THE PEOPLE, Plaintiff and Respondent, v. JOSEPH JAMES MELCHER, Defendant and Appellant.

A125507

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

2011 Cal. App. Unpub. LEXIS 7222

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PRIOR HISTORY: [*1]
San Francisco City & County Super. Ct. No. 205652.

JUDGES: Reardon, Acting P.J.; Sepulveda, J., Rivera, J. concurred.

OPINION BY: Reardon

OPINION

A jury convicted appellant Joseph James Melcher as charged of three counts of murder (counts 1-3); two counts of first degree attempted murder (counts 4 & 5); discharge of a firearm at an occupied vehicle (count 6); two counts of assault with a semiautomatic firearm (counts 7 & 8); and reckless driving while evading a peace officer (count 9). In connection with the murder counts, the jury found true the allegations of multiple-murder special circumstance as well as personal discharge of a firearm causing great bodily injury and death, but rejected a special circumstance allegation that the victims were intentionally killed because of race, color, religion, nationality or country of origin, as well as the hate crime murder sentencing factor. With counts four through six, the jury sustained personal discharge of a firearm causing great bodily injury allegations, but rejected the hate crime enhancements. And finally, counts seven and eight were accompanied by sustained allegations of personal and intentional discharge of firearm allegations, but again the hate crime enhancements [*2] were not found true. The trial court sentenced appellant to 200 years to life in state prison plus life without the possibility of parole.

Appellant raises a host of issues in this appeal, including that the trial court (1) should have granted his motion for severance of counts; (2) erred in admitting expert testimony on toolmarks and firearms; (3) erred in admitting uncharged conduct evidence; (4) should not have admitted evidence and a prosecutor's comment that firearms evidence was given to a defense expert; (5) should have instituted competency proceedings; and (6) should not have allowed appellant to waive entry of an insanity plea. As well, he asserts that aspects of his sentence were unauthorized. We conclude no errors occurred and hence there was no cumulative error. However, two aspects of appellant's sentence were unauthorized and we therefore order the abstract of judgment amended accordingly. In all other respects we affirm the judgment.

I. FACTS

A. *San Bruno Avenue Incidents*

Around 2:30 a.m. on August 27, 2006, Robert Stanford, Dominic Cheng and Tony Ma left the home of their friend Latesha Li, located on the 2600 block of San Bruno Avenue in San Francisco. This section of [*3] San Bruno Avenue is dotted with businesses with Asian characters depicted in their signage. Stanford and Cheng got into Stanford's car and Stanford made a U-turn. Ma saw a burgundy reddish car pull in front of Stanford's car. [1] According to Ma, a White or Hispanic man, five feet 10 or five feet 11 inches tall, 140-150 pounds, bald with a hoodie got out of the car with a gun, walked to Stanford's car and fired eight or nine shots at him. The shooter then drove off. Cheng got out of the car, injured and bleeding; a bullet was removed from his leg. Stanford died of multiple gunshot wounds.

1 Ma initially thought the car was a Toyota Corolla.

Cheng described the shooter as average size with light skin, round eyes, a shaved head, and wearing a hoodie. [2] The car was a red, hatchback-type car.

2 In November 2006 Cheng viewed a photograph array, but he was unable to make a positive identification of appellant. He pointed to two persons other than appellant as, respectively, looking most like the shooter, or maybe the shooter. He also viewed a video clip of the subsequent Japantown shootings. (See pt. I.B., post.) He said the Japantown suspect "looked a little big" and a "little buffer." He told [*4] the officers that he "knew it probably wasn't him because he could, like, not get buffed and stuff that fast." But the bald head and skin tone were similar to the person who shot Stanford.

A police inspector retrieved 10 Federal .45-caliber cartridge casings from the San Bruno Avenue scene.

B. *Japantown Incidents*

Nearly two months later, around 9:00 p.m. on October 21, 2006, bartender Mi Qyung Kim was working at The Flow bar in Japantown. Song Lee and Jung Lee were chatting at the bar. A White man in his 20's, five feet 10 inches tall, no facial hair, wearing a white cap and a white hooded sweater shirt, walked into the bar.

He asked Jung Lee in Korean, "[W]here is Jennifer?" Song Lee asked, "Why are you asking?" The man pulled out a black gun and shot Song Lee, using his right hand. Mi Qyung Kim scooted behind the bar. The man aimed the gun at her and shot; she fainted.

Around that time, Chak Ting Tsui was walking in Japantown with her boyfriend Stephen (Kam Li). A White man wearing a white hooded jacket or coat was coming from Denny's, a restaurant located above The Flow bar on Post Street. He was yelling loudly and swearing. The man was around 20 to 30 years old, about five feet 10 inches [*5] tall with no facial hair, and an average build. He came toward the couple, saying "I'm talking to you." He said "Fuck you," pulled out a black gun and shot Stephen in the back of the head, using his right hand.

Also around 9:00 that evening, Jeffrey Tai was walking with Jimmy Yu and other friends in Japantown toward an intersection between Post and Buchanan. Yu heard two shots coming from a basement. About two minutes later, a man ran next to the group, coming from the direction of the basement; he mumbled something. The man ran across the street while the light was still red, said "Fuck you, motherfucker" to a man, pulled out a gun and shot him.

Tai recalled the shooter as Caucasian, in his late 20's, wearing a baseball cap, a white jacket and jeans; he was about six feet tall. Yu described him as Caucasian, five feet 10 inches tall, wearing a baseball cap, white sweatshirt and jeans. He did not have any facial hair.

Kevin Hibbitt and Alissa Di Franco were also in Japantown when they heard a shooting in the plaza. Hibbitt saw the victim fall down. He heard a man yelling, "You don't fuck with Johnny boy whitey, San Francisco coke dealer." Di Franco started to call 911. The man looked [*6] at her and said, "Yeah, that's right, lady, call on the phone. Call the cops. Tell them someone has been shot." Di Franco heard him say, "White girl, don't fuck with me. Go ahead. Call emergency. San Francisco coke dealer." The shooter was walking backward, gesturing side to side at waist level, going toward Geary Street.

Di Franco said the perpetrator had very pale skin and very dark eyes. He was between five feet seven inches and five feet 11 inches tall, medium build, wearing a white sweatshirt or jacket with a hood. She also thought the jacket had blue stripes down the sleeves. Hibbitt stated the man was of medium height, Caucasian with very pale skin, and wearing a white sweatshirt or jacket with some covering on his head, either a white baseball hat or white hood. He had no facial hair and was medium to stocky build.

Juliana Boehmer also witnessed the shooting. She was walking in front of Katsumo Mall in Peace Plaza when she heard more than five firecrackers or gunshots. Soon thereafter she saw a man coming up the stairs to ground level from the downstairs bar. He was wearing a white sweatshirt and dark pants, about average height, medium weight. The man was saying something to [*7] himself. He cussed, asked a man, "What are you looking at?" and then shot him.

Walking in Japantown that night, Shmuel Krampf heard someone say "motherfucker"; he turned around and saw a flicker of fire between two people. Krampf heard a "puff" sound and saw someone fall down. People were running away. One man wearing a white sweatshirt and white baseball-type hat turned around and started walking away slowly, looking around him. He was "30 up," slightly taller than Krampf who was five feet eight inches tall, with a medium build. Krampf called 911.

The police arrived at the Japantown scene. Officer Danny Miller came upon Kam Li, who was lying on the ground with a gunshot wound to the head. [3] A woman came out of The Flow bar, screaming, "[H]e is in there shooting people." Inside the bar, Song Lee was on the ground, lying in a pool of blood; there was a lot of brain tissue and matter splattered. [4] Kim was propped up behind the bar, moaning and bleeding.

3 Li died as a result of the gunshot wound to his head.

4 She died of multiple gunshot wounds, including two to her head.

Inspectors Jimmie Lew, John Tursi and Daniel Cunningham were in an unmarked vehicle wearing raid jackets with "[P]olice" [*8] on the back when they received a dispatch call at 9:16 p.m. alerting them to a Japantown shooting. Dispatch described a White male, in white clothing with a white baseball cap. At the intersection of Webster and O'Farrell, two blocks from Japantown, they spotted a White male, wearing white clothing and a white cap with black striping. The man went into the Safeway parking lot, got into a white four-door Ford Focus and drove away. Inspector Tursi saw the man, whom he identified in court as appellant, holding a dark handgun pointed toward the car ceiling. Inspector Lew pointed his weapon at appellant, and he and Cunningham yelled, "Police." Appellant drove in front of the police vehicle, looked in the officers' direction and continued on. Cunningham broadcast the license plate and description of the vehicle; he and Lew followed appellant.

Meanwhile, Officer Steven Pomatto and his partner, in uniform and a marked vehicle, responded to a call of a possible suspect getting into a white vehicle in the Safeway parking lot. Appellant drove toward Officer Pomatto, who got out of his vehicle, drew his firearm, made eye contact and yelled to stop. The vehicle accelerated southbound onto Fillmore [*9] Street.

