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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JESUS JIMENEZ, Defendant and Appellant.	B299455 (Los Angeles County Super. Ct. No. BA453284)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed with directions.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Susan Sullivan Pithey, Assistant Attorneys General, Zee Rodriguez and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jesus Jimenez (defendant) appeals from the judgment entered after he was convicted of murder and other felonies. He contends that the trial court erred in denying his motion to suppress evidence; in telling the jury that this case did not involve the death penalty; and in admitting testimony regarding the Mexican Mafia. Defendant also contends that the trial court's oral pronouncement of sentence, the court's minutes, and the abstract of judgment must be corrected. We direct the court to correct its minutes and the abstract of judgment. The oral pronouncement of sentence will stand. Finding no other prejudicial error, we affirm the judgment.

BACKGROUND

Defendant was charged by information in count 1 with the murder of Carlos Rubio (Rubio) in violation of Penal Code section 187, subdivision (a),[1] in count 2, with felon in possession of a firearm in violation of section 29800, subdivision (a)(1), and in count 3, with driving or taking a vehicle without consent in violation of Vehicle Code section 10851, subdivision (a). The information further alleged that defendant personally and intentionally used and discharged a firearm, causing great bodily injury and death to Rubio, within the meaning of 12022.53, subdivisions (b) and (c). As to all three counts (pursuant to § 186.22, subd. (b)(1)(A)), it was alleged that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. It was

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

also alleged that defendant had served a prior prison term within the meaning of section 667.5, subdivision (b).

At the time set for trial defendant brought a motion to suppress evidence pursuant to section 1538.5. The day after the motion was denied, defendant pled no contest to counts 2 and 3 and admitted the gang and prior prison term allegations. A jury trial was held only as to count 1. The jury found defendant guilty of first degree murder, and found the gang and firearm allegations true. On June 7, 2019, the trial court sentenced defendant to 25 years to life in prison on count 1, plus 25 years to life for the firearm enhancement alleged under section 12022.53, subdivision (d), and stayed the remaining firearm enhancements. On each of counts 2 and 3, the trial court sentenced defendant to the middle term of two years, enhanced by two years due to the gang allegation, to be served concurrently with the sentence in count 1.[2]

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Anthony Chitica joined the Florencia 13 gang when he was 12 years old. He was still a member of the gang in September 2016, when he was 17 years old. Defendant was also a member of the Florencia 13 gang, and was known as "Basic." Close friends,

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[2] The court also sentenced defendant on a probation violation in case No. BA434733 to one year with credit for time served. The court granted custody credit, imposed mandatory fines and fees, and scheduled a hearing to determine direct victim restitution.

Chitica had known defendant since Chitica was 13 years old. Chitica respected and looked up to defendant, who considered him to be like a brother.

Chitica testified that late in the afternoon of September 30, 2016, Chitica was "hanging out" with his friends and fellow gang members, "Fader" and "Lil D" in Florencia 13 territory.[3] Omar, who was a year younger than Chitica, had told Chitica that he been shot by a member of the rival Playboys gang, a few days earlier. Omar showed his friends the stitches on his ankle. Chitica, who cared for Omar, was angry, and wanted to take action. Sometime later defendant showed up and they talked about Omar's experience.

Chitica knew that if a fellow gang member was shot by a rival, they were expected to retaliate with a shooting. When defendant suggested that they should "just drive by to see if we see anybody," Chitica understood that to mean that they should go looking for Playboys gang members in Playboys's territory. The four drove in Chitica's Chrysler Sebring, to a location where defendant knew of a van that did not need a key to start. Chitica got into the van's passenger seat and defendant drove to Playboys territory, with Omar and Perez following in the Sebring. On the way, defendant showed Chitica his black revolver with a brown grip. Once in a Playboys neighborhood, defendant pointed out a man walking on the sidewalk, and said he saw the man make a gang sign. Defendant said, "Get him," which Chitica interpreted as "shoot him." Since Chitica did not want to shoot the man,

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[3] Fader's real name was Omar Hermengildo and "Lil D" is Luis Perez. At trial they were referred to sometimes by their nicknames and sometimes by their first names or surnames. We refer to them as Omar and Perez.

defendant drove the van closer, stopped it, got out with the gun, chased the man, and shot him.

Surveillance video of the shooting was played in court, while Chitica identified the van and the Sebring approaching an intersection. The video shows defendant exiting the van from the driver's side first. Then Chitica exits a few moments later. Defendant is then seen shooting the victim. Chitica and defendant ran back to the van and drove away.

