See Dissenting and Concurring Opinion

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENDRICK JACKSON, Defendant and Appellant.	E070511 (Super.Ct.No. FSB1502439) OPINION

APPEAL from the Superior Court of San Bernardino County. Harold T. Wilson, Judge. Affirmed in part, reversed in part with directions.

David A. Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

While committing a drive-by shooting targeting a rival gang member, defendant and appellant, Kendrick Jackson, and his cohorts crashed into a tree. One of defendant's cohorts died in the crash. As a consequence, defendant was convicted of second degree murder, as a lesser included offense of first degree murder (Pen. Code, § 187, subd. (a)[1]; count 1), attempted premeditated murder (§§ 664, 187, subd. (a); count 2), and shooting at an occupied vehicle (§ 246; count 3). The jury also found true that defendant personally used and discharged a firearm in the commission of the offenses (§ 12022.53, subds. (b), (c)) and defendant committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)). In a bifurcated trial, the court found true that defendant had served a prior prison term (§ 667.5, subd. (b)), had a prior serious felony conviction (§ 667, subd. (a)(1)), and had a prior strike conviction (§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)). Defendant was sentenced to 69 years to life in prison.

Defendant asserts the following objections: the trial court erred in admitting a rap video, without audio (silent video or rap video); the prosecutor committed numerous instances of misconduct during cross-examination of defendant and closing argument rebuttal (rebuttal); the trial court erred in allowing testimony linking defendant with a 2010 murder; and defendant's murder conviction was not supported by substantial evidence. Defendant also seeks remand for resentencing to allow the trial court to

[1] Unless otherwise noted, all statutory references are to the Penal Code.

exercise its discretion to strike defendant's five-year enhancement (§ 667, subd. (a)) under Senate Bill No. 1393 (2017-2018 Reg. Sess.), and requests this court to strike defendant's one-year prison prior enhancement (§ 667.5, subd. (b)) under Senate Bill No. 136 (2019-2020 Reg. Sess.).

We conclude that, although the prosecutor made an erroneous statement of fact during rebuttal, the error was harmless. We also agree, as do the People, that defendant's prison prior should be stricken under Senate Bill No. 136, and this matter should be remanded for resentencing to allow the trial court to exercise its discretion to strike defendant's five-year enhancement under Senate Bill No. 1393. In all other regards, we reject defendant's contentions. We therefore affirm the judgment as to defendant's convictions, but reverse his sentence as to his prison prior and serious felony conviction enhancements, and remand the matter for resentencing.

II.

FACTS

At the time of the charged crimes, defendant, codefendants Ronald Lewis and Shontae Turner,[2] and decedent, James Eley, were active members of the Westside Projects criminal street gang (Projects). The Gardens Crips criminal street gang

[2] Lewis and Turner are not parties to this appeal. We further note that, before the trial, the prosecution moved to empanel two juries to avoid prospective *Aranda-Bruton* issues. The trial court granted the request and ordered two separate juries, one for defendant and Turner (purple jury), and one for Lewis and Gwen Tell, Lewis's wife (pink jury).

(Gardens) is a rival of the Projects.

On July 15, 2015, at 9:30 p.m., T.J. walked out to his car from his aunt's home on Blackstone Avenue. T.J.'s car was parked in front of a house next door to his aunt's home. Gardens members were known to congregate at his aunt's home (referred to herein as the Gardens home). T.J. was wearing blue clothing. Blue is associated with the Gardens gang. T.J. saw a black Dodge Journey SUV (SUV), with no lights on, parked about 300 or 400 feet north of T.J.'s car, on the opposite side of the street. T.J. noticed someone sitting on the SUV windowsill,[3] on the driver's side, behind the driver, Lewis. Turner was sitting in the front passenger seat, Eley was sitting in the rear passenger side seat, and defendant sat in the back, on the driver's side.

As T.J. was getting in his car door, the SUV began travelling southbound, towards him. When T.J. heard a gunshot strike his bumper, he ducked down. T.J. heard four to seven additional gunshots as the SUV drove past his car. He was not aware of anyone firing back at the SUV. A few seconds later, T.J. heard a loud boom. T.J. got out of his car and went back inside his aunt's house. He noticed the SUV had crashed into a tree in front of a nearby house. T.J. saw the man who had been sitting on the driver's side windowsill hanging out the SUV on the back seat, on the driver's side.

[3] We acknowledge that, technically, the person was observed sitting on the bottom portion of the SUV window frame, not a windowsill. However, since the parties and witnesses have universally referred to it as windowsill, we shall do the same to avoid confusion.

Neighbors heard the crash and called 911. A neighbor went outside after hearing the crash, and saw two men (defendant and Lewis) running from the crash site. A woman was also seen leaving the scene. All three individuals appeared to be injured. The woman, identified as Turner, told a neighbor she was concerned about someone named James and asked the neighbor to check on him. Another neighbor testified seeing Eley lying face down on the ground next to the SUV. He was moaning, asking for help. The neighbor said he saw Lewis lying face down on the driver's seat, halfway in and halfway out of the SUV. No one else was in the vehicle.

By the time law enforcement arrived at the crash scene, defendant, Lewis and Turner had left. Eley, who was lying on the ground, told the first officer who arrived at the scene that he had not been shot. Eley was transported to the hospital and died shortly thereafter. An autopsy showed he died from blunt force injuries caused by the car crash, not from being thrown from the SUV or being shot. Lewis, Turner, and defendant were located at nearby hospitals, where they were treated for their injuries and interviewed. Defendant and Lewis denied involvement in the drive-by shooting and crash. Defendant claimed he was struck by a car while walking to a nearby hospital.

The SUV keys were found in Lewis's possession. A 9-millimeter Glock semiautomatic and a .40 caliber Walther semiautomatic were located at the crash scene, near the SUV. The Glock was found in the middle of the street, 30 feet from the SUV. The Walther was found by a neighbor next to Lewis's feet. It was badly damaged from striking the tree during the crash. Nine .40 caliber shell casings and eight 9-millimeter

shell casings were found at the scene. There were four bullet holes in T.J.'s car, three bullet strikes to T.J.'s aunt's house, and a bullet strike to a wall between her house and her neighbor's home, where T.J.'s car was parked.

There was a bullet hole in the roof of the SUV, above the driver's seat. Police Officer Silva, who examined the SUV, estimated the bullet hole was made by firing a gun held about two feet above the SUV roof. Officer Silva testified he believed the bullet was possibly fired by someone just outside the passenger side, rear door of the SUV, from overhead, toward the left, front, driver's side. In Officer Silva's opinion the right rear passenger fired a handgun as the SUV was traveling southbound on Blackstone. He further determined the bullet travelled at a downward angle as it entered into the top of SUV roof from outside the SUV. The bullet originated from northwest of the bullet hole and traveled in a southeasterly direction. It then went through the roof just above the driver's head, went back into the roof headliner, and may have been trapped in there or exited. Officer Silva was unable to determine the exit point of the bullet or find the spent round. He did not know if the spent round remained inside the SUV.

Officer Siems, who examined the SUV, testified he also believed the bullet hole was made by a bullet fired from above the SUV, traveling from above the right rear passenger, at a downward angle towards the area of the driver. Red clothing fibers were embedded in the rear passenger side window frame. California Highway Patrol (CHP) Officer Bozyk, who testified as a traffic reconstruction expert, stated that, if the shooter

had been sitting on the windowsill at the time of the crash, he would have been ejected from the SUV.

The 9-millimeter shell casings found at the crash scene matched casings test fired from the 9-millimeter Glock. The .40 caliber Walther could not be test fired because it was too badly damaged from the crash.

DNA testing revealed that defendant was a major contributor of the DNA found on the grip of the Glock. Lewis and Turner were excluded as contributors. Defendant and Eley both had gunshot residue (GSR) on their hands. Eley had one GSR particle on his left hand and none on his right hand. Defendant had five GSR particles on his right hand and one particle on his left hand. Lewis and Turner did not have any GSR on their hands. The SUV event data recorder showed that about five seconds before impact, the SUV was traveling at 19 miles per hour. Four seconds before impact, the accelerator was fully depressed, causing the SUV to travel at 46 miles per hour up until impact.

Evidence of numerous recorded jail calls, letters, and comments made in court were introduced into evidence. During one such jail call, defendant denied being in the SUV or having any knowledge regarding the drive-by shooting. During the call, defendant instructed a woman to tell Turner to say that defendant was not in the SUV during the crash and say that defendant was hit by a car. On numerous occasions during defendant's jail calls, defendant denied knowing anything about the drive-by shooting and crash, and denied knowing any of the people involved. Also, during recorded jail calls played for the jury, defendant mentioned that Turner had implicated him when

talking to the police. Deputy McCracken testified that, as defendant, Lewis, and Turner were being escorted back to the holding facility after a pretrial hearing in May 2016, Deputy McCracken overheard defendant say to Lewis, Turner is "a whistle. She'll get hers."

