next tier in the hierarchy are the “sureños.” A sureño is a member of a southern California Hispanic gang (i.e., a “southsider,” as described in the next paragraph) who has professed his loyalty to the Mexican Mafia, has embraced its ideology and goals, and has volunteered and agreed to serve as a soldier for the Mexican Mafia and to commit violence. To become a sureño, a person must take some voluntary acts, possibly violent. The more an inmate does for the Mexican Mafia, the more his social status rises. Sureños must abandon their rivalries with other street gangs; they are allowed to fight other gang members only if given permission by a Mexican Mafia member. A sureño may become a camarada by moving into a leadership position or by growing his reputation.

The fourth tier in the hierarchy consists of both “southsiders” *and* “piasas.” Southsiders are members of any Hispanic gang in southern California. Piasas are Mexican nationals. Piasas and non-sureño southsiders are of equal rank in the hierarchy.

At the bottom of the hierarchy are “residents”. Residents are persons who live in gang areas, but are *not* gang members.

Enriquez also defined the terms “roll call,” “hard candy,” and “kites,” as used by the Mexican Mafia. A southsider can signify his desire to become a sureño by voluntarily filling out a “roll call,” i.e., a paper that lists his name, booking number, court dates, conviction offense, street gang affiliation, and moniker. But a person named on a

communications. He was serving two life sentences for murder and one life sentence for conspiracy to commit murder.

roll call is *not* necessarily a southsider or a sureño. Rather, *all* Hispanic inmates “are forced to sign the roll call.” Although everyone is forced to “fill out a roll call,” no one is required to commit to the Mexican Mafia or to participate in Mexican Mafia activity. Instead, the only act of violence required of every Hispanic inmate is to participate in “racial violence,” should it occur. A roll call can consist of a sheet written by a cell block shot caller *or* of individual writings by inmates.

The term “hard candy” means to kill a person or to physically attack a person with an intent to kill. But rarely is anyone on the hard candy list killed; instead, the Mexican Mafia uses the hard candy list to maintain control over inmates. An order is passed from a Mexican Mafia member “all the way down to the soldiers that are going to commit the act.” One method used by the Mexican Mafia to communicate its orders is via “kites,” which are notes written by inmates and passed from prisoner to prisoner until they reach their destination.

2. Seth Tunstall

Tunstall, a deputy sheriff assigned to a gang task force, had investigated the Mexican Mafia for the past 12 years. He testified about a power struggle within the Mexican Mafia between the years 2008 to 2012, during which Armando Moreno challenged long-time leader Peter Ojeda for control of the Mexican Mafia in the Orange County jail system, and sureños split into factions loyal to Ojeda or Moreno. After Ojeda won the battle for control, the sureños that supported Moreno, including Hernandez, wound up on the hard candy list.⁵

Tunstall testified that a “roll call is pretty much everyone collectively. So not everyone on that particular roll call is a sureño. Most of them are southern Hispanic

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Tunstall did not specify the materials or sources on which he relied for his testimony Hernandez was a Moreno sureño who ended up on Ojeda’s hard candy list.

street gang members, but there are some residents on there — there are some Christians on there, and it’s noted on the kite.”

Tunstall testified defendant’s moniker is Evil from the 17th Street gang, Peralta’s moniker is Slim from the Westside Anaheim gang, Diaz’s moniker is Speedy from the Eastside Santa Ana gang, and Hernandez’s moniker is Butch from the Vario Chico gang.

Tunstall opined that a hypothetical attack like the one on Hernandez would be committed for the benefit and at the direction of the Mexican Mafia.

We summarize the rest of Tunstall’s relevant expert testimony in the discussion section of this opinion.