Chitica testified that once they were away from the scene, defendant pulled over the van and the two of them got into the Sebring and abandoned the van. Moments after they drove away in the Sebring, they were pulled over by the California Highway Patrol. Since they all thought they were being pulled over because of the shooting, they all got out and ran away.

Rubio died of his gunshot wounds. The medical examiner testified that one bullet entered his lung and right carotid artery through his upper chest, another went through is clavicle and right carotid artery, and the third entered the back of his head, went through his brain, and exited through his mouth.

Deputy Sheriff Adam Machado testified that he and his partner Deputy Frank Quintana, came across defendant and detained him on a public sidewalk on October 15, 2016. As defendant remove his hands from his hooded sweatshirt and place them behind his back, the deputy saw the handle of a pistol hanging out of the front pocket of the sweatshirt. The deputies seized the gun, a revolver in working order, loaded with five .357 rounds. Deputy Machado asked defendant whether he belonged to a gang, to which defendant replied that he was a member of the Florencia 13 gang, with the street name "Husky."

The gun taken from defendant was test fired and the bullets were compared to a bullet fragment found a few feet away from Rubio's body on September 30. A firearms analyst determined that the bullet fragment recovered at the crime scene had been fired from the same revolver recovered from defendant on October 15, 2016.

Homicide Detective David Torres was assigned to investigate Rubio's killing with his partner. Detective Torres viewed the surveillance video of the shooting, and spoke to the son of the owner of the van, who identified a photograph of the van as the one that had disappeared in September 2016.

After learning that defendant had been arrested by the Sheriff's Department, Detective Torres arranged for a paid undercover informant to be placed in a cell with defendant. The informant was told that they were investigating a murder involving Florencia 13 and Playboys gangs, and was given a brief synopsis of the incident. In order to stimulate conversation with the informant about the murder, Detective Torres interviewed defendant, who said he was a member of the Florencia 13 gang, with the moniker "Husky"; and he admitted knowing Chitica and to having been in Chitica's Sebring. Defendant denied that he knew Perez. Defendant admitted to having been in possession of the revolver, and claimed that he had found it in an abandoned house. However he denied knowing about or being involved in the Rubio murder. At the conclusion of the interview, defendant was placed in a cell with the informant, and their conversation was recorded. A redacted recording, about three hours in length, was played for the jury.

Somewhat more than halfway through the recording, the informant is heard asking defendant how he got the gun. At first

defendant said he found it. When the informant laughed, defendant said, "Truth man. Yeah, the truth, man. I did that shit, man. Fuck." The conversation continued in relevant part as follows:

> "[Informant:] Don't fret homie. If [UI][4] fuck, man. You get what I'm saying? Fuck them homie.
>
> "[Defendant:] [UI] the cars, since -- that night, man -- it's a [UI] we got away fool, but,-- the van, man, was a G [UI], man, and the others -- the other homies were in the other car, man, and that white guy says, you know, "[UI]" the one- the one they showed me first -- that was his car, man. . . .
>
> "[Defendant:] So, I feel like they know this part of the car.
>
> "[Informant:] And, that fool, whose car was it, is your homeboy?
>
> "[Defendant:] Yeah.
>
> "[Informant:] Is he solid, dude, G? . . .
>
> "[Informant:] And, how old is this fool? Is he a youngster or older guy?
>
> "[Defendant:] No, this fool is [UI].

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[4] "UI" is meant to indicate unintelligible words and [O/V] refers to overlapping voices.

"[Informant:] That's how fucked up [UI] the youngster [UI].

"[Defendant:] [UI]. The other fool was only 16 [UI].

"[Informant:] That's- that's why you have to be careful, G. You know? That kid is -- just a boy, man and they're not -- They're not schooled up, you know? . . .

"[Informant:] But, on what side . . .?

"[Defendant:] [0/V]. [UI] on this, on my homie's car, and on the other one.

"[Informant:] Both cars? Which car where -- when you did that shit, what -- what car were you in though?

"[Defendant:] In the other one.

"[Informant:] In the -- in the -- in the van? When you were -- you were -- you were driving or you were a passenger? You were driving or you were a passenger?

"[Defendant:] Nah, I was [UI]."