Gang expert, Officer Saenz, testified that at the time of the drive-by shooting, the Gardens and Projects were involved in an ongoing "gang war." According to Officer Saenz, Projects members have a history of committing drive-by shootings by using rental cars obtained by a nonparticipant, and lying in wait for their targets. Officer Saenz concluded the drive-by shooting in the instant case was committed at the direction of, in association with, and for the benefit of the Projects gang. Officer Saenz further testified regarding a rap video posted on YouTube about a year after the drive-by shooting. The rapper in the video is wearing a shirt that says, "'Free Cootie,'" which Officer Saenz testified referred to defendant, whose gang moniker is "'Cootie.'"

Defendant testified that he was a Projects member but was not active in the gang. However, defendant told an officer during an incarceration classification interview on July 21, 2015, that he was an active Projects member. Defendant further testified Eley was also a Projects member, and Lewis was a Projects associate. Turner was in the SUV the night of the shooting because she was "messing around" with Lewis. Defendant had family members in both the Projects and Gardens gangs.

Defendant further testified that the night of the shooting, he was at his grandmother's house. Eley was there, too, wearing a red shirt. Defendant did not see a

gun on Eley, and defendant was not carrying a gun. Lewis picked up defendant and Eley at around 9:00 p.m. The group intended to go to a marijuana dispensary after dropping off Eley. On their way, Turner asked Lewis to take her home. Lewis ignored her. Lewis parked, facing south on Blackstone Avenue. After a couple of minutes, Eley told defendant to get down. Without any advanced warning, Eley leaned over defendant and began shooting out the window.

Because defendant's head was down, he could not see well. He therefore did not know if Eley was firing one or two guns. At one point Eley sat on the passenger side windowsill with his body outside. Defendant could not remember if, when the SUV crashed, Eley was back inside the SUV or was sitting on the windowsill. Defendant testified that, even though his leg was injured from the crash, defendant jumped out the SUV window and ran to the medical center. Defendant saw a Glock in the street but left it there. When defendant left the SUV, Lewis and Turner were in the SUV. Defendant claimed that on his way to the medical center, defendant was struck by a car, causing a broken arm and gash in his ankle.

Defendant testified that when an officer questioned him, defendant denied he had been in the SUV because he did not want to have anything to do with the incident. He also explained that during jail calls he said he was not involved because he was trying to distance himself from the incident. This was partly because he feared Eley's family would retaliate against defendant's family. Defendant was also worried Turner would

inadvertently say something that would implicate him. He was not worried she would say what she actually saw. Defendant knew Turner would say he was in the SUV.

Defendant acknowledged he told Turner to tell the police he was not in the car. Defendant wrote Turner and asked her to say he was not involved in the shooting, because the prosecution was trying to get her to lie. Defendant denied calling her a "whistle." Defendant also denied he, Eley, or anyone else in the SUV said, "'Pull up, pull up. That's him, that's him,'" when T.J. exited the Gardens home. Defendant acknowledged a boy was murdered during a shooting in 2010. Defendant said he did not know if the death was related to a Projects-Gardens shooting. Defendant admitted pleading guilty in 2012 to possession of a firearm, but did not realize he was also admitting a gang enhancement. Defendant denied that, when he was arrested for possessing a gun, he told Officer Clark he needed the gun for protection because the Gardens gang wanted to kill him.

T.J. testified he did not tell an officer that the person sitting on the SUV windowsill was sitting on the passenger side. The person was sitting behind the driver. T.J. noted he was not looking when the SUV started driving toward him and he did not see anyone shooting.

Officer Clark testified defendant told him in 2012, he was in possession of a gun for protection from the Gardens gang, which was "after him for a shooting that - - or a murder that had occurred. So they were blaming him for the murder and he carried a gun for protection."

III.

ADMISSIBILITY OF SILENT RAP VIDEO

Defendant contends the trial court abused its discretion by allowing the prosecution to show the jury a rap video, absent the sound. We disagree. The trial court's ruling allowing the silent video to be played for the jury was well within the court's discretion. (*People v. Her* (2013) 216 Cal.App.4th 977, 981 ["An appellate court reviews a trial court's evidentiary rulings for abuse of discretion."]; see *People v. Venegas* (1998) 18 Cal.4th 47, 93.)

A. *Factual and Procedural Background*

During the trial, the trial court held an evidentiary hearing (402 hearing) on the admissibility of a rap video which the prosecution requested to play for the jury. The prosecutor believed the rap video was produced in July 2016, about a year after the charged crimes.

The court reviewed a transcript of the rap video lyrics, and watched and listened to the two minute, 20 second rap video. The rap video shows a young man performing a rap song. Other young men join him in his performance. They display hand gestures and are wearing gang-related attire. The rapper is shown wearing a shirt stating, "Free Cootie," across the front. The group of men appear to be celebrating.

Defendant's attorney stated objected to the rap video on the grounds there was a lot of foul language in it and defendant did not write the lyrics. Defense counsel asserted "it's hearsay as to him. We have no way of knowing who wrote this, and foundation is in question. 352 comes into play as well." Defendant's attorney added, "On objection of 352, I've pointed out other areas of major concern. [¶] There's numerous parties making statements. These parties are not defendants in this case. We don't even know who they are. We've got foundation problems."

The prosecutor argued the rap video was relevant because it was anticipated the prosecution's gang expert, Officer Saenz, would provide opinion evidence based on the rap video, including testifying that the rap video is "a perfect example of one of the ways in which a gang member's status is enhanced." The prosecutor asserted that, even if the rap video was played without sound, it would show that defendant's reputation was enhanced within his gang, and the gang was showing defendant respect in the rap video.

The trial court ruled that, under a "352 analysis," the court would allow the rap video but exclude the audio, based on the prosecution's offer of proof that the gang expert would be able to testify to the meaning of the symbols in the rap video. The court concluded that "the probative value outweighs the prejudice with respect to the video."

Officer Saenz thereafter testified regarding the Projects gang, explaining its history, colors, gang signs, tattoos, and other identifying features. Officer Saenz discussed law enforcement's use of social media to investigate gang crimes and identify gang members. Officer Saenz explained that when a gang member does something

sanctioned or approved by a gang, the gang will reward such behavior by, among other things, creating a rap video mentioning the gang member. This enhances the gang member's reputation.

As to defendant, Officer Saenz testified that defendant's gang moniker was "'Cootie.'" While investigating defendant's case, Officer Saenz found "a lot of the social media" stated "'Free Cootie.'" "'Free Cootie'" was also seen on T-shirts. Officer Saenz testified the YouTube rap video was "a celebration of Cootie," which was posted after the charged crimes.

When the prosecutor stated she was going to play the silent rap video for the jury, defendant's attorney objected, stating, "Record should reflect we're objecting on foundation and relevance." The court overruled defendant's objections but noted that the prosecutor must lay the foundation as to the rap video being shown. Officer Saenz then testified that the rap video mentioned "'Cootie'" and "'Free Cootie.'" During a side-bar conference, the court noted that it had previously ruled under Evidence Code section 352 that the rap video was admissible but only without sound.

After the side-bar conference, the video was played without sound for the jury. Officer Saenz explained the meaning of the gang tattoos, signs, colors, clothing, rap video location, and the words, "'Free Cootie,'" on a T-shirt in the rap video. Officer Saenz stated that in his opinion the rap video was gang-related, showed defendant's gang supported him, and demonstrated defendant's enhanced status in the gang after the charged crimes were committed. Officer Saenz testified that the rap video was "an

example of celebrating someone after they've been involved in a violent crime." Officer Saenz further stated that celebrating the gang member's enhanced status extended to the larger community and beyond.

During closing argument, the prosecutor replayed the silent rap video once while discussing images in the silent rap video, and mentioned it four other times during her closing argument and rebuttal.

B. *Forfeiture*

Defendant argues the silent video was inadmissible on hearsay, foundation, relevance, and Evidence Code section 352 grounds. The People argue defendant forfeited his hearsay and Evidence Code section 352 objections to the silent video by not asserting these grounds when objecting to admissibility of the silent video. We agree.

A trial objection must "'fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.'" (*People v. Geier* (2007) 41 Cal.4th 555, 609; see *People v. Partida* (2005) 37 Cal.4th 428, 431; Evid. Code, § 353, subd. (a) [a judgment cannot be reversed on the basis of erroneously admitted evidence unless the defendant made a timely objection that "make[s] clear the specific ground of the objection or motion"].) "A defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial." (*People v. Partida*, *supra*, at p. 431.)

