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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN CARDENAS,

Defendant and Appellant.

H035900

(Santa Cruz County

Super. Ct. No. F17195)

Defendant Jonathan Cardenas was convicted by a jury of one count of second degree murder with an enhancement for personal use of a knife. (Pen. Code, §§ 187, 12022, subd. (b)(1).)<sup>1</sup> He was sentenced to 16 years to life in prison.

On appeal, Cardenas raises the following arguments: (1) the trial court erred in admitting evidence regarding gang culture despite there being no gang enhancement allegation or any allegation that the crime was gang-related; (2) the trial court erred in admitting gang evidence on the issue of witness credibility or bias; (3) the trial court erred in admitting evidence of prior statements Cardenas made to a police officer relating to gang culture; and (4) the trial court erred in declining to modify CALCRIM Nos. 371 and 372 regarding consciousness of guilt. Finally, Cardenas argues that he is entitled to reversal due to the cumulative impact of these various errors.

We find no error and shall affirm.

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Prosecution case*

On October 6, 2008, Cardenas was at home drinking beer with his friends Paris Lenc and Ryan Lanthier. Cardenas had a shiny pocket knife on his dresser. The three went to Lenc's home and smoked some marijuana. Lenc grabbed two steak knives, keeping one and handing the other to Lanthier. At some point, Lenc got a call from a minor female, N.C., asking him to come hang out with her.

N.C. and her friend Samantha I. (also a minor) had rented a motel room at the Paradise Inn near the Santa Cruz Beach Boardwalk. Cardenas, Lenc and Lanthier met Samantha and N.C. at a bowling alley near the Paradise Inn. Neither N.C. nor Samantha had ever met Cardenas or Lanthier before, but Samantha was immediately attracted to Cardenas. The group went back to the motel room, where they drank some beer and Samantha flirted with Cardenas.

After 15 to 30 minutes, Samantha and N.C. went to a nearby liquor store to buy more beer. On the way to the store, they ran into Robbie Reynolds and his two friends, Joseph Paul and Jose Reyes. The group continued to the store, where Samantha bought six large cans of beer, using a fake I.D., and Paul bought a cigar, which they would use to smoke marijuana. Samantha and N.C. invited Reynolds, Paul and Reyes back to the motel room to play games and drink beer. Paul got the impression that they would "smoke and drink and just chill."

When they got back to the room, Samantha and N.C. entered first, followed by Reynolds and the other two men. When they saw Cardenas, Lenc and Lanthier in the room, the three newcomers became quiet. Neither Samantha nor N.C. had mentioned that there were other men in the room already. Paul recognized Cardenas, though he did not know his name, and he noticed that Cardenas, Lenc and Lanthier were all wearing black.

Paul sat in a chair, while Reynolds sat on one end of the bed and Reyes sat down on the other end. Reynolds took out some marijuana, which he gave to Paul to roll into the cigar. Samantha placed her purse on the bed, opened a beer and passed out the other beers.

After a couple of minutes, Paul said one of the other three men asked, “where you from, where you guys from?” which he understood was a gang-related question. Lanthier volunteered he was from “West Side Santa Cruz,” and Reynolds may have said he used to live in West Side Santa Cruz, but now was “downtown, and we don’t gangbang or anything.” Lenc was quiet, but Cardenas and Lanthier asked if the other men were “down with gangbangng.” Paul, Reynolds and Reyes said they were not, but “just like to chill and smoke and have a good time.”

Cardenas, who was wearing an Atlanta Braves cap, introduced himself as “Cartoon,” and said he was from West Side Santa Cruz but had moved from Salinas to Santa Cruz. He also said he was a Northerner, which Paul understood to mean “Norteno.”

Paul asked Cardenas if he remembered him, and Cardenas said he did. Cardenas had recently beaten up one of Paul’s friends. Cardenas asked “are you with him [i.e., the friend who got beaten up]?” but Paul said he was not. Smiling, Cardenas said he “beat him up pretty good.” After that exchange, Paul stopped talking to Cardenas, Lenc and Lanthier.