Los Angeles County Sheriff's Detective Antonio Guillen testified as the prosecution's gang expert, with particular expertise and experience with the Florencia 13 gang. He explained that the Florencia 13 gang had about 30 cliques, and over 2,000 members. Detective Guillen identified photographs of

various tattoos worn by Florencia members; he demonstrated hand signs made by Florencia members to identity their gang, as well as common symbols they used, such as the Florida Marlins F logo; he testified that the primary activities of the Florencia 13 gang were vandalism, car thefts, narcotic sales, weapons possession, robberies, burglaries, and shootings; and he presented certified court dockets showing offenses committed by several Florencia 13 gang members. Detective Guillen explained that among the Florencia 13 gang's primary rivals were the Playboys and South Side Playboys. The rivalry with the Playboys was intense, with shootings back and forth. The purpose of most gang shootings is to retaliate against disrespect shown by rival gangs or for shootings by rival gangs. In his opinion, the murder of Rubio was retaliatory. Detective Guillen explained that respect is important within gangs, and disrespect for rivals is shown by graffiti, fights, robbery, and entering the rival's territory. A derogatory name the Florencia 13 gang members call the Playboys is "Peanut Butters," and the Playboys call Florencia 13 gang members "Flowers."

Detective Guillen had been acquainted with Chitica since November 2017, and twice Chitica had admitted to being a member of the Florencia 13 gang. Though Omar had not admitted his membership in the gang, in Detective Guillen's opinion, he was a member. The detective had not had any contact with Perez, but had seen him associating with known members of the Florencia 13 gang in 2016 and 2017. Defendant had personally admitted to Detective Guillen that he was a gang member, and since his arrest, he had acquired new Florencia 13 gang related tattoos. In Detective Guillen's opinion, Perez was a member of the Florencia 13 gang at the time of the September

2016 shooting. It was also his opinion that both Omar and defendant were members of the Florencia 13 gang at the time of the shooting.

In answering a hypothetical question mirroring the evidence presented in this case, Detective Guillen gave his opinion that the facts demonstrate a crime that promotes, furthers, and assists criminal gang conduct.

DISCUSSION

I. Section 1538.5 motion

Defendant contends that the officers who arrested him had no objectively reasonable basis for detaining or searching him, and that the trial court thus erred in denying his motion to suppress the evidence recovered.

A. Motion and ruling

At the hearing on the motion, Deputy Quintana testified that on October 15, 2016, he and his partner, Deputy Machado, were working patrol in the area of the 1300 block of 64th street. Both were in uniform and in a marked patrol car. Deputy Quintana had been a deputy sheriff for 11 years, had worked patrol for more than four years, mostly in the area of 64th Street. Deputy Quintana had been involved in vehicle burglary investigations, and he knew that the area around 64th Street had a high number of car thefts and burglaries.

Deputy Quintana identified defendant in court as the person he saw about 4:15 p.m. that day, standing in the open doorway of a legally parked silver Honda on 64th Street. Deputy Quintana was about two car lengths away from defendant when they first saw him. There was no traffic in area and defendant

was alone. When Deputy Quintana first saw defendant he did not see a weapon or other object in defendant's hand and did not know the Honda was stolen. When defendant looked in the direction of the patrol car, he looked surprised, immediately looked away, closed the car door, and began to walk at a fast pace away from the Honda toward the sidewalk. Deputy Quintana then noticed a chrome object in defendant's hand. Deputy Quintana had formal training regarding implements or objects which are used to gain access to a car or turn it on, such as shaved keys, and had gained experience regarding such objects in the course of conducting investigations. Initially Deputy Quintana thought the chrome object in defendant's hand was a shaved key.[5] Thinking he may have come upon a vehicle burglary, he stopped the patrol car, intending to make contact with defendant and investigate further. The deputies were about 10 feet from defendant when they got out of the patrol car.

When Deputy Machado said, "Come here," defendant stopped. Deputy Quintana was facing south, defendant facing north, and Deputy Machado was slightly behind defendant to his left. When defendant was asked if he was on probation or parole, he replied that he was on probation. Defendant Machado then moved to detain defendant and told him to remove his hands from his pockets. Defendant complied and Deputy Machado began to take control of defendant's hands. As he did, Deputy

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[5] "A 'shaved key' is a regular car key that has been filed down, making it usable to start and drive vehicles other than the one for which it was designed. It is commonly used as a burglary tool by car thieves." (*People v. Calderon* (2013) 214 Cal.App.4th 656, 660, fn.3.)