Inspectors Lew and Cunningham gave chase. Appellant ran stop signs and red lights, traveling at a high rate of speed, recklessly. Other officers, in a marked patrol car with lights and siren, eventually took the lead.

Appellant suddenly stopped between Webster and Fillmore Streets, and surrendered. As he was arrested, appellant repeated, "I'll never go to jail for this." He had a glazed look in his eye, and "strutted" his chest out. There was blood on appellant's jacket and sleeve, as well as bloodstains on his left shoe and jeans.

An officer processed appellant's hands for gunshot residue; another officer recovered a semiautomatic Glock handgun and magazine from the floorboard of the white Ford. The weapon smelled of gun powder that had recently burned. At trial the parties stipulated that appellant purchased the .45-caliber semiautomatic Glock pistol from L.A. Guns in Los Angeles, taking possession of it on August 22, 2006. Police also found a Dell laptop in the car.

Later that evening Chak Tsui viewed appellant in an orange jumpsuit, at the police station. She told the inspector, "I don't know" but added "that he looked very much like him." She wrote for the record, "The one [*10] that I saw in police station is very looked alike to the guy who shot my boyfriend, but I am not . . . 100 percent sure." Hibbitt and Di Franco also saw appellant at the police station. Hibbitt was 60 percent certain that he was the person he saw at the scene, and noted appellant fit the general description: White male, medium build, very pale skin, no facial hair. Di Franco said she recognized appellant's skin tone and eyes as that of the person in the plaza.

Kim was shown a six-photograph lineup in the hospital. She pointed to appellant's photograph, noting, "Maybe number 4 but not sure." Kim was in the hospital for six days, undergoing surgery, including placing a metal rod into her left leg to stabilize the shattered femur. Her left leg is now shorter than the right leg and she still has trouble walking up stairs, and up and down hill.

C. *Investigation*

Crime scene investigator Rolan Shouldice recovered one .45-caliber Federal casing on Post Street near bloody clothing; and from The Flow bar nine Federal casings, two expended bullets, two copper jacket fragments and one lead fragment.

Samples taken from both of appellant's hands tested positive for gunshot residue. The presence of gunshot [*11] residue on a person's hands indicates that the person fired a gun, was in close proximity when a gun was fired, or came in contact with an object that had gunshot residue on it.

Inspector Michael Johnson searched appellant's home in Panorama City, Los Angeles. He retrieved an Enterprise rental car receipt for a red, four-door Chevrolet Cobalt (not a hatchback). The car was rented on August 12, 2006, and returned September 27, 2006. Johnson also found a parking ticket from the San Francisco Department of Transportation dated August 5, 2006. Also recovered was a case for a Glock. Finally, Johnson found some small cards with Asian characters on the front and the statement " 'A fatal attraction to Cuteness' " on the back. There were no documents or paperwork located in appellant's home indicating any animosity toward Asians.

Officer Joseph Lynch, a computer forensics expert, conducted a search of appellant's computer, looking for "hate crime type of documentation." Using keywords including "Asian," "kill," "hate" and "Jennifer," he came upon the "rotten.com" Web site accessed many times on appellant's computer, including on September 5 and 9 and October 4, 8, 10 and 14, 2006. Lynch described [*12] the Web site as containing graphic images of crime scenes, pictures related to racism, and morbid images. In appellant's folder, accessed on October 14, 2006, was an animated cartoon of a female cut up as sushi. Another image, accessed on October 6, 2006, was of an animated Asian female lying on a bed, partially clothed. Other images accessed included Asian persons wearing protective masks over their faces, Asian military pictures, and sexually explicit animated cartoons.

D. *Expert Testimony*

Gerald Smith, a criminalist assigned to the firearm and toolmark unit of the San Francisco Police Department Crime Laboratory, is a firearms examiner and expert on firearms identification. He is certified in firearms and toolmark identification through the Association of Firearm and Toolmark Examiners. He testified that the .45-caliber semiautomatic Glock with a 10-cartridge magazine was in "very good condition" and "functioned properly." The Glocks are made with right-hand twists in the rifling of the barrel. These twists are in the form of grooves (recessed areas) and lands (raised areas) that the manufacturer cuts or forms into the barrel itself. As the bullet leaves the barrel, it is spinning; [*13] the purpose of the twist is to make the bullet more stable as it travels through the barrel. When the bullet is fired, it picks up the "opposite effect," meaning it is cut by the lands (since they are raised in the barrel), while the grooves form a raised area on the bullet. This particular Glock had eight lands and grooves that were right-hand twists, forged from polygonal, not conventional, manufacturing. Polygonal rifling is a forging process whereby the rifling is actually formed into the barrel, not cut, resulting in very smooth rifling.

Smith examined the 10 cartridge casings and spent bullets from the Japantown shootings, concluding that the bullets were right-hand twists with eight lands and grooves, consistent with the polygonal rifling of a .45-caliber Glock pistol.

Smith compared five casings he had test-fired from the seized weapon with the 10 casings that were fired during the Japantown incidents, looking for individual characteristics that are imparted on the firearm. The tooling in the manufacturing of the firearm causes random imperfections detectable on a microscopic level that are individual to each gun "and in and of themselves." Using side-by-side microscopic comparisons, [*14] Smith determined there were sufficient individual characteristics to conclude that the 10 cartridge casings were fired by the recovered Glock. He gave his opinion that "[t]he agreement that I am seeing on an individual level is sufficient enough for me to say that the chances of another firearm creating that exact same pattern are so remote to be considered practically impossible." The comparisons were "textbook," "very good examples of what it should look like when one firearm is identified to an exhibit." [5]

5 On the other hand, although Smith determined that the two bullets retrieved from the Japantown shootings came from a .45-caliber automatic weapon, showing eight polygonally rifled lands and grooves with a right-hand twist, he could not eliminate or identify them as coming from appellant's Glock. The smooth polygonal rifling in Glock pistols does not lend itself well to creating very prominent individual marks as the bullet drives itself down the barrel, changing its orientation slightly.

Smith also compared the test fire casings with a casing located at the site of the San Bruno shootings, concentrating on the aperture shearing. He concluded that the casing was fired by the Glock [*15] pistol recovered from appellant's car in Japantown.

Smith testified that there were many studies published over the years dealing with the individuality of gun barrels. And many studies have validated that each gun leaves individual markings. Conversely, there is no study that states two different guns left the exact same individual marks. In one recent study, a Glock pistol fired over 10,000 rounds and the first test fire still matched the 10,000th test fire, demonstrating that "many, many firings" would have to occur before there would be a change that you could not identify back to the gun.

Smith indicated that his opinions were subjective, based on his training, experience and exposure to firearms identification over the past 10 years. And, according to the lab standards for identification of firearms, the concept of "sufficient correspondence" is not numerically defined. Again, it is a subjective determination left to the examiner.

On cross-examination, Smith acknowledged that the February 2009 National Research Council (NRC) [6] report entitled *Strengthening Forensic Science in the United States: A Path Forward*, undertaken by congressional mandate, concluded that additional studies [*16] should be conducted to "make the process of individualization more precise and reputable." Smith indicated his agreement with that particular conclusion. However, he disagreed with the NRC's assessment that "[b]ecause not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and reputability of the methods." Smith also acknowledged that he did not measure the length, width or depth of the lines of marks because when looking through the comparison microscope, he could visually make the comparison. Nor did he count the number of matching lines. Further, he did not use three-dimensional surface measurements as suggested in another recent federal report.

6 The NRC is under the umbrella of the National Academy of Sciences.

The parties stipulated that the San Francisco Police Department released the ballistics evidence to the defense expert.

Criminalist Cherisse Boland, an expert in DNA analysis, testified that the blood on appellant's jeans and sweatshirt matched the DNA profile of Song Lee, [*17] and a mixture of DNA on his T-shirt and left shoe matched appellant's and Lee's profiles.

Investigator Shouldice, an expert in crime scene reconstruction, gave his opinion that the three linear lines of Song Lee's blood on appellant's sweatshirt had been transferred when appellant came in contact with the straight edge of the bar. As for the highly concentrated amount of her blood on appellant's sleeve, Shouldice opined that the sleeve would have to come in contact with a heavy concentration of blood, the most likely contact points being the bar area or the victim herself. The satellite spatters of her blood on appellant's left tennis shoe and the absence of blood on the shoe bottoms required a close proximity to the source of blood dripping into blood (not blowback spatter from a shooting). Shouldice deduced the shooter was to the right of Lee, standing on the bar, meaning his left shoe would be closest to where the blood was dripping (Lee being seated on a bar stool). There was no blowback stain on appellant's sweatshirt. The shooting of a person does not always produce blowback.

Defense: Appellant testified on his behalf. He lived in Panorama City and had family in Southern California [*18] as well as in the Bay Area. He did not recall being in the Bay Area during the week of August 22, 2006; he was probably doing something in Los Angeles. The day before his arrest, he had driven to his grandmother's house in San Mateo for her birthday.

On October 21, 2006, he struck up a conversation with a man named Charon and two women at a bar on Union Street in San Francisco. Charon was Asian or Latin-American, wearing a white hooded sweatshirt, light-colored jeans and a black, white and gray camouflaged Giants cap. Charon was a "bit shorter" than appellant, had a round face, tight eyes, and skin that was a "little bit" darker complected than his own. If he had hair, it was very short and black. The four of them went to the Bus Stop bar and also had drinks.

The subject of medical marijuana came up; appellant has a medical marijuana card. Charon wanted to smoke some marijuana but it was between 7:30 and 8:00 p.m., and most of the cannabis clubs would be closed at that time. Appellant and Charon went to appellant's car; there, Charon called someone to confirm that he could get some marijuana. Charon smoked a little marijuana in the car, and when he pulled out a cigarette pack, appellant [*19] saw a firearm in his waistband. Appellant asked to see the weapon, which he described as a .45-caliber semiautomatic gun, unknown make. Appellant then showed Charon his unloaded Glock, which he planned on shooting at a range that night. Appellant put the gun back in a pouch underneath the driver's seat.

Charon directed appellant to Japantown, to a bar below Denny's where he could get the marijuana. Appellant parked in the Safeway parking lot and Charon got out of the car. Appellant waited 35-45 minutes and when Charon did not return, appellant went looking for him on foot. He went down a stairwell into the bar as Charon had described. He walked to within inches of a woman's body on the floor, initially thinking it looked fake. Looking over the bar because he did not see a bartender, he saw another body.

Appellant did not call 911 because he panicked and ran out of the bar to his car, never crossing Peace Plaza. Pulling out, he saw a "regular car" behind him with a middle-aged man in regular clothes, brandishing a firearm. He was "still in panic" and thought he should get as far away as possible. As he left the parking lot, he noticed what appeared to be his pistol, and grabbed it; he [*20] saw "the police" while he still had the gun in his hand, so he ducked and put the gun under the seat. Appellant ran a couple lights, eventually saw a marked police car and pulled over.

Appellant denied killing or shooting any of the victims. He did not know anyone named Jennifer, and did not speak Korean. Initially he denied coming to San Francisco in August 2006, but then acknowledged that the August 5, 2006 San Francisco parking ticket with his name and address on it was his. He also conceded that he had accessed the rotten.com Web site and that it contained images of horrific deaths, crime scenes, and people with heads smashed in. The prosecutor asked if there were any racist pictures at the Web site, but withdrew the question upon defense objection.

Appellant admitted he had not yet met Charon on August 27, 2006, when Stanford was killed.

Appellant reported that he was five feet 10-1/2 inches tall, weighing between 150 and 160 pounds.

Appellant said he did not lock the passenger side of his car when he left to look for Charon, even though he thought his Glock was in the car. He wanted to make it convenient for Charon to sit in the car if he returned when appellant was not present.

II. [*21] DISCUSSION

A. *Severance*

1. *Background*

Without success, appellant moved to sever the San Bruno counts from the Japantown counts. Prior to deliberations, the trial court instructed the jury, "Each count charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." (*CALCRIM No. 3515.*)

After trial, appellant moved unsuccessfully for a new trial, in part based on failure to sever. On appeal, he renews his objection that the trial court abused its discretion in denying severance, which denial resulted in gross unfairness amounting to a denial of due process and a fair trial. [7] We conclude the trial court did not abuse its discretion in joining the causes, and the ensuing trial did not result in gross unfairness as a result of joinder.

7 When rejection of a claim on the merits necessarily leads to rejection of any constitutional theory raised on appeal, no separate constitutional discussion is required. (*People v. Lynch (2010) 50 Cal.4th 693, 735, fn. 14*, overruled on narrower Witherspoon/Witt recusal issue in *People v. McKinnon (2011) 52 Cal.4th 610 [2011 WL 3658915, *13-14].*)

2. *Legal Framework and Analysis*

Penal Code [8] *section 954* [*22] permits the joinder of offenses of the same class of crimes, under separate counts. However, the trial court retains discretion, "in the interests of justice and for good cause shown," to sever statutorily joinable offenses. (*Ibid.*) This provision recognizes that severance may be necessary to satisfy due process and fair trial guarantees. (*People v. Bean (1988) 46 Cal.3d 919, 935.*)

8 All further statutory references are to the Penal Code unless otherwise specified.

" 'Where the statutory requirements for joinder are met, the defendant must make a clear showing of prejudice to demonstrate that the trial court abused its discretion.' [Citation.]" (*People v. Lynch, supra, 50 Cal.4th at p. 735.*) The denial of a motion for severance amounts to a prejudicial abuse of discretion only if the lower court's ruling lies outside the bounds of reason. (*Alcala v. Superior Court (2008) 43 Cal.4th 1205, 1220.*)

In deciding if the trial court abused its discretion under *section 954* by declining to sever properly joined causes, we consider the record before the court at the time of its ruling. (*People v. Soper (2009) 45 Cal.4th 759, 774.*) There are criteria to guide our evaluation of the denial of a severance [*23] motion. The pertinent factors are whether (1) the evidence would be cross-admissible in independent trials; (2) certain charges are unusually likely to inflame jurors against the defendant; (3) a weak case is joined with a strong case or another weak case, such that the aggregate evidence might unfairly alter the outcome on some or all charges; and (4) one charge is a capital offense, or joinder of the charges would convert the matter into a capital case. (*People v. Lynch, supra, 50 Cal.4th at p. 736.*) Where evidence underlying the offenses at issue would be cross-admissible in independent trials of other charges, that factor normally is sufficient, by itself, to dispel any prejudice and validate the trial court's refusal to sever the charged offenses. (*People v. Soper, supra, 45 Cal.4th at pp. 774-775.*)

We note, too, that a jury can consider properly admitted evidence of other crimes if it finds, by a preponderance of evidence, that the defendant committed the other crimes. (*People v. Lynch, supra, 50 Cal.4th at p. 736.*) Here, there was a preponderance of evidence that appellant was the perpetrator who committed each crime. He purchased the gun that he used to kill or attempt to kill [*24] all the victims, and was found in possession of the gun minutes after the Japantown homicides. Further, appellant fit the description of the killer in each case and was connected to both getaway vehicles.

Appellant urges that reversal and remand for a fair trial is required, citing, among other authority, *Bean v. Calderon (1998) 163 F.3d 1073* (*Bean*). As becomes apparent, *Bean* is entirely inapposite. In *Bean*, there was immense disparity between the joined cases--both resulting in convictions of first degree murder, robbery and burglary--such that consolidation of a relatively weak case with compelling charges in the other led to an impermissible inference of criminal propensity. This inference in turn allowed the jury to rely on evidence in the strong case to bolster the otherwise weak case. (*Id. at p.*

1083.) In addition, evidence in the two cases was not cross-admissible. (*Ibid.*) Moreover, *Bean* was a capital case and the state's rational for joinder was that it was more convenient for the prosecution. (*Id. at pp. 1074-1075, 1086.*)

None of the *Bean* concerns are present here. First, and most importantly, there is cross-admissible evidence. Evidence of appellant's intent would be cross-admissible [*25] in separate trials. To be admissible on the issue of intent, the uncharged misconduct must be sufficiently similar to carry the inference that the defendant probably had the same intent in each case. (*People v. Lynch, supra, 50 Cal.4th at p. 736.*) The factual similarities among the crimes may tend to show that in each case the perpetrator harbored the same intent. For example, in *Soper*, the factual similarities tended to demonstrate that in each instance, the defendant harbored the intent to kill and the homicides were premeditated. In each instance the victim was a homeless man, killed by one blow to the head while sleeping at his camp, and the weapon was a large, heavy object apparently found by the defendant at the scene, and then discarded. (*People v. Soper, supra, 45 Cal.4th at p. 779, fn. 15.*) Like *Soper*, the similarities here demonstrated that in both the San Bruno and Japantown instances, appellant harbored the intent to kill and premeditated the homicides. In each case he committed an entirely unprovoked attack on Asian victims unknown to him, whom he shot with the gun he recently purchased, after renting a car which he used to escape the crime scenes.

The weapon and casings [*26] evidence likewise was cross-admissible--had the San Bruno and Japantown charges been severed, such evidence would have been admitted in both cases. The cartridges at each scene came from the same gun, which appellant purchased weeks before the San Bruno shootings. The magazine of that gun held 10 cartridges, and 10 cartridges were found at each scene. Further, the gun was retrieved from appellant, smelling of gun powder, right after the Japantown shootings. All this was circumstantial evidence that appellant was the shooter in both crimes. (See *People v. Johnson (1988) 47 Cal.3d 576, 589-590*, overruled on another point as recognized in *People v. Hunter (2006) 140 Cal.App.4th 1147, 1153, fn. 2.*) Additionally, the court delivered proper instructions that each count charged was a separate crime, and the jurors had the duty to consider each count separately, and return separate verdicts for each count.

Second, joinder did not result in tying an inflammatory charge with a noninflammatory charge. While the Japantown crime spree resulted in two murders and an attempted murder, as compared with the single murder and attempt in the San Bruno location, both sets of crimes were shocking, unprovoked [*27] and similar in nature. Thus neither set of charges was unusually likely to inflame the jury against appellant.

Third, we are not confronted with a weak case joined with a strong case such that the total evidence could unfairly alter the outcome on some or all charges. Again, although there was more evidence in the Japantown case, including victim DNA found on appellant's clothing, the San Bruno case was not weak. The shooter left 10 cartridges at the scene from the same .45-caliber weapon which appellant purchased and possessed. As well, witnesses described the killer with similar details in both cases and getaway cars were tied to appellant at both scenes. The victims targeted each time were Asians, and the attacks were always unprovoked.

Finally, the cases were not charged as capital cases.

Unlike *Bean, supra, 163 F.3d 1073*, joinder of the causes did not result in a violation of appellant's constitutional rights. The case was not a capital case, and the People presented valid reasons for opposing severance. Intent evidence and the matching gun and casing evidence were cross-admissible, thus dispelling any possibility of prejudice. Nor was there a great disparity in evidence between [*28] the cases. Indeed, both were strong cases, notwithstanding that there was more evidence in the Japantown cases.

B. *Expert Testimony on Toolmark and Firearm Identification*

Appellant challenges the admission of expert testimony regarding toolmark and firearm identification, without conducting a foundational "prong one" *Kelly* [9] hearing, and further attacks the form of the expert testimony.

> 9 *People v. Kelly (1976) 17 Cal.3d 24 (Kelly).* (See pt. II.B.2., post, for a discussion of the *Kelly* rule.) Formerly, California courts referred to a foundational Kelly/Frye showing, with "Frye" referring to *Frye v. United States (D.C. Cir. 1923) 293 F. 1013.* (See *People v. Leahy (1994) 8 Cal.4th 587, 591.*) In *Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) 509 U.S. 579, 588-589 (Daubert)*, the United States Supreme Court held that Frye was abrogated by *rule 702 of the Federal Rules of Evidence.* Nevertheless, our state's high court in *Leahy* determined, after careful analysis, that the *Kelly* rule survived *Daubert.* (*People v. Leahy, supra, 8 Cal.4th at pp. 591, 593-604.*)

1. *Procedural Background*

Prior to trial, defense counsel moved to exclude the firearm and toolmark identification evidence. Counsel asserted [*29] that the continuing general acceptance of such evidence, including assertions as to the degree of certainty or impossibility of another weapon being the weapon that fired the lethal or wounding bullets, was being questioned by the scientific community. Counsel relied in part on the February 2009 NRC report. The report criticized the foundation of firearm and toolmark identification for several reasons, including that the current process resulted in a subjective decision; there was no statistical foundation for estimation of error rates; firearms analysis lacked a precisely defined process and specific protocol; and more research was needed to determine the degree to which firearms-related toolmarks are unique.

At the hearing counsel argued that the NRC report marked a change in scientific opinion such that a "prong one" *Kelly* hearing was warranted. The trial court declined, stating that there was not sufficient evidence that the scientific community had called into question the techniques currently used. Thereafter the court found that Smith qualified as an expert and he performed the examinations and tests in compliance with the San Francisco Police Department protocol, the Association [*30] of Firearm and Toolmark Examiners and the protocols of Illinois and Florida. On the issue of the scope of permissible testimony, the court ruled that Smith "can't say that it's 100 percent; there is no other gun in this world. It's just his opinion."

Smith did testify, over objection, that the chance of another weapon creating the same pattern was so remote as to be "practically impossible." The court instructed the jury that "this is his opinion. He can only talk about how he is. I want it to be understood that he did not test fire every Glock pistol in the world or in this country or this state. So when he talks about this, this is his opinion as to his certainty." Smith went on to state that the comparisons were "textbook." And later, "[M]y identification is of a practical certainty based off of my training and experience."

At the close of trial, the unsuccessful new trial defense motion included argument that the trial court should have granted the "prong one" *Kelly* hearing and the form of Smith's testimony was improper.

2. *Legal Framework*

Our Supreme Court has laid down three requirements governing admission of evidence generated by a new scientific technique. First, the reliability [*31] of the new technique must be sufficiently established to have gained general acceptance in the relevant scientific field. Thus, when faced with a new method of proof, courts will require a preliminary showing of general acceptance in the relevant scientific community. (*Kelly, supra, 17 Cal.3d at p. 30.*) Second, the witness testifying to the reliability of the technique must be properly qualified as an expert on that subject. And third, the evidence must show that correct scientific procedures were followed. (*Ibid.*)

The *Kelly* court further explained that once a published appellate decision has affirmed admission of evidence based on a new scientific technique, that precedent will control subsequent trials, "at least until new evidence is presented reflecting a change in the attitude of the scientific community." (*Kelly, supra, 17 Cal.3d at p. 32.*) In other words, the precedent controls "in the absence of evidence that the prevailing scientific opinion has materially changed." *(People v. Venegas (1998) 18 Cal.4th 47, 53.)* We independently review the decision to deny a *Kelly* hearing. (See *id. at p. 85.*)

However, it is important to underscore that *Kelly* only applies to " ' "that limited [*32] class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law." ' [Citations.]" (*People v. Cowan (2010) 50 Cal.4th 401, 470.*) In *Cowan,* the expert had combined two existing techniques to compare a pistol barrel with bullets recovered from a man's body. Because the pistol barrel had been damaged, he made a cast of its interior using a silicone rubber compound routinely used in the casting of toolmarks. (*Id. at pp. 469-470.*) The defendant did not claim that the techniques of ballistics comparisons or of identifying toolmarks using molds from elastic material were new. As well, neither technique was " 'so foreign to everyday experience as to be unusually difficult for laypersons to evaluate.' [Citation.]" (*Id. at p. 470.*) The court explained that the purpose of the *Kelly* rule is to prevent jurors from being unduly influenced by procedures which appear scientific and infallible, but are not. But, where " 'a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent [*33] and need not be debated under' the *Kelly* rule." (*Ibid.*)

3. *Analysis*

Appellant's position is this: There has been growing authoritative criticism of the assumptions underlying "supposedly unique subjective toolmark identifications." The NRC 2009 report in particular, he asserts, has concluded that the core reliability of this type of subjective determination is in serious contention. Although courts continue to admit such evidence, some are questioning the testimony and form of testimony absent a hearing.

The court did not err in failing to hold a *Kelly* prong-one hearing.

As reported in 4 Faigman et al., Modern Scientific Evidence, The Law and Science of Expert Testimony (Thomson Reuters/West 2010) (*Faigman*), section 35:1, pages 613-614, "expert evidence on toolmarks and firearms identification is universally admissible . . . ." (Fn. omitted.) As well, "[e]xpert testimony identifying a particular weapon as the one source of both a questioned (crime scene) bullet and known bullets (test firings) is admissible in every American jurisdiction." (*Id.*, § 35:3, p. 619.) Nonetheless, the authors conclude, this universal admissibility has not been accompanied by "judicial evaluation of the validity [*34] of the underlying science or its application" (*id.*, § 35:1, p. 614) or "of the premises and performance of firearms experts" (*id.*, § 35:3, pp. 619-620). However, notwithstanding the continued admission of this forensic evidence, courts are beginning to apply closer scrutiny to these questions.

U.S. v. Green (D.Mass. 2005) 405 F.Supp.2d 104, cited by appellant, is one such case. The *Green* court admitted expert testimony on firearm and toolmark identification, but limited the testimony to observable similarities and differences in the unknown and test-fired casings, and forebade any conclusion that there was a definitive match between the casings and a specific weapon. (*Id. at pp. 108-109.*) The court expressed that the problem facing the defense "is that every single court post-*Daubert* [10] has admitted this testimony, sometimes without any searching review, much less a hearing." (*U.S. v. Green, supra, at p. 108*, italics & fn. omitted.) Notwithstanding the court's reservations, it allowed the testimony because of its "confidence that any other decision will be rejected by appellate courts, in light of precedents across the country . . . . The more courts admit this type of toolmark evidence [*35] without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more." (*Id. at p. 109*, fn. omitted; see also *U.S. v. Glynn (S.D.N.Y. 2008) 578 F.Supp.2d 567, 569-571.*)

10 *Daubert* established a gatekeeper function for district courts in evaluating proffered expert scientific testimony under the relevant federal rules, a function that entails a preliminary assessment of whether the proffered testimony is scientifically valid, and whether the underlying reasoning or methodology could properly be applied to the facts. (*Daubert, supra, 509 U.S. at pp. 592-593.*) To assist trial courts in the gatekeeper role, the *Daubert* court identified various factors to consider, including whether the theory or technique has been generally accepted within the scientific community. (*Id. at pp. 593-594.*)

In this case it is clear that the techniques which Smith used were not new. Moreover, toolmark identification evidence has been admitted in California for over 60 years (see *People v. Godlewski (1943) 22 Cal.2d 677, 685* [chisel marks]), and firearms identification is universally admissible in this country (*Faigman, supra*, § 35:3, p. [*36] 619). And, while the NCR report criticizes the subjectivity of toolmark and firearm identification, characterizes the standards as "unarticulated" and professes that there is no "statistical foundation for estimation of error rates" (fn. omitted), it does not call for outright abandonment of the field but rather recommends further study and, by inference, more specificity of protocols.

Furthermore, the court in *U.S. v. Monteiro (D.Mass 2006) 407 F.Supp.2d 351, 372*, cited by appellant and noting that some authors have argued for improvements in the field, found: "Although these authors have suggested possible improvements, the community of toolmark examiners seems virtually united in their acceptance of the current technique." (*Ibid.*) Moreover, the court concluded that "the methodology of firearms identification is sufficiently reliable." (*Ibid.*) So, too, the *Glynn* court determined that the methodology of ballistics examination "has garnered sufficient empirical support as to warrant its admissibility." (*U.S. v. Glynn, supra, 578 F.Supp.2d at p. 574.*) And similarly, the court in *U.S. v. Natson (M.D. Ga. 2007) 469 F.Supp.2d 1253, 1261* concluded that the toolmark testing methodology employed [*37] by the expert at trial was generally accepted in the scientific community.

Significantly, a recent unpublished decision concluded, after a full evidentiary hearing, that the very theory of firearm identification used by the San Francisco Police Department Crime Lab at issue in our case was "reliable under *Daubert*. While there is some subjectivity involved, it is the subjective judgment of trained professionals with a keen practiced eye for discerning the extent of matching patterns. The methods used are reliable." (*United States v. Diaz* (N.D. Cal.) 2007 WL 485967, *1.) The *Diaz* court further held that the "theory of firearms identification based on traditional pattern matching appears to have broad acceptance in the forensic community. There has been no critique sufficient to undermine the traditional examination method as it is performed by competent, trained examiners." (*Id.* at *11.)

Additionally, we point out that the motion to exclude was thoroughly briefed by both sides, and the trial court was well versed in the issues presented. For all these reasons we conclude that the trial court did not err in admitting the evidence without conducting a new prong-one *Kelly* hearing.

In any event, [*38] the absence of a new hearing caused no prejudice to appellant because the evidence was overwhelming. Appellant, who matched eyewitness descriptions, was caught fleeing after the Japantown shootings, with a recently fired .45-caliber semiautomatic Glock pistol. There was gunshot residue on his hands, and the blood of a victim on his clothing. As well, he made an incriminating statement. Moreover, appellant admitted purchasing the Glock and picking it up days before the San Bruno slaying, and admitted renting a red Cobalt, a car similar to the description provided by a San Bruno witness. Again, the description of the slayer matched appellant's general appearance. Both crimes involved unprovoked shootings of Asians and in both cases the shooter escaped by car. Ten Federal .45-caliber cartridge casings were recovered from both scenes, and the magazine for the Glock held 10 cartridges. Certainly an expert could at least testify that the type of recovered cartridges would fit appellant's Glock.

4. *Form of Testimony*

Appellant also complains that the form of Smith's testimony was improper under *Evidence Code section 352* and violated his due process rights. He protests that in expressing his [*39] opinion, Smith should not have used the phrases "practical certainty," or the "impossibility of another source."

Ruling on the motion to exclude firearm and toolmark identification evidence, the trial court stated that Smith could testify "[i]n my opinion I am certain that this is the same thing," but "no hundred percent." Smith did go on to opine, over objection, that the "chances of another firearm creating [the] exact same pattern are so remote to be considered practically impossible." The court admonished the jury that this was Smith's opinion, and made it clear that he did not test fire every Glock in the world, state or city. Smith went on to say that the comparison he demonstrated were "textbook"--"very good examples" of what firearm identification should look like. Later he explained that his identification was "of a practical certainty" based on training and experience, but that his opinion was not "absolute to the exclusion of all the other firearms."

Appellant argues these "authoritative expressions" should have been excluded under *Evidence Code section 352*. We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Catlin (2001) 26 Cal.4th 81, 120.*) [*40] *Section 352* gives the court broad discretion to decide whether the prejudicial effect of proffered evidence substantially outweighs its probative value. (*People v. Michaels (2002) 28 Cal.4th 486, 532.*) "Prejudicial," in *section 352* parlance, refers to evidence which uniquely tends to evoke emotional bias against the defendant as a person, and has little impact on the issues. In other words, " ' "prejudicial" ' " is not the same thing as " ' "damaging." ' " (*People v. Bolin (1998) 18 Cal.4th 297, 320.*)

First, as a general principle, the probative value of the expert evidence was high, and not substantially outweighed by the danger of undue prejudice within the meaning of *Evidence Code section 352*. Smith's testimony about a match between test-fired casings and the casings recouped from the two scenes was highly relevant to show that appellant, who owned and possessed the gun from the test-fired shots, was the shooter in both instances.

On the more specific complaint about the form of testimony, the federal courts vary on the proper form of testimony, based on varying degrees of concern about the reliability of the methodology. The *Monteiro* court explained that a qualified expert could [*41] testify to a match "to a reasonable degree of ballistic certainty." (*U.S. v. Monteiro, supra, 407 F.Supp.2d at p. 372.*) The *Green* court would not allow testimony " 'to the exclusion of every other firearm in the world' " or a conclusion that there was a definitive match. (*U.S. v. Green, supra, 405 F.Supp.2d at p. 109.*) The *Glynn* court limited the opinion that a match was " 'more likely than not . . . .' " (*U.S. v. Glynn, supra, 578 F.Supp.2d at pp. 574-575.*) And finally, the *Diaz* court forbade a conclusion "to the exclusion of all other firearms in the world" but permitted testimony that a casing was fired from a certain firearm to a " 'reasonable degree of certainty in the ballistics field.' " (*Diaz, supra*, at *14.)

Smith did not express a conclusion to the "absolute exclusion" of all other firearms, and did not express 100 percent certainty. He came very close to the line with the "practical certainty" and "so remote to be considered practically impossible" language. The trial court tempered the testimony somewhat with its admonition. Later instructions on how to evaluate expert testimony, including that the jurors must decide "whether information on which the expert relied was true [*42] and accurate," and can disregard an opinion they find unbelievable, unreasonable or not supported by the evidence, further enforced the court's admonition. In addition, the expert was tested by cross-examination, and appellant had the right to put on his own expert, but declined.

Assuming, for purposes of argument only, that the form of Smith's testimony should have been reigned in to comply with that of *Diaz* or *Glynn*, *no prejudice* stemmed from the form he did use. For all the reasons set forth above, the difference between "practical certainty' and "considered practically impossible" versus "reasonable degree of certainty" or "more likely than not" would not tip the outcome in this case. And, for the same reasons, the form of testimony did not render appellant's trial arbitrary or fundamentally unfair. (See *Estelle v. McGuire (1991) 502 U.S. 62, 70.*)

C. Uncharged Conduct Evidence

1. *Background*

Appellant also challenges admission of evidence that he had visited the "rotten.com" Web site numerous times, a Web site that contained death images, photographs of Asians in masks, Asian cartoons, an image of an Asian woman sliced like sushi, and the like. He claims this evidence was unduly prejudicial [*43] character evidence that denied him due process and a fair trial.

During a lengthy pretrial hearing, Officer Lynch testified about the forensic investigation of Internet links and Web sites accessed on appellant's computer, notably his 20 visits to the rotten.com Web site during the period September 5, 2006 through October 14, 2006. The trial court admitted the Internet links and images accessed on appellant's computer between August and October 2006 from the rotten.com Web site. It ruled that the evidence was relevant to prove motive, intent, premeditation, deliberation, and appellant's fixation on Asians, death and homicides. It explicitly found that the prejudicial value of the evidence was outweighed by its probative value. However, the court excluded evidence pertaining to African-Americans, finding such evidence more tenuous and more prejudicial than probative. As well, it excluded evidence of a restraining order issued three years prior to the events in question, finding the connection speculative.

At trial, Officer Lynch described the rotten.com Web site and the type of images appellant accessed. Two exhibits were passed among the jurors, one with the sushi picture and the other [*44] with images of Asians with protective masks, Asian military images, and sexually explicit cartoons of Asian women. On cross-examination, appellant admitting going to the rotten.com Web site several times, and acknowledged the nature of images depicted at the site.

2. *Admissibility*

Evidence Code section 1101, subdivision (b) permits the admission of evidence of past crimes, civil wrongs or other acts when relevant to prove a material fact at issue in the case such as motive, opportunity, preparation, intent, plan or knowledge, but not to prove a defendant's disposition or character to commit such an act. Because uncharged conduct evidence may be prejudicial, the court must weigh the probative value of the proffered evidence against the probability that its admission would create a substantial danger of undue prejudice, confusing the issues or misleading the jury. (*Id., § 352.*) Relevant evidence is evidence "having any tendency in reason" to establish any material fact of consequence to the case." (*Id.*, § 210.)

To admit uncharged acts evidence on the issue of intent, there must be a sufficient similarity between the charged and uncharged acts. (*People v. Kipp (1998) 18 Cal.4th 349, 369.*) [*45] On the other hand, the relevance of other acts evidence on the issue of motive need not depend on a similarity between the charged and uncharged acts, provided there is a direct logical nexus between the two. (*People v. Demetrulias (2006) 39 Cal.4th 1, 15.*) Thus, motive may be shown by evidence of prior dissimilar acts. (*People v. Scheer (1998) 68 Cal.App.4th 1009, 1018.*) Motive, of course, is always pertinent in a criminal prosecution. (*People v. Perez (1974) 42 Cal.App.3d 760, 767.*)

Here, appellant was charged with murder and attempted murder, with a special circumstance allegation that he intentionally killed the victims because of their "race, color, religion, nationality, or country of origin." (§ 190.2, subd. (a)(16).) With his not guilty plea, appellant put in issue all the elements of the murder offenses and the special allegation, including intent, deliberation, premeditation and the intentional killing because of the victims' race. Appellant asserts that his Internet views of the rotten.com images were "nothing short of irrelevant." We disagree. The other acts evidence was relevant to establish appellant's state of mind at the time he killed the victims, and attempted to kill [*46] the other victims, and whether he committed the crimes because the victims were Asian, supporting the section 190.2, subdivision (a)(16) allegation. (See *People v. Lindberg (2008) 45 Cal.4th 1, 45-46* [expert testimony that written material found in defendant's room referring to White supremacist organizations and advocated White supremacist beliefs was relevant to his state of mind and motive and whether he killed victim because of his race].) The evidence was also relevant to show that appellant acted deliberately and with premeditation. That on numerous occasions appellant viewed morbid death scenes and Asians in unflattering images tended in reason to show the planning and reflection involved in premeditation and deliberation, namely that in advance of the killings, he considered the choice to kill and then decided to kill the Asian victims.

Appellant calls our attention to *McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378* to argue that evidence that he was fixated on Asians, death and homicides is nothing more than character evidence. The issue in *McKinney* was whether the admission of evidence of the murderer's fascination with and prior possession of knives was probative of any element [*47] of the prosecution's case. The reviewing court concluded that the contested knife evidence was only probative of character and was irrelevant to any fact of consequence in the case. (*Id. at pp. 1383-1384.*) Conversely, here appellant's visits to the rotten.com Web site were relevant to the issue of motive (targeting Asians as the murder victims) and premeditation and deliberation. *McKinney* is of no assistance to appellant.

Nor was the admission of the evidence under *Evidence Code section 352* inherently prejudicial. The rotten.com images were less inflammatory than the photographs of the actual crime scenes shown to the jury, including pictures of bloodied victims who died from multiple gunshot wounds. Moreover, the evidence did not consume undue trial time; the expert testimony on the subject was relatively brief as was the cross-examination of appellant on the subject.

Additionally, there was no danger of confusing or misleading the jury. Appellant suggests that the court should have delivered a limiting instruction regarding the use of uncharged conduct evidence. For example, *CALCRIM No. 375* instructs that the evidence cannot be used to show that the defendant has a bad character or [*48] is disposed to commit the charged crimes, and lays out the specific grounds of relevance that may be considered. No one requested such an instruction, and the trial court in this case did not have a sua sponte duty to instruct on the limited admissibility of the evidence. (*People v. Collie (1981) 30 Cal.3d 43, 64.*) An exception to this no-duty rule might arise where "unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*Ibid.*) Here, the uncharged acts evidence constituted a small part of the evidence, was not unduly prejudicial and was relevant to the issues of motive and premedication/deliberation.

3. *No Due Process Violation*

Trial court error which renders a defendant's trial arbitrary and fundamentally unfair amounts to a violation of the defendant's due process rights. (*Estelle v. McGuire, supra, 502 U.S. at p. 70*; *Jammal v. Van de Kamp (9th Cir. 1991) 926 F.2d 918, 920.*) When the jury cannot draw any permissible inference from the proffered evidence, its admission violates due process. (*Jammal v. Van de Kamp, supra, at p. 920*; see *People v. Albarran (2007) 149 Cal.App.4th 214, 230-232.*)

There [*49] was no due process violation here. To reiterate, the trial court properly admitted the evidence as probative of contested issues in the case, and properly concluded that its probative value outweighed the danger of undue prejudice. Appellant relies on *People v. Albarran, supra, 149 Cal.App.4th 214* to argue that the evidence was "prejudicial overkill" such as to deny him due process and a fair trial. In *Albarran,* when denying defendant's new trial motion, the trial court found there was insufficient evidence to support the gang enhancement, but that some gang evidence was relevant to prove motive or intent. Reversing, the reviewing court held that even if some gang evidence were relevant on these issues, the lower court erred in admitting the other extremely inflammatory evidence--including references to the Mexican Mafia, threats to kill police officers, and descriptions of criminal activities by other gang members--that had no connection to the underlying charges. (*Id. at pp. 226-228.*)

In contrast, in this case the contested evidence was relevant to prove motive and deliberation/premeditation. There was substantial evidence that the killings were motivated by appellant's intent to target [*50] victims because of their race because all the victims were randomly selected Asians, killed in unprovoked attacks in neighborhoods home to Asian businesses. Also, the evidence tended in reason to support deliberation and preplanning, as appellant's viewing of morbid death images and Asians in unflattering pictures indicated that appellant considered his choice to kill and decided to kill the Asian victims.

Further, in *Albarran,* the reviewing court concluded that the motive for the underlying crimes was not apparent from the circumstances of the crime, and the expert conceded he did not know the reason for the shooting. (*People v. Albarran, supra, 149 Cal.App.4th at p. 227.*) On the other hand, here the prosecutor argued that the victims were targeted for their race in unprovoked attacks, although the precise reason *why* he targeted the victims for their race was not known from the evidence.

Finally, we note, too, that defense counsel elicited testimony from Officer Lynch that his computer file search did not unearth evidence of chat room activity or e-mails reflecting animus or hatred toward Asians. In closing argument, defense counsel underscored that point and argued that the absence [*51] of such evidence showed a lack of motive for the homicides, and undermined the "hate crime" allegations. The jury rejected the murder because of victim's race allegations. Therefore, while there was substantial evidence to support the section 190.2, subdivision (a)(16) allegations, the jury evaluated the evidence--including the contested images--and rejected the allegations.

D. *Evidence and Comment that Firearms Evidence Was Handed over to Defense Expert*

1. *Background*

Appellant also assails the trial court's decision to admit evidence, and the prosecutor's comment, that the firearms evidence had been given to a defense expert. He asserts damage to his rights to due process, a fair trial, and the effective assistance of counsel.

At trial defense counsel moved to preclude such evidence, raising concern that the prosecutor could argue that the defense conducted tests and if they came "back negative[,] you would have heard from a defense expert." The prosecutor represented that there was "no way" he would make that argument and further pointed out that because the People's expert had undergone significant cross-examination about "his practice, his field and the reliability of it," as a matter [*52] of fairness the jury should know that the evidence was turned over to the defense. The court concurred, remarking that since the cross-examination raised issues of how the expert performed the test, the jurors reasonably could deduce that "this is in the hands of the D.A. and that the defense could not have equal access." The court permitted the prosecutor to read a stipulation that a police inspector released ballistics evidence to the defense expert, and indicated it was holding the prosecutor to his representation.

Later in the course of trial, the prosecutor read the stipulation to the jury. And during closing argument he stated, "Did you know that the ballistics was turned over to the defense? There was a stipulation." On rebuttal he said, "There was no . . . one to confront . . . Mr. Smith's position. [¶] . . . [¶] Mr. Smith testified, subject to human error. Ballistics was turned over to defense."

2. *Analysis*

Appellant claims that his right to confidential expert assistance was impinged because "the defense could not even consult an expert without jurors being exposed to insinuations the expert could not come up with anything or, indeed, came up with unfavorable results." (Italics [*53] omitted.) We are not sure what appellant is trying to express. The stipulation did not interfere with defense counsel's ability to confidentially communicate with his defense expert, it merely stated that the firearms evidence had been released to the expert. No confidential information that defense counsel may have obtained from the expert was revealed. The stipulation did not indicate whether testing was conducted and results obtained, let alone the nature of any results. (See *People v. Bennett (2009) 45 Cal.4th 577, 595* [no work product privilege violation where prosecutor's questions simply sought to clarify that DNA samples were available to defense for independent testing]; *People v. Zamudio (2008) 43 Cal.4th 327, 355* [testimony that prosecution sent tested items and results to defense laboratory did not contravene privilege].)

Without the stipulation, the jury would be left with a truncated version of the circumstances involved in the firearms testing. Defense counsel attacked Smith's credibility, honing in on the methods he used, seeking to impugn the premises, reliability and limitations of toolmark and firearms identification, thereby opening the door for the prosecutor to [*54] respond and rehabilitate the witness. *People v. Lewis (2004) 117 Cal.App.4th 246* is helpful. There, the defendant attacked the prosecutor's questioning of a detective and related argument, in particular his references to the defendant's failure to demand a live lineup. This Division pointed out that the defense case centered on deficiencies in the police lineups, and defense counsel had sought to attack the procedures the detective used with the photo lineups. Under these circumstances the prosecution properly could respond to the criticisms by showing that the defendant did not pursue a potential remedy, thus permissibly referring to the defendant's failure to develop exculpatory evidence. (*Id. at pp. 257-258.*) Similarly, given the attack on the procedures Smith used to test and evaluate the firearms evidence, and the attempt to undermine his conclusions, the prosecutor was permitted to respond with the stipulation that the firearms evidence had been released to the defense expert. The stipulation dispelled a logical but erroneous implication that key evidence had been withheld from the defense.

Appellant propounds that he should not be penalized by "forced disclosures or prosecutorial [*55] comment" regarding his right to effective assistance of counsel, citing, for example, *Doyle v. Ohio (1976) 426 U.S. 610, 618)*, which holds that a prosecutor may not exploit a defendant's postarrest silence. *Doyle* has no application, as appellant's right to remain silence is not at issue here. Moreover, "*Doyle*'s protection of the right to remain silent is a 'shield,' not a 'sword' that can be used to 'cut off the prosecution's "fair response" to the evidence or argument of the defendant.' [Citations.]" (*People v. Lewis, supra, 117 Cal.App.4th at p. 257.*)

And last, appellant criticizes the trial court's admission of the evidence as contravening *Evidence Code section 352*. He argues that because it was agreed the defense would not offer any testimony concerning its expert, the reference to a defense *expert* created needless speculation regarding that expert's testing, if any. The reference to expert is of little moment. The defense *expert* would be the logical recipient of the evidence, and as we have explained, that the firearms evidence released to the defense expert was relevant to counter the impermissible implication that the evidence had been kept from the defense. As well, the fact [*56] that the same evidence had been given to the defense expert was relevant to counter the defense position that Smith's opinions about the firearms evidence were flawed, because no defense expert was introduced to rebut those purportedly flawed opinions. (See *People v. Ford (1988) 45 Cal.3d*

431, 448 [defendant's failure to call available witness "whom he could be expected to call if that witness testimony would be favorable is itself relevant evidence"].) The probative value of the stipulation was not outweighed by the danger of undue prejudice, within the meaning of *Evidence Code section 352*; nor was undue time spent on the reading of it. The stipulation itself was straightforward and there was no danger that its admission would confuse the issues or mislead the jury. Its rehabilitative purpose was clear because Smith had undergone lengthy cross-examination. Further, the trial court delivered instructions on the evaluation of witness testimony and expert testimony, and informed the jury that neither side was required to call all witnesses who might have information, or produce all physical evidence that might be relevant.

E. *No Error in Not Instituting Competency Proceedings*

Appellant [*57] charges that the trial court erred in failing to initiate competency proceedings or conduct further inquiry into his competency. We do not agree.

1. *Background*

On March 25, 2009, at the request of defense counsel, the trial court conducted an in camera inquiry to ensure that appellant understood his right to present mental health defenses. Counsel had provided the court with the report of Dr. Natalie Novick Brown and referenced it at the hearing, noting documentation therein of fetal alcohol syndrome and an Axis I diagnosis of delusional disorder. He expressed that the case falls "into a gray area" and observed that he struggled at length "with the competency issue." Counsel indicated that all the experts in the case except Dr. Brown believed appellant was competent. Appellant had cooperated with and had interviews with a "couple psychiatrists" and three psychologists. However, he refused to pursue mental health defenses, or undergo more tests such as an MRI.

Counsel believed that a mental state defense was more appropriate than an identification defense, and wanted to make sure that his client understood the various defenses he would be waiving by pursuing the latter. Counsel indicated [*58] that a possible mental state defense could focus on the components of intent. An insanity defense could focus on appellant's moral judgment as impeded by specific delusional fears.

The trial court discussed these defenses with appellant, asked probing questions, and appellant explained in his own words what the doctors had to say about the issues. Appellant indicated he understood and had considered the mental health defenses, but made the choice to waive those defenses and assert an identity defense.

2. *Analysis*

The trial of an incompetent defendant offends the due process protections of our federal and state Constitutions. (*People v. Hayes (1999) 21 Cal.4th 1211, 1281*.) Our statutes implement these protections. A defendant is mentally incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) Section 1368 calls for a competency hearing if a doubt as to a defendant's competence arises during trial, either because defense counsel informs the court that he or she believes the defendant is incompetent, [*59] or a doubt arises in the mind of the judge. Whether on defense motion or sua sponte, a trial judge must suspend trial proceedings and conduct a competency hearing when presented with substantial evidence of incompetence, "that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial." (*People v. Rogers (2006) 39 Cal.4th 826, 847*.)

Substantial evidence of incompetence is that which raises a reasonable doubt about a defendant's competence to stand trial. Evidence concerning past events that only forms the basis for speculation about possible current incompetence is not sufficient. (*People v. Hayes, supra, 21 Cal.4th at p. 1281*.) Further, evidence of incompetence may come from a variety of sources, such as the defendant's irrational behavior, demeanor, and past mental evaluations. (*People v. Rogers, supra, 39 Cal.4th at p. 847*.) The trial court's decision whether to initiate a competency hearing deserves deference, because the court has had the opportunity to observe the defendant during trial. (*Ibid.*) Nonetheless, when there is substantial evidence of incompetence, the failure to declare a doubt and conduct a hearing mandates reversal [*60] of the judgment. (*Ibid.*)

The trial court did not abuse its discretion. First, defense counsel did not express a doubt about appellant's competence. (See *People v. Hayes, supra, 21 Cal.4th at p. 1282*, finding that factor of note.) While counsel indicated he had struggled with the competency issue, we are satisfied from our review of the hearing that he had explored the issue, but was not pursuing that issue at the hearing. Rather, counsel expressed his desire to focus on the waiver, unless the court had questions about competency.

As to Dr. Brown, defense counsel represented that all experts except Dr. Brown believed appellant was competent. Dr. Brown's report noted that she administered an "Evaluation of Competency to Stand Trial," but the results were not included in her report and were not before the court. Further, her report does not specifically state he was incompetent to stand trial. Rather, she says that counsel had informed her of significant difficulties in efforts to work with appellant, and described him as wary of mental health professionals. In other words, her impression about his willingness to work with counsel came from conversation with counsel. Appellant mentions [*61] that Dr. Brown lamented that his "delusional process[]" appeared to affect his resistance to mental health inquiries and further testing. However, defense counsel represented to the court that appellant had cooperated with and done a number of interviews with five mental health professionals, and all those experts believed he was competent. And notably, Dr. Brown's report was dated January 7, 2009, and her interview of him occurred September 29, 2008. The March 25, 2009 in camera hearing took place six months *after* that interview.

Additionally, it bears clarifying what is required of a statement from a mental health professional in order to constitute substantial evidence of incompetence. Our Supreme Court has said "that if a qualified mental health expert who has examined the defendant ' "states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel," ' that is substantial evidence of incompetence." (*People v. Lewis (2008) 43 Cal.4th 415, 525* [psychologist's declaration [*62] that defendant might suffer brain damage that might cause him to have " 'less conscious control of his actions' " did not raise doubt about defendant's competence].) Dr. Brown's report does not meet this test.

In any event, the March 25, 2009 hearing itself bore on the issue of appellant's competence. He acted appropriately and with respect, spoke in turn, asked for clarification of a question, and gave a reasonable, detailed answer to the court's query as to what the doctors said about the matter of a mental illness defense.

Finally, that appellant did not pursue that defense does not mean he did not or could not cooperate with counsel. In fact, the record shows that he met with professionals at counsel's urging, and he discussed the mental health defenses in detail with them and with counsel. (See *People v. Gauze (1975) 15 Cal.3d 709, 717-718*, explaining that it is a defendant's call whether to enter an insanity plea, and concluding that defendant freely and voluntarily, with knowledge of the consequences, made the choice to rely on an alibi defense.)

F. *Waiver of Insanity Plea*

Appellant also faults the trial court for permitting him to waive an insanity plea and related defenses without [*63] an adequate inquiry. Specifically, appellant maintains the court abused its discretion by not asking *why* he was refusing the defenses and further mental health examinations, and for not following up on his overall competence.

1. *Background*

To recap, at the in camera hearing defense counsel expressed his belief that a mental health defense--either an insanity plea or an attack on intent--was more appropriate than an identification defense. He noted that all the experts basically agreed with the diagnoses of fetal alcohol syndrome and delusional disorder. According to counsel, all but Dr. Brown believed he was competent. Counsel understood that it was his client's decision whether or not to waive an insanity plea, but he wanted to ensure that appellant adequately understood and considered the defenses and waiver thereof.

The court explained that the purpose of the hearing was to make sure appellant understood the consequences of his decisions. The court asked if he heard and understood the statements made by his attorney at the hearing; and stated it had reviewed Dr. Brown's report, including the possibility that he suffered fetal alcohol syndrome and that Dr. Brown wanted to explore further [*64] tests, as the syndrome could be a defense. The court also probed exploring a mental defense that would negate premeditation and deliberation, an avenue his attorney wanted to pursue, which could be a strong defense to the charges, and observed that his preferred defense of identity may not be as strong. Additionally, the court explained that with the insanity plea, appellant would have to submit to an examination that might explain certain conduct. To all these questions and probes, appellant indicated that he understood. As well, the court inquired if appellant chose not to explore mental health defenses; appellant said he chose not to. He understood the possibility that these may be stronger defenses. Responding to further questions, appellant related what his attorney and the doctors had said about the tests and diagnoses, and how they might help him in the case. He understood the reason they talked with him was to find out if he were competent enough to be aware of the severity of his situation. Stating that he was "completely aware" of that, his own choice was to waive the defense; he wanted to beat the case based on the facts. Further, both appellant and counsel stated they had [*65] discussed the insanity defense in detail.

The court ruled that appellant had made an intelligent and voluntary decision to forego the insanity defense and any other mental health defenses, and advised appellant if he wanted to revisit the matter, to let the court know.

2. *Analysis*

The decision to plead, or change or withdraw a plea, ultimately lies with the defendant, not counsel. (*People v. Medina (1990) 51 Cal.3d 870, 899-900.*) A court may not compel a defendant to present an insanity defense, so long as it is satisfied that the defendant's refusal to plea is "a free and voluntary choice with adequate comprehension of the consequences." (*People v. Gauze, supra, 15 Cal.3d at pp. 717-718.*) In *Gauze*, our state's high court rejected the defendant's claim that the trial court interfered with his counsel's right to control the litigation by inducing counsel to defer to his wish not to plead guilty by reason of insanity. Rejecting this claim, the court noted that the defendant was advised by counsel and the court of the likely consequences of conviction, and informed him that if committed, he would have periodic review and a chance of being released. The defendant was aware of the prison potential [*66] but insisted on trying the case on his alibi defense, and upon being asked if he preferred state prison, he responded affirmatively. (*Id at p. 718.*)

It is apparent that *Gauze* does not mandate a specific protocol or colloquy. All that is required is that the decision to waive an insanity plea be free, voluntary, and with comprehension of the consequences. Those requirements have been met. Defense counsel, in appellant's presence, stated his opinion about the strength of the insanity defense. The trial court asked probing questions, appellant answered appropriately and coherently. The above described sequence demonstrates that appellant understood and considered the value of asserting the insanity plea, understood what his diagnosis meant and why the professionals were testing him, but in the end declined the plea because he made the choice to pursue an identification defense. Unlike the defendant in *People v. Merkouris (1956) 46 Cal.2d 540*, which appellant cites, he did indicate appreciation of the severity of the situation, indicating he was "completely aware of that." Further questioning was unnecessary.

G. *Sentencing Errors*

Appellant calls our attention to three unauthorized aspects [*67] of his sentence, as follows:

1. *Three 25 Years to Life Sentences*

In addition to the life without possibility of parole (LWOP) terms imposed based on the jury's multiple-murder special-circumstance finding, the trial court also sentenced appellant to three consecutive 25 years to life terms for the three murders. Section 190.2, subdivision (a) states that the penalty for first degree murder "is death or imprisonment in the state prison for life without the possibility of parole" if one or more special circumstances is found. LWOP thus is an alternate term for murder, in lieu of 25 years to life, not in addition to 25 years to life. Where, as here, the prosecutor does not seek the death penalty in a special circumstances case and the jury finds true the special circumstance alleged, the punishment is LWOP and the court had no discretion to impose anything else. (See *People v. Young (1992) 11 Cal.App.4th 1299, 1308.*) Therefore, we direct that the abstract of judgment be corrected to reflect a sentence of LWOP on each of the murder counts, and eliminate the 25 years to life terms. [11]

11 The trial court intended that the terms run consecutively, noting that the crimes were committed at different [*68] times and places, and constituted separate acts on different victims.

2. *Personally and Intentionally Discharging a Firearm*

The jury convicted appellant of two counts of assault with a semiautomatic firearm (§ 245, subd. (b)), and found true the allegations that he "personally and intentionally discharged a firearm, to wit: a Handgun, within the meaning of *Penal Code Section 12022.53(c)*." The allegations tracked the information, verbatim. Likewise, the court instructed that if appellant were found guilty on these (and other enumerated) counts, the jury must then decide whether the People proved that he personally and intentionally discharged a firearm during those offenses, citing *section 12022.53, subdivision (c)*. (*CALCRIM No. 3148.*) This statute mandates an additional and consecutive 20-year prison term when, in the commission of certain specified felonies, the perpetrator "personally and intentionally discharges a firearm." Subdivision (a) thereof lists the various felonies to which the enhancement applies, including section 245, subdivision (d), assault with a firearm on a peace officer or firefighter. (*§ 12022.53, subd. (a)(7).*) Assault with a semiautomatic firearm is not one of [*69] the enumerated offenses. Nonetheless the trial court imposed two 20-year gun enhancements under this statute.

Appellant insists that the enhancements must be stricken. The People counter that the jury's true findings on the enhancements require the trial court to impose a sentence for them, and accordingly we should remand so the sentencing court can impose and stay sentences pursuant to section 12022.5, subdivision (a). This statute calls for an additional and consecutive term of three, four or 10 years when the perpetrator "personally uses a firearm in the commission of a felony or attempted felony . . . unless use of a firearm is an element of that offense." [12] (§ 12022.5, subd. (a).)

12 Notwithstanding the element of the offense limitation, the additional term "shall be imposed

for any violation of Section 245 if a firearm is used . . . ." (§ 12022.5, subd. (d).)

This situation is one of simple, technical clerical error, a clerical error that carries no issue of lack of fair notice or violation of explicit statutory pleading and proof requirements, as was the case in *People v. Mancebo (2002) 27 Cal.4th 735, 743-745.*) The information, instructions and verdict form contained firearm [*70] allegations that for all practical purposes, except for the numerical designation, invoked the section 12022.5, subdivision (a) personal use enhancement. The information apprised appellant of allegations that he personally and intentionally discharged a firearm during commission of the assaults, the court delivered instructions tracking those allegations, and the jury found them true beyond a reasonable doubt. With these findings the jury necessarily found it true that appellant personally *used* a firearm in commission of those felonies. (§ 12022.5, subd. (a).) Once a defendant intentionally deploys a gun in the furtherance of an offense, he or she is subject to the use enhancement. (*People v. Granado (1996) 49 Cal.App.4th 317, 327.*) Employing a firearm " 'at any time on the continuum between the initial step of the offense and arrival at a place of temporary safety' " triggers the enhancement. (*Id. at p. 329.*)

We therefore remand for imposition and stay of sentence on the gun enhancements pursuant to section 12022.5, subdivision (a).

3. *Restitution Fine*

The trial court imposed a restitution fine of $90,000, consisting of $10,000 for each of the nine felonies in the consolidated case. [*71] We agree with appellant that the fine must be reduced to $10,000. Absent compelling and extraordinary reasons, section 1202.4, subdivision (b)(1) requires the trial court to impose "a separate and additional restitution fine" of "not more than $10,000" in every case where the defendant is convicted of a felony. The term " 'every case' " includes a jointly tried case. (*People v. Ferris (2000) 82 Cal.App.4th 1272, 1277-1278.*) The $90,000 fine was unauthorized and must be modified accordingly.

III. DISPOSITION

We affirm the judgment of conviction; direct that the abstract of judgment be modified to reflect an LWOP sentence on each of the three murder counts and to reduce the restitution fine to $10,000; and remand for imposition and stay of sentence under section 12022.5, subdivision (a).

Reardon, Acting P.J.

We concur:

Sepulveda, J.

Rivera, J.