Defendant cites *People v. Brooks* (2017) 3 Cal.5th 1, for the proposition that, even though defendant did not assert an Evidence Code section 352 objection as to the silent video, it was not forfeited because the court nevertheless considered the objection. *Brooks* is not on point. In *Brooks*, unlike in the instant case, the court clarified that the defense was asserting an Evidence Code section 352 objection, and then rejected the ground. Here, defendant asserted two objections to the silent video, and the court overruled them. Defendant did not assert hearsay or Evidence Code section 352 objections to the silent video, and therefore those objections were forfeited.

C. *Admissibility Under Evidence Code Section 352*

Even assuming defendant's Evidence Code section 352 objection was not forfeited, we nonetheless reject it. Under Evidence Code section 352, "[t]he 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." (See Evid. Code, § 353.)

Here, the trial court's ruling allowing the silent video was well within the court's discretion. Defendant has not demonstrated that the admission of the silent video resulted in a miscarriage of justice or was more prejudicial than probative. To minimize any prejudice, the trial court reasonably excluded the video audio and transcript of the rap song lyrics, while allowing the silent video of the relevant video imagery. We recognized that "California courts have long recognized the potentially prejudicial effect of gang

membership." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) Nevertheless, the trial court reasonably concluded that the silent video was admissible as not unduly prejudicial when weighed against probative value of the silent video evidence. The evidence was not highly inflammatory because there was already substantial evidence that defendant and his companions were gang members and had participated in a drive-by shooting.

Evidence "adverse to a defendant's case does not render it prejudicial within the meaning of [Evidence Code] section 352. [Citation.] In applying this statute we evaluate the 'risk of "undue" prejudice, that is, "'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,'" not the prejudice "'that naturally flows from relevant, highly probative evidence."' [Citations.]'" (*People v. Salcido* (2008) 44 Cal.4th 93, 148.) "[G]ang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect." (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 223.)

Because the silent video was directly relevant to establishing defendant's gang enhancement and motivation for committing the charged drive-by shooting crimes, there was no abuse of discretion or miscarriage of justice in allowing the silent video evidence. Although defendant was not in the video because he was incarcerated, his gang moniker is shown in the silent video and the gang expert, Officer Saenz, testified the silent video

could be reasonably construed as showing defendant's gang conveying adulation and support for defendant because of his involvement in the charged drive-by shooting crimes.

Defendant's reliance on *U.S. v. Gamory* (11th Cir. 2011) 635 F.3d 480, in support of excluding the silent video, is misplaced. Unlike in the instant case, in *Gamory* the trial court allowed a rap video with audio to be played for the jury.[4] The *Gamory* court concluded the probative value of the rap video was outweighed by its prejudicial impact. This determination was based on the particular circumstances in *Gamory*, which included the trial court allowing the jury to hear the rap video, which contained prejudicial, inadmissible hearsay statements. (*Id*. at p. 493.)

People v. Coneal (2019) 41 Cal.App.5th 951, is also distinguishable. In *Coneal*, the trial court permitted the jury to hear and watch five rap videos showing the defendant and members of his gang. The *Coneal* court held that the trial court abused its discretion in admitting the five videos under Evidence Code section 352. The court concluded the rap videos had minimal probative value, because they provided cumulative evidence of other less prejudicial evidence. Also, the rap video lyrics were unduly prejudicial because they could be construed as unfounded, prejudicial statements of fact and intent. We note the *Conceal* court nevertheless held that any error in allowing the videos was harmless error. (*People v. Coneal*, *supra*, at pp. 953-954.) In the instant case, unlike in

[4] We note that intermediate federal court decisions, such as in *Gamory*, are merely persuasive and are not controlling authority. (*People v. Bradley* (1969) 1 Cal.3d 80, 86; *People v. $8,921 United States Currency* (1994) 28 Cal.App.4th 1226, 1232, fn. 6.)

Coneal, the audio and lyrics were not provided to the jury and the jury was shown only one two-minute video, which was relevant to gang issues and motive for the drive-by shooting.

Defendant argues the prosecution's reliance on the silent video and the prosecutor's five references to the silent video during closing argument was unduly prejudicial as inadmissible character evidence. We disagree. The prosecutor's several references to the silent video and playing the two-minute silent video one time during closing argument was not a miscarriage of justice or unduly prejudicial. The silent video was relevant, admissible evidence, which the prosecutor appropriately discussed during her closing argument. (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 223.) Because the silent video was admissible evidence, from which the jury could have reasonably drawn permissible, relevant inferences, we also reject defendant's contentions that showing the silent video to the jury violated his rights to due process and a fair trial.

IV.

PROSECUTORIAL MISCONDUCT DURING CROSS-EXAMINATION OF DEFENDANT

Defendant contends that during his cross-examination, the prosecutor committed misconduct by asking him a series of questions derived from hearsay statements by Turner that were inadmissible under *People v. Aranda* (1965) 63 Cal.2d 518, *Bruton v. United States* (1968) 391 U.S. 123 (*Aranda-Bruton*), and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Specifically, defendant objects to the prosecutor having asked

him if either he or Eley stated just before the drive-by shooting, "'That's him, that's him. Pull up, pull up.'"'"

Defendant argues these statements were inadmissible under *Crawford*, *supra*, 541 U.S. 36, because Turner's extrajudicial statement was inadmissible hearsay and Turner had invoked her right not to testify. She also had not been subject to cross-examination. (*Id.* at p. 53.) In addition, defendant argues Turner's extrajudicial statements were inadmissible under *Aranda-Bruton* because Turner was a codefendant and Turner's statements implicated defendant. Defendant further argues the trial court erred in overruling his *Aranda-Bruton* objection to a question regarding Turner's statement.

The People argue defendant forfeited his objection by not raising it in the trial court. Regardless of whether the objection was forfeited, we will consider it on the merits because defendant is also asserting, in the alternative, ineffective assistance of counsel (IAC) based on defense counsel not raising the objection in the trial court.

A. *Procedural Background*

During an investigative interview in August 2015, Turner told Detective Bonshire that, before the drive-by shooting, defendant and the others in the SUV conversed about a coordinated plan to shoot T.J. During the preliminary hearing in May 2016,[5] Detective Bonshire testified Turner told her that just before the shooting, defendant, Lewis, and Eley "were talking, getting ready to shoot out the subject that was walking towards the

[5] The preliminary hearing transcript was not entered into evidence at trial.

vehicle." Turner further stated she heard defendant say "something to the effect of 'Pull up, pull up, pull up,'" and heard someone say, "'There he is. Let's go get him.'" Turner told Detective Bonshire that immediately after these statements, defendant and Eley began shooting at the victim from the backseat, driver's side of the SUV. Turner said that shortly after she heard defendant say, "'Pull up, pull up, pull up,'" the SUV crashed.

During the prosecution's case-in-chief, Detective Bonshire testified she interviewed Turner on August 20, 2015. There was no attempt to admit into evidence Turner's statement to Detective Bonshire that Turner had heard defendant or Eley tell Lewis to pull up to T.J. so they could "'go get him.'" The substance of this statement by Turner to Detective Bonshire was not disclosed to the jury.

After the prosecution rested, Turner exercised her right not to testify. Defendant, on the other hand, testified. He stated during direct examination that he was unaware of any plan to commit a shooting. He thought he and the codefendants were going to a marijuana dispensary. Defendant further testified Eley committed the shooting on his own, after telling defendant to duck. During cross-examination, defendant testified he believed the prosecutor and police had tried to convince Turner to lie about him.

During recross-examination of defendant by the prosecutor, defendant testified to the following:

Prosecutor: "Isn't it true, sir, . . . you stated, 'Pull up, pull up, pull up. That's him, that's him' . . . ?"

Defendant: "That's not true."

Prosecutor: "Isn't it true . . . someone in that car yelled . . . ." Defendant's attorney objected on hearsay grounds. The court sustained the objection.

Prosecutor: "Isn't it true . . . Mr. Eley was part of someone saying, 'That's him, that's him. Pull up, pull up'?"

Defendant: "I didn't hear Eley say that . . . ."

Prosecutor: "You didn't hear Eley say, 'That's him, that's him. Pull up, pull up'?"

Defendant: "No, I didn't."

Prosecutor: "Did you hear anyone saying 'That's him, that's him. Pull up, pull up' just before the driving started?"

The court sustained defendant's attorney's hearsay objection.

Prosecutor: "Did you say that? Did you say 'That's him, that's him. Pull up, pull up'?"

Defendant: "I don't know him. Why would I say that? No."