Quintana, who was then about five feet away, saw the wooden grip of a revolver protruding from defendant's left side, under his sweater. The gun, loaded with five live rounds, was retrieved, and defendant was handcuffed. Deputy Quintana also recovered a shaved spoon, which he described as a burglary tool used to start a vehicle. Throughout this contact with defendant, the patrol car's overhead lights were not activated and the deputies did not draw their weapons.

The trial court denied the motion, finding that the deputies had reasonable cause to believe defendant was possibly breaking into a locked vehicle, a felony. The court found that defendant was detained when the deputy said, "Come here." When defendant said he was on probation, the deputies were entitled to pat him down for weapons to protect their safety and perform a probation search. The court also made a specific finding that the deputy's testimony was credible.

B. Relevant legal principles

"A defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on . . . the . . . grounds . . . [¶] . . . [t]he search or seizure without a warrant was unreasonable." (§ 1538.5, subd. (a)(1)(A).) "The Fourth Amendment protects against unreasonable searches and seizures. (U.S. Const., 4th Amend.; *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*).) 'A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.' [Citation.]" (*People v. Hernandez* (2008) 45 Cal.4th 295, 299.)

In making reasonable-suspicion determinations, reviewing courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. [Citation.] This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.]" (*United States v. Arvizu* (2002) 534 U.S. 266, 273 (*Arvizu*).) "Although an officer's reliance on a mere "'hunch'" is insufficient to justify a stop, [citation], the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard [citation]." (*Id*. at p. 274.)

"'In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. We review the court's resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review.' [Citation.] On appeal we consider the correctness of the trial court's ruling *itself,* not the correctness of the trial court's *reasons* for reaching its decision. [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145 (*Letner and Tobin*).) "[I]f the trial court's ruling is correct ""upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."""" (*Ibid*.)

C. Defendant's contentions

Defendant first argues that the trial court's "memorandum of law" showed that "the court had a near complete misunderstanding of what this case was about and as a result relied on conclusions and caselaw that were simply not applicable." As respondent notes, this memorandum was not the court's ruling and is therefore irrelevant here. Moreover, even if the trial court had intended it to be the ruling, we would not defer to any factual findings unsupported by substantial evidence, and we would independently determine the issues of law. (*Letner and Tobin*, *supra*, 50 Cal.4th at p. 145.)

Throughout defendant's briefs, nearly all his arguments depend, at least in part, on the unsupported assertion that when defendant saw the patrol car, he walked toward the deputies, not away from them. Deputy Quintana testified that when defendant looked in the direction of the patrol car, he looked surprised, immediately looked away, closed the car door, and began to walk away at a fast pace. The deputies then exited the patrol car. Deputy Quintana faced south, while defendant faced north, and Deputy Machado was slightly behind and to the left defendant. When Deputy Machado said, "Come here," defendant stopped. He did not walk toward the deputies. The trial court expressly stated that it believed Deputy Quintana's testimony. We accept the trial court's credibility determinations and we review the evidence in the light most favorable to the trial court's ruling, resolving any factual conflicts in favor of the ruling. (*People v. Woods* (1999) 21 Cal.4th 668, 673.)

Defendant also contends that the stop was unreasonable because each of the reasons Deputy Quintana gave for his suspicion that defendant was burglarizing the Honda was equally

consistent with innocent activity: being in a high-crime area, looking surprised at seeing the deputies, and holding a shiny object. He argues that that the shiny object could have been the keys to his car and that any brown person in a bad neighborhood might have looked surprised at seeing law enforcement officers. Defendant concludes that the deputies must have stopped him solely because he was a person of color in a neighborhood in which crimes had been committed.[6]

"'[T]here could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot.' [Citation.]" (*United States v. Sokolow* (1989) 490 U.S. 1, 9, quoting *Reid v. Georgia,* 448 U.S. 438, 441.) "[A]s the [United States Supreme Court] repeatedly has explained, the possibility of innocent explanations for the factors relied upon by a police officer does not necessarily preclude the possibility of a reasonable suspicion of criminal activity." (*Letner and Tobin*, *supra*, 50 Cal.4th at p. 146, citing *Arvizu*, *supra*, 534 U.S. at p. 274 and *United States v. Sokolow*, *supra*, at p. 9.) "'[T]hat a person's conduct is consistent with innocent behavior does not