DISCUSSION

Any Error in Admission of the Kites as Substantive Evidence was Harmless

1. The parties’ contentions on appeal

Defendant contends his conviction and gang enhancement should be reversed because the court improperly permitted the prosecution to introduce or use the November and February kites: “Although the People sought to introduce such ‘kites’ under the hearsay exception for statements in furtherance of a conspiracy under Evidence Code section 1223, they failed to establish, by independent evidence, the existence of that conspiracy, that the claimed authors were part of that conspiracy, or that the ‘kites’ — which were not found until *after* the assault had occurred — were created during the course of the conspiracy, each of which were required to justify the admission of the evidence under that exception. The People also failed to provide the basic evidentiary foundation for such documents, including the author’s personal knowledge, if any, of the ‘facts’ contained in the ‘kites.’”

In response, the Attorney General argues defendant's argument should be rejected because it is based on the trial court's January 2014 rulings on the admissibility of the kites and "not on the court's later September 2014, superseding ruling on the admissibility of the" kites. The Attorney General contends the court's September 2014 evidentiary ruling properly found the "inmate notes admissible as circumstantial evidence of the underlying assault and not on the basis that it was prepared prior to, or during, the commission of a conspiracy."

Defendant counters that, regardless of the basis of the court's September 2014 ruling, "the information contained in the 'kites,' including the names and monikers of alleged gang members, was clearly offered for the proof of the matter asserted and, therefore, clearly hearsay. As a result, and because . . . authentication and foundation constitute separate requirements under the Evidence Code, evidence of the 'kites' could not be admitted unless it was subject to *some* exception to the rule against hearsay, which the People fail to provide. As a result, nothing in the People's brief justifies the trial court's rulings in this case."

2. The November kite

During Evidence Code section 402 pretrial hearings, the prosecutor and defense counsel described the kites.⁶ Both kites were addressed to "B," which stands for Bob.

The November kite commenced with three dots and two lines, signifying Mexican Mafia politics. It continued: "'My S & R,' . . . a common term used by Mexican Mafia associates, 'to you and the homies with you. Specifically, okay right to the . . . bizz. 'That was done about "Butch" on Friday. The homey D-E-S-S-A said it was hard to get the homies to do it. The only ones that said yes were Evil, 17th Street,

⁶ At one of the Evidence Code section 402 hearings, the court and counsel referred to the February kite as the H4 exhibit and the November kite as the H5 exhibit.

Slim, Westside Anaheim, and El Speedy, E-S-S-A.” “They knocked him out like two times They said he looked ‘surprised.’ Anyhoot it’s done! . . .” “I let ‘Evil’ know everything that you told me and he said ‘yes’ when I get the program.”

The November kite also contained a roll call which included defendant, Peralta, and Diaz.

3. The February kite

The February kite started out, “Every clean up!”, and then named everyone on the “latest” hard candy list, including Hernandez (identified by his moniker and gang). The kite’s author directed “anybody” to respond to him at his home in sector 45’s module P (where defendant and Hernandez were also housed). At one of the Evidence Code section 402 hearings, defense counsel stated the February kite appeared to bear the date, “1-25-12,” i.e., a date after the November 2011 assault.

4. The first court ruling (by Judge Richard M. King)

In a January 30, 2014 pretrial Evidence Code section 402 hearing, defense counsel moved to preclude the prosecution from eliciting an expert opinion based on hearsay, and argued the kites were written by unknown authors, were *not* found in defendant’s possession, and were found *after* the assault on Hernandez.

The prosecutor advised Judge King and defense counsel that this case involved a large conspiracy in the Orange County jail between 2007 through 2009, concerning a power struggle between Mexican Mafia members Moreno and Ojeda, which resulted in assaults in jail between their supporting factions. To prove that the Ojeda faction ordered the assault on Hernandez, the prosecutor intended to elicit an expert’s opinion *and* the testimony of a percipient witness named Ruorock, who “was an elevated

shot-caller within the Orange County Mexican Mafia who personally passed kites” and had “direct percipient knowledge of the feud and of the current assaults.”⁷

In response to Judge King’s question, the prosecutor stated he planned to introduce both kites (1) for the truth of their contents under Evidence Code section 1223 and (2) for the expert to consider in forming his opinion. Evidence Code section 1223 creates a hearsay exception for statements made by a conspiracy participant before or during the conspiracy, so long as sufficient independent evidence shows the declarant’s requisite participation in the conspiracy and the requisite timing of the statement.