Thereafter the prosecutor argued out of the presence of the jury that Turner's attorney introduced testimony that, before the shooting, Turner said she wanted to be taken home because she knew something was going to happen. Nevertheless, Turner chose to stay in the SUV. The prosecutor asserted that Turner's attorney thus opened the door to the prosecution inquiring further regarding the rest of Turner's statements to Detective Bonshire and risked violating *Aranda-Bruton*. The court concluded *Aranda-Bruton* was not at issue as to defendant, and therefore Detective Bonshire could testify

about Turner's statements as long as the testimony did not violate *Aranda-Bruton*. Thereafter, defendant's attorney did not ask any additional questions based on Turner's statements to Detective Bonshire.

During the prosecutor's rebuttal argument, she stated that "That someone said, 'That's him. That's him. Pull up. Pull up,' before they started shooting . . . ,'" "which shows coordination and planning that they're all following and working together."

B. *Analysis*

Defendant argues the prosecutor committed misconduct by incorporating Turner's statements into the prosecutor's cross-examination of defendant when asking him whether he or Eley said "'That's him, that's him. Pull up, pull up.'" While we agree statements by Turner implicating defendant would have been inadmissible under *Aranda-Bruton*, the prosecutor did not attempt to introduce any such statements made by Turner. The prosecutor's cross-examination concerned statements made by defendant or Eley. The cross-examination was not only relevant to refuting defendant's version of his involvement in the drive-by shooting, but also was relevant to refuting defendant's testimony denying any knowledge of or intent to participate in the drive-by shooting.

Under *Aranda-Bruton*, "a defendant is deprived of his or her Sixth Amendment right to confront witnesses when a facially incriminating *statement of a nontestifying codefendant* is introduced at their joint trial, even if the jury is instructed to consider the statement only against the declarant." (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 68;

italics added.) Under *Crawford, supra*, 541 U.S. 36, *Aranda-Bruton* extends only to out-of-court statements that are testimonial in nature. (*Gallardo, supra,* at pp. 68-69.)

Here, *Aranda-Bruton* does not apply to the prosecutor's cross-examination of defendant because it does not concern statements of a nontestifying codefendant. The statements which were the subject of defendant's cross-examination were made either by defendant, who was testifying, or by Eley, who was not a codefendant and was unavailable, because he was deceased.

Defendant's extrajudicial statements were also not inadmissible under *Crawford*. Under *Crawford*, testimonial hearsay violates the Confrontation Clause unless the declarant is unavailable to testify, or the defendant has had the opportunity for cross-examination. (*Crawford, supra*, 541 U.S. 36 at p. 59.) Because defendant was available to testify during the trial regarding whether he made the extrajudicial statements, there was no violation of *Crawford*.

In addition, the subject cross-examination concerned statements that were not hearsay. The prosecutor asked defendant if he or Eley said, "'That's him, that's him'" and "'Pull up, pull up.'" These statements were not offered for the truth of the matter stated. The prosecutor merely asked if the statements had been made by defendant or Eley. In addition, the statements were directives, offered to show defendant's intent to commit the drive-by shooting. (*People v. Clark* (2016) 63 Cal.4th 522, 592 ["We have often characterized commands not as hearsay but rather as 'simply verbal conduct consisting of a directive that was neither inherently true nor false.'"]; *People v. Curl*

(2009) 46 Cal.4th 339, 361-362; *People v. Montes* (2014) 58 Cal.4th 809, 863 ["[A]n out-of-court statement can be admitted for the nonhearsay purpose of showing that it imparted certain information to the hearer, and that the hearer, believing such information to be true, acted in conformity with such belief."].)

C. People v. Earp *(1999) 20 Cal.4th 826*

There also was no misconduct under *People v. Earp* (1999) 20 Cal.4th 826 (*Earp*). In *Earp*, the court held prosecutorial misconduct exits when a prosecutor asks a question containing harmful facts which had not been proven and, most likely, would not be proven by admissible evidence. According to *Earp*, "a prosecutor commits misconduct by asking 'a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means.' [Citation.] For a prosecutor's question implying facts harmful to the defendant to come within this form of misconduct, however, the question must put before the jury information that falls outside the evidence and that, *but for the improper question*, the jury would not have otherwise heard. (See *People v. Warren* (1988) 45 Cal.3d 471, 481[describing the gist of the misconduct as implying in the question 'facts [the prosecutor] could not prove'].)" (*Earp*, *supra*, at pp. 859-860.)

The court in *Earp* noted, however, that if "'the prosecutor is not asked to justify the question, a reviewing court is rarely able to determine whether this form of misconduct has occurred.' [Citation.]" (*Earp*, *supra*, 20 Cal.4th at pp. 859-860; accord,

People v. Price (1991) 1 Cal.4th 324, 481.) "Therefore, a claim of misconduct on this basis is waived absent a timely and specific objection during the trial." (*People v. Price*, *supra*, at p. 481.)

Here, defendant did not object based on prosecutorial misconduct and therefore forfeited his objection to the prosecutor's cross-examination of defendant. Furthermore, there appears to have been good reason not to object. Objecting may have brought attention to the fact that the statements, "'That's him, that's him. Pull up, pull up'" were not in evidence, thus risking the prosecution seeking to introduce evidence of the statements. Alternatively, defense counsel may have reasonably concluded the cross-examination was proper and, therefore, an objection would have been futile and would have brought unfavorable attention to the statements.

We thus conclude there was no IAC, because the prosecutor's cross-examination did not mention that Turner said she overheard defendant or Eley say "pull up" and "that's him." There was thus no basis to object based on *Crawford* or *Aranda-Bruton*. There also were no grounds to object because the cross-examination was proper. The prosecutor had reasonable grounds to believe defendant or Eley made the statements. It was unrefuted that Eley and defendant were in the SUV during the drive-by. There was also evidence that the SUV pulled up to T.J., and defendant and Eley began shooting at him.

Even though defendant testified to a different version of the incident and it may have been unlikely defendant would admit he or Eley said, "pull up" and "that's him," it

was not improper under *Crawford*, *Aranda-Bruton*, or hearsay rules, for the prosecutor to ask defendant on cross-examination whether he made such statements. Because defendant has not established that the cross-examination in question constitutes misconduct, we reject defendant's IAC contention.

D. *Due Process*

Defendant argues his rights to due process and a fair trial were violated by the prosecutor asking defendant if he or Eley said "'That's him, that's him. Pull up, pull up.'" Defendant acknowledges that the prosecutor did not state the cross-examination was based on Turner's statements to law enforcement, but argues this would have been obvious to the jury because the jury had been informed during the trial that Turner was interviewed by the police and defendant believed she had implicated him.

Defendant bases this assumption that it was obvious on the following evidence introduced at trial: (1) Deputy McCracken's testimony that he overheard defendant say to Lewis that Turner is "a whistle. She'll get hers"; (2) Officer Saenz's testimony that defendant said during a recorded jail call that Turner "snitched," and the police made her do it; and (3) Detective Bonshire's testimony she interviewed Turner on August 20, 2015. We conclude it is not obvious from this trial testimony that the prosecutor's cross-examination of defendant was based on Turner's statements to law enforcement. We therefore reject defendant's contention his rights to due process and a fair trial were violated.

V.

ADMISSION OF EVIDENCE LINKING

DEFENDANT TO A 2010 MURDER

Defendant contends the trial court abused its discretion by allowing evidence and closing argument linking defendant to a 2010 murder. Defendant alternatively argues that, if the objection was forfeited, his attorney committed IAC by failing to object to the evidence and closing argument.

A. *Procedural Background Regarding Defendant's Statement*

Out of the presence of the jury, defendant's attorney informed the court that defendant was concerned for his safety in jail because other inmates had learned he had previously killed a six-year-old boy. The prosecutor denied he had relayed the information to any inmate. The prosecutor confirmed defendant previously had been arrested and prosecuted for a drive-by shooting that resulted in the death of a six-year-old child. Defendant had been charged and held to answer for the crime but the case was dismissed a year later because of "a witness issue." The matter was publicized in the news. The trial court found there had been no misconduct by the prosecutor.

Thereafter, during testimony by the prosecution's gang expert, Officer Saenz, defendant objected outside the presence of the jury to the prosecution using as a predicate gang offense defendant's prior 2013 conviction for possessing a firearm for the benefit of a criminal street gang. The trial court overruled the objection and permitted use of the 2013 prior as a predicate act. Officer Saenz then testified defendant was convicted in

2013 of being a felon in possession of a firearm, and defendant had admitted committing the offense for the benefit of a criminal street gang. Officer Saenz further testified the 2013 prior served as a predicate gang offense and as a factor which Officer Saenz relied on in forming his opinion defendant was an active member of the Projects gang.

Before defendant testified, his attorney requested that the prosecution be limited to relying on only the 2013 prior, which had already been admitted as a predicate act. Defendant argued his 2012 prior should be excluded under Evidence Code section 352. The trial court ruled both convictions would be admissible "for impeachment only," limited to the date, nature of the conviction, and location of the conviction. The court stated that the underlying facts might become relevant, depending on defendant's testimony. The court said it would consider admissibility of the facts of the convictions after defendant testified.