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[6] Defendant mischaracterizes the evidence. Defendant refers to no evidence in the record of the hearing, regarding the defendant's skin color, or suggesting that everyone with an Hispanic name is a person of color. Defendant also suggests that a shaved spoon cannot be a shaved key or similar instrument for opening locked car doors, because he found no mention of such an instrument in any published California or federal court opinion, and just one mention in an unpublished California case. Again, we rely on the trial court's assessment of Deputy Quintana's credibility and view the evidence in the light most favorable to the ruling. (See *People v. Woods*, *supra*, 21 Cal.4th at p. 673.)

necessarily defeat the existence of reasonable cause to detain.' [Citation.] . . . . "'[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.'" [Citation.] Indeed, the United States Supreme Court has acknowledged that by allowing the police to act based upon conduct that was 'ambiguous and susceptible of an innocent explanation,' the court in *Terry* 'accept[ed] the risk that officers may stop innocent people.' [Citations.]" (*Letner and Tobin*, *supra*, at pp. 146-147; see *Terry*, *supra*, 392 U.S. at p. 22.)

Moreover, Deputy Quintana, based on his experience and training, saw what to him was *unlawful* behavior. The possession of a shaved key could have been a violation of section 466, possession of a burglary tool, which includes not only the tools listed in that statute, such as a "bump key," but also similar devices. (See *People v. Diaz* (2012) 207 Cal.App.4th 396, 404, fn. 2.) A "bump key . . . is essentially a standard key with all of the cuts shaved down to the maximum depth [and] can be inserted almost all of the way into a lock." (Wiksell, *Chapter 119: Bump Keys Break into the Penal Code* (2009) 40 McGeorge L. Rev. 498, fn. omitted.) A shaved key is a burglary tool that is also shaved down to open locks. (See *People v. Calderon*, *supra*, 214 Cal.App.4th at p. 660, fn. 3.) Possession of a shaved key can result in a conviction under section 466. (Cf. *People v. Najera* (2008) 43 Cal.4th 1132, 1134-1135.)

Defendant suggests that because Deputy Quintana merely believed that the object in defendant's hand "'possibly' and 'may' have been" a shaved key, the deputy's belief could not justify an investigative stop. On the contrary, the officer need only "point to specific articulable facts that, considered in light of the totality

of the circumstances, provide some objective manifestation that the person detained *may* be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231, italics added) "[T]he Fourth Amendment is satisfied if the officer's action is supported by a reasonable suspicion to believe that criminal activity "'*may* be afoot'" [citation]." (*Arvizu*, *supra*, 534 U.S. at p. 273, italics added.) The officer need not have an "actual belief in guilt required to arrest, book, and jail an individual on a named criminal charge." (*In re Tony C.* (1978) 21 Cal.3d 888, 892.)

Deputy Quintana was permitted to "draw on his own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.]" (*Arvizu*, *supra*, 534 U.S. at p. 273.) Thus, it was reasonable for Deputy Quintana to consider, as part of that cumulative information, the appearance of the object in defendant's hand as possibly a shaved key. Other factors that Deputy Quintana could reasonably consider were the area's reputation for car thefts and burglaries as well as defendant's surprised expression and his immediate looking away, followed by walking away at a fast pace, which appeared to the deputy to be evasive behavior. (See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.) We reject defendant's effort to discredit each of Deputy Quintana's reasons for suspecting that defendant may have possessed a burglar tool and may have been involved in a car burglary. Rather, we have reviewed "the 'totality of the circumstances'" and conclude that the deputy had "a 'particularized and objective basis' for suspecting legal wrongdoing. [Citation.]" (*Arvizu*, *supra*, at p. 273.) As the deputies' investigative stop was lawful, the

seizure of the gun from defendant's person was justified, in plain view or not. (See *Terry*, *supra*, 392 U.S. at p. 23.)

We agree with defendant that the trial court erred in finding that the deputies could assume that a condition of defendant's probation made him subject to searches by law enforcement. (*People v. Sanders* (2003) 31 Cal.4th 318, 333 [search cannot be justified by a probation search condition of which the officer is unaware].) However, we also agree with respondent that the contention need not be reached, as we have concluded that the stop was justified by Deputy Quintana's other articulated reasons. As we found the trial court's ruling correct under a defferent applicable theory of the law, "it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."" (*Letner and Tobin*, *supra*, 50 Cal.4th at p. 145.)

