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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALAN WILLIAMS, Defendant and Appellant.	F052218 (Super. Ct. No. MCR017968B) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Jennifer R. S. Detjen, Judge.

Sharon Giannetta Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the Facts and parts I, IIA., IIB., IID., IIE., and IIF. of the Discussion.

On the evening of March 1, 2004, Rose Johnston was stabbed to death because she ostensibly caused a conflict between two members of a group of young men calling themselves the Small Town Peckerwoods. Her body was then placed inside her car and burned beyond recognition. As a result of these events, appellant Michael Alan Williams now stands convicted, following a jury trial, of murder involving the personal use of a deadly weapon and committed by an active participant in a criminal street gang to further the activities of that gang (Pen. Code,[1] §§ 187, subd. (a), 190.2, subd. (a)(22), 12022, subd. (b)(1); count 1) and active participation in a criminal street gang (§ 186.22, subd. (a); count 2).[2] His motion for a new trial was denied, and he was sentenced to life in prison without the possibility of parole plus one year.

In the published portion of this opinion, we will address the relationship that must exist before a smaller group can be considered part of a larger group for purposes of determining whether the smaller group constitutes a criminal street gang. In the unpublished portion, we will reject appellant's various claims of error affecting the murder conviction. We will also reject his claims of evidentiary insufficiency with respect to the special circumstance finding and conviction on count 2. Because we conclude the evidence was sufficient to establish the Small Town Peckerwoods were a criminal street gang, but we cannot determine whether jurors based their determination in this regard solely on evidence concerning that group or also erroneously considered evidence related to some larger Peckerwood organization, however, we will reverse the special circumstance finding on count 1 and the conviction on count 2.

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

[2] Raymond Allen Elisarraras was jointly charged with appellant. Prior to trial, he committed suicide in jail.

FACTS*

I

PROSECUTION EVIDENCE

A. The Homicide

On March 1, 2004, a barbecue was held at the rural Madera home of Raymond Elisarraras (also known as Bubby) and Tawnya Abbott (also known as Hopie or Hopi), in celebration of Elisarraras's birthday. Appellant (also known as Mouse), who was living with Elisarraras and Abbott at the time, attended the gathering, as did John James, Ben Owen, and Justin Anderson. In addition, Rose Johnston brought Anthony Smith, Sharee Baker and her 16-year-old brother, Shannon Baker (sometimes Sharee and Shannon, respectively), and Sharee's boyfriend, Rhyse Parsons.[3]

Shannon Baker and Rose Johnston were friends. Although they had kissed before, Shannon did not really view them as having had a romantic relationship. He denied that his relationship with Johnston caused any problems between him and his friend, Anthony Smith, who was also friends with Johnston, or that he and Smith had an argument concerning her. At some point during the party, John James and Johnston played a drinking game, during which Johnston initiated physical contact. As James was interested in going farther, he asked Anthony Smith, who he knew liked Johnston, what Smith thought. Smith said he did not care, but James could tell by his expression that he

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* See footnote, *ante*, page 1.

[3] Parsons identified himself as a member of the Small Town Peckerwoods, and had an "STP" tattoo that was related to that group. About a dozen of his friends, including appellant, Justin Anderson, John James, Ben Owen, and Anthony Smith also had tattoos relating to the Small Town Peckerwoods. Michael White and his brother, Paul, associated with the group.

We set out the gang-related evidence in further detail, *post*.

did. Out of respect for a friend, James did not speak to Johnston the rest of the time he was there. Smith did not show any anger toward James.

As the evening progressed, a lot of the males were smoking methamphetamine, and there was lots of drinking. Johnston became very drunk. Ben Owen believed appellant had Johnston's keys and, at some point, she and Anthony Smith argued, although he was uncertain whether he had an actual memory or was told by someone. He remembered someone telling Johnston it was time to go or that she had to leave, but he could not remember whether it was appellant.[4]

At some point, Johnston went and sat in her car. Justin Anderson heard appellant, who was inside the house, say she was a slut. Appellant seemed angry and said she was "fucking all the homeboys." Several of the people inside the house were saying similar things about her. Elisarraras also seemed upset with Johnston that evening. He said she was getting in between the homeboys. Anderson knew Anthony Smith and Shannon Baker, and observed a problem between them over Johnston. According to Anderson, the group was "tight" before Johnston started coming around. After, everyone was "still tight," except for Smith and Baker, who were both having a relationship with Johnston. Both of them got kind of attached to her, and they ended up getting into a fistfight in which a pocket knife was pulled, and then the fight was broken up. Anderson believed this occurred either earlier the day of, or the night before, the barbecue. However, there were no fights at the barbecue.

Appellant invited Jennifer Stowers to the barbecue, and, as she had to work until 8:00 p.m., she arrived near the end of the party. Owen and James had already left. Johnston was in her car, and Smith and Shannon Baker were talking to her. When

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[4] Owen told Detective Hancock that Anthony Smith and Rose Johnston got into an argument sometime during the party, and that appellant asked Johnston to leave.

Stowers pulled up, they both approached her car; they were laughing and joking around with each other. Stowers also talked to Johnston, who repeatedly said she was drunk.

Before Stowers arrived, appellant told her that Johnston was getting on his nerves, he wished she would leave, and he wanted to kill her. Later, he said again that he just wanted her to leave. He also said he wanted to kill her. When Stowers asked him why he was so angry and wanted her to leave so badly, he said Johnston was "fucking with the homeboys." He seemed angry the entire time Stowers was there.[5]

Stowers estimated that she stayed at the barbecue for about an hour. The Bakers and Parsons, who had school the next day, asked Stowers to take them home. Stowers offered, to no avail, to take Johnston home, as well. She did not say anything about appellant wanting to kill Johnston, though, because she did not believe he was going to. Stowers, Parsons, and the Bakers left around 10:00 or 10:30 p.m. Prior to leaving, Stowers noticed that appellant and Elisarraras had changed clothes, which she thought was odd. It was also odd that appellant did not say good-bye to her. When she left, he was standing under one of the trees, staring blankly at Johnston's car. Parsons believed Johnston was asleep in the vehicle. Besides Johnston, only Elisarraras, appellant, and Abbott remained at the house, although Jack Craig pulled up as Stowers and her group were leaving.

Jack Craig had been good friends with Elisarraras for about eight years and had known appellant for about 12 years, although they did not really become acquainted until appellant moved in with Elisarraras and Abbott. He was not acquainted with Rose Johnston. On the night of the barbecue, he arrived at the house around 10:00 p.m.

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[5] Stowers had lived with Elisarraras and Abbott from November 2003 to February 2004. Appellant previously had told her that he and Johnston had had intercourse on Valentine's Day. Stowers was not angry about it, since she and appellant were not dating then. Although she moved out of the house soon after, she continued to return to spend time with appellant, as they remained friends.

Stowers's car was leaving as he drove up. He parked in the half-circle driveway, a couple of car lengths from a dark blue hatchback.

Elisarraras and appellant were standing on the front walk. They did not acknowledge Craig until he walked up to them. As he approached, appellant started walking toward the hatchback. Elisarraras said, "'Oh, it's my birthday, Dawg. It was my birthday," then he also started walking over to the car. Appellant was standing a couple of feet from the driver's door, but Elisarraras opened the driver's door and leaned in. Craig could not tell whether anyone was inside the car, but once Elisarraras got in, Craig heard a noise, like a slapping sound, four times. Elisarraras then got out of the car and started walking toward Craig, who heard a female voice say, from inside the car, "'I don't feel so well.'" Appellant pulled a woman out of the car. Craig yelled, "'What the fuck's going on?'" then Elisarraras made a weird yelling noise and walked back to the car. He kicked the girl – Craig thought in the head – and she groaned. Elisarraras and appellant then squatted down beside her. They did not do anything right then; Craig, who was in complete shock, did not say anything. The girl said, "I'm sorry, Bubby; I'm sorry, Mouse,'" then Elisarraras and appellant both started making downward motions with their arms. Although Craig did not see a knife in either man's hand right then, he believed they were stabbing the girl to death. It did not take long; when they stood up, he saw that each of them had a knife and bloody hands. Elisarraras and appellant were talking; although Craig was in shock, he believed Elisarraras was telling appellant thanks or something. At some point, Elisarraras said something like he had stabbed her four times and the bitch wouldn't die.

Elisarraras and appellant dragged the body to the back of the car. Appellant opened the car's hatch, and Elisarraras picked the body up under the armpits. Appellant started yelling at Craig to hold the trunk open. Craig complied. The other two put the body inside the car. Craig looked at the stomach area and chest for movement, but saw none. The clothes were saturated with blood. Elisarraras jumped in the driver's side and

appellant got in the passenger side. Both were yelling at Craig to follow them. Not knowing what else to do, Craig got into his own car. He was asking God why and thinking about how he had gone to church the day before for the first time in 10 years, and now this happened. When appellant and Elisarraras took off in the other car, Craig started to leave, too. When he got to the end of the street, he was asking himself what he should do. As he felt there was no way he could have helped the victim and he had an overwhelming feeling that he needed to be a witness, he followed them.

The two cars headed west on Avenue 18½ for what Craig, who was in shock when he was driving, believed was a couple of miles. They then turned into an orchard, and Elisarraras set fire to the car's interior. Appellant helped. Once the car was burning well, they got into Craig's car, and Elisarraras told him to drive up and turn around. Craig obeyed, then Elisarraras told him to stop, as he wanted to stay there until the other car blew up. When Craig told him that only happened in the movies, they left and returned to the house.

Once there, Elisarraras and appellant washed their hands and changed their clothes, then threw what they had been wearing into the hallway. They threw the knives on top of the clothes, then appellant took everything outside and set it on fire on the side of the house, not in the regular burn pit.[6] When Craig asked about Abbott, Elisarraras took him into the bedroom where she was sleeping and showed him a tattoo he had put on her thigh. Craig then went back into the kitchen and smoked a cigarette. Elisarraras said something about getting a letter and that the girl had been a snitch in some high-profile case and that he had had to do it. He asked Craig for a ride into town, but to wait while he made a telephone call. Meanwhile, appellant was hosing down the driveway where the hatchback had been parked.