Cardenas and Samantha were continuing to flirt and went into an adjoining bedroom for 15 to 45 minutes. They talked and had sex. Everyone else remained in the main room, and Reynolds turned the volume up on the television to try to cover the sounds of the two having sex in the back. Reynolds talked about Samantha being promiscuous and asked N.C. why she did not warn Cardenas that Samantha was “nasty.” Everyone joked and laughed about how Samantha had just met Cardenas and was having

sex with him. Reynolds took a marker and wrote “FTW”<sup>2</sup> on the wall, then started going through Samantha’s purse on the bed.

After Samantha and Cardenas returned to the room, someone suggested they needed more alcohol, and Samantha said she had money. She looked in her purse and discovered she was missing \$60. Samantha asked everyone but Cardenas and N.C. where her money was. Reynolds was laughing and said, “why would I take your money, I got money.” Samantha started getting more aggressive and louder, demanding that Reynolds, Paul and Reyes turn out their pockets. Reynolds would not do so, and said, “bitch, no one wants your money.” Samantha told Reynolds, Paul and Reyes to leave, and then she and Reynolds continued to yell and swear at each other at the doorway for a few minutes. Samantha kept saying “fuck you, Robbie” and “that’s fucked up, Robbie.” Reynolds got angry and said, “bitch, shut up.”

Reynolds started walking towards the motel office, and Paul said, “Come on,” “if you’ve got it [i.e., Samantha’s money], come back and give it to her.” As Samantha continued to curse at Reynolds he walked back to the door of the room and, laughing, threatened to slap her. Cardenas was standing behind Samantha, to one side.

Reynolds slapped or hit Samantha on the cheek.<sup>3</sup> Almost immediately, Cardenas punched Reynolds in the jaw. Reynolds’ knees buckled, and he fell back against the door, but then got up swinging, as if trying to push Cardenas away. Cardenas stepped back and Reynolds’ swing missed. The two then began swinging at each other. Paul and Reyes came back into the room and Reyes saw Lanthier and Lenc moving towards Reynolds. Reyes pushed Lanthier, who fell on the bed. Lanthier got up, pulled out a knife and threatened Reyes, telling him to get out.

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<sup>2</sup> “Fuck the world.”

<sup>3</sup> Samantha testified Reynolds punched her with his hand closed. Paul testified it was an open-handed slap. Reyes recalled it being more of a “push.”

Paul told Lenc to back away from Cardenas and Reynolds so it would be a fair fight. He looked over and saw that Lanthier had pulled out a knife. As he turned back to Lenc, Lenc pulled out a short switchblade knife, so Paul grabbed him and swept his leg out from underneath him, knocking him to the floor. Paul saw Cardenas lying on the bed with Reynolds leaning over him, trying to hit him in the chest. Reynolds' torso was within a few inches of Cardenas' torso. Cardenas' hand was on Reynolds' shoulder, pulling him down toward himself. Paul saw Reynolds land three punches on Cardenas, whereas five or six of Cardenas' punches connected. The fight lasted about a minute or two.

About 20 seconds after Reynolds and Cardenas were fighting on the bed, they separated, and Reynolds walked out of the motel room, with Paul and Reyes behind him. Lanthier flashed his knife and told Reyes, "get out," "we don't want to stab nobody, get out." Paul did not see Cardenas holding a knife and did not know Reynolds had been stabbed. Cardenas walked backward toward the door, saying "I'm cool" twice.

Reynolds walked away from the room, touched his ribs and then fell face first in the parking lot, apparently unconscious. Paul tried to pick him up, and realized Reynolds had been stabbed. He saw blood on Reynolds' chest and told Reyes to call 911.

Reyes saw Reynolds appeared to be struggling for breath, and he tried to cover the wound while he talked to him. Reyes called 911. He later claimed he did not recall seeing Cardenas with a knife, but admitted he did not want to talk about the incident.

Paul was angry and wanted to fight Cardenas, but Cardenas had run away up the street. Paul sprinted after him, but lost him. When he heard sirens, he ran down the hill and saw Reyes holding Reynolds. Because he believed there was a bench warrant for his arrest for failing to appear in court, Paul ran off down the street. Paul encountered Lenc, who held up his hands to indicate he did not want to fight. Lenc said, "I didn't know he was going to stab your homie." In his interview with police, Paul said Lenc had said,

“you seen him, he just stabbed your homie.” Paul walked around downtown for a couple of hours, then fell asleep at a park across from Reynolds’ house.

*1. Samantha’s trial testimony*

Samantha testified that after Reynolds left the motel room and she was about to close the door, he said, “well, I should hit a bitch.” She responded, “well, hit a bitch then.” As she stood in the doorway, Reynolds punched the left side of her face. Samantha grabbed her nose, and next saw Cardenas and Reynolds fighting. She did not know who started the fight. At one point she saw Reynolds leaning over Cardenas who was lying on the bed with his feet on the floor. Samantha said she saw Reynolds punch Cardenas once, but also said she did not see Reynolds punch him. She did not see Cardenas punch Reynolds, but saw him grab Reynolds to push him off. She had a vague memory of seeing Cardenas holding Reynolds.

At some point she saw Cardenas standing on a round table next to the bed and admitted telling police Cardenas was standing on a table. Cardenas screamed, but Samantha could not remember what he said. She was not absolutely certain, but thought he may have yelled, “I’m going to stop this fool,” or “I’m going to stab this fool.”

After Reynolds fell down, Samantha saw “everybody running out the door.” When she heard the sirens, she ran away to avoid contact with the police because she herself was a runaway. She went to a nearby motel and called her mother.

Samantha testified she did not see anyone with a knife, and denied remembering that she told the police she saw Cardenas with a knife or that he held a knife in his right hand and pulled it out of Reynolds’ side. She admitted liking and having strong feelings for Cardenas, and also admitted lying to police about his name.

Samantha admitted having a tattoo of four dots on her hand, which she said meant she is a “North Sider,” and “back[s] up Norters to the fullest.” She testified that she got this tattoo after the murder, and it indicated “you’re in a gang, that you have been jumped in.”

## *2. Samantha's police interviews*

In her interview with police, however, Samantha said that Cardenas stabbed Reynolds. When Santa Cruz Police Detective Gregory Crofts interviewed Samantha on October 7, it appeared that she was holding back information. After she learned that Reynolds had died, she returned to the police department upset and volunteered more information. She identified Cardenas by name, said he was from Salinas, and he had stabbed Reynolds at the motel.

Samantha told police that Cardenas came forward after Reynolds hit her and began fighting with Reynolds. She and N.C. tried to break up the fight. Cardenas, Lenc and Lanthier all had knives. She mentioned that Cardenas was standing on a table, and she saw him pull out the knife, with the blade protruding between his thumb and index finger. Cardenas was holding the knife in his right hand and stabbed Reynolds on the left while he was partially turned away from Cardenas. However, she also sometimes said that Reynolds fell on the knife. After everyone left the room, Cardenas came back to retrieve his hat.

In her interview with Santa Cruz Police Detective Michael Hedley, Samantha similarly described Reynolds as partially turned away from Cardenas when he was stabbed. Samantha said she “saw [Cardenas] pulling the knife back, and it was kind of like a surprise moment” for her. It was her impression that Cardenas pulled the knife because he was angry. She could not recall if he jumped on the table before or after he stabbed Reynolds, but she “did see him jump on the table.” Cardenas was screaming something, and she was unsure what it was, but he “might have said something about the knife.”

Prior to trial, District Attorney Inspector Raul Castellanos photographed Samantha's tattoos, which consisted of the four dots on her hand, as well as the words “Santa Cruz” on her leg. Samantha told Castellanos that she got the four dots tattoo before the murder, and the “Santa Cruz” tattoo afterwards.

### 3. *N.C.'s trial version of the fight*

N.C. saw Cardenas and Reynolds hitting each other, saying Reynolds was “going crazy” and “kicking ass.” She did not see anyone with a knife. N.C. said she stepped between Cardenas and Reynolds, put her arms around Reynolds and told him to stop. She heard Samantha also telling Reynolds to stop, but could not remember what Samantha was doing otherwise or where anyone else was at the time.