II. Death penalty comment

Defendant contends that the trial court prejudicially erred in telling the jury that this case did not involve the death penalty. The only such comment to which defendant refers is the following statement by the prosecutor out of the presence of the jury: "The court has already advised the jury on multiple occasions that this is not a death penalty case." As defendant points to no comment by the court that might be reviewed in context, he is apparently making an abstract argument that in general the trial court should never tell the jury that a murder case is not a death penalty case.

Defendant has cited no authority for such a proposition, but merely refers to several federal cases indicating that it is inappropriate to inform the jury of what penalty might be

imposed if it found the defendant guilty. (See *Rogers v. United States* (1975) 422 U.S. 35, 40; *United States v. Frank* (9th Cir. 1991) 956 F.2d 872, 879, citing *Miller v. United States* (C.A.D.C. 1911) 37 App.D.C. 138, 143; *Pope v. United States* (5th Cir. 1962) 298 F.2d 507, 508.) However, defendant's complaint is that the trial court told the jury what the penalty would *not* be, not what it would be. Thus, the cited cases do not support his contention.

Respondent points out that it was during voir dire that the trial court made such a comment, to which defendant failed to object. Defendant has thus failed to preserve the issue for review. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 781.) Regardless, defendant's contention fails on the merits. In voir dire, the trial court said to the jury: "By the way, because I'm sure, one juror may ask it, . . . this is not a death penalty case. So in case you're going to ask that, the death penalty is not involved in this case." This was "proper and prudent . . . . It is reasonable to anticipate that a significant number of prospective jurors might question their ability to sit on a jury which potentially would have to consider imposition of a sentence of death." (*People v. Hyde* (1985) 166 Cal.App.3d 463, 479.) As observed by a sister-state court, "Overwhelmingly, other [sister-state] courts have approved of telling prospective jurors when the death penalty is not at stake. [Citations.]" (*State v. Pierce* (2020) 195 Wash.2d 230, 241-242, and see the cases cited therein, including *Hyde*.)

Defendant's contention also fails because he has not demonstrated prejudice. Prejudice from improper judicial comments is determined under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Melton* (1988) 44 Cal.3d 713, 736.) Under that test, it is defendant's burden to demonstrate the

reasonable probability of a different result absent the alleged error. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746.) Defendant's entire prejudice argument is: "There is no telling what factor persuaded the jury to find appellant guilty, and the trial court's comments cited herein may very well have been a tipping point. The error cannot be considered harmless and reversal is required." Not only did defendant fail to cite any comments by the court, but there is in fact a "telling" factor which persuaded the jury to find defendant guilty: the strong evidence of defendant's guilt. Chitica, defendant's accomplice, friend and fellow member of the Florencia 13 gang, testified that that defendant initiated the incident by suggesting they drive to Playboys's territory, stealing the van, and bringing a firearm with him. Chitica testified that it was defendant who shot and killed Rubio, and when defendant was arrested, the murder weapon was found in the pocket of his sweater. In addition, defendant admitted in the jailhouse recording that he was at the scene of the shooting, had the gun, and "did that shit."

Moreover, as respondent observes, the court instructed the jurors that penalty or punishment could not affect their verdicts or be considered by them, and it is presumed that jurors understand and follow their instructions. (See *People v. Pearson* (2013) 56 Cal.4th 393, 414.) Given this instruction and the evidence, we discern no reasonable probability that the result would have been different if the trial court's comment in voir dire had been error.

III. Mexican Mafia testimony

Defendant contends that the trial court erred in admitting testimony relating to the Mexican Mafia, arguing that the

evidence was irrelevant, since there was no evidence that the Mexican Mafia figured in any part of this case, and that the evidence was highly prejudicial and thus excludable under Evidence Code section 352. Defendant also argues that the prosecutor *repeatedly* mentioned the Mexican Mafia.

The record differs from defendant's position. The prosecutor elicited the following testimony from the gang expert:

> "Q. Now, this use of the No. 13, does that have some significance within gang culture down here in L.A.?
>
> "A. Yes.
>
> "Q. And what is that significance?
> "A. That it's sanctioned or governed by the Mexican Mafia.
>
> "Q. What does the 13 say exactly that it connects it to the Mexican Mafia?
>
> "A. The 13th letter is the letter M.
>
> "Q. Are all the Hispanic gangs in L.A., to your knowledge as a gang expert, aligned with the Mexican Mafia?
>
> "A. Not altogether.
>
> "Q. Are the vast majority of Hispanic gangs --"

At that point the trial court interrupted and called a recess. Defendant had not objected to any of the questions regarding the Mexican Mafia. Outside the jury's presence. the trial court said to the prosecutor:

> "You're making me nervous about getting into this area of the Mexican Mafia. I don't know if you're aware of it, but there are cases that are reversed, gang cases, for reference to the Mexican Mafia when there is no reason to reference the Mexican Mafia. Why are we referencing the Mexican Mafia so much? I understand 13 is the number of the Mexican Mafia, but you seem to be going on in this area, and I'm concerned we'll be a case that is reversed because the Mexican Mafia is viewed a lot more sinister than just a regular gang. Is there a reason we're going into it?"