Judge King ruled the *February* kite was admissible for the truth of the matter under Evidence Code section 1223, but it was up to the jury to determine whether the statement was made prior to the assault on Hernandez. Judge King stated he did not have to analyze whether an expert could rely on the February kite because the kite was independently admissible under Evidence Code section 1223.

Judge King ruled the *November* kite was *not* admissible under Evidence Code section 1223, but that his ruling would not “prohibit an expert from relying on” the November kite. But Judge King ruled, without prejudice, that any reference in the November kite to defendant and his codefendant Peralta would be excluded. Based on Evidence Code section 352, Judge King denied the prosecutor’s motion that the roll call portion of the November kite be admitted as a basis for the expert’s opinion that defendant and Peralta were active members of the 17th Street gang and the Westside Anaheim gang, respectively. Judge King noted that (1) abundant other evidence showed defendant and Peralta’s active membership in their criminal street gangs; (2) this issue was unlikely to be disputed; (3) the significant issue for the jury was whether defendant and Peralta assaulted Hernandez for the benefit of the Mexican Mafia; and (4) introduction of the roll call created the unduly prejudicial danger that the jury could

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Ruorock did not ultimately testify at trial.

misuse the roll call for the truth that defendant and Peralta acted at the direction of and to benefit the Mexican Mafia. Judge King further excluded, without prejudice, the references in the November kite to some bizz being done about Butch, and Dessa saying it was hard to get the homies to do it. Judge King ruled the expert could testify in general terms that the November kite was connected to the Mexican Mafia.

5. The second court ruling (by Judge Gregg L. Prickett)

On February 4, 2014, the trial was continued. Later, on September 3, 2014, Judge Prickett presided at a pretrial hearing.

The People's trial brief stated they would introduce the February and November kites "as evidence of a conspiracy to assault Hernandez and as basis testimony for Tunstall that each defendant assaulted Hernandez because he was on the Hard Candy list and that the assault was carried out at the direction of and for the benefit of the Mexican Mafia."

Judge Prickett excluded part of the November kite, but entertained discussion as to the admission of the roll call. Defense counsel objected to admission of the roll call, arguing that defendant's membership in the 17th Street gang and moniker of Evil were not at issue. Defense counsel offered to stipulate to defendant's active membership in the 17th Street gang as of the date defendant admitted it in a certified court document.

But Judge Prickett ruled the roll call was admissible, analogizing the roll call to a baseball team roster. Specifically, Judge Prickett stated that the obvious goal of a baseball player on the Albuquerque Dukes (the then AAA farm club of the Los Angeles Dodgers) is to play for the Dodgers. Similarly, defendant's membership in the 17th Street gang was "circumstantial evidence to prove the [gang] allegation," according to

Judge Prickett.⁸ In response to Judge Prickett's question, the prosecutor stated he sought to use the roll call as independent evidence *and* as evidence relied upon by the gang expert. As to the use of the roll call as substantive evidence, defense counsel argued the kite contained post-conspiracy hearsay (not coming within any hearsay exception) and was unauthenticated, with no known authorship. Judge Prickett responded, "Moving on to the next kite."

As to the February kite, defense counsel noted it was dated January 25, 2012 and found on February 6, 2012, i.e., two and one-half months after the November 2011 assault on Hernandez. Defense counsel argued the February kite showed Hernandez was on the hard candy list as of February 6, 2012 (i.e., a date after defendant's assault on Hernandez), that the authenticity and authorship of the kite was unknown, that it contained inadmissible hearsay, and that its use by the gang expert would be speculative, lacking in foundation, and unduly prejudicial.

The prosecutor stated he would be unable to establish the authenticity of the kite as to who wrote it.

Judge Prickett digressed from discussing the February kite. Then, after a recess, when defense counsel stated, "This particular kite that we were discussing —," Judge Prickett interjected, "I have moved away from kites. We now are just talking about expert opinion."

Judge Prickett proceeded to discuss the People's trial brief. Defense counsel objected to the People's gang expert testifying that defendant was a sureño for the Mexican Mafia while incarcerated. Over defense counsel's objection, Judge Prickett ruled the expert could opine that defendant was a sureño.

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Peralta's counsel argued that the baseball analogy better correlated to sureños (rather than all southsiders) as the Albuquerque Dukes.

6. Tunstall's testimony on the kites

At trial, the prosecutor showed Tunstall the November kite. Tunstall testified the kite contained a roll call for a sector in module P. The prosecutor asked, "And I believe you testified that it contains the list of individuals and what their status is as a gang member or sureño, as a resident, as a Christian, things of that nature, right?" Tunstall answered, "Yes. It will be denoted next to their name." Tunstall then testified the roll call listed defendant's, Peralta's, and Diaz's names, booking numbers, street gang affiliations, monikers, and court dates; Tunstall did *not* mention any designation of sureño status on the roll call for defendant, Peralta, or Diaz.

Tunstall testified that defendant had admitted (in a certified court document) that he was an active participant in the 17th Street gang on August 28, 2010. Looking at photos of defendant, Tunstall testified that defendant's tattoos represented the 17th Street gang. Based on the "letters [Tunstall] reviewed, including the certified court documents, the kites, and the photographs of" defendant's tattoos, Tunstall opined that defendant was an active member of the 17th Street gang on November 4, 2011. The prosecutor then asked Tunstall, based on the kites and "the other information" he had reviewed, whether he had an opinion on whether defendant was a sureño on November 4, 2011. Tunstall opined that defendant was an active sureño on that date.

Similarly, Tunstall testified that Peralta and Diaz were active participants in their respective gangs, as well as sureños, on November 4, 2011.

The prosecutor enlarged the November kite to show it to the jury. Tunstall testified that, on the November kite, the "B", two bars, and three dots signified this was Mexican Mafia related. He proceeded to read other sections of the November kite not at issue here.

Tunstall recognized photos of the victim Hernandez's tattoos representing Vario Chico San Clemente gang. In addition, Hernandez's back was tattooed with "SUR," which stands for sureño. Tunstall opined that Hernandez was an active member

of the Vario Chico gang and a sureño on November 4, 2011. Tunstall also opined that, based on his review of the “kites and things of that nature,” Hernandez was on the Mexican Mafia’s November 4, 2011 hard candy list.

In response to a hypothetical describing the attack, Tunstall testified that the attack would have been done for the benefit and at the direction of the Mexican Mafia, and that it would promote the interest of the organization by providing an example of what would happen if its orders were not followed and by using fear to keep everyone in check.

7. A gang expert may properly rely on hearsay in formulating an opinion

The Attorney General argues that Judge Prickett’s rulings superseded those made by Judge King. As to the November kite, Judge King ruled it was *not* admissible under Evidence Code section 1223 *and* that the expert could *not* rely on the roll call, because of the unduly prejudicial risk the jury could misuse the roll call for the truth that defendant and Peralta acted at the direction of and to benefit the Mexican Mafia. In contrast, Judge Prickett subsequently ruled the roll call was admissible as circumstantial evidence of, apparently, the desire and goal of all southsiders (or of everyone on the roll call) to become Mexican Mafia members or to work for the Mexican Mafia. It appears Judge Prickett admitted the roll call both substantively (as circumstantial evidence) and for the gang expert’s use. Judge Prickett did *not* instruct the jury on the limited use of evidence.

As to the February kite, Judge King ruled it was admissible for the truth of the matter under Evidence Code section 1223 and, consequently, made no ruling on whether it could be properly relied on by the expert. Judge Prickett, on the other hand, never expressly ruled on the February kite.

It appears Tunstall may have relied on the *February* kite to testify as a fact (not simply opine) that Hernandez was on the hard candy list, since the record does not reflect any other source for this information.

Furthermore, Tunstall relied at least in part (and possibly completely) on the *November* kite to opine that defendant was a sureño on the date of the assault. Moreover, Tunstall's affirmative response to the prosecutor's question about whether a roll call denotes street gang *and* sureño status, may have given the jury the false impression that the roll call designated defendant, Peralta, and Diaz as sureños.⁹

Defendant argues: “[T]he information contained in the ‘kites,’ including the names and monikers of alleged gang members, was clearly offered for the proof of the matter asserted and, therefore, clearly hearsay. As a result, and because as noted above authentication and foundation constitute separate requirements under the Evidence Code, evidence of the ‘kites’ could not be admitted unless it was subject to *some* exception to the rule against hearsay, which the People fail to provide.”

Defendant is correct that, clearly, the kites were hearsay. Nor did the People meet the requirements for the Evidence Code section 1223 hearsay exception.¹⁰ Had the kites been admissible, they were certainly relevant as circumstantial evidence, as

⁹ Indeed, the Attorney General states in her respondents' brief on appeal, “Tunstall opined that the November 8 inmate note contained a ‘roll call’ list of jail inmates willing to carry out Mafia orders to increase their reputation in jail”

¹⁰ The court instructed the jury that the People had presented evidence of a conspiracy, including that Hernandez was placed on the hard candy list on around November 1, 2011. The record does not reflect the People presented evidence (independent of the kites) of a conspiracy, since Ruorock (the witness mentioned in the prosecutor's offer of proof for the Evidence Code section 1223 independent evidence element) never testified at trial.

Judge Prickett ruled. But characterizing the kites as circumstantial evidence does not make admissible that which is inadmissible.¹¹

But even if the kites were inadmissible as substantive evidence, they may nonetheless have been properly used by the gang expert to inform (and assist) the jury on a subject beyond “common experience.” (Evid. Code, § 801, subd. (a).) Our Supreme Court has held that a gang expert may properly rely on inadmissible hearsay in formulating an opinion: “Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert’s opinion testimony must be reliable.” (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) “So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert’s opinion testimony. (*In re Fields* (1990) 51 Cal.3d 1063, 1070 [275 Cal.Rptr. 384, 800 P.2d 862] [expert witness can base ‘opinion on reliable hearsay, including out-of-court declarations of other persons’] [Citations].) And because Evidence Code section 802 allows an expert witness to ‘state on direct examination the reasons for his opinion and the matter . . . upon which it is based,’ an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion.” (*Ibid.*) “A trial court, however, ‘has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.’ [Citation.] A trial court also has discretion ‘to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as

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Judge Prickett’s ruling the roll call was admissible as circumstantial evidence also presumed a false preliminary fact (Evid. Code, §§ 400, 402), i.e., that all southsiders on the roll call strive to become Mexican Mafia members or to work for the Mexican Mafia. To the contrary, both Enriquez and Tunstall testified a roll call includes all Hispanic inmates (even residents), and that not all southsiders are sureños.

independent proof of the facts recited therein.’ [Citation.] This is because a witness’s on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into ‘independent proof’ of any fact.” (*Gardeley*, at p. 619.)

Defendant’s appellate brief contains no discussion or analysis of whether (or to what extent) the court abused its discretion by allowing Tunstall to rely on the kites.¹² Accordingly, he has waived any such argument. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

“To prove the gang enhancement, the prosecution may introduce expert testimony regarding street gangs.” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820.) Since Tunstall properly relied on the kites and described them to the jury pursuant to *People v. Gardeley, supra*, 14 Cal.4th at pages 618-619, any error by the trial court in admitting the kites into evidence was harmless (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Fuiava* (2012) 53 Cal.4th 622, 671 [applying *Watson* standard to claim of erroneous admission of evidence]) and provides no basis for reversing defendant’s assault conviction or the associated gang enhancement.

The Court Did Not Err By Declining to Instruct the Jury on the Defense of Duress

Defendant contends the court erred by denying his request for a jury instruction on the defense of duress. He asserts the jury could have concluded from the evidence that he “faced [an] immediate threat of retaliation by the Mexican Mafia if he refused to take part in the assault.” He argues “the burden of proving the absence of duress is on *the People*, who must prove lack of duress *beyond a reasonable doubt*.” He contends “the trial court has a duty to instruct the jury as to all principles closely

¹² Defendant does argue that the kites “formed the clear basis for Tunstall’s opinion that [the assault] was gang-related,” but only in the context of arguing he was materially prejudiced by the erroneous admission of the kites under the conspiracy hearsay exception.

connected with the case that are necessary for the jury's understanding, including all affirmative defenses, whether or not actually asserted by the defendant, for which there is evidentiary support," and that "the fact that evidence of such defense or other matter may be perceived as weak or unconvincing, or does not otherwise inspire confidence, does not excuse the trial court from its duty to instruct as to that matter."

The court denied defendant's request for a duress instruction (CALCRIM No. 3402), finding no substantial evidence of an immediate danger. The court did instruct the jury on the defense of necessity (CALCRIM No. 3403), as also requested by defendant.¹³

The duress instruction, which was not given, provides that a defendant acts under duress if, because of threat or menace, he believes his or someone else's life would be in immediate danger if he refuses a demand or request to commit a crime, and that a "threat of future harm is not sufficient; the danger to life must have been immediate." (CALCRIM No. 3402.) The instruction further states that the People must prove beyond a reasonable doubt that the defendant did not act under duress.

The rationale underlying the duress defense is that a person who responds to an immediate and imminent danger "has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent." (*People v. Heath* (1989) 207 Cal.App.3d 892, 900.)

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The court instructed the jury that, in order to establish the defense of necessity, a defendant must prove by a preponderance of the evidence "that, one, he acted in an emergency to prevent a significant bodily harm or evil to himself or someone else. Two, he had no adequate legal alternative. Three, the defendant's acts did not create a greater danger than the one avoided. Four, when the defendant acted, he actually believed that the act was necessary to prevent the threatened harm or evil." "Five, a reasonable person would also have believed that the act was necessary under the circumstances. And six, the defendant did not substantially contribute to the emergency."

“A trial court is required to give a requested instruction on a defense only if substantial evidence supports the defense.” (*People v. Panah* (2005) 35 Cal.4th 395, 484.) “In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether ‘there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.’” (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

As noted, duress applies only when a defendant reacts to a danger that is so immediate and imminent as to leave him no time to consider any other action or to formulate criminal intent. Defendant asserts the following testimony by Enriquez and Tunstall constitutes sufficient evidence he reacted to an immediate danger: “[T]he foundation of gang membership was its use of violence and intimidation. With respect to the Mexican Mafia, that foundation included the specific targeting of persons, and threats or acts of violence and retaliation against individuals that disobeyed its orders, including death to those perceived as ‘rats.’ Indeed, Enriquez testified that the failure to carry out orders of the Mexican Mafia while in jail could result in the individual’s inclusion on the ‘hard candy’ list of persons to be killed or assaulted, and that if he personally had refused an order to kill, he himself would have been killed. [Citation.] Similarly, Tunstall testified that, within the Theo Lacy facility in which [defendant] was housed, being a rat was generally considered a ‘death warrant,’ and that there had been a recent schism between factions of the Mexican Mafia, which resulted in the assault upon Hernandez.”

The foregoing testimony by Enriquez and Tunstall contains no evidence from which the jury could have inferred defendant reacted to an immediate danger. No evidence showed defendant was in danger of being branded a rat. Had defendant been placed on the hard candy list, any repercussions would have occurred in the future. Furthermore, Enriquez testified that the Mexican Mafia does not force people to participate in violent crime; rather, it used volunteers.

The court did not err by declining to instruct the jury on duress.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.