Defendant testified he had previously lied that he was not in the SUV during the drive-by shooting in 2015, because he feared Eley's family would retaliate against him and his family, because of Eley's death. Defendant said this was also why he had told others to pressure Turner to lie on defendant's behalf. Defendant admitted several in his family were members of the Gardens gang. When asked about a 2010 murder, defendant testified a boy was shot in 2010, but defendant said he did not know if it was a result of a gang rivalry fight between the Projects and Gardens gangs. Defendant acknowledged that the boy was related to a Gardens member. Defendant denied Gardens were a rival.

The prosecutor asked defendant if he told law enforcement in July 2012, that the reason he was in possession of a loaded gun and was staying in Las Vegas was because the Gardens gang wanted to kill him. Defendant denied this. Defendant admitted he pleaded guilty to carrying a concealed firearm in 2012, but testified he did not remember if he admitted possessing the gun for the benefit of a criminal street gang. Defendant denied he possessed the gun and denied he went to Las Vegas because of an incident in 2010, in which he "got into a little bit of trouble" and because "the Gardens were focusing on" retaliating against him.

Officer Clark testified defendant told him in 2012 that he was in possession of a loaded firearm for his protection, because a rival gang, the Gardens, was after him for a murder. Defendant told Officer Clark the Gardens gang was trying to kill him, and he feared for his life.

The prosecutor stated during closing argument that, when in 2012 defendant was arrested for possessing a firearm, defendant told law enforcement he possessed the firearm because the Gardens gang was trying to kill him. The prosecutor further stated that this was because the Gardens believed defendant was responsible for the 2010 murder. During rebuttal, the prosecutor twice argued that defendant told law enforcement he possessed a gun because the Gardens gang wanted to kill him because the gang linked him to the 2010 murder.

B. *Analysis*

Defendant argues the trial court erred in allowing the prosecutor to ask him about the facts of the 2012 firearm possession conviction. Defendant asserts that the prosecutor used defendant's prior statement to Officer Clark to link him to the 2010 murder. The prosecutor mentioned the 2010 murder four times, including during defendant's cross-examination and closing argument.

Defendant argues he did not forfeit this evidentiary objection because he objected under Evidence Code section 352 in the trial court to the evidence. Although he did not assert prosecutorial misconduct in the trial court or object to use of defendant's prior inconsistent statement to Officer Clark, defendant argues that, if the objections were forfeited, his attorney committed IAC by failing to object. Defendant adds that, even if he had objected and requested an admonition, it was unlikely doing so would have cured the harm.

Regardless of whether defendant forfeited his evidentiary and misconduct objections, we will consider defendant's objections on the merits. Evidence regarding defendant's 2012 statement to Officer Clark police was admissible and had probative value as impeachment evidence and as evidence of defendant's motivation for carrying a weapon and committing the drive-by shooting offense. Defendant argues that, nevertheless, inquiring about his prior statement should have been prohibited under Evidence Code section 352 as more prejudicial than probative. We disagree.

"When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled. [Citation.] On appeal, the [evidentiary] ruling is reviewed for abuse of discretion. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Even though the evidence regarding defendant's 2012 firearm possession conviction may have been adverse to defendant's defense, it was not inadmissible as unduly prejudicial under Evidence Code section 352. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) As noted in *Coddington*, "'"[t]he 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging."' [Citation.]" (*Id*. at p. 588.)

Here, Officer Clark's testimony that defendant had told him he was carrying a gun for protection against the rival Gardens gang, and defendant's cross-examination regarding his 2012 firearm possession conviction was directly relevant to establishing defendant's dishonesty, motivation for committing the crimes, and gang allegations. The evidence was highly probative and relevant because it impeached defendant's trial testimony. In response to being asked about his apparent prior false statements, defendant testified that he had lied because he feared Eley's family would retaliate

against him and his brother, because of the 2010 shooting. The prosecutor's cross-examination regarding defendant's 2012 firearm possession conviction provided relevant, admissible impeachment evidence refuting this testimony. It also refuted his evasive cross-examination testimony that he did not remember or was unaware he had admitted that his 2012 and 2013 prior convictions were gang-related.

Defendant nevertheless argues that the prosecutor's cross-examination and closing argument constituted misconduct because the prosecutor elicited prejudicial testimony about the 2010 murder. Defendant asserts that the prosecutor's expressed disbelief when defendant denied knowing if the 2010 murder was retaliatory improperly conveyed to the jury that defendant committed the murder of the boy. But it cannot be assumed that the jury inferred this from the prosecutor's response and the evidence. There was no evidence presented to the jury that defendant was involved in murdering the boy. The only evidence introduced regarding the 2010 murder was defendant's admissible statement made to Officer Clark that defendant was carrying a gun because he believed the Gardens gang blamed him for "a murder" and, therefore, was "in fear for his life."

We conclude any prejudice caused by admission the gang evidence or evidence of defendant's prior inconsistent statement to Officer Clark was outweighed by the probative value of the admissible evidence and thus was proper under Evidence Code section 352. We therefore also conclude there was no prosecutorial misconduct. Defendant thus has not established that the trial court abused its discretion by allowing evidence related to defendant's 2012 conviction.

VI.

PROSECUTORIAL MISCONDUCT DURING REBUTTAL

Defendant contends the prosecutor committed prejudicial misconduct during rebuttal by misstating testimony, mischaracterizing the defense's theory, and making unsupported and false factual claims. We reject these arguments, with the exception of the contention that the prosecutor referred to facts not in evidence.

A prosecutor is given wide latitude during closing argument and rebuttal. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) The prosecutor may argue vigorously as long as it amounts to fair comment on the evidence, which can include reasonable inferences and deductions from the evidence. (*Ibid.*) "When a defendant makes a timely objection to prosecutorial argument, the reviewing court must determine first whether misconduct has occurred, keeping in mind that '"[t]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom"' [citation], and that the prosecutor 'may "vigorously argue his case" . . . , "[using] appropriate epithets warranted by the evidence."' [Citation.] Second, if misconduct had occurred, we determine whether it is 'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct." (*People v. Welch* (1999) 20 Cal.4th 701, 752-753 (*Welch*).) "We review the trial court's rulings on prosecutorial misconduct for abuse of discretion." (*People v. Peoples* (2016) 62 Cal.4th 718, 792-793.)

A. *Mischaracterizing Defense's Theory of the Case*

Defendant contends the prosecutor improperly argued that defendant's theory, that Eley was firing two guns at once while sitting on the SUV windowsill, was implausible. Defendant asserts his attorney actually argued the plausible theory that Eley fired out the rear, driver's side window and later fired over the roof.

Defendant argues the prosecutor also misstated the defense as being that both guns were outside the vehicle at the time of impact, with one gun flying forward and then reentering the SUV. Defendant explains that his actual theory was that one gun, the Glock, was inside the SUV during the crash, and may have come in contact with defendant while items were flying through the SUV, and eventually ended up as it did in the middle of the street.

We conclude the prosecutor's arguments did not rise to the level of prejudicial misconduct requiring reversal. "To observe that an experienced defense counsel will attempt to 'twist' and 'poke' at the prosecution's case does not amount to a personal attack on counsel's integrity." (*People v. Medina* (1995) 11 Cal.4th 694, 759; see *People v. Young* (2005) 34 Cal.4th 1149, 1191.) This is because a prosecutor has broad discretion to state the prosecution's views as to what the evidence shows and what inferences may be drawn from the evidence. (*Welch*, *supra*, 20 Cal.4th at p. 752.)

Here, the prosecutor simply urged the jury, within the bounds afforded prosecutors during argument, to draw reasonable inferences from the evidence and construe defense

counsel's argument in a way that was unfavorable to the defense. The prosecutor properly attempted to discredit the defense's theory by urging the jury to conclude the evidence demonstrated defendant's theory was implausible. Furthermore, even if the prosecutor did not accurately construe defendant's theory of the case during rebuttal, the trial court appropriately reminded the jury during rebuttal that the jury was to decide the case based solely on the evidence, and the prosecutor's argument did not constitute evidence. We therefore conclude that the prosecutor's characterization of the defense did not constitute prejudicial misconduct during rebuttal.

C. *Improper Reliance on GSR Evidence*

Defendant argues the prosecutor improperly invited the jury to speculate that the GSR evidence was inconsistent with defendant's testimony. A criminologist testified he evaluated GSR evidence, from which he determined that there was GSR on Eley's left hand and none on Eley's right hand. There was also GSR on both defendant's right and left hands. There was no GSR on Turner or Lewis's right or left hands. The criminologist testified that GSR on a person did not establish that the person fired a gun. The criminologist explained that this is because the presence of GSR indicates several possibilities: that the person (1) fired or handled a firearm, (2) was within 12 feet of a discharging firearm, or (3) had contacted a surface that had GSR on it.