The prosecutor replied, "Just to establish context. I don't intend to ask any further questions on it, your Honor."

Defense counsel did not object to the testimony. The trial "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352; *People v. Valdez* (2012) 55 Cal.4th 82, 138.) However, a judgment may not be reversed by reason of the erroneous admission of evidence unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a); *Valdez*, at p. 138.)

Defendant acknowledges that ordinarily the failure to object effects a forfeiture of Evidence Code section 352 issues on appeal. He contends, however, that the trial court's inquiry amounted in effect to a sua sponte objection which preserved defendant's challenge on appeal. In *People v. Ramos* (1997) 15 Cal.4th 1133, the California Supreme Court rejected a similar argument, that the prosecutor's suggestion of a possible basis for objection preserved the issue. The court explained: "[D]efense counsel never adopted, endorsed, or ratified the inference or requested an appropriate ruling from the court pursuant to Evidence Code section 352. While 'Evidence Code section 353 does not exalt form over substance' [citation], it does require sufficient specificity of evidence and legal grounds for the opposing party to respond if necessary, for the trial court to determine the question intelligently, and for the appellate court to have a record adequate to review for error." (*Ramos,* at pp. 1171-1172.) Here too, defendant did not ask for a ruling, did not ask the court to weigh the prejudicial effect of the testimony against its probative value, and most importantly, did not move to strike the testimony or to admonish the jury. "'[W]e cannot hold the trial court abused its discretion in rejecting a claim that was never made.'" (*People v. Lightsey* (2012) 54 Cal.4th 668, 711, quoting *People v. Valdez* (2004) 32 Cal.4th 73, 109.)

Defendant contends that if we deem the issue forfeited, as we do, then we must conclude that defense counsel rendered ineffective assistance, and then consider the issue on the merits.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-694.) It is the defendant's burden on appeal to demonstrate that trial

counsel was inadequate and that prejudice resulted. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) Prejudice is shown by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694.) We presume that counsel's tactical decisions were reasonable, unless ""the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."" [Citation.]" (*Lucas*, *supra*, at pp. 436-437.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Defendant attempts to meet his burdens by arguing that any competent counsel, upon hearing the trial court's comments regarding the Mexican Mafia testimony would have leapt to his feet to object and move for a mistrial. He concludes that defense counsel's failure to do so was "textbook ineffective assistance." Defendant fails to present a persuasive or sufficiently developed claim. We need not reach undeveloped claims. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.) Moreover, it is possible trial counsel did not object or move to strike because he did not want to bring more attention to the brief reference than was necessary or risk a ruling admitting the testimony when the prosecutor said he would not mention it again. Defendant has failed to demonstrate error by counsel.

Moreover, defendant has not demonstrated prejudice. Defendant relies on a comparison to *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran)*, to argue that while any gang

evidence is highly inflammatory, evidence regarding the "notorious" and "vicious" Mexican Mafia is so highly prejudicial that he was deprived of a fair trial. *Albarran* did not so hold. Instead it held that *nearly all* the gang evidence admitted at trial in that case, including the Mexican Mafia evidence, "was irrelevant, cumulative and presented a substantial risk of undue prejudice." (*Albarran*, at p. 228.) As respondent observes, the reference to the Mexican Mafia was brief, and unlike in *Albarran*, it was not cumulative to irrelevant gang evidence. Here, the words, "Mexican Mafia" were uttered three times at the early stage of nearly four days of testimony. Over the course of the trial, the relevant gang testimony covered about 85 pages of reporter's transcript, not counting the gang references in defendant's three-hour jailhouse conversation with the informant. We agree with respondent that defendant's comparison to *Albarran* is misplaced.