N.C. heard Cardenas yell, while standing on the bed, “I’m going to stab him.” She did not think this was serious, so she walked into the bathroom. The next thing she knew, Samantha knocked on the bathroom door and told her to “get out.” Samantha appeared scared and everyone had already left the room.

N.C. did not see anyone stabbed and did not see anyone with a knife. She did not recall telling the police that Cardenas had a purple knife. Outside, N.C. saw Cardenas, Lenc and Lanthier running toward the bowling alley and she saw Reynolds on the ground in the parking lot. Samantha was scared and sad. She heard Reyes telling Reynolds to breathe. She called 911, and Reyes told her, “don’t tell the cops what happened.” Samantha ran away, but she and Reyes stayed with Reynolds.

### 4. *N.C.'s police interview*

N.C. and Samantha met up with Cardenas, Lenc and Lanthier by the bowling alley before they went back to the motel room. She and Samantha went downtown to buy more alcohol and ran into Reynolds, Reyes and Paul. They invited them back to the motel room as well.

Reynolds asked Cardenas and his friends if they were West Siders, and they said they were. It seemed as if everyone was getting along. Samantha and Cardenas went into the back room and had sex, and everyone else made fun of them. Reynolds was “talking some shit” about Samantha. When Samantha came back to the main room, she looked in her purse and said her money was missing. She accused Reynolds of taking it and began arguing with him. Reynolds told her to shut up or he would slap her.

Samantha said, “just hit me,” and he did. Samantha started to cry and everyone started fighting.

N.C. thought Reynolds was “kicking [Cardenas’s] ass,” and thought Reynolds punched Cardenas quite a few times. Reynolds, Reyes and Paul did not have weapons, but Cardenas had a knife. She saw him stand on a table, holding his purple knife, and saying, “I’m going to stab him.” N.C. did not see Reynolds get stabbed and assumed it happened outside, since that is where he fell.

#### 5. *Police response*

Alexander Ganzel, a City of Santa Cruz police officer, received a dispatch to respond to the Paradise Inn on Second Street at 11:40 p.m. on October 6, 2008. He was the first officer to arrive on the scene and upon parking in the motel lot, he saw three people. Reynolds was lying on his back. Reyes knelt beside him, pressing on his chest, while N.C. stood nearby, crying. Ganzel ran up to them and asked them who had done this. Reynolds was unresponsive, his eyes were droopy and he was gasping for air. Ganzel looked for injuries and found what appeared to be a knife wound on the left side of Reynolds’ chest and a second wound on his chin. Reyes and N.C. both claimed that they had just found Reynolds lying in the parking lot.

Santa Cruz Police Officer William Clayton arrived about the same time as Ganzel. He saw Reynolds struggling to breathe and losing consciousness. When Clayton asked Reynolds what happened, Reyes interrupted and told Reynolds in a defensive and hostile tone, “[d]on’t say anything to him.”

Santa Cruz Police Officer Sergio Venegas contacted Lenc, who was near the Paradise Inn. Lenc said he had been at home with his mother. When Venegas searched Lenc’s room at his house, he collected a knife from the front pocket of a pair of jeans on the floor.

Santa Cruz Police Detective Dave Forbus interviewed Reyes some hours after the murder. Reyes appeared tired, anxious and in shock. He admitted he was scared. Reyes

said Cardenas punched Reynolds first, then Lenc hit Reynolds in the face. Reyes saw Cardenas with a knife, and Lanthier brandished a knife at him after Reynolds walked out of the hotel room. Reyes said the fight lasted only 15 seconds. Forbus described Reyes as hesitant and confused; he was fearful of being labeled a snitch.

When Santa Cruz Police Detective David Pawlak interviewed Reyes again on October 7, Reyes was not forthcoming. At first, Reyes claimed the incident had nothing to do with gangs, he did not see any knife and did not see anyone swing at Reynolds. Later, he said there was some pushing. He also said he heard, “West Side,” but claimed he paid no attention to that. Reyes did not want to give the police any information and was, in part, afraid of being a snitch. Later, he said all three of the other men--Cardenas, Lenc and Lanthier--had knives.

District Attorney Inspector Lewis<sup>4</sup> Schlumbrecht drove Reyes home from the courthouse during the trial. Schlumbrecht said that Reyes was nervous and constantly looking around to see if they were being followed.

On October 9, Forbus interviewed Paul, who said Cardenas introduced himself as “Cartoon” and asked, “are you guys down with gangbangin.” He said Cardenas said he was a Northerner and his friends said they were West Side, but it was not said aggressively. Reynolds called Samantha a bitch before slapping her; Paul described it as a “little slap.” Paul said Cardenas punched Reynolds “out of nowhere.” Reynolds fought with Cardenas, trying to put him down, but no one was really winning the fight. The two ended up on the bed because “we were all pushing at them” and there was very little room between the bed and the door.

Paul did not see a knife in Cardenas’ hand, did not see him stand on a table and did not hear him threaten to stab anyone. While he was fighting with Lenc, he saw

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<sup>4</sup> Called to the stand as Kent, but when sworn in, corrected the court that his first name was Lewis.

Reynolds walk out. Detective Forbus, who interviewed Paul, described his demeanor as direct, confident and sad.

Lanthier thought Cardenas and Lenc were West Siders, and he admitted telling police they were West Side Nortenos. His nickname was “Ryder,” and Lenc’s was “Bloody.” Lanthier initially did not say much to the police, hoping the situation would “just go away.” He admitted in his interview he was trying to protect Lenc.

#### 6. *Autopsy*

Dr. Richard Mason determined Reynolds’ cause of death to be a stab wound to the right ventricle of the heart, resulting in hemothorax and hemopericardium, meaning a collection of blood in the chest and sac around the heart. The knife wound was one inch long and two inches deep, and was inflicted by a single-edged blade with the cutting edge facing the midline of Reynolds’ torso. It penetrated between the sixth and seventh rib, perpendicular to his body, and was an “in and out” wound, meaning Reynolds was stationary when the wound was inflicted. It was possible the stabber grabbed Reynolds and pulled him toward the knife.

Immediately after the stabbing, blood began to accumulate in the pleural space around Reynolds’ left lung, making him feel like he could not breathe. His blood pressure would have dropped suddenly, causing confusion and panic within about 30 seconds of the stabbing.

Reynolds also had a bruise on his left eye, a bruise on his left elbow, and small bruises on the knuckles of his left pinky and middle fingers. He had an abrasion on his chin consistent with landing on a rough surface, such as asphalt.

Reynolds’ blood alcohol level was 0.129 percent and also tested positive for marijuana, meaning he had ingested marijuana anywhere from 30 minutes to one week prior to death. He had \$22 in cash and 4.7 grams of marijuana in his pocket.

A purple knife was recovered from an apartment patio not far from the motel, and DNA on the knife matched Reynolds’ DNA.

## 7. *Gang evidence*

Santa Cruz Police Detective Jose Garcia, a gang expert, was the lead detective in the case. Garcia testified that Nortenos, or Northerners, associate with the color red, as well as the numbers 14 and 4. Cardenas was a member of a Salinas Norteno street gang, Acosta Plaza, at the time of the murder. The Atlanta Braves baseball cap he wore the night of the murder was associated with Acosta Plaza.

Lenc was also a member of a Norteno street gang and had “Northside” tattooed above his eyebrows, as well as an “S” and a “C,” representing “Santa Cruz,” on his cheeks.

Garcia also testified that Santa Cruz is predominantly a Sureno city, and the Beach Flats area was Sureno territory.

According to Garcia, the concept of respect is very important within a gang. Respect may be earned by committing violent crimes or by being a good leader. Respect is lost if a gang member acts cowardly, loses a fight, or fails to respond to a challenge, which may consist of a slight, an insult, a challenging look, claiming membership in a rival gang or flashing a rival gang sign/tattoo. When someone claims a gang, it is meant as an assertion of dominance and a challenge to rival gang members. If someone asks “Where you from,” the question can actually mean, “What gang are you in?” Any disrespect directed towards anyone closely associated with a gang member, such as family, girlfriends and close friends, is considered disrespect towards the gang member. If someone “punks out” in front of a fellow gang member, it is a problem. Gang members frequently carry weapons, including knives.

In gang culture, being a “snitch” can lead to serious, negative consequences, up to and including being killed. A gang expects its members not to talk to the police or anyone outside the gang about fellow gang members and the gang’s activities.

## II. DISCUSSION

### A. *Admission of gang evidence*

#### 1. *Motive and intent*

Cardenas argues that the trial court erred in allowing the prosecution to introduce gang evidence, ostensibly to establish motive and intent. Since there was no gang enhancement charged, nor was it alleged that the stabbing was gang-related, this evidence was unduly prejudicial and deprived Cardenas of his due process right to a fair trial.

#### a. *Background*

The prosecution moved in limine to introduce gang evidence and to allow a gang expert to testify about the Norteno gang and gang culture, specifically, concepts of respect and disrespect in gang culture, the significance of claiming gang membership, the nature of gang assaults, what it means when a gang member arms him/herself and the importance of supporting another gang member. Cardenas objected, arguing the evidence was irrelevant and its probative value was outweighed by the potential prejudice.

The trial court granted the prosecution's motion, finding the proffered gang evidence was "relevant to intent and motive for his [i.e., Cardenas'] behavior and his conduct, especially where the knife comes out." The court noted the "stage was set in this event when they walk in the door and they state they're Northerners. You don't make that statement unless you want to put somebody on notice right away that . . . I'm a member of this particular gang, watch yourself."

Cardenas renewed his objection during Garcia's testimony, and moved for a new trial based on the admission of the gang evidence. The trial court denied the motion for a new trial, again finding the evidence was admissible to prove Cardenas' intent, motive and absence of mistake.

*b. Analysis*

Although “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[,] . . . [¶] . . . in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect.” (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*).

Here, the theory of the prosecution was that Cardenas felt disrespected when Reynolds hit Samantha, a girl with whom he had recently had sex. Cardenas could not allow that challenge to his dominance go unanswered, particularly since at least one fellow gang member, Lenc, was present. Consequently, he attacked Reynolds and, when he began to lose the fight, which would have resulted in a loss of respect within his gang culture, Cardenas pulled out his knife and stabbed Reynolds.

Indeed, the evidence showed that Cardenas, Lenc and Lanthier, in response to an invitation to hang out and drink in a motel room with two minor females, armed themselves with knives first.<sup>5</sup> When Reynolds, Paul and Reyes showed up unexpectedly, Cardenas almost immediately pronounced his gang affiliation, boasted that he had recently beaten up a friend of Paul’s “pretty good” and impliedly threatened to assault Paul. Evidence of gang culture was therefore relevant to show the import of Cardenas’ statements, which was to caution Reynolds, Paul and Reyes against disrespecting Cardenas or anyone associated with him. The gang evidence also showed why, once Cardenas had sex with Samantha, any disrespect shown to her amounted to disrespect shown to Cardenas. It showed why Cardenas had to prevail in his fight with Reynolds

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<sup>5</sup> Though there was no evidence offered to explain why they did so, it is reasonable to infer they armed themselves because they were Nortenos and they were meeting the girls in or near Sureno territory.

and pulled his knife once it appeared Reynolds was getting the better of him with his fists.

Because the gang evidence was relevant, the remaining question is whether its probative value was substantially outweighed by its potential for prejudice. (*Williams, supra*, 16 Cal.4th at p. 193.) We do not think so.

The standard of review for Evidence Code section 352 challenges is abuse of discretion. “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) On appeal, “ ‘[a] trial court’s exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.’ ” (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

Here, the trial court carefully considered the evidence and weighed its probative value against its possible prejudicial effect. Given the prosecution’s theory of the case and the fact that the gang evidence tended to explain why Cardenas attacked and eventually stabbed Reynolds in response to him slapping Samantha, the trial court’s conclusion that the gang evidence was not outweighed by its potential for prejudice did not exceed the bounds of reason, and, therefore, was not an abuse of discretion.

## 2. *Witness credibility/bias*

Cardenas claims the trial court erred in admitting gang evidence on the issue of witness credibility or bias. He asserts that the evidence should have been limited to the fact that certain witnesses shared a common gang membership with Cardenas and that gang members do not snitch on each other. The remaining gang evidence was not relevant to witness credibility or bias, and was cumulative since there was ample

evidence to show how Samantha and Lenc were biased by their association with Cardenas. We disagree.