During closing argument, defendant's attorney argued that, although there was evidence of defendant's DNA on the grip of the Glock, the DNA "could have come from anyplace" and the GSR found on defendant's hands was "very likely" the result of GSR

mist landing on defendant. Defendant's attorney argued that one of the guns Eley was firing when the SUV crashed could have struck defendant, causing GSR mist while defendant was ducking, or GSR could have landed on defendant when Eley fired over him.

Defendant objects to the prosecutor's rebuttal, in which the prosecutor stated: "This mist while Mr. Jackson is ducking down gets all over him because they're in such close proximity, yet doesn't end up on" Lewis or Turner. Defendant argues the prosecutor improperly implied during closing argument that the defense made no sense, and improperly invited the jury to draw the unsupported inference that GSR would have spread differently among the SUV occupants had defendant not fired a gun.

The prosecutor's rebuttal was not improper. The prosecutor had broad discretion to state the prosecution's views as to what the evidence showed and suggested inferences that reasonably could have been drawn from the evidence. (*Welch*, *supra*, 20 Cal.4th at pp. 752-753, 793.) It also was not misconduct for the prosecutor to refute defendant's closing argument by highlighting the implausibility of the defense's arguments, based on the GSR and DNA evidence and reasonable inferences drawn from the evidence. (*Ibid*.)

C. *Mischaracterizing Expert Witness Testimony*

The prosecution's expert witness, Officer Silva, inspected the SUV. Officer Silva testified it appeared that the bullet that struck the roof of the SUV was fired from the right rear seat of the SUV. Based on the angle of the bullet's trajectory, he believed the gun was fired into the SUV, a few feet from above the bullet hole, downward toward the

roof. Officer Silva further testified he was unable to locate an exit hole, where the bullet could have exited the SUV and did not find a spent round inside the SUV. He only found the single bullet hole in the roof. He said he "couldn't determine whether what [he] was looking at was an exit point or damage as part of the collision." Officer Silva stated that he believed the gun was fired within close proximity to the bullet hole, and could have happened by someone sitting below the roof, with their arm extended over the roof of the car and the gun above the roof.

Defendant argues the prosecutor improperly argued, without any supporting evidence, that it was not possible to determine the distance of the gun from the bullet hole when the gun was fired. We disagree. Officer Silva indicated he was unable to determine the exact distance but estimated the gun could have been a couple of feet above the SUV roof when it was fired. The prosecutor's argument was within the prosecutor's broad discretion to state his or her views of what the evidence showed and suggest inferences that reasonably could have been drawn from the evidence. (*Welch*, *supra*, 20 Cal.4th at pp. 752-753.)

D. *Referring to Facts Not in Evidence*

Defendant contends the prosecutor committed misconduct during rebuttal by misstating defendant's trial testimony and referring to facts not in evidence. We agree, but this was harmless error.

During cross-examination of defendant, defendant denied he had said, "'That's him, that's him. Pull up, pull up.'" He also denied that Eley or anyone else in the SUV made such statements. However, during the prosecutor's rebuttal, she stated that defendant testified that defendant heard Eley say, "'That's him. That's him. Pull up. Pull up,'" The prosecutor also stated during rebuttal that "someone said, 'That's him. That's him. Pull up. Pull up,' before they started shooting . . . ,'" "which shows coordination and planning that they're all following and working together."

Defendant is correct that there was no evidence introduced at trial that these statements had been made. Therefore, the prosecutor's argument regarding the statements was improper. The People concede in their respondent's brief that Turner's extrajudicial statement to law enforcement that she heard someone in the SUV say, "'That's him, [t]hat's him. Pull up, pull up,'" was not admitted into evidence, and the prosecutor erroneously argued that defendant had admitted overhearing the statement.

As stated in *People v. Hill* (1998) 17 Cal.4th 800, 827-828, stating facts during closing argument that are not in evidence, "is 'clearly . . . misconduct' [citation], because such statements 'tend[ ] to make the prosecutor his own witness — offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.] 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.'

[Citation.]" (*Ibid.*)

However, "[i]t is a fundamental principle that reversal for prosecutorial misconduct is not required unless the defendant can show that he has suffered prejudice. [Citations.]" (*People v. Uribe* (2011) 199 Cal.App.4th 836, 873; see, *In re Martin* (1987) 44 Cal.3d 1, 54 [dismissal unwarranted where no showing that prosecutorial misconduct "prejudiced the defense by undermining the defendant's ability to mount a defense"].)

We conclude the prosecutor's misstatements during rebuttal constitute harmless error. The prosecutor's remarks were brief and there was other strong evidence showing coordination and planning of the drive-by shooting by defendant and his companions in the SUV, with possibly the exception of Turner. Such evidence included evidence that defendant was a gang member; he was with other members of his gang; the group committed a drive-by shooting against T.J., a rival gang member; defendant was one of the shooters, based on GSR, DNA, and gun evidence; Lewis's wife rented the SUV; Lewis parked the SUV down the street from the Gardens home, where rival gang members were known to congregate; when T.J. exited the Gardens home, Lewis drove the SUV with its lights off, toward T.J.; defendant and Eley fired a barrage of bullets at T.J. and the Gardens home as the SUV passed by; the SUV was hit by gunfire; Lewis lost control of the SUV, and crashed into a tree; and defendant and Lewis fled from the SUV.

Based on the totality of this evidence, we conclude the prosecutor's error in referring to facts not in evidence was harmless error. It is not reasonably probable that the trial outcome would have been more favorable to defendant, had the prosecutor's

erroneous rebuttal statements not been made. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) Reversal for prosecutorial misconduct thus is not required here where defendant has not demonstrated he suffered prejudice. (*People v. Uribe, supra,* 199 Cal.App.4th at p. 873.)

Because this was the only instance of error, we reject defendant's contention there was cumulative error. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1382[no cumulative error where court "rejected nearly all of defendant's assignments of error"]; *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.)

E. *Argument that Defendant's Version Only Happens on Television*

Defendant contends the prosecutor committed prejudicial prosecutorial misconduct, in violation of his right to due process, by arguing during rebuttal that defendant's version of the drive-by shooting only happens on television. Defendant's attorney argued during closing argument that the drive-by shooting was committed by Eley shooting over the SUV roof while sitting on the windowsill. The prosecutor responded during rebuttal: "No one would do that. You would seek cover inside the vehicle, so you could hide more quickly. So he's trying to give you a theory which is something you might see on TV and picture, Oh, well, that would be cool. You see them hopping up and down. That's not real. [¶] Real people are aware that they can be shot back, and they're not stupid about it."

Defendant argues this was improper rebuttal because it was false and was an attempt to invoke the prosecutor's personal beliefs, which were founded on facts not in evidence. We conclude the prosecutor's rebuttal argument did not constitute misconduct. The evidence at trial supported the prosecutor's argument that defendant's version of the incident might not be plausible. A traffic reconstruction expert testified that if someone had been sitting on the SUV windowsill during the crash, that person (Eley) would have been ejected. The pathologist testified that Eley's injuries were not consistent with being ejected from a moving vehicle. The pathologist concluded Eley's injuries were "crush" injuries from being inside the vehicle during the crash.

Because the prosecutor's argument was founded on admissible evidence, her argument was proper. Her description of defendant's version of the incident, as being an unreal, TV scenario, also does not constitute misconduct. "Using colorful or hyperbolic language will not generally establish prosecutorial misconduct." (*People v. Peoples*, *supra*, 62 Cal.4th at p. 793.) """""[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom . . . ." [Citation.]""""" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 368; see *Welch*, *supra*, 20 Cal.4th at pp. 752-753.) The prosecutor's rebuttal arguments amount to fair comment on the evidence and lack of plausibility of defendant's version of the incident.

VII.

SUFFICIENCY OF THE EVIDENCE

The jury found defendant guilty of second degree, provocative act murder. This conviction reflects that the jury rejected defendant's theory that Eley shot a bullet into the SUV roof. Defendant contends his second degree murder conviction (count 1) was not supported by substantial evidence.

A. *Applicable Law*

The People argue there was sufficient evidence supporting defendant's second degree murder conviction based on the provocative act murder theory. This theory is explained in *People v. Cervantes* (2001) 26 Cal.4th 860 (*Cervantes*) as follows: Principles of implied-malice murder and intervening-act causation apply "to situations in which criminal defendants neither killed nor intended to kill, but instead caused a third party to kill *in response* to their life-threatening provocative acts. [Citation.] The traditional provocative act factual pattern is but a subset of those homicide cases in which death results through the acts of an intermediary. In all homicide cases in which the conduct of an intermediary is the actual cause of death, the defendant's liability will depend on whether it can be demonstrated that his own conduct *proximately caused* the victim's death—i.e., whether it can be shown that the intermediary's conduct was merely a dependent intervening cause of death, and not an independent superseding cause. If proximate causation is established, the defendant's level of culpability for the homicide in turn will vary in accordance with his criminal intent." (*Id.* at p. 873, fn. 15.)