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[6] Craig believed the knives were buck-style, meaning they folded, but the blades were open.

Once Elisarraras got off the telephone, he and appellant got into Craig's car. While Craig was trying to get the car started, Abbott came to the front door and objected to Elisarraras's leaving. He went back inside. Right after, Stowers pulled up, and appellant got out of Craig's car and asked her for a ride. About that time, Craig got his car started, and he went home.

Stowers estimated that she arrived back at the house some 45 minutes to an hour after she initially left. She returned to give Johnston a ride, as she did not want her to drive home drunk. When she drove up, however, she saw that Johnston's car was gone. Stowers thought that was unusual, considering how drunk Johnston had been. Appellant was pacing the sidewalk that led to the front door. Jack Craig was sitting in his car, staring blankly. His boys' two car seats, which she had previously seen in the backseat, were now stacked on top of each other. Craig left as she pulled up. Stowers also saw a small fire burning in the backyard, right next to the detached garage. Although there was a burn pit in the backyard where trash was regularly burned, this fire was not in it.

As soon as Stowers got out of her car, she asked where Johnston was. Appellant said he had given her her keys and she had gone home. He also said that Abbott and Elisarraras were inside, arguing. Appellant asked Stowers to take him into town, which she did. On the way, Stowers suggested driving by Johnston's house to see if she was okay. Appellant asked, "'Why the fuck do you care about this bitch?'" Johnston's car was not at her house. Stowers subsequently was pulled over by a sheriff's deputy and appellant was arrested for reasons unrelated to the homicide. Stowers returned to the residence on Road 22 about 2:00 a.m. She cleaned the kitchen, as it had rained that evening and the tile throughout the house was muddy. She did not notice any blood anywhere.

Justin Anderson left the barbecue between 9:00 and 10:00 p.m., as he had to pick up his brother. When he returned approximately 30 to 45 minutes later, no one was there. All the cars were gone, including Johnston's two-door Toyota. When no one

answered his knock on the door, he went to Firebaugh to pick up Michael White. The two then returned to Elisarraras's house, arriving around 11:00 p.m. or midnight. When they pulled up, Elisarraras and Abbott were outside, waiting for Anderson, and they got in his car. He was going to drop them off somewhere, but Elisarraras said he wanted to show Anderson something. He directed Anderson to an orchard where a car was on fire. They drove past, then Anderson took Elisarraras and Abbott where they wanted to go. Ultimately, they all returned to Elisarraras's house. Jennifer Stowers was there, mopping the floor, which was muddy as it was raining that evening. Anderson did not see any blood on the floor. He spent the night at the house, as did Stowers.

Later that morning, appellant telephoned the house. He spoke to Abbott, who answered the phone, then talked to Stowers for a few minutes, and then asked to talk to Elisarraras.[7] At one point, Elisarraras said, "homeboy that was a nice Bar-B-Q." Appellant agreed and said, "that was a first." Elisarraras responded, "hey it's alright homeboy there's a first time for everything."

At approximately 9:45 p.m. on March 3, 2004, Rose Johnston's burned-out vehicle was found one row into an orchard at Road 18 and Avenue 18½ in Madera County. Charred human remains found in the rear portion of the vehicle were subsequently identified as those of Johnston, who had been burned beyond recognition. An autopsy revealed two linear lacerations on the external surface of her heart that could be consistent with stab wounds. Two sets of herringbone-patterned shoe tracks were found near the vehicle, one on the driver's side and the other near the passenger side rear. Tire tracks from the burned vehicle showed it had been traveling north and then headed west into the orchard. Other tire tracks showed another vehicle had made a U-turn just south of the location.

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[7] A tape recording of the telephone call was played for the jury.

Two days later, a search was conducted at Elisarraras's residence, which was approximately four miles away. Similar herringbone shoe tracks were found around the outside of the garage and main entrance door, as well as in the kitchen. Multiple tire tracks were also found, as was some strawberry blonde hair. A comb containing matching hair was found where it was suspected Johnston's vehicle had been parked.[8] In the back of the house was a burn pile in which what looked like metal shoelace eyelets and fabric were found, together with some other items that had been burned. No knives were found in the burn pile or yard.

In early March 2004, appellant was in the Madera County Jail for an unrelated offense when Detective Smith interviewed him about the Johnston homicide.[9] Appellant said he had known Johnston about a month, and had last seen her on March 1, at a party at Abbott's house. During the interview, appellant referred to Johnston as a "[h]omie hopper." He said this meant she would go with different men in the group. Appellant further related that two of the men at the party, Anthony Smith and Shannon Baker, both had feelings for Johnston, and that another youngster at the party had asked Smith about her. Appellant said there was tension between Smith and Baker the night of the party, because both had feelings for Johnston. Appellant said that the last time he saw Johnston at the party, almost everyone else had left. Johnston was in her car in the front yard, and appellant thought she also left. He said she left about five minutes after Stowers left with Anthony Smith, the Bakers, and Parsons, and that he, Elisarraras, and Abbott remained at the house. At no time did appellant mention Jack Craig.

Stowers visited appellant in jail in 2004, after the preliminary hearing. She asked him a series of questions by writing them down on paper, because appellant was always paranoid that the jail or someone would be listening in. When she previously asked him

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8 DNA could not be extracted from the hair.

9 Appellant was advised of, and waived, his constitutional rights.

once whether he killed Johnston, he said no and she believed him. This time when she asked him whether he had done it, however, appellant said yes. When Stowers asked why, appellant started getting emotional. When she asked if he had told anyone else, he said that he had told a couple other STP members. She asked why; his response was, "'For pride.'"[10]

B. <u>The Small Town Peckerwoods</u>

Rhyse Parsons described the Small Town Peckerwoods as a bunch of friends who did not really subscribe to any specific beliefs, although he admitted the phrase "white pride" had to do with their beliefs and meant staying with one's own kind or own race. Insofar as going to prison was concerned, being a member of the Small Town Peckerwoods meant the person would be with his own race. Elisarraras, who "[s]omewhat" formed the group, gave Parsons an STP tattoo. When the group was together, they liked to sit around and talk about their families, jobs, girlfriends, and the like, or shoot pool. They did not plot to commit crimes.

Ben Owen, who also had " STP" tattooed on him by Elisarraras, described the Small Town Peckerwoods as a group of friends who liked to hang out, fish, and drink beer. In his mind, the Small Town Peckerwoods had no specific beliefs. With respect to "white pride," the group were all white, but Owen had a lot of friends of other races.

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10 Stowers admitted being uncooperative at the time of the preliminary hearing. She was still living with Abbott and associating with the same people. She subsequently contacted the prosecutor, however, as she had changed her lifestyle and wanted to cooperate. She was no longer using methamphetamine, which she had been ingesting about once a week from 2003 to the time of the party, and then daily until December 2004. On the night of the party, she did not use any until 2:30 a.m., after the fact. She was using methamphetamine at the time of the preliminary hearing, and was on it when she testified then. She was also taking Paxil. At the preliminary hearing, she was very forgetful about what had happened, as she was using drugs to cloud her memory. Once she stopped using methamphetamine, her memory returned. She was not under the influence of anything at the time of trial.

Aside from Elisarraras giving Owen the STP tattoo, the group had no leader. Elisarraras turned 30 years old around the time of the barbecue, while Owen was around 18 at the time. Owen believed appellant was in his 20's, and that Elisarraras was probably one of the oldest people Owen knew who had the STP tattoo. Owen denied that the group plotted to commit crimes; as a group, at most they rolled through a stop sign or engaged in underage drinking.

John James had a number of tattoos, including one on his arm related to the Small Town Peckerwoods. He received it from a friend in Sacramento, before he ever met appellant or Elisarraras. He told one of the investigators in this case that it meant Stone Temple Pilots. James was familiar with the phrase "white pride," but had no knowledge how it related to the Small Town Peckerwoods, other than being proud to be white.

At the time of the barbecue, Justin Anderson had an STP tattoo, standing for Small Town Peckerwoods, but had since had it covered with another tattoo. He considered himself a Small Town Peckerwood. In his opinion, "white pride" had something to do with the Small Town Peckerwoods.

Agent Dilbeck of the Madera Police Department testified as an expert on criminal street gangs. According to Dilbeck, "homeboy" is basically a term of endearment for a fellow gang member.

Dilbeck testified that Peckerwoods are known to him to be a criminal street gang as defined by the Penal Code. Concentrated in California, the gang is spreading throughout the West Coast, with over 100 members in Madera. Some of those members, with whom Dilbeck had spoken, were Elisarraras, Shannon Baker, Ben Owen, Rhyse Parsons, John James, and Michael White. Dilbeck had also investigated crimes in Madera in which Peckerwoods were suspects, and had read reports by other officers about crimes committed by Peckerwood gang members in Madera.

According to Dilbeck, Peckerwoods are usually small groups having up to about 20 members, who typically range in age from 16 to about 24, with 19 being the average

age, and who share the same type of white pride or white supremacist ideology. Although there is a hierarchy, with "shot callers" who answer to a higher authority residing inside the prison system, Peckerwoods typically are not as organized as other criminal street gangs. They do not have a constitution like some of the other criminal street gangs, and do not have as much of a well-defined rank structure. What makes them very strong, however, is members' loyalty to one another.

Often when Peckerwoods get together, they will brag about crimes they have committed. If they are going to commit crimes in unison, they will strategize. While they may commit more sophisticated types of crime that take some planning, they often will commit crimes of opportunity. However, one group of Peckerwoods will not necessarily know what another group is doing. Peckerwood groups usually are divided into what are referred to as cells. All are smaller factions of the Peckerwood organization. They have common ideologies, but may not know what another cell is doing. There are multiple Peckerwood cells in Madera, including Small Town Peckerwoods, Crazy White Boys, Krazy White Boys, and Dirty White Boys. All are Peckerwoods, albeit different sects or factions.