The admission of gang-affiliation evidence over an Evidence Code section 352 objection is a matter within the trial court's sound discretion, and this decision will not be disturbed on appeal unless the admission of the evidence exceeded the bounds of reason. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.)

Evidence that a witness belongs to the same group or gang as the defendant can be probative of the witness's bias. (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.) While such evidence "often carries with it a certain amount of prejudice, Evidence Code section 352 is designed for situations in which evidence of little evidentiary impact evokes an emotional bias." (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1369.)

Of course, where no gang enhancement is alleged, courts must be cautious in allowing introduction of common gang membership to show a witness's bias, especially where such evidence is cumulative to other evidence establishing witness bias. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, and *People v. Maestas* (1993) 20 Cal.App.4th 1482.) In *Cardenas* there was ample evidence to show that the witnesses were closely associated with the defendant, independent of the gang evidence, which was introduced simply to establish that the witnesses lived in the same neighborhood and had friends in common. (*People v. Cardenas, supra*, at p. 904.) In *Maestas* the evidence of the defendant's gang membership was weak and moreover denied by the defendant at the evidentiary hearing. (*People v. Maestas, supra*, at pp. 1494-1495.) In addition, the witness's affinity for the defendant was affirmed not just by the witness, but by two other witnesses. (*Id.* at p. 1495.)

In this case, the nongang evidence showing the strength of Samantha's association with Cardenas was both minimal and conflicting. Samantha said she was attracted to Cardenas and had sex with him just prior to the stabbing. However, she also admitted she had just met Cardenas that night, and there was evidence Samantha's other

acquaintances, such as N.C. and Reynolds, believed she had many sexual partners, which would tend to further minimize the emotional significance of her having sex with Cardenas.

Samantha admitted writing to Cardenas while he was in jail, saying she would wait for him even if it took five years. However, she also denied ever being in love with him.

Evidence of Samantha's gang affiliation was thus relevant to demonstrate why she may have had a stronger bias towards Cardenas, particularly after she herself got "jumped in" to a Norteno gang sometime between the stabbing and the trial. Accordingly, the evidence relating to gang membership and the consequences in gang culture for snitching was admissible to demonstrate possible reasons why her testimony at trial differed from what she told police in her second interview, the one which took place just after she learned that Reynolds had died.

As for Lenc, he testified to having known Cardenas "going on two years," but denied knowing him well, stating "I don't know him that much. We know each other. We're cool." This testimony did not establish the kind of close relationship between the two which would render evidence of gang affiliation cumulative.

Accordingly, the trial court did not abuse its discretion in admitting the gang evidence for the purposes of evaluating witness credibility and bias.

### 3. *Cardenas's prior statements about gang culture*

Cardenas argues the trial court erred in admitting prior statements he made to a police officer a couple of months before the stabbing in which he discussed what would happen if someone were to flash gang signs or disrespected his mother.

#### a. *Background*

In an in limine motion, the prosecution sought admission of statements Cardenas made to a police officer in August 2008, just two months prior to him stabbing Reynolds. In that conversation, Cardenas said that if someone shouted gang slogans, it would lead to

fights and shootings. Defense counsel objected to the admission of the statements under Evidence Code sections 1101, 1103 and 352. The prosecution argued the statements were admissible to prove motive and intent. The trial court granted the prosecution's motion, finding that the statements were relevant and went to the issue of intent.

At trial, Santa Cruz Police Officer Elizabeth Butler testified she spoke with Cardenas on August 2, 2008, he said that he would not "stand by and do nothing" if someone disrespected his mother. He also said it would be dangerous for someone to yell "Norte" or "West Side," as it would probably "lead to fights," that could include "fist fights, kicking, sticks or running people over with cars" or "someone crazy might shoot somebody."

*b. Analysis*

The testimony was relevant to establish that Cardenas shared the mentality of the gang members described by Garcia, specifically the mentality that disrespecting a gang member or someone close to a gang member would lead to a fight.

Evidence is relevant if it "tends, logically, naturally, or by reasonable inference to establish a material fact, not whether it conclusively proves it." (*People v. Yu* (1983) 143 Cal.App.3d 358, 376.) As discussed above, the trial court's decision to admit or exclude evidence under Evidence Code section 352 will not be overturned unless it appears the court exceeded the bounds of reason and a miscarriage of justice is shown. (*People v. Green, supra*, 34 Cal.App.4th at pp. 182-183.)

Here, the theory of the prosecution's case was that the stabbing was motivated by gang culture, which dictated how Cardenas must respond to disrespect, actual or perceived. Butler's testimony tended to show that Cardenas was aware of and shared the gang mentality described by Garcia, specifically that he must take action when someone challenged or disrespected him or someone associated with him. The evidence tended to prove Cardenas' motive and intent in stabbing Reynolds and was therefore admissible.

4. *Any error was harmless*

Assuming that the trial court erred in admitting any of the gang evidence, however, such error was harmless. The jury was properly instructed that this evidence could not be used to establish that Cardenas was predisposed to violence.<sup>6</sup> Furthermore, the evidence presented at trial did not support either a verdict of manslaughter or a viable claim of self-defense. Manslaughter is not an available defense where the defendant engages in mutual combat and then takes undue advantage of his victim by using a deadly weapon. (*People v. Lee* (1999) 20 Cal.4th 47, 60, fn. 6.) The evidence showed: (1) Cardenas armed himself with a knife before meeting two girls in Santa Cruz; (2) Cardenas initiated the fistfight with Reynolds; and (3) Cardenas, at some point during the fight, pulled out his knife and stabbed his unarmed opponent in the chest.

D. *CALCRIM Nos. 371 and 372*

Cardenas argues the trial court erred in refusing his request to modify CALCRIM Nos. 371 and 372 to instruct the jury that “consciousness of guilt may not be considered in determining the degree of defendant’s guilt.” He claims that the unmodified instructions allowed the jury to make the erroneous inference that Cardenas was

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<sup>6</sup> The trial court instructed the jury:  
“You may consider evidence of street gang culture and association/membership only for the limited purpose of deciding whether:  
“The defendant had a motive to commit the crime charged;  
“Or whether[,]  
“The defendant actually believed in the need to defend himself or Samantha [I.];  
“Or whether[,]  
“The defendant acted in the heat of passion;  
“Or whether[,]  
“The defendant had the specific intent and/or mental state for the charged crime or any lesser crime.  
“You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

necessarily guilty of murder because of the evidence showing he fled the scene and sought to conceal evidence. We disagree.

As provided to the jury in this case, CALCRIM Nos. 371 and 372 permitted, but did not require, the jury to conclude that Cardenas' concealment of evidence and flight showed consciousness of guilt of murder. (*People v. Yeoman* (2003) 31 Cal.4th 93, 131.) They also permitted, but did not require, the jury to conclude that the evidence showed consciousness of guilt of the lesser included charges of voluntary manslaughter and attempted voluntary manslaughter. Thus, it was proper for the trial court to give these instructions even though this is a case in which Cardenas essentially conceded his identity as the perpetrator but contested the issue of whether he possessed the required mental state to commit murder. “ ‘[W]e have repeatedly rejected the argument that instructions on consciousness of guilt, including instructions regarding the defendant's flight following the crime, permit the jury to draw impermissible inferences about the defendant's mental state, or are otherwise inappropriate where mental state, not identity, is the principal disputed issue.’ ” (*People v. Martinez* (2009) 47 Cal.4th 399, 450.)

Accordingly, we reject Cardenas' argument that the consciousness of guilt instructions should have been modified.

*E. Cumulative error*

Cardenas finally argues that the cumulative effect of the asserted errors deprived him of his right to due process under the federal Constitution. The California Supreme Court has instructed that “a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.” (*People v. Hill* (1998) 17 Cal.4th 800, 844.) As we have rejected each of Cardenas' claims of error, there is no occasion to evaluate cumulative error.

**III. DISPOSITION**

The judgment is affirmed.

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Premo, Acting P.J.

WE CONCUR:

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Elia, J.

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Mihara, J.