SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

QUANG MINH TRAN,

Defendant and Appellant.

CRC 8.25(b)

SUPREME COURT
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Case No. S176923

Fourth Appellate District, Division Three, Case No. G036560
Orange County Superior Court, Case No. 01WF0544
The Honorable Robert R. Fitzgerald, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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Did the trial court abuse its discretion in allowing the prosecution to introduce evidence of defendant's own uncharged criminal acts in order to prove a pattern of criminal activity for purposes of Penal Code section 186.22, subdivisions (a) and (e)?

INTRODUCTION

Planning to retaliate against a rival gang member for an earlier act of disrespect towards his gang, appellant and other members of the Vietnamese for Life (VFL) street gang armed themselves, tracked the rival gang member to his apartment, and shot him, wounding him in the shoulder. After his first victim fled, appellant came across 18-year-old Lon Bui, who was helping his mother carry groceries into the apartment complex. Mistaking Bui for another rival gang member, appellant shot Bui in the back as he tried to flee, killing him.

The jury convicted appellant of street terrorism, attempted premeditated murder, and first degree murder, finding the murder and the attempted murder were committed for the benefit of a criminal street gang. In doing so, the jury was required to find that VFL's members engaged in a pattern of criminal gang activity as defined in Penal Code section 186.22, subdivision (e), and, under section 186.22, subdivision (a), that appellant knew that VFL members engaged in a pattern of criminal gang activity. In order to demonstrate these elements, the prosecution introduced evidence of appellant's prior conviction for extortion, committed on behalf of VFL.

The trial court properly allowed the prosecution to introduce the prior extortion as relevant to prove VFL's pattern of criminal gang activity and to prove appellant's knowledge of VFL's pattern of criminal gang activity. In enacting the "California Street Terrorism Enforcement and Prevention Act" (STEP Act), the Legislature expanded the admissibility of gang evidence to

prove gang crimes, and expressly contemplated and intended the gang's past crimes be admissible to prove the substantive crime of street terrorism under Penal Code section 186.22, subdivision (a), and to prove a gang enhancement allegation under Penal Code section 186.22, subdivision (b). Nothing in the plain language of the statute, its legislative purpose, legislative history, or subsequent decisions of this Court interpreting the STEP Act suggests any intent to preclude admission of a defendant's own crimes to show the required pattern of criminal gang activity.

Appellant's prior extortion had substantial probative value to prove that he knew VFL engaged in, or had engaged in, a pattern of criminal gang activity, and to prove the predicate offenses necessary to show that VFL met the statutory definition of a criminal street gang. Admission of the prior extortion was not unduly inflammatory or unnecessarily cumulative. In balancing the substantial probative value against the danger of undue prejudice under Evidence Code section 352, the trial court did not abuse its discretion in allowing the prosecution to introduce evidence of defendant's extortion to prove a pattern of criminal activity for purposes of Penal Code section 186.22, subdivisions (a) and (e).

STATEMENT OF THE CASE

An Orange County jury convicted appellant of first degree murder (Pen. Code, § 187), attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 664), and street terrorism (Pen. Code, § 186.22, subd. (a).) The jury also found that appellant personally used a gun in the commission of the murder and attempted murder (Pen. Code, § 12022.5, subd. (a)), and committed the murder and the attempted murder for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)). (5 CT 977-981, 997-998.) Appellant was sentenced to a term of 54 years to life and a consecutive life term. (5 CT 1086-1088.) The aggregate prison term was comprised of the following: 25 years to life

for the murder, plus the upper term of 10 years for the attendant firearm-use enhancement and 3 years for the gang enhancement; life with the possibility of parole for the attempted murder, plus the upper term of 10 years for the firearm-use enhancement and 3 years for the gang enhancement; and the upper term of 3 years for street terrorism. (5 CT 1086-1088.)

On appeal, appellant claimed, *inter alia*, that the trial court prejudicially erred in admitting evidence of his prior extortion because the probative value of the evidence was substantially outweighed by the danger of undue prejudice. The Court of Appeal disagreed, finding the evidence of appellant's prior crimes was admissible to show appellant's active participation in a street gang, his willful promotion of that gang, and his knowledge that the gang was involved in criminal activity under Penal Code section 186.22, subdivision (a), as well as to show that members of the gang had committed two or more predicate crimes under Penal Code section 186.22, subdivision (e). Consequently, the Court of Appeal held the trial court did not abuse its discretion under Evidence Code section 352 in admitting the evidence. (Slip Opn.10-15.) The Court of Appeal stayed the 3 year sentence for the street conviction under Penal Code section 654, and affirmed the judgment and sentence as to the remaining sentence, and in all other respects. This Court granted appellant's petition for review, limiting the issue to whether the trial court abused its discretion in allowing the prosecution to introduce evidence of defendant's own uncharged criminal acts in order to prove a pattern of criminal activity for purposes of Penal Code section 186.22, subdivisions (a) and (e).

STATEMENT OF FACTS

On May 6, 1997, "Oriental Play Boys" (OPB) gang member Duc Vuong, drove to a gas station with two other OPB members, Wes and Andy. (1 RT 72, 74-75, 82-83; 6 RT 817.) Three men in a Honda Prelude

also drove into the station and asked them what gang they belonged to, but Vuong, Wes and Andy did not answer. (1 RT 83-86.) Wes drew a .9-millimeter gun from his waistband. The Prelude drove away, with Vuong, Wes and Andy in pursuit. (1 RT 87, 89, 90-91, 95.) Vuong fired a "warning shot" at the Honda using Wes's gun. (1 RT 91-92.)

Qui Ly, a member of the "V" gang, which was aligned with "Vietnamese for Life" (VFL) at the time of the crimes, received a "911" page from appellant, aka "K-9," the leader or shot caller of the Orange County clique of VFL, soon after the gas station incident. (2 RT 145-146, 161-162, 166-167, 192; 5 RT 755.) When Ly called appellant, appellant said he needed guns. (2 RT 193.) Ly retrieved two loaded guns from a pool hall in Los Angeles and met up with appellant in Garden Grove. Appellant told Ly that Vuong, an OPB member, had shot at Phuong Cao, a VFL member. (2 RT 195-202.) At the time, OPB was VFL's number one rival. (2 RT 172.) Appellant wanted to retaliate against OPB for the disrespect shown VFL. (2 RT 203, 205, 215, 218.)

Ly wanted to discuss this in private, so appellant and Ly met four other VFL members — "VC", "Funky" Liem, Phuong Cao, and Huan Hoang Nguyen ("Uncle Dave") — another V member, Huang Meo, and a man not affiliated with a gang in a V member's garage. (2 RT 206-211.) Appellant did most of the talking at the meeting, telling the others that he wanted to find Vuong at his apartment complex and shoot him. Appellant said he knew the area where Vuong lived and where they could park the cars. (2 RT 215-218.) Because it was "a VFL thing," appellant and two of his fellow gang members at the meeting, Nguyen and "VC", planned to arm themselves, find Vuong, and shoot him. Everyone else was to remain in the three cars. Appellant, Nguyen, Ly and VC made masks to wear. Someone delivered a TEC-9 to appellant. Ly got his two guns out of his car, and gave one of them to Nguyen. (2 RT 218-223.)