Dilbeck had specifically investigated the Small Town Peckerwoods, and had determined that approximately 16 individuals in Madera had been identified as members, with an "STP" tattoo on the forearm being a common identifying symbol. Based on police reports he had read, investigations he had conducted and been involved in, speaking to colleagues, and listening to testimony, he opined that the primary activities of the Peckerwoods street gang ranged from anything from narcotic sales to burglaries and arson, all the way to murder. The primary activities of the Small Town Peckerwoods were assault, arson, and homicide. To make this determination, Dilbeck looked at the 16 members of the Small Town Peckerwoods and cases they were involved in. He determined there were more assaults and arsons than other crimes, in addition to the

Johnston murder in which two members were involved. Members also committed other offenses, such as possession of methamphetamine and burglary.

Based on various criteria, including "STP" and "Peckerwood" tattoos, Dilbeck opined that Paul White, Anthony Smith, Shannon Baker, appellant, and Elisarraras belonged to a criminal street gang. He further opined that, if there was a conflict within a criminal street gang because of men having competing interests over a woman, and the decision was made to kill the woman and she was in fact killed, it would benefit the gang to accomplish that crime. Dilbeck explained that it is common, in criminal street gangs, for the bond between members to become stronger than the bond of family or the members' own best interests. If it was a situation where the gang would break apart and individuals would have problems with each other over another person, then it would be easiest to take that person out of the equation. A rift within a gang can be very damaging to other members of the gang. Gang members commonly commit crimes together, and a common trust exists because everyone has the same things to lose. When individuals split away form the gang or drop out, however, the rifts can result in members testifying against other members or violence between members. The gang should be more important than the individual. If a person admitted to killing the woman and, when asked why, said "pride," it would boost both the individual's reputation and that of the gang. It would raise the individual's stature within the gang, and would also show that members of the gang are willing to commit violent acts. Having a reputation for violence helps a gang control turf and territory, and also helps it commit other criminal activities because witnesses become more afraid and less cooperative with authorities.[11]

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11 According to Dilbeck, there are no territorial-based white gangs in Madera County, and it is not typical for such organizations to claim turf and territory.

II

DEFENSE EVIDENCE

Appellant testified on his own behalf and denied killing Rose Johnston. On March 1, 2004, he arrived at the barbecue at around 6:00 p.m. and stayed until about 11:00 p.m.. When he arrived, Elisarraras, Ben Owen, John James, Rose Johnston, Anthony Smith, Rhyse Parsons, Shannon Baker, Sharee Baker, and Tawnya Abbott were there. Jennifer Stowers was not. Although nobody had started drinking at the time he arrived, there was drinking at the party. Abbott, for one, became very drunk, as did John James. Although appellant did not talk to Johnston, he believed she got drunk and ended up throwing up in her car. There was also methamphetamine at the party, which appellant and some of the others smoked.

Appellant did not see any fights or arguments at the party. Everyone seemed to be having a good time. Jennifer Stowers, who was appellant's girlfriend at the time, arrived around 9:00 or 9:30. Appellant had spoken to her by telephone and asked her to come, as it was a party for Elisarraras's 30th birthday. Rose Johnston was not mentioned during that conversation, and appellant never told Stowers that he wanted to hurt or kill Johnston. On February 15, 2004, however, which was appellant's birthday, he and Johnston had had sex in the bedroom appellant shared with Stowers. He told Stowers about it the night after it happened. At first, she said it did not bother her, but later she admitted it did and she wanted to know details. Appellant wanted her to just let it go, but she would not. Stowers moved out a week or two before the party, although she came over every night. She often threw the incident in appellant's face. Although she did not directly bring it up on the night of the party, she hinted around about it.

By the time Stowers arrived, Owen, James, and Smith had left. Johnston was in her car, and Abbott was already drunk. Stowers stayed for an hour and a half to two hours, and things were fine between her and appellant. Appellant did not notice any problems between anyone else at the party; Anthony Smith was in the car most of the

time, talking to Johnston, and appellant did not notice anything with respect to Shannon Baker.

During the party, appellant was "bouncing around" and spent a lot of time in and out of his room. He believed he changed clothes as the night went on. Appellant often changed clothes, as he liked to flaunt the fact he had a lot of nice new things at the time. It was not uncommon for him to change more than once in an evening, especially when it was rainy.

At some point, some of those at the party wanted Johnston to leave, although they were not particularly hostile. Appellant did not care one way or the other, as Johnston was in the car and not bothering him. He was not personally having any problems with her that night, and did not recall telling anyone that he wanted her to leave. He could not remember whether he told Johnston she had to leave; if he did, the only reason would have been that the party was ending. He did not say he wanted to hurt or kill her, even just as a figure of speech. Anthony Smith told appellant that he (Smith) was getting feelings for Johnston and did not think any of their other friends should be messing around with her, but that was the extent of it. Appellant then told the other person – John James – that Smith was starting to get feelings for Johnston and so it would not be all right for James to go after her. James said okay. Appellant had previously told Smith that appellant and Johnston had had sex; Smith did not care. Appellant was not aware of any arguments at the party and would not say anyone became angry over Johnston.

When appellant and some of the other males were smoking methamphetamine in the garage, appellant said Johnston was screwing around, sexually, with a few of the homeboys. To him, "homeboy" was just another way of saying "friend."[12] Appellant

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[12] Appellant denied being in a gang with those at the party. They were just a group of friends who got together. He admitted, however, having "Peckerwood" tattooed across his abdomen, and "STP," which stood for Small Town Peckerwoods, tattooed on his arm. He got the STP tattoo because he thought it looked nice and because his friends

liked Johnston, and was not upset because she was causing friction within his group. She was not really causing friction; the small amount of tension that might have been there between Anthony Smith and Shannon Baker had been resolved earlier and was not a factor that night.

Stowers, Parsons, and the Bakers left together. As Stowers was pulling out, Jack Craig pulled in. Appellant and Elisarraras were standing on the front walkway. They greeted each other; Craig and Elisarraras, who considered themselves best friends, had a conversation to which appellant was not paying attention, and then appellant went into his room and lay down. This was around 10:00 or 10:30. Johnston was still in her car, alone.

Appellant dozed on and off. At some point, he looked out the window of his room, which faced the front of the house. He saw somebody standing next to Johnston's car, on the driver's side. It looked like a man, but appellant could not tell for sure because he did not have his glasses on and it was dark out. He could not hear anything. He could not see inside the car, but nothing indicated anything was wrong, and he lay back down. At some point, he heard Craig's car start and then drive off. He did not hear any other cars start up.

Appellant did not hear the car return, but at some point, Craig and Elisarraras came into the house. It sounded like they headed toward the kitchen and then went into Abbott's room. Appellant could hear Elisarraras saying something about her tattoo. A short while later, Elisarraras came into appellant's room, said they were going to go somewhere and get some more methamphetamine, and asked if appellant wanted to go. When appellant got up, he did not go into the kitchen at all, nor did he notice a fire in the

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were getting it. To him, Small Town Peckerwoods meant a group of friends that hung out, and Peckerwood was just a white person. He admitted describing Johnston to Detective Smith as a "homie hopper," meaning she had sex with more than one of the group of friends.

backyard. As the burn pit was full, appellant used a different area when he burned trash two or three times a week, but he never burned any shoes or clothing there. He did not believe he burned any trash the night of the party, but could not recall with any certainty.

The three men got into Craig's car, but Abbott came out and objected to Elisarraras going anywhere. Elisarraras told appellant and Craig to go ahead, then got out of the car. While Craig was trying to get it started, Stowers pulled in. Deciding he would go to his own connection for the methamphetamine, appellant got out of Craig's car and went to hers.

As Stowers and appellant were driving off, Stowers asked how Johnston got home. When appellant said he did not know, Stowers wanted to go and check on Johnston.[13] Appellant wondered why Stowers was doing that, and felt she was just trying to get at him again about the sexual encounter he had had with Johnston. They drove by Johnston's house and saw a car slowly drive by, then pull into and out of the driveway. They did not see Johnston's car, however. They were subsequently pulled over and appellant was arrested. The arrest was unrelated to this incident. He did not learn something had happened to Johnston until days later.

Stowers visited appellant while he was in custody. She asked him a couple of times whether he did it. He told her no. He did not write anything down or pass her a note; there was no way to pass notes. With respect to the tape-recorded telephone call, the comments about there being a first time for everything referred to the barbecue, and that it had been the first time they had gotten that many of their friends together.

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13 Appellant did not know how Johnston left the house that night. He assumed she drove, as her car was gone. He first noticed it was gone when he went to get into Craig's car. Appellant did not have Johnston's keys.

DISCUSSION[14]

I*

NON-GANG-RELATED ISSUES

A. Impeachment of Jack Craig with Prior Acts of Domestic Violence

As described in the statement of facts, *ante*, Jack Craig testified that he was "in shock" when he saw appellant and Elisarraras beating and stabbing Johnston, and that he did what they told him to do because he was "in shock and awe …." On cross-examination, Craig denied doing anything to harm Johnston. This ensued:

> "Q [by Mr. Boyce, defense counsel] So you were saying you've never seen anything like this before, it put you in shock, right?
>
> "A Yes.
>
> "Q And by not having seen something like this before, you mean the killing of someone?
>
> "A Yes.
>
> "Q Do you mean the hitting of a woman?
>
> "MR. LICALSI: Objection. Relevance.
>
> "THE COURT [prosecutor]: Sustained.
>
> "BY MR. BOYCE:
>
> "Q So what shocked you was the stabbing, right?
>
> "A Yes.
>
> "Q Did the – the time when [Elisarraras] kicked her in the head, did that shock you?

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14 For organizational purposes, we have divided appellant's claims into what might roughly be termed gang-related and non-gang-related issues.

***** See footnote, *ante*, page 1.

"A It sure did.

"Q And is that because you already saw the stabbing or is something like that kind of violence shocking to you?"

After the prosecutor's relevance objection was again sustained, a bench conference was held. The court subsequently stated for the record that defense counsel had asked to question Craig about prior acts of violence Craig had committed against someone who was not related to this case, and that the line of questioning was relevant to Craig's credibility as a witness.

The prosecutor subsequently moved, in writing, to exclude evidence that, according to Craig's ex-wife, Craig was verbally and physically abusive toward her while she was pregnant, in December or January of 1999, and used his full body weight to push her up against the kitchen counter; caught her by the hair and dragged her up the stairs sometime in 1999; and, in the early part of 2000, choked her. The prosecutor asserted (1) the uncharged acts were inadmissible because they were being offered to show Craig's criminal disposition (Evid. Code, § 1101); (2) Evidence Code section 788 limits impeachment by previous crimes to felonies; and (3) the proffered evidence was inadmissible under Evidence Code section 352.[15] During the ensuing hearing, defense counsel clarified that he was not offering the evidence to prove propensity to commit violence or some crime, but instead to challenge the credibility of Craig's testimony that the acts of violence committed against Johnston – which, initially, Craig did not realize involved knives – shocked and froze him. Counsel argued: "And I think that being he's done, you know, acts that would probably rise to a felony 273 to someone, why would it shock him so much to see this? And it goes towards his credibility as a witness, that it's

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[15] The prosecutor also moved to exclude evidence, again related by Craig's ex-wife, that Craig had made false statements about her to Child Protective Services (CPS) and then recanted those statements. As appellant does not now challenge the trial court's exclusion of the CPS evidence, we include it only insofar as it is relevant to the court's ruling concerning the domestic violence evidence.

an impeachment issue. Impeachment comes in two forms. I caught you in a lie and simply bad character reason to distrust you. [¶] In this case, I think this evidence would tend to show greatly that there is a reason to distrust him in this story that he's relating to the jury. Not to say that he has propensity to commit this kind of crime."

The discussion then turned to the CPS issues. Citing Evidence Code section 1100 et seq., the prosecutor argued that a specific act of lying was inadmissible, and also that admission of the evidence would be time-consuming and prejudicial under Evidence Code section 352. This ensued:

> "THE COURT: 1101(a) says that character evidence is not generally admissible on propensity. But I think 1101(c) … says that credibility is an exception to that rule. [¶] … [¶] 787 of the Evidence Code, 'specific instances of conduct is inadmissible to attack or support the credibility of a witness. The exceptions being felony conviction, convictions of moral turpitude.' 786 says, 'evidence of traits of character other than honesty or veracity is inadmissible to attack or support the evidence of a witness. Specific instances of conduct are inadmissible.' [¶] So the request to question Mr. Craig about prior specific conduct with CPS on an unrelated matter on the issue of his credibility is denied. [¶] Getting back to the specific instances of prior domestic violence, though. On the issue of credibility, I guess that reply as well, if that's what it's being offered for. [¶] Mr. Boyce, do you wish to be heard? [¶] … [¶]
>
> "MR. BOYCE: … I believe my argument is that it does go to his honesty and veracity. When he says on the stand, 'I was shocked, I was stunned by this, I couldn't move, I was frozen.' I think if he has partaken of acts of violence in his own life, why should this be any more shocking? So it goes to his credibility and veracity …. [¶] … He says he doesn't see the knives until – I believe if I remember the testimony correctly, that until they stood up. So then it's just an act of violence. Why should he be so shocked?
>
> "MR. LICALSI: There's nothing consistent with the allegations against Mr. Craig and his testimony as to what he observed. I think it would be taking a great leap to say that someone would not have been shocked from what they saw that night, assuming Mr. Craig is telling the truth, based upon the fact that they had committed the acts of violence upon their spouse years before as alleged.

> "THE COURT: Any motion to admit into evidence the cross-examination of Jack Craig, prior acts of domestic violence against unrelated person on the issue of credibility is denied."

Appellant now contends the trial court erred by precluding impeachment of Craig with evidence of his prior acts of domestic violence. Appellant says the acts were crimes of moral turpitude that were usable to impeach Craig's credibility generally and to cast doubt specifically on his testimony that he was shocked by the attack on Johnston. Appellant claims the error violated both state law and his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 316.) However, although "[t]he trial court must afford the defense '"wide latitude"' to test the credibility of a prosecution witness during cross-examination in a criminal case," "the court has broad discretion to determine the scope of such cross-examination. [Citation.]" (*People v. Adames* (1997) 54 Cal.App.4th 198, 208.) Thus, "[a] trial court's ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court 'exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.)

In our view, the proffered evidence was offered to show that the witness was lying rather than to show he had committed bad acts and therefore should be disbelieved. "Evidence tending to contradict any part of a witness's testimony is relevant for purposes of impeachment. [Citations.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1017; Evid. Code, § 780, subd. (i)). We cannot say the proffered evidence had absolutely *no* tendency in

reason to contradict Craig's testimony. Hence, it was not irrelevant (see *id*., § 210) and, since it was proffered for impeachment and not to prove Craig's character or disposition, it was not made inadmissible by Evidence Code section 1101 (see *People v. Millwee* (1998) 18 Cal.4th 96, 130-131; *People v. Lang, supra,* 49 Cal.3d at p. 1017).

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.… [¶] Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297, fn. omitted.)

Respondent contends we reasonably may infer that the trial court's ruling implicitly included an Evidence Code section 352 analysis and that, when viewed through the prism of that statute, exclusion of the proffered evidence was not an abuse of discretion. Appellant counters that nothing in the record suggests the trial court ruled under that statute. He acknowledges the general rule that a trial court's decision must be upheld if there is any basis in the record to sustain it and even if it is made for the wrong reason (*People v. Brown* (2004) 33 Cal.4th 892, 901; *People v. Marquez* (1992) 1 Cal.4th 553, 578), but says the rule does not apply here since a critical component of Evidence Code section 352 is the trial court's exercise of discretion.

Although the record certainly could be clearer on this point, we conclude the trial court's ruling rested, at least in part, on Evidence Code section 352. It is apparent the court read and considered the prosecutor's written motion, which expressly relied on that statute, at the outset of the hearing thereon. During the hearing, the prosecutor expressly

cited the statute in arguing against admission of the CPS evidence, and indirectly argued lack of probative value, with respect to the domestic violence evidence, just before the trial court ruled.[16]

When a motion is made pursuant to Evidence Code section 352, the record must affirmatively show the trial court weighed prejudice against probative value. (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.) However, "the trial court '"need not expressly weigh prejudice against probative value … or even expressly state that [it] has done so …."' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1187.) The necessary showing can be inferred where "[t]he record as a whole shows the court was well aware of, and consistently performed, its duty … to balance the probative value of evidence against any prejudicial effect." (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1053; see also *People v. Prince*, *supra*, 40 Cal.4th at p. 1237.) Such is the state of the record as a whole here.

Under Evidence Code section 352, "the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

We find no abuse of discretion. The alleged misconduct was somewhat remote, having occurred four to five years before the homicide and some six or more years before

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16 As previously set out, the prosecutor stated: "I think it would be taking a great leap to say that someone would not have been shocked from what they saw that night, assuming Mr. Craig is telling the truth, based upon the fact that they had committed the acts of violence upon their spouse years before as alleged."

trial. Significantly, as the prosecutor suggested, there was at most a tenuous connection between Craig's alleged acts of domestic violence and the brutality of the attack on Rose Johnston.

Even if we were to find error, we would not reverse. Appellant contends the trial court's ruling violated his Sixth Amendment right to confront and cross-examine witnesses, together with his Fourteenth Amendment due process right to offer exculpatory evidence. "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury facts from which jurors … could appropriately draw inferences relating to the reliability of the witness.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, quoting *Davis v. Alaska, supra,* 415 U.S. at p. 318; accord, *People v. Frye* (1998) 18 Cal.4th 894, 946.) "There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness's] credibility ….' [Citation.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 750, fn. 2, quoting *Delaware v. Van Arsdall, supra,* at p. 680.)

In the present case, Craig's testimony was subjected to significant and extensive impeachment reflecting on his credibility.[17] Defense counsel successfully established that Craig did not go to the police and tell them who was responsible for Johnston's murder, but instead waited for the police to come to him. Moreover, he told several friends about what he had seen before he ever told anyone in law enforcement, even though he professed to be somewhat scared of appellant and Elisarraras. Additionally, defense counsel got Craig to admit that, during his first interview, he failed to tell

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17 Appellant concedes that, even without the proffered evidence, there was already reason to doubt Craig's testimony.

detectives that he had held open the trunk of Johnston's car while her body was being placed inside, and that he was not initially forthcoming with that information during the second interview. Defense counsel elicited that appellant and Elisarraras did not threaten Craig in any way to make him assist them or follow them when they went to dispose of the body; that he had his cell phone but followed them instead of calling the police; and that, although he had an overwhelming feeling at the time that he needed to be a witness, he did not immediately report events to the police, even though he was only "[a] little bit" concerned about what might happen if he went to the police instead of following appellant and Elisarraras. Counsel also got Craig to admit that, after appellant got into the car with Stowers, Craig did not think anything would happen to her despite what he had just witnessed and, although Craig was a little concerned for Abbott's safety, he neither called the police nor went into the house potentially to intervene when Elisarraras went inside. Defense counsel subsequently argued at length to the jury, based on inferences reasonably drawn from Craig's testimony, that Craig should not be believed.

Under the circumstances, and given the extensive and searching impeachment, we see no possibility evidence Craig may have engaged in several acts of domestic violence a number of years earlier might have given jurors a significantly different impression of his credibility. Accordingly, there was no Sixth Amendment violation. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680; *People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.) For the same reason, assuming error, it was harmless under any standard. (See, e.g., *People v. Cornwell* (2005) 37 Cal.4th 50, 95; *People v. Rodriguez, supra,* 42 Cal.3d at p. 750, fn. 2; *People v. Sully* (1991) 53 Cal.3d 1195, 1220; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103-1104; cf. *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Turning to appellant's Fourteenth Amendment claim, we find "[h]is attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. 'As a general matter, the "[a]pplication of the ordinary rules of evidence … does not impermissibly infringe on a defendant's right to present a defense." [Citations.]

Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* [(1956)] 46 Cal.2d 818, 836 [(*Watson*)] …, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24 [(*Chapman*)]).' [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Again, in light of the impeachment to which Craig's testimony was subjected, no prejudice has been shown.[18]

B. <u>Foundation for Justin Anderson's Testimony</u>

As described in the statement of facts, *ante*, the prosecutor questioned Justin Anderson about what went on at the barbecue the night Johnston was killed. The examination included the following:

> "Q And are you aware, was there ever a problem between [Anthony Smith and Shannon Baker] over Rose [Johnston]?
>
> "MR. BOYCE: Objection. Foundation.

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[18] In arguing prejudice with respect to this and other issues, appellant points to the length of deliberations and requests for readback as showing jurors had a difficult time deciding the case. To the contrary, the methodical requests for readback of testimony concerning the homicide, followed by requests for clarification on points relevant to the gang charge and allegations, strongly suggest jurors were simply working their way through the charges, special allegations, and evidence with special care, in light of the serious nature of the case. (See *People v. Brown* (1985) 40 Cal.3d 512, 535, revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538; *People v. Walker* (1995) 31 Cal.App.4th 432, 438-439.)

"THE COURT: Would you re-ask the question. Lay the foundation.

"BY MR. LICALSI:

"Q Did you ever observe a problem between Anthony Smith and Shannon Baker over Rose?

"A Yeah.

"MR. BOYCE: Foundation, Your Honor.

"THE COURT: Overruled. [¶] The answer was yes. Would you ask the next question.

"BY MR. LICALSI:

"Q And what did you observe?

"A They – they stopped being – because we were all tight before, you know, Rose started coming around. And then – or everybody was still tight except those two. Because they were both having a relationship with Rose. And Little Shannon got kind of attached and Anthony got attached, and they ended up getting into a fistfight where a pocket knife was pulled and then it was broken up.

"MR. BOYCE: I'd move to strike the bulk of that answer since it seems to be based on lack of foundation or personal knowledge and hearsay.

"THE COURT: Overruled.

"BY MR. LICALSI:

"Q And when did that occur in relationship to this March 1st barbecue?

"A I think it was earlier that day or the night before. I know it wasn't too far before that."

Appellant now contends the trial court erred by denying his motion to strike the portion of Anderson's testimony that was not based on personal knowledge. He reads the testimony quoted above as establishing Anderson was not present during the purported fight, had no personal knowledge of it, and was relying on and conveying hearsay to the

jury. Appellant says the error was prejudicial and violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Because, as we shall explain, we conclude there was no error, we need not determine whether, as respondent contends, the federal constitutional claims were forfeited because appellant failed to object on those grounds at trial, and whether, as appellant counters, any forfeiture of the issue constitutes ineffective assistance of counsel.

A witness's "testimony on a *particular matter* (other than expert opinion testimony) is inadmissible 'unless [the witness] has *personal knowledge* of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.' (Evid. Code, § 702, subd. (a), italics added.) The testimony must be excluded unless 'there is evidence *sufficient to sustain a finding*' that the witness has such personal knowledge. (*Id*., § 403, subd. (a)(2), italics added.)" (*People v. Anderson* (2001) 25 Cal.4th 543, 573.)

Appellant challenged Anderson's testimony on lack of personal knowledge and foundation grounds.[19] "A witness challenged for lack of personal knowledge must … be allowed to testify if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible. [Citation.]" (*People v. Anderson*, *supra*, 25 Cal.4th at p. 574, italics omitted.) The appropriate standard is preponderance of the evidence. (*People v.*

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19 Appellant also raised a hearsay objection. Where a witness testifies to facts that were, in reality, merely related to the witness by another, a hearsay objection will frequently be lodged. Where the witness does not purport to recount a *statement*, however, the hearsay rule is inapplicable and the appropriate objection is lack of personal knowledge. (*Browne v. Turner Const. Co.* (2005) 127 Cal.App.4th 1334, 1348-1349; 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 47, pp. 298-299.) Recognizing that Anderson did not testify to any statements, appellant approaches the issue as one of lack of personal knowledge. We do likewise.

Marshall (1996) 13 Cal.4th 799, 832.) In short, "there [must] be sufficient evidence to enable a reasonable jury to conclude that it is more probable that the fact exists than that it does not. [Citations.]" (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) In making a determination whether such evidence exists, a trial court need not hold an evidentiary hearing outside the jury's presence (Evid. Code, § 402, subd. (b); *People v. Hoyos* (2007) 41 Cal.4th 872, 897), nor must it make an express or formal finding to that effect (Evid. Code, § 402, subd. (c)).[20] We review its determination as to the sufficiency of the foundational evidence under an abuse of discretion standard. (*People v. Tafoya* (2007) 42 Cal.4th 147, 165; *People v. Guerra* (2006) 37 Cal.4th 1067, 1120.)

We find no abuse of discretion here. After being told to lay a foundation, the prosecutor asked specifically what Anderson had *observed*. We see nothing in the record to suggest Anderson did not understand the meaning of the word or was not answering the precise questions asked. A witness's personal knowledge can be shown by his or her own testimony (Evid. Code, § 702, subd. (b)), and the trial court did not exceed the bounds of reason by implicitly concluding the preliminary fact of personal knowledge was sufficiently shown.[21] The record simply does not support appellant's assertion Anderson was not present during, and had no personal knowledge of, the fight. Any

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[20] Evidence Code section 402 provides: "(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. [¶] (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests. [¶] (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute."

[21] Had defense counsel wished to pursue the subject, he could have done so on cross-examination and, if appropriate, renewed his motion to strike the testimony about the fight. He did not do so.

uncertainty Anderson expressed about when the fight occurred went to the weight and not the admissibility of the evidence. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1142; *People v. Avery* (1950) 35 Cal.2d 487, 492 [discussing former Code Civ. Proc., § 1845, from which Evid. Code, § 702 was derived].)

C. <u>CALCRIM No. 362</u>

At the prosecutor's request, and over appellant's objection, the trial court instructed jurors in the language of CALCRIM No. 362 (Consciousness of Guilt: False Statements), to wit: "If the defendant made a false or misleading statement relating to the charged crime knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence the defendant made such a statement cannot prove guilt by itself."

Appellant implicitly concedes he made statements that could be found to be knowingly false or intentionally misleading.[22] He says, however, that the instruction violated his right to a fair trial by subjecting only his own purportedly false or misleading statements to negative inferences.

The California Supreme Court has repeatedly upheld CALCRIM No. 362's counterpart, CALJIC No. 2.03, against numerous challenges on similar grounds. (See, e.g., *People v. Geier* (2007) 41 Cal.4th 555, 588-589; *People v. Stitely* (2005) 35 Cal.4th 514, 555; *People v. Holloway* (2004) 33 Cal.4th 96, 142; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Turner* (1994) 8 Cal.4th 137, 202, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Kelly* (1992) 1

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[22] Although defense counsel's argument in opposition to the giving of the instruction focused on appellant's trial testimony, appellant also made arguably false or misleading statements to Detective Smith when interviewed about Johnston's disappearance. (See *People v. Snow* (2003) 30 Cal.4th 43, 96.)

Cal.4th 495, 531-532.) At least one appellate court has held that the same reasoning applies to CALCRIM No. 362. (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103-1104; see *People v. Howard* (2008) 42 Cal.4th 1000, 1024-1025 [equating CALJIC No. 2.03 with CALCRIM No. 362].)

Appellant acknowledges these cases, but says that since he argued Craig, not he, likely was Elisarraras's cohort in the murder, it was prejudicially unfair to focus the jury on any purportedly false or misleading statements appellant may have made, as opposed to those made by Craig. Under the circumstances, he claims, CALCRIM No. 362 favored the prosecution. Upon appellant's objection that it unfairly singled him out, the argument runs, it should not have been given, as the objection made clear that appellant did not want its purported benefits and CALCRIM No. 226 (Witnesses), which neutrally stated principles applicable to all witnesses, was sufficient.[23]

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[23] Pursuant to CALCRIM No. 226, jurors in the present case were instructed: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion or national origin. You may believe all, part or none of any witness's testimony. [¶] Consider the testimony of each witness and decide how much of it you believe. In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are, how well could the witness see, hear or otherwise perceive the matters about which the witness testified? How well was the witness able to remember and describe what happened? What was the witness's behavior while testifying? Did the witness understand the questions and answer them directly? Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? What was the witness's attitude about the case or about testifying? Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? How reasonable is the testimony when you consider all the other evidence in the case? Did other evidence prove or disprove any fact about which the witness testified? Did the witness admit to being untruthful? Has the witness engaged in other conduct that reflects on his or her believability? Was the witness promised immunity or leniency in exchange for his or her

"There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527.) This does not mean, however, that the giving of CALCRIM No. 362 in the instant case was constitutionally infirm. (See *People v. Turner, supra,* 8 Cal.4th at p. 202 [rejecting claim that CALJIC No. 2.21, a predecessor to part of CALCRIM No. 226, should have been given & CALJIC No. 2.03 omitted].) In *People v. Jurado* (1981) 115 Cal.App.3d 470, 495-496, this court rejected the claim that CALJIC No. 2.03 impermissibly singles out a defendant's testimony for juror scrutiny. We reach the same conclusion with respect to CALJIC No. 362, even where, as here, the defense essentially points the finger at a prosecution witness.

Deliberately false statements by a defendant about matters materially related to his or her guilt or innocence "have long been considered cogent evidence of a consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances. [Citation.] Moreover, permitting the jury to draw an inference of wrongdoing from a false statement is as much a traditional feature of the adversarial fact finding process as impeachment by prior inconsistent statements. [Citations.]" (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1167-1168.) Indeed, "[t]he inference of consciousness of guilt from willful falsehood … is one supported by common sense, which many jurors are

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testimony? [¶] Do not automatically reject testimony because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event, yet see or hear it differently. [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

likely to indulge even without an instruction. In this case, such circumstantial evidence of consciousness of guilt … would certainly have been argued – properly – by the prosecutor even without the challenged instructions. To highlight this circumstantial evidence in the course of cautioning the jury against overreliance on it was not unfair to defendant." (*People v. Holloway, supra,* 33 Cal.4th at p. 142; see also *People v. Jackson, supra,* 13 Cal.4th at p. 1224 [emphasizing cautionary nature of instruction]; *People v. Kelly, supra,* 1 Cal.4th at p. 531 [if court tells jury certain evidence is not alone sufficient to convict, it must necessarily inform jury said evidence may at least be considered].)

"'"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."' [Citations.]" (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) Here, jurors were told to use their common sense and experience, and to judge the testimony of each witness by the same standard. Under the circumstances, we reject the notion that the trial court violated appellant's constitutional rights or otherwise prejudicially erred. The instruction "benefit[ed] the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory" (*People v. Jackson, supra,* 13 Cal.4th at p. 1224), while neither precluding the defense from pointing the finger at a prosecution witness nor affording the same express protection to that witness's testimony.

II

GANG-RELATED ISSUES

Appellant challenges the sufficiency of the evidence to support the jury's findings on the gang-activity special circumstance and count 2. As to both, he contends there was insufficient evidence of the primary activities element that had to be proven in order to establish the Small Town Peckerwoods (STP) constituted a criminal street gang, and that appellant knew the group engaged in a pattern of criminal gang activity. As to the special

circumstance, he further contends the evidence was insufficient to show Rose Johnston was killed to further the activities of a criminal street gang.[24]

A. <u>The Standard of Review</u>[*]

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson*, *supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) "'A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] … A finding of fact must be an inference drawn from evidence rather than … a mere speculation as to probabilities without evidence."' [Citation.]" (*People v. Raley* (1992) 2 Cal.4th 870, 891.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of

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24 Appellant raises several additional gang-related issues. In light of our conclusion that the special circumstance allegation and count 2 must be reversed, we do not address them.

***** See footnote, *ante*, page 1.

whether the prosecution relies primarily on direct or on circumstantial evidence (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125), and applies to special circumstance findings as well as convictions (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414).

B. <u>The Statutory Elements</u>*

Section 186.22, subdivision (a) defines a substantive offense and specifies punishment for "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang …." Section 190.2, subdivision (a)(22) provides for a penalty of death or life in prison without the possibility of parole for a defendant convicted of first degree murder where the jury finds "[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." Thus, both require proof of the existence of a criminal street gang.

As defined by subdivision (f) of section 186.22, "'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in … subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." "'[P]attern of criminal gang activity' means the commission of, attempted commission of, … or conviction of two or more [enumerated] offenses, provided [the offenses occurred within a specified time period], and the offenses were committed on separate occasions, or by two or more

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* See footnote, *ante*, page 1.

persons." (*Id*., subd. (e).)[25] Enumerated offenses include assault with a deadly weapon or by means of force likely to produce great bodily injury, murder, and arson. (*Id*., subds. (e)(1), (3) & (7).)

To prove that a defendant "actively participates" in a gang, the prosecution need not show the defendant held a leadership position in the group or devoted all, or a substantial part, of his or her time and efforts to the gang, but merely that his or her involvement with the gang was more than nominal or passive. (*People v. Castenada* (2000) 23 Cal.4th 743, 745, 752.) A "pattern of criminal gang activity" can by shown "by evidence of 'two or more' predicate offenses committed 'on separate occasion' *or* by evidence of such offenses committed 'by two or more persons' on the same occasion. Therefore, when the prosecution chooses to establish the requisite 'pattern' by evidence of 'two or more' predicate offenses committed on a single occasion by 'two or more persons,' it can … rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member." (*People v. Loeun* (1997) 17 Cal.4th 1, 10, fn. omitted.) Proof of the predicate offenses "need not consist of evidence that different Penal Code provisions were violated." (*Id*. at p. 10, fn. 4.)

Evidence of past or present criminal acts listed in section 186.22, subdivision (e) is admissible to establish the "primary activities" requirement, although such evidence is not necessarily sufficient proof in and of itself. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*Ibid*.)

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[25] The requisite "two or more" enumerated offenses are often referred to as the "predicate offenses." (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, fn. 1 (*Gardeley*).)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley*, *supra*, 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" (*Sengpadychith*, *supra*, at p. 324, italics omitted.)

C. <u>The Relevant Group</u>

As an initial matter, we must address appellant's argument that the group relevant to our determination is the Small Town Peckerwoods, not other groups calling themselves Peckerwoods or some overall Peckerwoods gang. He says there was no evidence he was an active participant in any group other than the Small Town Peckerwoods, and there was insufficient evidence of a connection between members of the Small Town Peckerwoods and anyone else.[26]

Evidence of gang activity and culture need not necessarily be specific to a particular local street gang as opposed to the larger organization. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 53; *People v. Ortega* (2006) 145 Cal.App.4th 1344, 1356-1357; *In re Jose P.*, *supra*, 106 Cal.App.4th at pp. 467-468; *In re Elodio O.* (1997)

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26 In making this argument, appellant refers, in passing, to the testimony of a gang expert in *People v. Schmaus* (2003) 109 Cal.App.4th 846. As noted in *In re Jose P.* (2003) 106 Cal.App.4th 458, 467, "the expert testimony in [*Schmaus*] was evidence in that case, not this one. It is irrelevant to our determination of whether there is substantial evidence to support the gang findings here."

56 Cal.App.4th 1175, 1178, 1180, disapproved on other grounds in *People v. Sengpadychith, supra,* 26 Cal.4th at p. 323.) This does not mean, however, that having a similar name is, of itself, sufficient to permit the status or deeds of the larger group to be ascribed to the smaller group. Thus, in *People v. Ortega*, *supra*, 145 Cal.App.4th at pages 1356-1357, the Court of Appeal rejected the assertion that the prosecution had to prove precisely which Norteno subset was involved in the case before it, noting that there was sufficient evidence Norteno was a criminal street gang, while "[n]o evidence indicated the goals *and activities* of a particular subset were not shared by the others." (Italics added.) The court stated: "In this case there was testimony that it was not uncommon for members of different gangs to work in concert to commit a crime. In light of the nature of gang structure and the apparent willingness of members to work with other gangs to commit crimes, requiring the prosecution to prove the specific subset of a larger gang in which a defendant operated would be an impossible, and ultimately meaningless task." (*Id*. at p. 1357) In *In re Jose P.*, *supra*, 106 Cal.App.4th at page 463, the gang expert testified that the Norteno street gang was an ongoing organization having around 600 members or associates in Salinas; that there were separate cliques or factions within the larger Norteno gang; that the two gangs at issue in the case were such subgroups; that the two subgroups were loyal to one another and to the larger Norteno gang; and that all Norteno gangs followed the same bylaws as the Norteno prison gangs.

Here, by contrast, Dilbeck testified that Peckerwoods are a criminal street gang, as defined by the Penal Code, and that smaller groups, such as the Small Town Peckerwoods, are all factions of the Peckerwood organization. Insofar as is shown by the record before us, his conclusion appears to have been based on commonality of name and ideology, rather than concerted activity or organizational structure. He testified that Peckerwood groups share a white pride or white supremacist ideology, and there is a hierarchy, with "shot callers" who answer to a higher authority inside the prison system. It was Dilbeck's further testimony that Peckerwoods are not typically organized like

other criminal street gangs, however: for the most part, they have no constitution, and are a looser organization with a less well-defined rank structure. Peckerwood groups get together more for bragging than for strategizing, and one group of Peckerwoods will not necessarily know what another group is doing.

In our view, something more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization. There was no such showing here. Dilbeck's general references to "shot callers" answering to a higher authority within the prison system were insufficient, absent any testimony that the group calling themselves the Small Town Peckerwoods contained such a person, or that such a person was a liaison between, or authority figure within, both groups. There was testimony that appellant had a "Peckerwood" tattoo, and that Elisarraras identified himself to Dilbeck as a Peckerwood. There was also evidence that Rhyse Parsons believed being a member of the Small Town Peckerwoods would be relevant in a prison setting, and that a poem titled "Peckerwood Soldiers," which referred to Peckerwoods in prison, was found in what inferentially was Elisarraras's bedroom.[27] On the record before us, however, it would be speculative to infer that the Small Town

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[27] The writing read (as nearly as we can discern from the handwritten copy contained in the clerk's transcript): "We're Peckerwood Soldiers down/for a cause, California convicts/and solid outlaws. The rules/we live by are written in/stone, awesome an fearless we're/bad to the bone. [¶] We live in California Prisons/all long the way, the man tries/to down us with each passing day./Our bodies are solid an blazen/with in, warbirds on SS lightning/bolts the way that we think. [¶] When we go into battle our/hands are held high, some/may get hurt yet others may/die. It's a small price we/pay to survive in the yard, we're/Peckerwood Soldiers down for a/cause, California convicts and/solid outlaws."

Peckerwoods and greater Peckerwood gang shared more than an ideology, especially where the term "Peckerwood" has such an ideological or racial connotation in everyday parlance. (See, e.g., "A Visual Database of Extremist Symbols, Logos and Tattoos" <http://www.adl.org/hate_symbols/peckerwood.asp> (as of Aug. 25, 2008).) Elisarraras's apparent reference to getting a letter and having to kill Johnston because she was a snitch in a high-profile case does not alter this; we can only speculate as to the source of the letter or whether it was Peckerwood-related. "'[S]peculation is not evidence ….' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 735.)

In light of the foregoing, only the Small Town Peckerwoods, and not some larger Peckerwood group, may be considered in assessing appellant's claims of evidentiary insufficiency.

D. <u>The Primary Activities</u>*

In conjunction with both the special circumstance and count 2, jurors were instructed that the People had to prove, inter alia, that appellant was an active participant in a criminal street gang. A criminal street gang was defined as having, "as one of its primary activities, the commission of murder, a violation of Section 187 of the Penal Code; arson, a violation of Section 451, Subdivision (c) of the Penal Code; or assault by means of force likely to produce great bodily injury, a violation of Section 245, Subdivision (a), Subdivision (1) of the Penal Code …." Jurors were further instructed that, "[i]n order to qualify as a primary activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of a group." During deliberations, jurors asked for clarification whether criminal activity of the gang only referred to murder, arson, and assault, or whether other activity (such as drug use, underage drinking, or statutory rape) could be considered. With the agreement of both counsel, the trial court responded with

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* See footnote, *ante*, page 1.

the definition of "primary activities" contained in the jury instructions, and told jurors those were the only three crimes that could be considered.

As previously described in more detail, *ante*, appellant, Rhyse Parsons, and Ben Owen all testified that the Small Town Peckerwoods were merely a group of friends who socialized together. Not surprisingly, Dilbeck disagreed. Appellant now says Dilbeck's testimony was insufficient to establish the primary activities requirement because it was based "on unfounded assumption and over-generalization." He points to the fact Dilbeck was unable to state how many of the three specified types of offenses were committed by STP members within certain time frames, and argues that the predicate crimes did not satisfy the requirement because they showed no more than the occasional commission of such offenses by the group's members.[28]

Evidence was presented that Anthony Smith was convicted of arson, in violation of section 451, subdivision (c), for which he was sentenced on December 5, 2003. Dilbeck testified that Smith was someone with whom he had spoken and about whom he had seen police reports, and who was a self-admitted member of the Small Town Peckerwoods. Evidence was also presented that, on October 18, 2002, Michael White was convicted of assault by means of force likely to produce great bodily injury, in violation of section 245, subdivision (a)(1). Dilbeck was familiar with White, who had "Peckerwood" tattooed across his chest and "STP" tattooed on his forearm, in a style

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28 Appellant also notes that, in instructing the jury pursuant to CALCRIM No. 1400 (Active Participation in Criminal Street Gang), the trial court did not give the elements of the three crimes relied upon, although the Bench Note to the instruction says the court should define the elements of all such crimes. (See Bench Note to CALCRIM No. 1400 (2006) p. 1177.) As appellant merely mentions this fact in passing, we do not view it as a claim of error. Accordingly, we do not address the propriety of the trial court's reasoning for the omission, i.e., that because the People were proving the predicate acts through convictions, not evidence, the omitted paragraph of the instruction would have been confusing to the jury.

consistent with many of the other STP members. In Dilbeck's opinion, Michael White was a member of the Small Town Peckerwoods, based on his identification as such by his tattoos, his own admissions, the admissions of other STP members, and his jail classification.

Dilbeck also was familiar with appellant, through conducting a thorough investigation of his gang status, as well as the Johnston homicide. In Dilbeck's opinion, based on appellant's tattoos, his identification by other gang members, his participation in a gang crime, the fact he associated with Small Town Peckerwoods on a regular basis, and his commission of crimes with other gang members, appellant was an STP member. Dilbeck had had occasion to talk to Elisarraras in both a custodial environment and in a consensual contact; based on Elisarraras's self-admission that he was a Peckerwood, his STP tattoo, his association with other STP members, and his jail classification, Dilbeck opined that, before Elisarraras's death, he was also a member of a criminal street gang.

Dilbeck testified, in pertinent part, that he had conducted an investigation with respect to the Small Town Peckerwoods and had determined that approximately 16 individuals in Madera had been identified as members of the group. When asked his opinion, on direct examination, as to the primary activities of the Peckerwoods street gang, he responded, "It ranges from anything to – from narcotic sales to burglaries, arson, all the way up into murder." He stated that he based this opinion on police reports he had read, investigations he had actually conducted and in which he had been involved, and speaking to colleagues as well as listening to testimony. When asked whether there were any primary activities other than criminal street gang ones, Dilbeck replied, "No, they don't get together to do a lot of charitable functions or anything like that, if that's what you mean."[29]

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29 Respondent submits it is clear, from the context of the questioning, that the testimony referred to the Small Town Peckerwoods, but we disagree. As Dilbeck had

On cross-examination, defense counsel asked Dilbeck expressly about the primary activities of the Small Town Peckerwoods, and whether Dilbeck had listed assaults, arsons, and homicides. Dilbeck responded, "Yes." Dilbeck conceded he did not know how many arsons occurred in Madera the preceding year, or how many were committed by Small Town Peckerwoods. When Smith pled to the one arson, however, he admitted being involved in at least three of the arsons that happened during the year in which he entered his plea, and he was suspected of more. According to Dilbeck, Smith was known to be involved in "a multitude" of arsons with other STP members. Dilbeck similarly did not know how many assaults occurred in Madera County or how many were committed by Small Town Peckerwoods, and testified that the Johnston homicide was the first homicide committed by STP members. He knew of members who had committed assaults and arsons, but not the dates they committed them except where a conviction resulted. Dilbeck explained: "Basically what I did is I looked at the 16 members of the Small Town Peckerwoods and I pulled cases that they were all involved in, and I looked for commonalities, which there was more arsons than other crimes. There were more assaults than other crimes. And then there was the – the murder that involved two members. [¶] When you have a gang that only has 16 members and two members have committed a murder, then that, you know, makes it more of a primary activity. If you had 500 members in a gang, the fact that they had done – only two members had done a murder, wouldn't be as much of a primary activity. That's how it came up with the primary activities." Other crimes committed by members included vandalism, assault and battery, burglary, and possession of methamphetamine. Dilbeck admitted he did not

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just answered a question in which he discussed common identifying symbols of both Peckerwoods and Small Town Peckerwoods, there is no way to tell to which group the prosecutor was referring when he asked whether Dilbeck had an opinion concerning the primary activities of the Peckerwoods street gang, or how Dilbeck understood the question.

know how many such crimes were committed by Small Town Peckerwoods in 2004, and that he would have to research the individuals to find out the dates.

We conclude, upon consideration of the entire record before us, that a rational trier of fact could have found the primary activities requirement was established beyond a reasonable doubt. The purpose of the California Street Terrorism Enforcement and Prevention Act (the STEP Act, § 186.20 et seq.), of which section 186.22 is a part, is, as expressed by the Legislature in enacting the law, "the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon *the organized nature of street gangs*, which together, are the chief source of terror created by street gangs." (§ 186.21, italics added.) To this end, subdivision (f) of section 186.22 requires that the organization, association, or group of three or more persons have as one of *its* – in other words, the *group's* – primary activities the commission of one or more enumerated crimes, in addition to members who individually or collectively engage in a pattern of criminal activity. As explained in *People v. Gamez* (1991) 235 Cal.App.3d 957, 971 (disapproved on other grounds in *Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10), "Section 186.22 does not punish association with a group of individuals who, in a separate capacity, may commit crimes. Rather, it requires that one of the primary activities *of the group or association itself* be the commission of crime." (Italics added.)

Thus, to establish the existence of a criminal street gang under section 186.22, subdivision (f), the prosecution must prove that commission of one or more enumerated crimes is a primary activity of the group itself, and not just of individual members of the group. This does not mean every member of the group must be shown to have committed an enumerated offense or that only offenses committed by multiple group members will suffice, but there must be evidence sufficient to support a rational conclusion about the *group's* purpose. The target of the STEP Act is not, for example, a group of friends who happen to break the law sometimes, but a group with a common

purpose, such that any member of the group can be deemed to have acted with that purpose.

Dilbeck testified to the commission of past criminal acts by members of the Small Town Peckerwoods. In addition, evidence of the charged crimes was properly considered for this purpose. (See *People v. Sengpadychith, supra,* 26 Cal.4th at p. 323; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1225; *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140.) Although the persuasiveness of his opinions and conclusions arguably was undercut by the information he was unable to supply on cross-examination, this lack was for the jury to assess and did not render his testimony insufficient as a matter of law. Moreover, while his testimony that "they" suspected Anthony Smith of involvement in more than the three arsons he admitted when pleading to one, and that "We know him to be involved in a multitude of arsons with other members of STP," was not shown to be based on reliable sources, no objection was made on foundational grounds. (Compare *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612 & fn. 4 [similar testimony held to be insufficient; defense counsel's objection on foundational grounds was erroneously overruled].) Failure to object at trial to the reliability of the material upon which an expert witness's testimony is based, forfeits the issue for purposes of appeal. (See, e.g., *People v. Gonzalez* (2006) 38 Cal.4th 932, 948-949.)

It would have been preferable for Dilbeck to be able to supply additional, more specific information concerning the criminal conduct of STP members. Nevertheless, in light of the apparent similarity between his testimony and that found sufficient in *Gardeley, supra,* 14 Cal.4th at page 620, we conclude Dilbeck's testimony afforded a rational basis upon which the jury could find that the commission of the specified crimes was a primary activity of the Small Town Peckerwoods, such that the group constituted a criminal street gang. (See also *People v. Vy, supra,* 122 Cal.App.4th at pp. 1212, 1225-1226.)

As we have discussed, however, jurors could only rely on the conduct of STP members, and not some larger Peckerwood organization, in making this assessment. We cannot determine, from the record before us, whether they did so. It was often unclear to which group Dilbeck was referring, or whether he was even differentiating between the two. The prosecutor linked the two groups in the course of his summation to the jury. It is apparent jurors were confused about the matter: during deliberations, they asked whether, in terms of appellant's knowledge that members of the gang engaged in criminal activity, gang activity referred to Small Town Peckerwoods or the greater Peckerwood group in Madera. In response, and with the concurrence of both counsel, the trial court instructed: "If you determine that the Small Town Peckerwoods and the Peckerwoods essentially acted as one gang, you may look to the activity of both groups to determine whether the defendant knew that members of the gang engaged in a pattern of criminal gang activity. If you do not determine that they acted as one gang, then you may not look to the activity of both groups."[30]

In *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*), the jury was permitted to convict the defendant of a felony if it found he either sold or transported cocaine on a specified occasion. The evidence was insufficient to support a finding that he sold cocaine, but sufficient to support a finding of transportation. (*Id*. at p. 1119.) Harmonizing the rules stated in *Griffin v. United States* (1991) 502 U.S. 46 and *People v. Green* (1980) 27 Cal.3d 1,[31] the California Supreme Court concluded that, "[i]f the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect,

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30 Pursuant to Government Code section 68081, we informed the parties of our tentative conclusions concerning the propriety of allowing jurors to rely on evidence concerning some larger Peckerwood organization and the effect of the error in this regard, and afforded them the opportunity to address the issues.

31 *Green* was overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3 and *People v. Martinez* (1999) 20 Cal.4th 225, 239.

reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, … the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*Guiton, supra,* 4 Cal.4th at p. 1129, fn. omitted.)

In the present case, permitting jurors to consider evidence concerning the larger Peckerwood organization was akin to the type of legal inadequacy discussed in *Guiton*. Jurors were fully equipped to make the *factual* determination of whether Dilbeck's testimony and other evidence concerning the Small Town Peckerwoods proved the existence of a criminal street gang, but not the *legal* determination of what evidence they properly could consider for that purpose. Accordingly, because the record does not permit us to conclude the jury's findings were actually based solely on evidence concerning the Small Town Peckerwoods, reversal of the special circumstance finding on count 1, and the verdict on count 2, is required. (See *Guiton, supra,* 4 Cal.4th at p. 1129.) This is so even though the evidence presented with respect solely to the Small Town Peckerwoods was sufficient to support the jury's findings.

Because we are not reversing due to insufficiency of the evidence, cases holding that the double jeopardy clauses of the federal and state Constitutions bar retrial in such circumstances do not apply. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15; see, e.g., *Burks v. United States* (1978) 437 U.S. 1, 11; *People v. Morales* (2001) 25 Cal.4th 34, 61 (dis. opn. of Brown, J.).) We need not address arguments made by appellant as to the application of other constitutional and statutory principles (see, e.g., § 1023; *Apprendi v. New Jersey* (2000) 530 U.S. 466), as those are appropriate matters for resolution by the trial court and have not been adequately presented to us by the parties.

E. Knowledge[32*]

As to both the special circumstance and count 2, jurors were instructed that the People had to prove, inter alia, that appellant "knew that members of the gang engaged in or have engaged in a pattern of criminal gang activity …." Penal Code section 186.22, subdivision (e) defines "pattern of criminal gang activity" as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated offenses, within a specified time period, and on separate occasions or by two or more persons.

Under the statutory language, "a pattern can be established by two or more incidents, each with a single perpetrator, or by a single incident with multiple participants committing one or more of the specified offenses." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003.) Assuming jurors found appellant and Elisarraras *both* killed Rose Johnston, the charged murder would have constituted the requisite pattern, since both were direct participants in the fatal stabbing, as opposed to one being a direct perpetrator and the other an aider and abettor. (*People v. Zermeno* (1999) 21 Cal.4th 927, 928-929, 932-933; *People v. Loeun, supra,* 17 Cal.4th at pp. 9-11 & fn. 4.) A finding appellant had the requisite knowledge necessarily would have followed. (See *id*. at p. 10 [nothing in statutory scheme suggests Legislature intended that prosecution could prove pattern only if it could show defendant had knowledge of *prior* crimes committed by fellow gang members].)

For unknown reasons, however, jurors here were not instructed on the myriad means by which a pattern can be established under subdivision (e) of Penal Code

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32 Appellant notes that respondent has not addressed the claim the evidence was insufficient to establish the requisite knowledge. Although we could treat the omission as an implicit concession (see *People v. Bouzas* (1991) 53 Cal.3d 467, 480), we decline to do so.

***** See footnote, *ante*, page 1.

section 186.22. Instead, a "pattern of criminal gang activity" was defined for them as "the *conviction* of any combination of two or more of" the crimes of murder, arson, or assault by means of force likely to produce great bodily injury, occurring within a specified time frame. (Italics added.) Although jurors were told that if they found appellant guilty of a crime in this case, they could consider that crime in deciding whether a pattern of criminal gang activity had been proved, Elisarraras was never convicted of murder, due to his death. Under the instructions given, appellant had to have knowledge of a pattern established by criminal *convictions*. Accordingly, the instant murder could not establish the requisite pattern by itself. (See *In re Nathaniel C., supra,* 228 Cal.App.3d at p. 1003.)

Appellant says there was no evidence he had any knowledge of White's or Smith's convictions. While there was no direct evidence on this point, we conclude the circumstantial evidence was such that a rational juror could infer the requisite awareness. The overall impression of the Small Town Peckerwoods was one of a small group whose members, although they had not necessarily known each other for a long time, were fairly close companions who did not keep secrets from each other. For instance, Anderson described the group as "tight" and knew that Elisarraras and appellant carried knives, even though he had only known Elisarraras for about a month and a half and had socialized with appellant only three or four times.[33] Elisarraras showed Anderson and White the burning car that contained Johnston's body, while appellant told a couple STP members that he killed Johnston. By his own admission, appellant had known Elisarraras for about 10 years, and the two of them were probably the two oldest members of the group who attended the barbecue. Based on the relative ages and Parsons's testimony that Elisarraras "[s]omewhat" formed the group, jurors reasonably could have concluded

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33 We recognize there is nothing to indicate the knives were illegal.

Elisarraras and appellant made up the informal leadership of the Small Town Peckerwoods and so likely would have known what was going on with the gang's members. According to Dilbeck, most, if not all, of the males who attended the barbecue were gang members. According to Parsons, although he had only known appellant approximately five months, they often hung out with the group, which included White. When the group was together, the members liked to sit around and talk. Although Parsons claimed they would talk about their families, jobs, girlfriends, and the like, and appellant denied knowing Smith had been convicted of a crime, jurors reasonably could have rejected this testimony and instead could have inferred from the testimony of Dilbeck, who had talked to a number of the group, that they would also brag about crimes they committed. Moreover, the fact appellant may not have known anyone but Elisarraras for longer than a few months did not suggest he was on the periphery of the group; Dilbeck testified that the gang was still in its infancy.

The resolution of conflicting evidence and credibility issues was for the jury's determination. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) Under the circumstances, we cannot say "that upon no hypothesis whatever is there sufficient substantial evidence to support [the true finding as to the special circumstance and the conviction on count 2]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Accordingly, reversal on the ground of insufficient evidence is unwarranted. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

F. <u>Furtherance of the Gang's Activities</u>*

Jurors were instructed that, in order to establish the truth of the special circumstance allegation, the People had to prove, inter alia, that "the murder was carried out to further the activities of the criminal street gang" in which appellant was an active participant. Appellant says the evidence was insufficient to uphold the jury's true

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* See footnote, *ante*, page 1.

finding, because it did not show the perpetrators of the murder thought killing Rose Johnston would further some activity of the gang. He says "activities" does not mean the welfare of the group, and that the special circumstance is not established merely because a murder might benefit the gang in some speculative, intangible way.

From the testimony of those who attended the barbecue, jurors reasonably could have concluded that appellant and others were angry with Johnston because she was having sex with several of the gang's members. For instance, Elisarraras said she was getting in between the gang members, while appellant said he wanted to kill Johnston and that he was so angry because she was "fucking with the homeboys." The gang was "tight" before Johnston started coming around, then she caused a rift between Anthony Smith and Shannon Baker that was significant enough to lead, within a day or so before the barbecue, to a physical altercation between the two in which blows were struck and a knife was pulled.

In response to a hypothetical question, Dilbeck opined that it would benefit the gang to accomplish the killing. He testified that the bond between gang members becomes stronger than the bond of family or the members' own best interests, and that if the gang could break apart or individuals would have problems with each other over a certain person, then it would be easiest to take that person out of the equation. He explained: "[W]hen you have a rift within a gang, it can be very damaging to other members of that gang. We call them gangs because gang members commonly do crimes together. And when everybody is a member of that gang, there's a common trust that is there because everybody has the same things to lose. [¶] When individuals split away from that gang or they drop out of that gang, when those rifts can – can cause division, which could cause people to testify against other people, it could cause violence between members, things of that nature. The gang should be more important than that individual." When asked on cross-examination whether it seemed severe to kill the girl who was having a sexual relationship with someone in the gang, Dilbeck responded, "No.

Because that's breaking up the gang. That's splitting the gang apart. That's two gang members, you know, that are members of a gang that are – and she's the third party that's putting that internal conflict there that could rip the gang apart. [¶] And this is – this is a gang that hasn't been around a long time, as you know, historically speaking for, you know, Madera gangs. And so it's still in its infancy; so the things that happen now are going to determine where that gang goes in the future."

We do not find Dilbeck's testimony to be speculative or based on insufficient or improper foundation. (See *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197 [recognizing that expert testimony has frequently been allowed with respect to motivation for particular crime].) Although Dilbeck testified in terms of benefiting the gang as opposed to furthering its activities, we have no problem holding that the evidence was sufficient to permit a rational trier of fact to conclude the special circumstance allegation was true. It seems commonsensical that a rift between gang members – especially members of a fairly new gang that does not have many members to begin with – will likely have a negative effect on the gang as a whole and its ability successfully to engage in criminal activity. Thus, removing the source of the rift, while perhaps not directly in furtherance of the gang's activities in the way that, for instance, eliminating a witness to the gang's crimes might be, still furthers the activities of the gang by keeping the gang together so that it can continue to engage in its criminal activities. Such a conclusion is neither contrary to the language of the statute nor to the intent of the voters who enacted it (see *People v. Shabazz* (2006) 38 Cal.4th 55, 65 [in enacting Prop. 21, of which Pen. Code, § 190.2, subd. (a)(22) was a part, voters intended to address gang-related crime generally]), nor does it run afoul of the rule of lenity. This rule, "under which 'ambiguous penal statutes are construed in favor of defendants[,] is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.' [Citations.]" (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1022-1023.) The rule

does not "require a statutory interpretation in a defendant's favor when, as here, a court 'can fairly discern a contrary legislative [or voter] intent.' [Citation.]" (*Id*. at p. 1023.)

DISPOSITION

The judgment of conviction and the deadly weapon use finding on count 1 are affirmed. The special circumstance finding on count 1 and conviction on count 2 are reversed.

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Ardaiz, P.J.

WE CONCUR:

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Cornell, J.

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Kane, J.