The trial court instructed the jury that murder is unlawful homicide with malice aforethought, that malice can be implied from deliberately committing a dangerous act with indifference to human life, and that committing a provocative act resulting in death can be such an act. (*Cervantes, supra,* 26 Cal.4th at p. 864.) The trial court further instructed the jury "that liability for homicide requires a causal connection between an unlawful act and death, namely, that the act's direct, natural and probable consequences must be death" (*id.* at p. 865), and that "a direct, natural and probable consequence must be reasonably foreseeable, measured objectively under a reasonable person test." (*Ibid*.) The court also instructed the jury regarding expert opinion testimony: "You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. . . . You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

B. *Analysis*

We recognize the jury could have rejected the prosecution's provocative act murder theory and construed the evidence as supporting one of defendant's various theories of the case. Defendant's theories included that (1) Eley fired a bullet into the SUV rather than the bullet hole being caused by retaliatory Gardens gunfire; (2) any return gunfire was "likely an opportunistic, malicious criminal act perpetrated by a bystander," acting as an independent, superseding intervenor; and (3) even if there was return gunfire, it did not proximately cause Eley's death.

Even if there was evidence supporting these defense theories, there also was substantial evidence refuting them and supporting the prosecution's provocative act murder theory. The prosecution presented evidence and argued that retaliatory return gunfire, triggered by the drive-by shooting, caused Lewis to lose control of the SUV and crash, resulting in Eley's death from crash-related injuries. It is improper for this court to reverse defendant's murder conviction based upon a reweighing of the evidence in favor of defendant. This court "must review 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of a second degree, provocative act murder beyond a reasonable doubt. (*People v. Hatch*, *supra*, 22 Cal.4th at p. 272.) Evidence supporting defendant's provocative act murder conviction includes evidence that the drive-by shooting was committed by defendant and his companions using a rental SUV; parking it down the street from the Gardens home where rival gang members congregated; driving with the SUV lights were turned off, towards T.J. when he exited the Gardens home and got in his car; firing a barrage of bullets at T.J. and the Gardens home as the SUV passed by T.J.'s car and the Gardens home; receiving return gunfire; and crashing into a tree, causing Eley's death from crash-related injuries.

In addition, a gang expert testified that the Projects and Gardens were rival gangs and had been engaged in a gang war since 2015. As a result, there had been numerous retaliatory shootings between the two rival gangs, including drive-by shootings and murders. The gang expert further testified drive-by shootings are commonly committed by using a vehicle rented by a third party so that the vehicle cannot be easily traced to the shooter. The SUV was recently rented by Lewis's wife. The gang expert also testified that rival gangs' feuds are very violent. "If they have access to weapons, it's a shooting for sure as soon as they see each other."

The prosecution presented expert witness testimony discrediting defendant's theory that Eley fired a bullet from above the SUV roof, down into the SUV, while sitting on the windowsill on the rear, passenger side of the SUV. A CHP officer, testifying as a traffic reconstruction expert, testified that had Eley been sitting on the windowsill, he would have been ejected when the SUV crashed. An autopsy showed Eley suffered blunt force injuries consistent with being in a car accident while inside the SUV. The pathologist testified that Eley's injuries were not consistent with being ejected from a vehicle. Therefore, a reasonable inference could be made that Eley did not fire the bullet that entered the SUV above the driver's head, from above the roof of the SUV.

The jury could reasonably conclude from the trial evidence that the SUV crash, killing Eley, was caused by someone associated with the Gardens gang who returned gunfire during the drive-by shooting, causing Lewis to lose control of the SUV. There was evidence the SUV accelerated right before the crash, from 19 to 46 miles per hour.

There was also evidence that defendant and Eley were firing at, not only T.J.'s car, but also at the Gardens home. There were 3 bullet strikes in the Gardens home and one bullet strike in the wall between the Gardens home and an adjacent home. T.J.'s car, which was parked in front of the adjacent home, had 4 bullet holes. The jury could have reasonably found that, under these circumstances, return gunfire in response to the drive-by shooting, triggered the SUV crash and Eley's death. The evidence was also sufficient to support a reasonable finding that Eley's death was a natural and probable consequence of defendant's conduct during the drive-by shooting, and was proximately caused by defendant's and his companions' dangerous and reckless behavior committed during the drive-by shooting.

Defendant's reliance on *Cervantes*, *supra*, 26 Cal.4th 860, for the proposition there was insufficient evidence to support his murder conviction, is misplaced. In *Cervantes*, the defendant, who was a member of the Highland Street gang, went to a birthday party thrown by the Alley Boys gang. The two gangs were not rivals at that time. The defendant called a woman at the party a "ho" when she declined his advances. Juan Cisneros, an Alley Boys member, told the defendant not to disrespect the woman. Cisneros drew a gun and threated to shoot the defendant. The defendant brandished a handgun. Richard Linares, an Alley Boys member, intervened by touching the defendant on the shoulder to separate the men. The defendant told him, "nobody touches me" and shot Linares in the arm and chest. Someone yelled that a "homeboy" had been shot. A melee erupted. The defendant fled. As Hector Cabrera, a Highland Street gang member,

was also driving away, a group of Alley Boys shot and killed him. Recovered shell casings showed at least five shooters had participated in killing Cabrera.

The defendant was convicted of murdering Cabrera based on the theory of provocative act murder. The defendant argued on appeal that there was insufficient evidence of provocative act murder. The California Supreme Court in *Cervantes*, *supra*, 26 Cal.4th 860, agreed, focusing on the element of proximate causation. The court explained that "The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander." (*Cervantes*, *supra*, at p. 867.)

The court in *Cervantes* explained that "'[i]n general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.] On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability.

[Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' [Citation.]" [Citation.]'" (*Cervantes, supra,* 26 Cal.4th at pp. 870-871.)

In other words, "no criminal liability attaches to an initial remote actor for an unlawful killing that results from an independent intervening cause (i.e., a superseding cause). In contrast, when the death results from a dependent intervening cause, the chain of causation ordinarily remains unbroken and the initial actor is liable for the unlawful homicide." (*Cervantes, supra,* 26 Cal.4th at pp. 868-869.) Ordinarily the question of whether an act of a second party is too remote to be a proximate cause will be for the jury, unless "'undisputed evidence may reveal a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus. [Citations.]'" (*Id.* at pp. 871-872, citing *People v. Roberts* (1992) 2 Cal.4th 271, 320, fn. 11.)

Based on these principles, the *Cervantes* court held the evidence was insufficient to support the defendant's conviction for provocative act murder. The *Cervantes* court concluded the prosecution failed to establish proximate causation. (*Cervantes, supra,* 26 Cal.4th at p. 872.) The court in *Cervantes* explained: "The facts of this case are distinguishable from the classic provocative act murder case in a number of respects. Defendant was not the initial aggressor in the incident that gave rise to the provocative act.[] There was no direct evidence that Cabrera's unidentified murderers[] were even

present at the scene of the provocative act, i.e., in a position to actually witness defendant shoot Linares. Defendant himself was not present at the scene where Cabrera was fatally gunned down; the only evidence introduced on the point suggests he was already running away from the party or speeding off in his car when the victim was murdered." (*Id.* at p. 872, fns. omitted.) The *Cervantes* court added that the critical fact distinguishing *Cervantes* from other provocative act murder cases was that in *Cervantes*, the actual murderers did not respond to defendant's provocative act by shooting at the defendant, in the course of killing someone. Nor were the actual murderers acting without volition, reflexively. (*Cervantes*, *supra*, at p. 873.)

The instant case is distinguishable from *Cervantes*, *supra*, 26 Cal.4th 860. Unlike in *Cervantes*, there was substantial evidence that defendant was an initial aggressor committing the provocative act, the drive-by shooting. There was evidence this act directly and foreseeably gave rise to return gunfire by a rival gang, leading to the SUV driver losing control of the SUV and crashing, which caused Eley's death. There was also direct evidence that whoever fired at the SUV in response to defendant's provocative act of firing at T.J. and the Gardens home was present at the scene of the provocative act, and immediately responded by returning gunfire. In addition, unlike in *Cervantes*, defendant was present during the drive-by shooting, return gunfire, and SUV crash, in which Eley sustained his fatal injuries. Furthermore, the return gunfire was directed at defendant and was in direct response to defendant's provocative act, the drive-by shooting.

The acts leading to Eley's death were thus foreseeable acts dependent upon defendant's provocative act of engaging in the drive-by shooting. We therefore conclude the evidence was sufficient to support defendant's conviction for provocative act murder.

VIII.

SENATE BILL NO. 1393

Defendant contends, and the People agree, that this court should remand this matter to allow the trial to exercise its discretion to strike his five-year section 667, subdivision (a)(1) enhancement under Senate Bill No. 1393.

Effective January 1, 2019, Senate Bill No. 1393 amended sections 667, subdivision (a), and 1385, subdivision (b), to allow the trial court, in its discretion, to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under former versions of sections 667, subdivision (a), and 1385, subdivision (b), in effect when the trial court sentenced defendant, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony" (former § 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667" (former § 1385, subd. (b)).

Changes to sections 667, subdivision (a), and 1385, subdivision (b), enacted by Senate Bill No. 1393, apply retroactively to judgments that were not final when Senate Bill No. 1393 went into effect on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) This matter therefore must be remanded to allow the trial court to

consider whether to exercise its discretion to dismiss defendant's prior serious felony conviction, five-year enhancement under amended sections 667, subdivision (a), and 1385, subdivision (b).

IX.

SENATE BILL NO. 136

Defendant filed a supplemental brief arguing defendant's prison prior should be stricken under Senate Bill No. 136. The People filed a respondent's brief agreeing defendant's prison prior should be stricken under Senate Bill No. 136.

"Prior to January 1, 2020, section 667.5, subdivision (b) required trial courts to impose a one-year sentence enhancement for each true finding on an allegation the defendant had served a separate prior prison term and had not remained free of custody for at least five years." (*People v. Jennings* (2019) 42 Cal.App.5th 664, 681.) Effective January 1, 2010, Senate Bill No. 136 amended section 667.5, subdivision (b), to limit enhancements for prison priors to prior prison terms for certain sexually violent offenses. (§ 667.5, subd. (b).)

The parties agree, as do we, that defendant's prior prison term was not for a sexually violent offense and therefore no longer qualifies as a prison prior enhancement under section 667.5, subdivision (b).

The parties and this court also agree that the amendments enacted by Senate Bill No. 136 apply retroactively to any case in which the judgment is not yet final on Senate

Bill No. 136's effective date. (*People v. Jennings*, *supra*, 42 Cal.App.5th at p. 682.) Defendant's section 667.5 prison prior enhancement therefore must be stricken.

X.

DISPOSITION

The judgment is affirmed as to Defendant's convictions, but his sentence is reversed as to his prior prison term enhancement (667.5, subd. (b)) and prior serious felony conviction enhancement (§ 667, subd. (a)), and the matter is remanded for resentencing.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

I concur:

RAMIREZ
P. J.

[*People v. Jackson*, E070511]

FIELDS J., Concurring and Dissenting.

I fully concur in all aspects of the majority opinion except its determination that "the evidence was sufficient to support defendant's conviction for provocative act murder." As to that portion of the opinion, I must respectfully dissent.

The essential question presented here is whether sufficient evidence supports defendant's conviction of murder based on the provocative act murder theory. In *People v. Cervantes* (2001) 26 Cal.4th 860 (*Cervantes*), our Supreme Court explained the provocative act murder doctrine as its application of the principles of implied malice murder in "situations in which criminal defendants neither kill nor intend to kill, but cause a third party to kill in response to their life-threatening provocative acts." (*Id*. at p. 867.) Applying the provocative act murder doctrine to this case, the question to be determined is whether there is sufficient evidence that defendant caused a third party to kill in response to his life-threatening provocative acts.

In answering this question, I recognize that we view the evidence in the light most favorable to the verdict and we must determine "whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) To be sure, as the majority points out, there is substantial evidence of defendant's life-threatening acts. Such evidence includes evidence that the drive-by shooting was committed by defendant and his companions using a rental SUV that they drove with the lights turned off towards T.J.

when he exited his aunt's house (hereafter the Gardens home) and got in his car; that defendant and his companions then fired a barrage of bullets at T.J. and the Gardens home as the SUV passed by T.J.'s car and the Gardens home; and more specifically, that defendant was an actual shooter based on the DNA, gunshot residue, and gun evidence. What is lacking is substantial evidence that a third party killed in response to defendant's provocative acts.

There is no evidence, as the prosecution argues, that a third party shot at the SUV, causing it to crash. Not a single witness testified that there was any gunfire from T.J. or any other person near T.J. or the Gardens home directed back at the SUV. Nor was there any evidence that anyone even heard gunfire coming from the area where T.J. or the Gardens home was located. Further, there was no forensic evidence demonstrating the trajectory of any bullets toward the SUV. In fact, T.J. specifically testified that he was not aware of anyone firing back at the SUV and there was no evidence to contradict his testimony. Moreover, there was no evidence that there was even any other person near T.J. or the Gardens home at the time of the shooting.

The only evidence as to any shooting at or near the SUV came from the prosecution's own witnesses. There was a single bullet hole in the roof of the SUV located above the driver's seat. This was the prosecution's basis for arguing that someone from the rival Gardens gang must have fired back at the SUV. The People specifically argued in their brief that "it was reasonable for the jury to reach the

conclusion that the SUV received return fire during the drive-by shooting, and that the return fire precipitated the almost-immediate crash of the vehicle."

The question is whether there is substantial evidence that the bullet hole was caused by a bullet that came from a third party causing the SUV to crash. I submit there is no substantial evidence that the bullet came from a third party but there is overwhelming evidence that it came from the SUV containing defendant and his companions. The majority correctly identifies the evidence demonstrating the bullet hole came from the suspect vehicle—the SUV. Officer Silva opined that the bullet hole was caused by a bullet fired from the SUV. The majority summarize Officer Silva's testimony as follows: "Police Officer Silva, who examined the SUV, estimated the bullet hole was made by firing a gun held about two feet above the SUV roof. Officer Silva testified he believed the bullet was possibly fired by someone just outside the passenger side, rear door of the SUV, from overhead, toward the left, front, driver's side. In Officer Silva's opinion the right rear passenger fired a handgun as the SUV was traveling southbound on Blackstone. He further determined the bullet travelled at a downward angle as it entered into the top of [the] SUV roof from outside the SUV. The bullet originated from northwest of the bullet hole and traveled in a southeasterly direction. It then went through the roof just above the driver's head, went back into the roof headliner, and may have been trapped in there or exited. Officer Silva was unable to determine the exit point of the bullet or find the spent round. He did not know if the spent round remained inside the SUV."

Officer Siems also examined the vehicle and also opined that the bullet hole was caused by a shot fired from the SUV. The majority summarizes his testimony as follows: "Officer Siems, who examined the SUV, testified he also believed the bullet hole was made by a bullet fired from above the SUV, traveling from above the right rear passenger, at a downward angle towards the area of the driver. Red clothing fibers were embedded in the rear passenger side window frame." The clothing fibers are consistent with both officers' testimony that the bullet came from the area of the right rear passenger.

Finally, California Highway Patrol (CHP) Officer Bozyk, who testified as a traffic reconstruction expert, opined that if the shooter had been sitting on the right rear windowsill at the time of the crash, the shooter would have been ejected from the SUV. This raises the possibility that, contrary to the testimony of the other two officers, perhaps the hole in the SUV was not caused by the right rear passenger being the shooter. However, Officer Bozyk's testimony is not inconsistent with the testimony of the other officers. The crash occurred after the drive by shooting. The right rear passenger apparently returned inside the car after the drive-by shooting. In fact, such conduct would be expected. The evidence fully supports the position that the right rear passenger was back in the vehicle at the time of the crash as the right rear passenger was not ejected from the vehicle but, according to the autopsy, died from blunt force injuries caused by the crash. In any event, Officer's Bozyk's testimony does not relieve the People of their

burden of proving that the shot was fired from a third person, which I believe they have failed to do.

In considering a claim that insufficient evidence supports a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The standard of review is the same in cases in which the People rely mainly on circumstantial evidence." (*People v. Cravens* (2012) 53 Cal.4th 500, 507.)

In the absence of evidence that a third party shooter shot at the vehicle and caused the SUV to crash, we are left only with speculation that the shot came from a third party. I am aware of the evidence of the bad blood between the two gangs. However, such evidence cannot substitute for evidence of an actual third party shooter. Motive alone cannot support a conviction. (See generally *People v Thompson* (2016) 1 Cal. 5th 1043, 1123.)

Because I believe the evidence was insufficient to demonstrate the applicability of the provocative act murder doctrine, I respectfully dissent to that aspect of the majority opinion. I would reverse the murder conviction. In all other aspects, I fully concur with the majority opinion.

FIELDS

J.