Before they left, VC asked Ly, who was supposed to drive one of the cars, if he knew the fastest way to the freeway from Vuong's apartment. Because Ly did not, VC said he would drive and Ly "became a shooter." Ly then kept one of the guns so that he could back up appellant. (2 RT 219, 223, 228-229.)

Appellant directed them to Yockey Street, around the corner from Vuong's apartment. (2 RT 226-227, 231.) Appellant, Nguyen, Ly and Meo got out of the cars while the drivers remained inside. (2 RT 227-229.)

Meanwhile, the intended victim, Vuong, left his apartment to retrieve something from his car, which was parked behind his apartment. (1 RT 100, 103-104.) When he closed the trunk, he saw three masked men standing in front of his car. (1 RT 103-105, 137; 2 RT 231-233.) Appellant said, "That's Duc, that's Duc[,] that's him." (2 RT 232; 3 RT 348.) Appellant shot at Vuong first (2 RT 232-233), then both Ly and Nguyen fired shots. (2 RT 233-235.)

Vuong heard shots then fled down a walkway between the apartment buildings towards his apartment. The three men chased after him, firing shots along the way. (1 RT 104-106; 2 RT 234-235.) A bullet grazed Vuong's right shoulder. (1 RT 106, 111.) When Vuong reached his apartment and shut the door, one of the shooters fired a shot through his front door, kicked the door in, and continued shooting into his apartment. (1 RT 107-110.)

Unable to find Vuong, appellant and Ly ran to the front gate of the apartment complex where they found 18-year-old Lon Bui. Bui had been to the market with his mother and had groceries in hand. (2 RT 234-234; 3 RT 350-351; 5 RT 710-714.) When Ly and appellant got to the front gate of the complex, they saw Bui. Tran told Ly, "That's him, that's him, that's Play Boy [referring to OPB]." (2 RT 235, 243-244.) As Bui tried to run with his groceries still in hand, appellant crouched down on the sidewalk,

took aim and shot Bui in the back. (1 RT 52; 2 RT 235; 5 RT 714-715; 6 RT 869-872, 882.) He stumbled, then called for his parents, saying, "I've been shot. I've been shot," then fell to the ground. (5 RT 693, 715.) The fatal bullet entered Bui's back, exited his abdomen and lodged in his right arm. (5 RT 723-724.)

A couple of days after the murder, appellant told his friend Hahn Dam, a member of V, about the shooting. Appellant told him that an OPB member shot at him at a gas station. The next night appellant learned where Vuong lived and went to his house. Appellant told Dam that "they" shot at Vuong and killed Vuong's friend, whom they encountered while leaving the complex. Appellant told Dam about the murder as a warning to be cautious if Dam saw an OPB member. (4 RT 637-642.)

At a wedding about a month after the shooting, Ly told appellant that he had heard the man appellant killed was not an OPB member. Appellant responded, "Fuck it, like oh well." (2 RT 253-254.)

At Vuong's apartment complex, police found 14 expended nine-millimeter casings; five expended .45-caliber casings; two live nine-millimeter rounds; nine bullet fragments; bullet marks on Vuong's car and a truck in the parking lot; ten strike marks on the building, a bullet hole in Vuong's front door, and a mark on Vuong's interior wall where the bullet from the door came to rest. (4 RT 450-458, 504-505, 525-533.) The .45-caliber casings were all fired from the same gun. (4 RT 554.) Eleven of the 14 nine-millimeter casings were fired from the same gun. (4 RT 556-558.) The remaining three nine-millimeter casings from the complex were fired from a different gun. (4 RT 557-558.)

In addition to the expended casings, the police found two live nine-millimeter rounds with dimpling and markings on them that were consistent with a misfire. (4 RT 569-572, 575, 580-581.) According to Ly, appellant used the TEC-9 because the gun would jam when a round was fired and

appellant knew how to clear it. (2 RT 222.) The pathologist removed a 9-millimeter copper jacketed bullet from Bui's arm that could have been fired from a TEC-9. (3 RT 483; 4 RT 566-569.)

A. Gang Expert Testimony

Garden Grove Police Officer Ronnie Echevarria, an expert on Vietnamese gangs, testified that VFL was an ongoing organization with about 70 members at the time of these crimes and that its primary activities included extortion, prostitution, robberies, burglaries, and murder. (5 RT 729-730, 758.) Investigator Echevarria testified that a VFL member was convicted of a gang-related murder in 1996. (5 RT 759-760, 770; see also 5 CT 1010 [People's Exhibit 51].) He also testified, over defense objection, that appellant committed a series of extortions in 1993 and 1994 with other VFL members. Officer Ecchevaria testified that appellant and three other VFL members targeted Vietnamese businesses in Los Angeles for protection money. The businesses were shot into, and the owners were verbally threatened and asked for money to protect their businesses from any gang activity. Appellant was arrested and prosecuted following a sting operation by the Los Angeles County Sheriff's Office. In Officer Ecchevarria's opinion, appellant was an active member of VFL when he committed extortion, and the crime was committed for the benefit of VFL. (5 RT 761-763.) A certified copy of the Los Angeles County Superior Court record reflecting appellant's conviction for extortion was admitted into evidence. (5 CT 1011 [People's Exhibit 52].) The parties stipulated appellant pled guilty to one count of extortion in June 1995. (6 RT 895-896; 5 CT 1012 [People's Exhibit 62].)

Officer Echeverria opined appellant was an active participant in VFL. His opinion was based on photographs of appellant with other gang members, his gang tattoos, his commission of crimes with other VFL members, his correspondence with other gang members, police

documentation of his membership and the statements of other gang members identifying appellant as a VFL member. (5 RT 782-783; 6 RT 817-818.)

Officer Echevarria also explained the relationships between VFL, V, and OPB. He opined that, like VFL, V was a criminal street gang within the meaning of section 186.22.[1] At the time of the murder and attempted murder in this case, V and VFL were aligned and OPB was a rival of both gangs. (5 RT 755, 771-781.)

When given a hypothetical based on the facts of the murder and attempted murder, Officer Echevarria opined they were committed in association with and for the benefit of VFL and V and that they were committed with the specific intent to promote the criminal conduct of both gangs. (6 RT 823-827.) He explained that respect is paramount in a gang and that VFL achieved a payback with a deadly show of force for the disrespect OPB showed at the gas station. (5 RT 744; 6 RT 827.) This violent payback would enhance the reputations of V and VFL and send a message that these gangs will commit murder if necessary to address any disrespect, as well as benefit the gangs' recruitment efforts and enhance their reputation for violence in the community. (6 RT 827-828.)

B. Defense

The defense was that three other people -- Ly, Meo, and either Dam or Nguyen --committed the crimes. (7 RT 977-992.) The defense presented the testimony of a man who happened to be standing across the street from the apartment complex at the time of the shooting. The man recalled seeing

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[1] Officer Ecchevaria testified that a V member was convicted of residential burglary and street terrorism in 1995, and that a second V member was convicted of attempted extortion and robbery. (5 RT 777-780; see also 5 CT 1011 [People's Exhibits 53, 54].)

two masked men exit the gate and one of the men shooting Bui. (6 RT 871-872, 876, 992, 888-889, 895.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S PRIOR EXTORTION AND CONVICTION FOR THAT CRIME BECAUSE THE EVIDENCE HAD SUBSTANTIAL PROBATIVE VALUE TO PROVE THE ELEMENTS OF THE STREET TERRORISM CHARGE AND GANG ENHANCEMENT

Appellant contends the trial court prejudicially erred in admitting evidence of his prior extortion and his conviction for this offense because the probative value of this evidence was substantially outweighed by the danger of undue prejudice. (Appellant's Brief on the Merits (ABOM) 15-43.) The trial court properly exercised its discretion in admitting this to show that VFL was a criminal street gang and that appellant was an active participant in VFL, because proof of that conviction was direct evidence of two elements that, under the STEP Act, the prosecution was required to prove beyond a reasonable doubt. The STEP Act requires the admission of certain past crimes by the gang's members to prove a pattern of criminal activity, and to prove the crime of street terrorism, the prosecution must also prove that a defendant knew of the gang's pattern of criminal activity.

The STEP Act should not be limited to prohibit the use of a defendant's own gang predicates to prove these elements. The STEP Act expressly requires the admission of evidence of two or more predicate crimes to establish the pattern of criminal activity necessary to prove the existence of a criminal street gang. Moreover, to prove street terrorism, the Act requires proof that the defendant knew that the gang engaged in that pattern of criminal activity. The legislative history suggests the Legislature intended that the predicate crimes used to show the pattern of criminal activity may be those of *any* gang member, and did not intend to limit the

admission of predicate crimes to only those crimes that did not involve the defendant. Past decisions of this Court construing the "pattern of criminal activity" element of the statute have allowed prosecutors broad discretion in the types of predicate offenses that may be used to prove the required pattern. Finally, in cases involving the admission of "other crimes" evidence under Evidence Code section 1101, and in cases involving the admission of gang evidence in general, this Court has repeatedly reiterated that such evidence may be admitted where relevant and material to prove elements of the crime, and that the risk of prejudice does not require the exclusion of such evidence, but merely requires the trial court to exercise its discretion carefully.

Recent appellate cases incorrectly suggest that the admission of a defendant's own crimes is unnecessarily cumulative where other predicate crimes are available to prove a pattern of criminal activity. In this case, where appellant was charged with street terrorism, attempted murder, and first degree murder with a gang enhancement allegation, appellant's commission of, and conviction for extortion had substantive probative value both to prove that he knew VFL engaged in, or had engaged in a pattern of criminal gang activity, and to prove the required predicate offenses necessary to show that VFL met the statutory definition of a criminal street gang. Thus, when viewed against the evidence that must be presented to prove the street terrorism charge and the gang enhancement allegation, the trial court did not abuse its discretion in finding the probative value of the extortion conviction outweighed any potential for undue prejudice.

A. The Court's Rulings and the Challenged Testimony

Before trial, defense counsel objected under Evidence Code section 352 to the admission of any evidence of appellant's prior criminal acts or convictions for any purpose other than impeachment, arguing there were

other predicate acts that the prosecutor could introduce to establish the gang charge and enhancements. (1 RT 27-28.) The court overruled the objection. (1 RT 28.)

At trial, Officer Echevarria testified a VFL member was convicted of murder in 1996, and that the murder was gang-related. (5 RT 759-761.) He further testified he was familiar with the facts underlying appellant's 1995 conviction for an extortion that occurred on January 7, 1994. (5 RT 761.) Officer Echevarria testified, over appellant's hearsay and Evidence Code section 352 objections, that appellant and three other VFL members committed a series of extortions from late 1993 to mid-1994. Threats were made and shots were fired at Vietnamese businesses in order to obtain protection money from the businesses. (5 RT 761-762.) At the end of a sting operation, the police arrested appellant, his brother, and VC. (5 RT 762.) Officer Echevarria opined appellant was an active member of VFL when he committed the extortion and that it was committed for the benefit of VFL. (5 RT 762-763.)

During a recess that followed, defense counsel asked the court to strike Officer Echevarria's testimony regarding the shots fired into businesses because the evidence was extremely inflammatory, highly prejudicial, and not referenced in the documents offered to establish appellant's conviction. (5 RT 764.) The court denied the motion to strike and defense counsel's request to admonish the jury "that when the officer was talking about shooting in regard to these businesses that it was not in regard to" appellant. (5 RT 770.) The court advised defense counsel that she could explore this area on cross-examination, and that it would then reconsider any motion to strike. (5 RT 764, 770.) Defense counsel did not cross-examine Officer Echevarria about the identity of the person who shot at the buildings.

The trial court gave a limiting instruction as to the use of this evidence, telling the jury that evidence of uncharged criminal acts by gang members could only be considered in deciding the gang charge and enhancement and not as evidence that appellant is a person of bad character or has a disposition to commit crimes. (7 RT 1062-1063.)

B. The STEP Act

The STEP Act was enacted in 1988 to eradicate the criminal activity of street gangs. (Pen. Code, § 186.20; *People v. Loeun* (1997) 17 Cal.4th 1, 4.) "It is the intent of the Legislature in enacting this chapter to seek 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." (Pen. Code, § 186.21.)

The 1997 version of Penal Code section 186.22, subdivision (a) (§ 186.22(a))[2], as with the current version of the statute, sets forth the substantive offense of street terrorism. To prove street terrorism as defined in § 186.22(a), the prosecution must prove that a defendant: (1) was an active participant in a criminal street gang; (2) had knowledge that its members engage in or have engaged in a pattern of criminal gang activity;

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[2] At the time of the offense, former section 186.22(a) provided:

> Any 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, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(Stats. 1996, ch. 982 (Assem. Bill No. 2035), sec. 1.)

and (3) willfully promoted, furthered, or assisted in any felonious criminal conduct by members of that gang. (§ 186.22(a); *People v. Lamas* (2007) 42 Cal.4th 516, 523.)

Penal Code section 186.22, subdivision (b)(l) (§186.22(b)(1)),[3] the enhancement provision, prescribes additional punishment for persons "convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang." Both subdivisions (a) and (b) require proof of a "criminal street gang," as defined in subdivision (f) of Penal Code section 186.22. (*People v. Gardeley* (1996) 14 Cal.4th at 617.)

A criminal street gang is defined as "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 [certain enumerated acts], 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." (Pen. Code, § 186.22, subd. (f).)

In turn, former Penal Code section 186.22, subdivision (e) (§ 186.22(e))[4], defined "pattern of criminal gang activity" as "the commission

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[3] At the time of the offense, subdivision (b)(1) provided:

> Except as provided in paragraph (4), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or three years at the court's discretion.

(Stats. 1996, ch. 982 (Assem. Bill No. 2035), sec. 1.)

[4] Subsequent amendments to this subdivision added additional crimes to the list of crimes that may be used to prove a pattern of criminal

(continued...)

of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons...." A pattern of criminal activity may be based on two crimes committed in the course of a single incident by two or more persons, or by evidence of one or more predicate offenses committed on separate occasions. (*People v. Louen* (1997) 17 Cal.4th 1, 8-11; *People v. Gardeley, supra,* 14 Cal.4th at p. 624.)

Appellant finds fault with the Court of Appeal's conclusion that the language of the STEP Act allows evidence of a defendant's own prior crimes to be used to show a pattern of criminal activity under Penal Code section 186.22, subdivisions (a) and (e), arguing that the evidence should have been excluded under Evidence Code section 352. (ABOM 25-29.) Hence, before examining the admissibility of the evidence under Evidence Code section 352, it is first necessary to consider the legislative intent behind the STEP Act. As the Court of Appeal explained, "[I]n ascertaining whether a trial court has abused its discretion in admitting evidence going to a street terrorism count as against a section 352 objection, the sort of evidence that the Legislature contemplated could be presented under section 186.22 must legitimately be included in the calculus of probativeness and undue prejudice under section 352." (Slip. Opn. at 12.) As the Court of Appeal concluded, nothing in the language of the statute or

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(...continued)
gang activity, and added conspiracy to commit one of the enumerated crimes as an additional means of proving the required pattern.

its legislative history suggests an intent to exclude a defendant's past crimes when relevant to show a pattern of criminal activity.

In construing a statute, this Court strives to ascertain and effectuate the Legislature's intent. (*People v. Gardeley, supra*, 14 Cal.4th at p. 621; *People v. Pieters* (1991) 52 Cal.3d 894, 898.) In approaching this task, a court "must first look at the plain and common sense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400; see also *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, 727-728 [in adopting legislation, the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing on them].) If there is "no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and it is not necessary "to resort to legislative history to determine the statute's true meaning." (*People v. Cochran, supra*, 28 Cal.4th at pp. 400-401; *People v. Louen, supra*, 17 Cal 4th at pp. 8-9.) However, "'[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*People v. Pieters, supra*, 52 Cal.3d at p. 899.) Courts do not construe statutes in isolation, but rather "read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*Ibid.*) Namely, the words must be considered "'in context, keeping in mind the nature and obvious purpose of the statute....'" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) A court must take the language of a statute "as it was passed into law, and must, if possible without doing violence to the language and spirit of the law, interpret it so as to harmonize and give effect to all its provisions." (*People v. Garcia* (1999) 21 Cal.4th 1, 14.)

Courts will not construe an ambiguity in favor of the accused if such a construction is contrary to the public interest, sound sense, and wise policy. (*People v. Superior Court (Douglass)* (1979) 24 Cal.3d 428, 434-435; *In re Ramon A.* (1995) 40 Cal.App.4th 935, 941.) Rather, the primary consideration in interpreting a criminal statute is the legislative purpose. The statute is read in light of the evils which prompted its enactment and the method of control which the Legislature chose. (*In re Ramon A., supra*, 40 Cal.App.4th at p. 941.) As the Court of Appeal took pains to point out, the Legislature could have unambiguously said "two or more crimes, other than those of the defendant," but it did not. (See Slip Opn at 14.)

And the legislative purpose of the statue and its legislative history suggest that the Legislature did not intend to limit proof of a pattern of criminal gang activity in such a way as to exclude the defendant's own gang predicates. The bill analysis prepared for the Senate Committee on Judiciary, prior to the enactment of the STEP Act explained:

> The sponsors of this bill chose [the enumerated] crimes because they considered them to be serious crimes; in addition, they claim that these crimes are crimes which are typical of street gangs. Once a prosecutor established that *any* member of a gang had committed at least two of these crimes, the threshold for a pattern of criminal activity would be met.

(Sen. Com. on Judiciary, Analysis of Assem. Bill 2013(1987-88 Reg. Sess.) as amended June 22, 1988, at p. 5 [emphasis added].) This legislative history suggests that the Legislature intended that any gang member's predicate offenses, including the defendant's own, may be used to show the requisite pattern, not just those gang predicates committed by other members.

Past decisions of this Court construing the "pattern of criminal gang activity" element of the statute have declined to limit the types of predicate offenses that may used to establish the required pattern of criminal activity.

In *People v. Gardeley, supra*, 14 Cal.4th at pages 620-624, this Court held that the predicate offenses needed to establish a "pattern of criminal gang activity" within the meaning of § 186.22(e) need not be gang related. The Court also found the required pattern of criminal activity may be proven using the current offense, together with a past offense, as long as the two offenses occurred within the statutory time limits. (*Id.* at p. 625.) A year later, in *People v. Louen, supra*, 17 Cal.4th at pages 8-11, this Court held that evidence of the charged offense and proof of another offense committed on the same occasion by another gang member was also sufficient to prove a pattern of criminal gang activities. (Cf. *People v. Zermeno* (1999) 21 Cal.4th 927, 928-929, 931 [combined activities of defendant and another who aided and abetted the crime established only one predicate offense].)

More recently, this Court in another context addressed concerns that a defendant might be prejudiced by the admission of gang evidence, but held that a trial court may, but was not required to, bifurcate the trial of the gang enhancement from the underlying charges. This Court explained that the Legislature had specifically recognized the potential for prejudice when a jury deciding guilt hears of a prior conviction, and had, in other statutes, provided a mechanism designed to prevent the jury from hearing or considering a defendant's prior conviction, but had chosen not to do so in the case of gang evidence used to prove an enhancement allegation under the STEP Act. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, citing Pen. Code, § 1025 [where a defendant pleads not guilty of the primary offense but admits an alleged prior conviction, the charge of the prior conviction may neither be read to the jury, nor alluded to during the trial, except as otherwise provided by law.] This Court went on to find that in enacting the STEP Act, "the Legislature has given no indication of a similar concern regarding enhancements related to the charged offense, such as a

street gang enhancement. Nothing in section 186.22 suggests the street gang enhancement should receive special treatment of the kind given prior convictions." (*Ibid.*) The *Hernandez* Court also noted that under Penal Code sections 190.1, subdivisions (a) and (b), and 190.2, subdivisions (a)(2) and (22), the truth of a prior murder conviction special circumstance must be tried only after the guilt determination, but that other special circumstances, including a gang special circumstance, are to be determined at the same time as the guilt determination. (*Ibid.*) As this Court found in *Hernandez*, nothing in the STEP Act suggests that a trial court must shield that gang evidence from the jury's consideration when that evidence is relevant and probative to prove the substantive gang offense or a gang enhancement allegation.

In fact, in *In re Jose P.* (2003) 106 Cal.App.4th 458, the Court of Appeal explicitly relied on the defendant's past crimes in finding sufficient evidence to support the street terrorism charge and the gang enhancement. *In Jose P.*, the juvenile court sustained a delinquency petition finding that the minor had committed home invasion robbery, false imprisonment, and first degree burglary, found the gang enhancement allegations true as to these crimes, and found the minor had committed the substantive offense of street terrorism. The Court of Appeal affirmed, relying in part on the gang expert's testimony that the minor had committed other crimes to find sufficient evidence to support the street terrorism conviction under Penal Code section 186.22, subdivision (a). The trial court also found sufficient evidence to support the gang allegation, again relying in part on the minor's ongoing involvement with the gang and his prior arrests for gang-related crimes. (*Id.* at p. 468.)

Any evidentiary limitations on the admission of evidence to prove elements of the STEP Act violation must be viewed through the lenses of the Legislature's intent in enacting the statute. The express legislative

purpose of the Act was to eradicate criminal street gang activity "by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs." (Pen. Code, § 186.21.) Accordingly, the Legislature necessarily intended to relax the evidentiary restraints to allow the admission of gang evidence, including prior gang convictions, where relevant to prove the substantive gang crimes and gang enhancements created under the STEP Act.

C. Appellant's Extortion Conviction Was Relevant to Prove VFL's Pattern of Criminal Gang Activity and Appellant's Knowledge of VFL's Pattern of Criminal Gang Activity

Applying these principles to the present facts, the trial court did not abuse its discretion in admitting appellant's extortion conviction. The conviction was relevant to prove the commission of two or more predicate offenses required to establish the required pattern of criminal street gang activity, and to prove appellant's knowledge that VFL engaged in a pattern of criminal gang activity.

1. The Extortion Was Relevant to Prove the Pattern of Criminal Gang Activity Under Penal Code Section 186.22, Subdivisions (a) and (e)

Appellant's extortion conviction was relevant to prove a pattern of criminal activity under § 186.22(e), and to prove appellant's knowledge of that pattern of criminal activity under § 186.22(a). Only relevant evidence is admissible, and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code §§ 350, 351; (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Evidence Code section 210 defines relevant evidence as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." "The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish

material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Scheid, supra*, 16 Cal.4th at pp. 13-14.)

As explained in *People v. Thompson*,

> Probative value goes to the *weight* of the evidence of other offenses. The evidence is probative if it is material, relevant, and necessary. "(H)ow much 'probative value' proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity)." [Citation.]

(*People v. Thompson* (1980) 27 Cal.3d 303, 314, fn. 20, emphasis in original.)

Here, the prosecution was required to prove at least two predicate crimes beyond a reasonable doubt in order to show that appellant knew that VFL members engage in or have engaged in a pattern of criminal activity, and to show that VFL was, in fact a criminal street gang whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. Evidence of appellant's prior conviction went directly to prove that VFL was a criminal street gang, and that appellant was an active participant in the gang with knowledge that VFL engaged in a pattern of criminal activity.

In this case, the prosecution presented evidence of four predicate crimes to prove the pattern of criminal activity: (1) appellant's 1996 extortion conviction; (2) appellant's commission of the charged murder and attempted murder; (3) the attempted murder of Vuong in this same incident by former co-defendant Nguyen; and (4) another VFL member's 1996 conviction for gang-related murder. If the jury found insufficient the evidence of Nguyen's involvement in the present case and rejected the

evidence the other VFL member's murder conviction, the prosecutor would have been unable to establish either the substantive gang offense or enhancement without the evidence of appellant's own predicate crime. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1525-1528 [jurors do not have to unanimously agree on which two of several possible predicate offenses established that gang had engaged in pattern of criminal activity].)

2. Appellant's Extortion Conviction Was Relevant to Prove His Knowledge of VFL's Pattern of Criminal Gang Activity

Moreover, appellant's prior gang extortion was also directly relevant to show his knowledge of VFL's pattern of criminal gang activity under Penal Code section 186.22(a). Even if predicate acts of other gang members might have sufficed to show that VFL engaged in a pattern of criminal activity, those other predicate crimes did not tend to show that appellant knew of the gang's pattern of criminal activity, as required under section 186.22(a). By its plain terms, section 186.22(a) applies only to a defendant who has knowledge that the members of his or her gang "engage in or have engaged in a pattern of criminal gang activity." A defendant's knowledge that gang members engage in, or have engaged in, criminal activity is a required element of section 186.22(a). (*People v. Bautista* (2005) 125 Cal.App.4th 646, 656, n. 5.)

The Evidence Code specifically allows evidence of a defendant's prior crimes to be admitted when relevant to show knowledge. (Evid. Code, § 1101, subd. (b); *People v. Williams* (2009) 170 Cal.App.4th 587, 607 [evidence of prior drug use and prior drug convictions admissible to prove knowledge of the narcotic nature of the drug]; see also *People v. Pijal* (1973) 33 Cal.App.3d 682, 691.) In this case, appellant's past conviction for gang-related extortion was admissible to prove that he knew of VFL's pattern of criminal gang activity.

Thus, as the Court of Appeal concluded, when weighed against the STEP Act elements that the prosecution was required to prove, "the probativeness of Tran's extortion conviction becomes overwhelming." (Slip. Opn. at 15.) The strongest, most probative evidence that appellant knew VFL's members engaged in a pattern of criminal activity was the fact that he himself had been convicted for committing extortion for the benefit of VFL. (See Slip Opn. at 15.) Without this evidence, appellant would have been free to argue that he was unaware of the criminal acts committed by other members.

In sum, appellant's prior extortion conviction had substantial probative value to establish appellant's knowledge of VFL's pattern of criminal gang activity under section 186.22, subdivision (a), as well as to show the required pattern of criminal activity necessary to prove that VFL was a criminal street gang within the meaning of section 186.22, subdivisions (e) and (f). Because the evidence had substantial probative value, it was admissible subject to the trial court's exercise of its discretion under Evidence Code section 352.

D. The Trial Court Properly Exercised its Discretion Under Evidence Code Section 352

Appellant contends that while his prior extortion conviction may have been relevant to establish a predicate act for purposes of the street terrorism charge, and even elements of the charge, the evidence was unduly prejudicial, cumulative, misleading to the jury, and should have been excluded under Evidence Code section 352. (ABOM 20.) The trial court did not abuse its discretion by admitting the prior extortion conviction for the limited purpose of proving a predicate offense under Penal Code section 186.22, subdivision (e), and to establish one of the elements under Penal Code section 186.22(a), namely that appellant knew that VFL members engaged in a pattern of criminal gang activity. As set forth above, the

Legislature expressly contemplated that this type of gang evidence would be admissible to prove street terrorism or a gang enhancement allegation. And in this case, where appellant was charged with attempted murder and first degree murder, with an allegation that the crimes were committed for the benefit of a criminal street gang, and street terrorism, the admission of his earlier conviction for extortion was not unduly prejudicial.

Under Evidence Code section 352, a trial court 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." Under Evidence Code section 352, a trial court may exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading of the jury. The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

As this Court has repeatedly reaffirmed,

> When ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state that it has done so. All that is required is that the record demonstrates the trial court understood and fulfilled its responsibilities under... section 352.

(*People v. Williams* (1997) 16 Cal.4th 153, 213, citing *People v. Lucas* (1995) 12 Cal.4th 415, 448-449.)

A trial court has broad discretion in determining whether the probative value of particular evidence is outweighed by the risk of undue prejudice, confusion, or consumption of time. (*People v. Valencia* (2008) 43 Cal.4th 268, 286.) A reviewing court reviews a trial court's evidentiary

rulings under Evidence Code section 352 for abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.) The trial court's ruling will not be disturbed on appeal unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Williams* (2008) 43 Cal.4th 548, 634-635.)

Appellant contends the trial court abused its discretion in admitting his prior extortion conviction because the evidence "constituted prohibited character/propensity evidence." (ABOM 15.) As an initial matter, proof of the predicate acts is not propensity evidence at all. Such evidence is admitted not to show that appellant had a criminal disposition, but rather to demonstrate that appellant committed an element of the offense. And to the extent the prior conviction was used to prove appellant's knowledge of VFL's pattern of criminal gang activity, it was admissible under Evidence Code section 1101, subdivision (b).

In general, evidence of a person's character or a trait of his or her character, including evidence of prior conduct is inadmissible to that person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) However, as previously noted, other crimes evidence may be admitted "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented)." (Evid. Code, §1101, subd. (b).)

Even if evidence is relevant for other purposes, it may not be admitted if doing so would run afoul of policies limiting admission, such as those contained in Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Evidence of uncharged crimes "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson, supra,* 27 Cal.3d at p 314, fn. omitted, overruled on another

point in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) Thus, the admissibility of such evidence "requires extremely careful analysis." (*People v. Ewoldt, supra*, at p. 404.) "The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Steele* (2002) 27 Cal.4th 1230, 1243, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 378-379.) To be admissible, the other crimes evidence "must have substantial probative value that is not greatly outweighed by the potential that undue prejudice will result from admitting the evidence." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.)

Appellant further contends the extortion conviction was unduly prejudicial as gang evidence. (ABOM 20-25.) As a general rule, evidence of a defendant's gang affiliation may be admissible when relevant, but is subject to careful scrutiny because of its potentially inflammatory impact. (*People v. Kennedy* (2005) 36 Cal.4th 595, 624.) Gang evidence is admissible if it is logically relevant to some material issue in the case, is not more prejudicial than probative, and is not cumulative. (Evid. Code, §§ 210, 352; *People v. Carter* (2003) 30 Cal.4th 1166, 1194. However, gang evidence is inadmissible if introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) Gang evidence should not be admitted if it is only tangentially relevant to the charged offenses. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) As with evidence of a defendant's other crimes, the trial court's admission of gang evidence is reviewed for abuse of discretion. (*People v. Gutierrez* (2009) 45 Cal.4th 789-819.)

The foregoing principles do not apply to the case at hand. The instant case is a gang case in which appellant was charged with both a substantive gang offense and gang enhancements. Gang evidence was the crux of the charge, and was not simply "tangentially related" to the charged offenses. As this Court has previously explained in the context of a gang enhancement, "Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez, supra,* 33 Cal.4th at p. 1040, 1049; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) When a gang enhancement is alleged, the STEP Act requires the prosecution to prove additional facts beyond the elements of the underlying offense through the admission of gang evidence. "Accordingly, when the prosecution charges the criminal street gang enhancement, it will often present gang evidence that would be inadmissible in a trial limited to the charged offense." (*People v. Hernandez, supra*, 33 Cal.4th at p. 1044; see also *People v. Gutierrez, supra,* 45 Cal.4th at pp. 819-820 [trial court did not abuse its discretion in admitting evidence of defendant's gang affiliation where evidence related only to the enhancement allegation and not the underlying charged crimes.) These principles apply all the more so when the defendant is also charged with a substantive gang charge under section 186.22(a) and the prosecution must also prove the underlying predicate acts to support that charge.

Although evidence of a defendant's other crimes is inherently prejudicial, that danger of prejudice means that the court must exercise its discretion, not that it must exclude the evidence. (See *People v. Steele, supra*, 27 Cal.4th at p. 1245 [analyzing the trial court's exercise of discretion in admitting other crimes evidence under Evidence Code section

352].) Even though, under the STEP Act, the evidence of appellant's extortion conviction had substantial probative value to prove that VFL is a gang, and that appellant had knowledge of VFL's pattern of criminal gang activity, the evidence "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." (*People v. Balcom* (1994) 7 Cal.4th 414, 426.)

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. [A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

In weighing the probative value of an uncharged offense against the dangers of undue prejudice under Evidence Code section 352, the trial court must balance the probative value of the evidence against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) the remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses. (*People v. Branch* (2001) 91 Cal.App.4th 274, 283 [discussing factors to be considered in evaluating evidence of uncharged offenses of uncharged offenses offered under Evidence Code 1101, subdivision (b), or section 1108 pursuant to section 352, as set forth in *People v. Ewoldt, supra*, 7 Cal.4th at pages 404-405, and *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741].)

Here, the evidence of appellant's prior conviction was substantially probative to prove the purpose for which it was offered, namely: (1) that VFL members had been convicted two or more times of committing one of the enumerated offenses; and (2) that appellant knew that VFL was engaged in a pattern of criminal gang activity. The prior crime was not too remote in time, occurring in 1994, three years prior to the charged crimes. There was little likelihood of confusion as the evidence of the prior offense was completely independent of the evidence of the charged offenses and the conviction occurred well before the charged offense, and several years before trial. The present gang-retaliation murder had nothing to do with extortion or blackmail. Moreover, the jury was specifically instructed as to the use of the predicate acts evidence. (7 RT 1062-1063.) The evidence that appellant had been convicted of extortion was certainly no more inflammatory than the evidence concerning the charged offenses of murder, attempted murder, and street terrorism. (See *People v. Ewoldt, supra,* 7 Cal.4th at p. 405.) The prejudicial effect of the uncharged misconduct evidence is lessened if the misconduct resulted in a criminal conviction, as was the case here. (*Ibid.*) Finally, a very limited amount of time was consumed; the testimony required only a few pages of transcript. (See 5 RT 761-763; 6 RT 895-896.) Applying the factors articulated in *Ewoldt* and *Harris*, the probative value of the evidence of appellant's prior offense was not "substantially outweighed" by the probability of any prejudicial effect. (Evid. Code, § 352.)

Nonetheless, appellant contends the evidence was too inflammatory to be admitted. Relying on *People v. Albarran, supra*, 149 Cal.App.4th 214, appellant contends the evidence was inadmissible because it created a risk that the jury would improperly infer that he has a criminal disposition or bad character and thus create an impermissible inference that he committed the charged crimes. (*Id.* at p. 223; see ABOM 24-25.) Appellant's reliance

is misplaced. In *Albarran*, the trial court granted a motion for new trial as to the gang enhancements, finding sufficient evidence did not support the true findings. (*Ibid.*) The defendant then filed a motion for new trial as to the substantive charges, alleging prejudice stemming from the admission of the gang evidence. The trial court determined that the gang evidence was relevant to the issues of motive and intent in committing the underlying crimes, and denied the motion. (*Ibid.*)

The Court of Appeal reversed the judgment and remanded the matter for a new trial on the underlying offenses, finding the prosecution had failed to present sufficient evidence that the crimes were gang motivated. (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 217, 232.) Thus, as appellant notes, the issue in *Albarran* was not whether the gang evidence was admissible to prove a gang enhancement or a substantive gang charge, but whether the gang evidence should be admitted to show intent and motive as to the underlying charges. (*People v. Albarran, supra*, at p. 217; see ABOM 24, fn. 11.) Unlike in *Albarran*, there was no question in this case that appellant's crimes were gang-related. And appellant's prior conviction was necessary to prove the street terrorism offense and the gang enhancement allegation, and was limited to that purpose. As the Court of Appeal pointed out, citing *People v. Hernandez, supra,* 33 Cal.4th at page 1044, when the prosecution charges a gang enhancement, it will often present evidence that would be inadmissible in a trial limited to the charged offense. (Slip Opn. at 14.)

Appellant cites two appellate cases to support the contention that the use of his own crimes to show a pattern of criminal activity was an abuse of discretion. (ABOM 20-24.) In *People v. Leon* (2008) 161 Cal.App.4th 149, the Court of Appeal found that the trial court abused its discretion in admitting the defendant's prior juvenile adjudication to prove the defendant was an active participant in a criminal street gang and to prove gang

enhancement allegations. In *Leon*, the defendant was convicted of burglary, attempting to dissuade a witness from reporting a crime, possessing a concealed firearm in a vehicle while being an active participant in a criminal street gang, and carrying a loaded firearm while being an active participant in a criminal street gang. (*People v. Leon, supra*, 161 Cal.App.4th at p. 152.) At trial, the court permitted the prosecution to introduce evidence of the defendant's juvenile adjudication for robbery to establish the predicate offenses necessary for a section 186.22, subdivision (b)(1) gang enhancement. (*Id.* at pp. 164-165.)

On appeal, the *Leon* court held that the trial court abused its discretion in admitting evidence of the defendant's prior juvenile adjudication to establish that the defendant was a gang member and that the group in question was a criminal gang. The court noted that the robbery convictions of two other gang members were sufficient to establish the predicate offenses, and the other evidence of the defendant's gang membership was overwhelming. (*People v. Leon, supra*, 161 Cal.App.4th at p. 169.) The Court of Appeal held "the evidence of [the defendant's] robbery adjudication was 'merely cumulative regarding an issue that was not reasonably subject to dispute.'" (*Ibid.*, citing *People v. Ewoldt, supra*, 7 Cal.4th at pp. 405-406.) The Court of Appeal went on to find the error harmless under *People v. Watson* (1956) 46 Cal.2d 816, 836. (*Id.* at pp. 169-170.)

In *People v. William, supra*, 170 Cal.App.4th 587, police executed a search warrant on a house and found two guns, drug paraphernalia, and ammunition. Seven gang members were present at the time, including the defendant. (*Id.* at pp. 596-597.) The defendant was convicted of gun and drug charges with gang enhancements and participation in a criminal street gang. (*Id.* at p. 595.) On appeal, the court found that the trial court abused its discretion in admitting evidence of "at least eight crimes committed by

[gang] members," as well as evidence of dozens of police contacts with the gang. (*People v. Williams, supra*, 170 Cal.App.4th at pp. 600-602, 609.) The court found the evidence cumulative because it "concern[ed] issues not reasonably subject to dispute." (*Id.* at p. 611.) It found introduction of the cumulative gang evidence harmless. (*Id.* at pp. 612-613.)

Respondent submits that to the extent *Leon* and *Williams* suggest that the trial court must exclude evidence of a defendant's prior offenses whenever the prosecution has other predicate crimes available to show the required "two or more" predicate offenses needed to establish the existence of a criminal street gang under section 186.22, subdivision (e), or that appellant was an active participant of a criminal street gang under subdivision (a), those cases were wrongly decided. First, neither opinion addressed the fact that as part of proving that the defendant was an active gang participant, the prosecution was required to prove that the defendant knew of the gang's pattern of criminal activity. "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value." (*People v. Mattson* (1990) 50 Cal.3d 826, 871.) Appellant's conviction for extortion had more weight and probative value to show his knowledge of VFL's pattern of criminal gang activity, than did predicate crimes committed by other gang members. Thus, the trial court was not required to exclude this evidence as merely cumulative to the other predicate crimes evidence.

Appellant contends that the evidence in this case was cumulative, as was found in *Leon* and *Williams* because, based on the other gang evidence presented, the issue of appellant's criminal gang activity was not reasonably subject to dispute and his prior extortion activity should have been excluded as unnecessary. (See AOB 36, citing *People v. Thompson, supra*, 27 Cal.3d at p. 318, *People v. Ewoldt, supra*, 7 Cal.4th at pp. 405-406.) In a criminal trial, the prosecution has the burden of proving each

element of an offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 361-363 [90 S.Ct. 1068, 25 L.Ed.2d 368].) "[T]he prosecutor's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69 [112 S.Ct. 475, 116 L.Ed.2d 385].) Appellant's plea of not guilty placed all elements of the charged offenses and allegations at issue. (*People v. Steele, supra*, 27 Cal.4th at p. 1243; *People v. Carpenter* (1997) 15 Cal.4th 312, 379; see Penal Code, § 1019.) Even if other evidence was presented to establish the pattern of criminal gang activity, the prosecution was still entitled to prove its case, and the facts required to show appellant's guilt beyond a reasonable doubt. (*People v. Steele, supra*, 27 Cal.4th at p. 1243.)

In *People v. Rowland, supra*, 4 Cal.4th at page 260, this Court determined that evidence of other crimes was relevant for purposes of Evidence Code section 210 if it concerns a disputed fact and that a fact "generally becomes 'disputed' when it is raised by a plea of not guilty or a denial of an allegation. [Citation.] Such a fact remains 'disputed' until it is resolved." (*Ibid.*) VFL's pattern of criminal activity and appellant's knowledge of VFL's criminal activity were disputed, thus appellant's extortion conviction was relevant to show his knowledge of VFL's pattern of criminal activity, and to prove the predicate offenses required under section 186.22(e).

Moreover, the plain language of the statute says that proof of the pattern of criminal gang activity is not limited to only two predicate offenses. As the Court of Appeal pointed out, section 186.22, subdivision (e), explicitly requires the prosecution to prove "two or more of the following offenses." (Slip. Opn. at 13-14.) "Not only does the phrase actually obligate the prosecution to put on evidence of at least two other crimes, but it clearly implies that the prosecution has the discretion to put

on evidence of 'more' than two other crimes. And the choice of words indicates that it does not mean, 'and no more than three.' If the Legislature wanted to say, 'at least two but no more than three,' it could have easily said so. The 'or more' clause of the statute implies that if the prosecution decides, for example, that evidence of four other crimes is appropriate, then it may put on that evidence. Put another way, our Legislature has taken street gangsterism so seriously that it has built into the statute, in the engineering sense of the word, a certain amount of redundancy." (Slip Opn. at 14.)

To prove that a defendant is an active participant in a criminal street gang, the prosecution must prove beyond a reasonable doubt both a defendant's knowledge of the gang's pattern of criminal activity, and the existence of two or more predicate crimes to establish that pattern of criminal gang activity. Thus, the fact that the defendant himself was convicted of one of the predicate crimes is not "merely cumulative" whenever the prosecution happens to have two other predicate crimes, not involving the defendant, available.

Because the evidence of appellant's prior conviction had substantial probative value, and was not more prejudicial than probative, the trial court properly exercised its discretion under Evidence Code section 352 in allowing the prosecution to introduce evidence of appellant's conviction for the purpose of proving that VFL was a criminal street gang and that appellant had knowledge of VFL's pattern of criminal activity.

II. ANY ERROR WAS HARMLESS

Even assuming the court erred in admitting the evidence, it is not reasonably probable the jury would have reached a result more favorable to appellant had the evidence been excluded. "The erroneous admission of evidence under Evidence Code section 352 does not warrant reversal unless it is reasonably probable that a more favorable result would have occurred

had the evidence been excluded. [Citations.] (*People v. Davis* (2009) 46 Cal.4th 539, 603; see also *People v. Avitia, supra*, 127 Cal.App.4th at pp 185, 194 [applying standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at page 836, to find harmless any error in admitting evidence of prior crimes].)

The evidence of guilt in this case was quite strong. Ly's testimony was corroborated by appellant's admission to Dam, the testimony of the percipient witnesses, Vuong's testimony, and the ballistics evidence. The jury was instructed not to consider uncharged gang crimes as propensity evidence. (7 RT 1062-1063.) The jury is presumed to have abided by the court's instructions. (*People v. Sanchez* (1995) 12 Cal.4th 1, 82.) Finally, neither party referenced appellant's prior extortion during closing argument. Moreover, even if inadmissible to show a pattern of criminal gang activity under Penal Code section 186.22, subdivisions (a) and (e), the gang expert properly relied on the extortion conviction to show that extortion was one of the primary activities of the gang, and to support his opinion that appellant was an active member of VFL. Under these circumstances, any error was harmless under the *Watson* standard.

Appellant, however, argues that he was prejudiced by the trial court's ruling because this was a close case and the erroneous admission of the extortion evidence tipped the balance in the prosecution's favor, relying on the jury's readback requests and the length of deliberations. (ABOM 45-47.) But neither establishes that this was a close case.

The jury deliberated for about eight and a half hours over the course of four days. (4 CT 875, 877, 879-880, 997.) During that time the jurors requested and received a read back of Ly's testimony regarding "when the suspects exited vehicles on Yockey to the time the suspects left Yockey," Dam's testimony regarding what appellant and Uncle Dave told him about the crimes, and the redirect and recross of Ly. (4 CT 876, 878-879.)

"[T]he length of a jury's deliberation is related to the amount of information presented at trial[.]" (*People v. Houston* (2005) 130 Cal.App.4th 279, 301.) Here, the trial, including closing argument and instructions, lasted seven court days. The jury heard the testimony of 17 witnesses during this time. (4 CT 844-858, 862-872, 874-875.) The jury's deliberation of this vast information for about eight and a half hours over the course of four days reflects its diligence. The jury's requests for the reading back of selected testimony "does not necessarily indicate that this was a 'close' case as appellant argues; in fact, the jury's time spent reviewing that testimony reduced their time spent actually deliberating." (*People v. Houston, supra*, 130 Cal.App.4th at p. 301.) To conclude that this was a close case "in the absence of more concrete evidence would amount to sheer speculation" as "the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision[.]" (*People v. Walker* (1995) 31 Cal.App.4th 432, 439 [rejecting claim that case was closely balanced simply because the presentation of evidence took roughly two hours and deliberations lasted six and one half hours];see also *People v. Houston, supra*, 130 Cal.App.4th at 301 [rejecting argument case was close where jury deliberated for unspecified number of hours over a four-day period and asked for readbacks of selected testimony where record indicated "that there were extensive trial proceedings involving over three dozen witnesses occurring on 10 different days spread over three weeks, as well as lengthy closing arguments and jury instructions spread over two additional days"].)

Appellant's claim that the trial court's admission of the gang evidence violated his right to due process and a fair trial is meritless. (AOB 43-49.) The application of the ordinary rules of evidence generally does not impermissibly infringe upon a defendant's constitutional rights. (*People v.*

Prince (2007) 40 Cal.4th 1179, 1229.) If a trial court commits an error which renders a defendant's trial arbitrary and fundamentally unfair, it has violated the defendant's federal due process rights. (*Estelle v. McGuire, supra*, 502 at p. 62, 70; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; see *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [determination of prejudice where a federal right is implicated].) A trial court's admission of evidence constitutes such a due process violation only if there are no permissible inferences the jury may draw from the admitted evidence. (*People v. Steele, supra*, 27 Cal.4th at p. 1246; *People v. Albarran, supra*, 149 Cal.App.4th at p. 229.) Here, the permissible inference for the jurors to draw from the gang evidence was that VFL members had committed at least two predicate crimes, and that appellant had knowledge of VFL's pattern of criminal gang activity. Even under the stringent *Chapman* standard, any error was harmless beyond a reasonable doubt. Based on the foregoing, it is evident that the trial court's admission of the gang evidence did not render appellant's trial so fundamentally unfair as to constitute a due process violation.

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Court affirm the judgment below.

Dated: June 11, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,325 words.

Dated: June 11, 2010

EDMUND G. BROWN JR.
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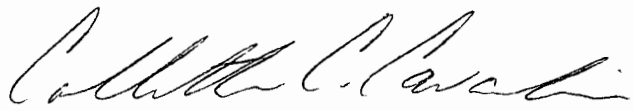

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. QUANG MINH TRAN** No.: **S176923**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 14, 2010, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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For delivery to:
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Fourth Appellate District Division Three
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and furthermore declare I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address of ADIEService@doj.ca.gov on **June 14, 2010** to Appellate Defender's, Inc.'s electronic notification address, eservice-criminal@adi-sandiego.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 14, 2010**, at San Diego, California.

Jena Ray
Declarant

Signature

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