Defendant counters that "jurors know the difference between some no-name street gang, and the Mexican Mafia . . . [and] the jury would know about the Mexican Mafia and apply to appellant all of the heinousness known to be a part of the Mafia's modus operandi." "Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs." (*People v. Merriam* (1967) 66 Cal.2d 390, 397, disapproved in part on another ground in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882.) There is no evidence in the record regarding how widespread knowledge was among these jurors or among the County's entire jury pool about the Mexican Mafia or its modus operandi.

In any event, it is not defendant's burden to demonstrate that *any* gang member accused of crime might have a different

result without mention of the Mexican Mafia. It is his burden to demonstrate the reasonable probability of a different result in *this* case absent the alleged error. Defendant cannot do so, as the evidence of his guilt was overwhelming. Chitica, defendant's friend of many years and fellow member of the Florencia 13 gang, described defendant's part in the crime, as well as the gun defendant displayed while they were en route to Playboys territory in the van, followed by two other gang members in Chitica's car. The murder weapon was found on defendant's person after the shooting. Furthermore, defendant admitted to the informant that he "did that shit," that the weapon was his, that he participated in a crime with his youthful companions, and that he was in a van with others following in his "homie's" car. Chitica and Detective Guillen both testified that a rival's shooting of a fellow gang member would result in retaliation, and Chitica testified that Omar said that a Playboys member had shot him.

While there was a video recording of the incident played for the jury and entered into evidence, defendant has not had it transmitted to this court to be included in the record on appeal. As it is defendant's burden to provide an adequate record to show error and prejudice, we assume the video would support his conviction. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564-565.) We thus accept Chitica's description of the action as the video was played as accurate. Chitica pointed out the van and the Sebring as he, defendant, and the others arrived at the crime scene. He identified defendant as the person seen exiting the van from the driver's side and shooting the victim. We conclude that as defendant has demonstrated neither error by his trial counsel, nor prejudice, his claim of ineffective assistance of

counsel fails and his challenge to the admission of the Mexican Mafia evidence is forfeited.

Moreover, defendant has failed to demonstrate that he was prejudiced by the admission of the evidence, despite it being his burden to show that the error resulted in a miscarriage of justice under the "'reasonable probability' standard" of *People v. Watson*, *supra*, 46 Cal.2d at p. 836. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746; Evid. Code, §§ 352, 354; Cal. Const., art. VI, § 13.) In fact defendant makes no effort to meet his burden. He merely concludes that "[t]he trial court's failure to strike the testimony [or] admonish the jury to disregard it, was error of constitutional dimension requiring reversal of the conviction." Defendant's assertion is erroneous,[7] and unsupported by authority or any factual discussion. In light of the overwhelming evidence of defendant's guilt, as discussed above, we discern no reasonable probability that exclusion of the brief mention of the Mexican Mafia would have produced a different result.

IV. Correction of judgment, minutes and abstract of judgment

Defendant asks that the record be corrected to accurately reflect the trial court's imposition of sentence. Defendant asserts that the trial court misspoke in stating that the two-year gang enhancement for counts 2 and 3 was the middle term.

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[7] It was defendant's burden to move to strike the testimony. (See Evid. Code § 353, subd. (a).) And it is defendant's burden to demonstrate a miscarriage of justice. (Evid. Code § 353, subd. (b).) Finally, the trial court had no sua sponte obligation to admonish the jury. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.)

Respondent agrees. Two years is the low enhancement term under section 186.22, subdivision (b)(1)(A). The trial court corrected itself as to the gang enhancement on count 2, stating: "I didn't mean to say 'midterm. I meant low term." The court then said that the sentence would be the same on count 3 as count 2, but then referred to the gang enhancement as the middle term.

Defendant asks that the judgment be corrected to reflect that the court imposed the lower, not the middle gang enhancement of two years as to each of counts 2 and 3. We agree with respondent that there is nothing to correct in the judgment. The trial court's intent was clear, a two-year term for each offense, with each of counts 2 and 3 enhanced by two years for a total of four years as to each count.

Defendant also asks that the trial court be ordered to correct the minutes and the abstract of judgment to reflect that the court imposed the two-year gang enhancement under section 186.22, subdivision (b)(1)(A), not subdivision (b)(1)(C) as stated in the minutes and the abstract. There being no objection, we will do so.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct its minutes to reflect that the sentences in counts 2 and 3 were enhanced pursuant to Penal Code section 186.22, subdivision (b)(1)(A), in place of the erroneous notation that they were enhanced under section 186.22, subdivision (b)(1)(C). The court is further directed to prepare an amended abstract of judgment reflecting this change, and to forward the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT