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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR SENDEJAS et al., Defendant and Appellant.	B263449 (Los Angeles County Super. Ct. No. BA420834)

APPEAL from judgments of the Superior Court of Los Angeles County, Edmund Wilcox Clarke, Jr., Judge. As to defendant Gina Sanchez, reversed. As to defendant Arthur Sendejas, affirmed in part, reversed in part, and remanded with directions.

Jerome McGuire, under appointment by the Court of Appeal for Defendant and Appellant Arthur Sendejas.

Melissa Hill, under appointment by the Court of Appeal for Defendant and Appellant Gina Sanchez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters,

Assistant Attorney General, Steven D. Matthews, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Two men, one of whom was identified as defendant Arthur Sendejas (Sendejas), a gang member, fired multiple shots at Robert R., who was affiliated with a nonrival gang. After Sendejas's arrest, the police learned from a confidential informant that Sendejas had a copy of the police report of the shooting. Like the original report, the copy in Sendejas's possession contained identifying information about the witnesses to the shooting. Sendejas had received the copy of the report from his cousin, codefendant Gina Sanchez (Sanchez), who worked for the police. Both were arrested.

Following a joint trial, a jury convicted Sendejas of attempted murder, firearm possession by a felon, attempted dissuasion of a witness, and conspiracy to dissuade a witness. The jury also found true gang and firearm enhancements. The jury convicted Sanchez of attempted dissuasion of a witness and conspiracy to dissuade a witness.

On appeal, defendants assert prejudicial discovery violations and evidentiary and instructional errors, errors concerning the prosecution's gang expert testimony, and insufficient evidence to support the convictions and gang and firearm enhancements. We reverse both defendants' convictions for conspiracy and Sanchez's conviction for attempted dissuasion of a witness for insufficient evidence, remand for the trial court to exercise its discretion whether to strike Sendejas's firearm enhancement, and otherwise affirm Sendejas's convictions and enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Charges

Sendejas was charged in a fourth amended information with four felony counts: attempted willful, deliberate and premeditated murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)),[1] firearm possession by a felon (§ 29800, subd. (a)(1), attempted dissuasion of a witness (§ 136.1, subd. (c)(2)) and conspiracy to dissuade witness (§ 182, subd. (a)(1)).

As to the attempted murder count, the information specially alleged Sendejas had personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and the offense was gang-related and punishable by a life term pursuant to section 186.22, subdivision (b)(5)). As to the attempted witness dissuasion and conspiracy counts, it was specially alleged Sendejas had committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subds. (b)(1)(A), (b)(4)). As to all counts, the information specially alleged Sendejas had suffered one prior strike conviction (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), and one prior serious felony conviction (§ 667, subd. (a)(1)), and had served one prior prison term for a felony (§ 667.5, subd. (b)).

The same information charged Sanchez with two felony counts: attempted dissuasion of a witness and conspiracy to dissuade a witness.

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[1] Statutory references are to the Penal Code, unless otherwise indicated.

The defendants pleaded not guilty, and Sendejas denied the special allegations. The case proceeded to trial.

B. Summary of the Prosecution Evidence

1. The events leading up to the shooting

Robert R.[2] was an "inactive" member of the Metro 13 gang. He was friendly with members of the gang, but he no longer associated with them. Robert R.'s younger brother, Omar R., was a gang detective for the Montebello Police Department.

In September 2012, Robert R. and N.V., his live-in girlfriend, had a violent argument, which Robert R. reported to the Montebello Police Department. Robert R. knew he risked gang retaliation for "snitching" to the police about N.V. who was on parole at the time. N.V. left and moved in with Sendejas, with whom Robert R. later learned she had been having an affair. N.V. and Sendejas began making threatening phone calls to Robert R. Sendejas and Martin V., both Sangra gang members, attempted to confront Robert R. outside his house.

2. The shooting

On October 14, 2012, Robert R. was in his backyard, when he saw Sendejas and Martin V. at the nearby gate. The two men yelled "Sangra," and Sendejas fired multiple shots before fleeing with Martin V. The bullets struck a car belonging to K.B., who was visiting Robert R. K.B. telephoned the emergency operator and reported seeing two men, "probably gang members" shooting

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[2] To protect personal privacy interests, we identify certain people by first name and last initial only and, in some instances, by initials only. (Cal. Rules of Court, rule 8.90(b).)

a handgun over the gate. Neither Robert R. nor K.B. was injured in the shooting.

S.F. was inside the house located in front of Robert R.'s on the same lot. She saw two men approach the backyard and peek over the gate. One of the men yelled, "This is for San . . . " or "This is for S . . . ," and fired five or six shots toward the back house. S.F. told Montebello Police Officer Daniel Contreras that she saw the shooter's face and could identify him. She described the shooter as Mexican, with a moustache, a patch of hair below his bottom lip, and tattoos on his right arm.

After interviewing S.F. and K.B., Officer Contreras wrote a report (the shooting report) and included their identifying information. Later, Robert R. and S.F. separately identified Sendejas as the shooter from a six-pack photographic lineup prepared by Detective Craig Adams. Following S.F.'s identification of Sendejas, Detective Adams showed her a single photograph of Sendejas.[3]

On November 20, 2012, charges were filed against Sendejas and a warrant for his arrest was issued. Sendejas was arrested on January 16, 2013 and was released on bail.

3. The conversations between Sendejas and the confidential informant and the search of Sendejas's home

B.L. (Informant), a former gang member, worked as a paid confidential informant for the Montebello Police Department gang detectives, including Omar R., Robert R.'s brother.

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[3] S.F. testified Detective Adams showed her the single photograph and then pressured her to identify Sendejas in the photographic lineup.

Informant knew Sendejas through N.V., the sister of Informant's wife.

On June 11, 2013, Informant told Montebello Police Detectives Cervantes and Adams that Sendejas had acquired a copy of the shooting report from Sendejas's cousin Gina Sanchez, who worked at the Montebello Police Department. Sendejas had picked up the copy from his mother's house. Sendejas's copy was unredacted; it included the witnesses' identifying information.

Informant agreed to try to obtain for the detectives the unredacted shooting report in Sendejas's possession. Informant telephoned Sendejas and offered to show a copy of the report to "Stranger" (a moniker), who was a member of Robert R.'s former Metro 13 gang. The report would serve as "paperwork" to prove Robert R. had snitched to the police. Sendejas agreed to have Informant show Stranger the police report "for cleaning house."

On June 26, 2013, Informant met Sendejas in a parking lot. Informant was wearing a concealed audio recording device that recorded their conversation.[4] During the conversation, Sendejas warned Informant to keep the report from getting into "the wrong hands." Sendejas said his attorneys had refused to give him a copy of the unredacted shooting report, and he was not supposed to have it.[5]

At trial, Informant acknowledged that on October 4, 2013, four days before the preliminary hearing, he told Detectives Adams and Cervantes that Sendejas did not commit the

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[4] The audio recording of Informant's meeting with Sendejas was played for the jury at trial.

[5] On August 17, 2013, the police executed a search warrant on Sendejas's home and found a copy of the unredacted shooting report.

shooting.[6] Instead, Informant reported, Robert R. had staged the shooting because he was angry with Sendejas over N.V. and wanted to get Sendejas arrested.[7] On direct examination, Informant recanted his October 4, 2013 statements to detectives as "a false story." Informant explained he had been "misled" at the time by emotions and family loyalty.

4. The investigation of Sanchez

Sanchez, Sendejas's cousin, was employed by the Montebello Police Department. As a records technician, Sanchez was able to view, modify, download, and photocopy police reports that had been scanned into the Department's computerized records management system. Sanchez also had access to the original hard-copy police reports stored in the master case record file. Her job required that she sign an acknowledgement of the confidentiality of criminal record information. When victims or suspects were provided copies of police reports, witness and suspect identifying information was always redacted.

In the wake of Informant's conversation with Detectives Cervantes and Adams, Diane Cisneros, the Department's records supervisor, began auditing Sanchez's computer activity. The audit revealed that Sanchez had accessed the shooting report on numerous occasions between November 28, 2012 and August 21, 2013 and deleted addresses and aliases from Martin V.'s and Sendejas's criminal records. These dates

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[6] Detective Adams wrote down Informant's statements and provided them to the defense.

[7] At his request, Informant was relocated by the Montebello Police Department shortly after this conversation.

appeared to coincide with court proceedings and/or police investigations related to the shooting.

On September 13, 2013, the Montebello Police Department devised a ruse that involved scanning a false supplemental report to the shooting report into the records management system. The supplemental report listed new, but nonexistent, eyewitnesses. In Sanchez's presence, a detective feigned a telephone conversation with Detective Julio Calleros about the phony eyewitnesses and mentioned N.V., Sendejas and Martin V. Minutes later, Sanchez accessed the false supplemental police report, took a break, and was seen using her cellphone.

Iris Belliston, a document examiner for the Los Angeles County Sheriff's Department, opined that the copy of the unredacted shooting report recovered from Sendejas's home was probably not produced from a scanned and printed copy of the report but was more likely "a copy of a copy" of the original report from the master case record file.

5. The gang evidence

Sergeant Javier Clift (Sergeant Clift) of the Los Angeles County Sheriff's Department testified as the People's gang expert. According to Sergeant Clift, the Mexican Mafia prison gang controlled all the Sureno or Hispanic gangs. It set the rules governing gang culture, of which respect, fear, and reputation were important aspects. Under the rules, if a gang member were disrespected and failed to retaliate, both the gang member and the gang would be perceived as weak by their own gang, other gangs, and the community. A gang member was also obligated to retaliate if a fellow gang member, family member, or romantic partner were disrespected.

Gang members instilled fear in the community by committing violent crimes. They also engendered fear by wearing gang-affiliated tattoos, painting graffiti on public places and, although not common, by yelling their gang name before committing a crime. Invoking the gang name was a way to ensure the crime victim realized the gang supported the commission of the violent crime.

The Mexican Mafia had strict rules against "snitching" or assisting law enforcement, the consequence of which was always death. A Sureno gang member accused of snitching was not to be killed by other Sureno gang members without "paperwork," or a legal document indicating the gang member had cooperated with the police. An unredacted police report bearing a gang member's name and statements to the police qualified as paperwork. If that paperwork were given to fellow gang members, they were required to retaliate by "cleaning house" or killing the snitch.

Sergeant Clift was familiar with the Sangra gang, which began in the city of San Gabriel. The primary activities of the Sangra gang were narcotics sales, murder, murder for hire, assault with a deadly weapon, automobile theft, car stripping, robbery, burglary, and identity theft. Prior crimes committed by convicted Sangra gang members included murder in April 2009 and dissuading a witness in December 2009. Sergeant Clift learned about the facts of both crimes from Sergeant Valdez, a gang investigator for the San Gabriel Police Department. Sergeant Clift also had read about the murder in the newspaper.

Sendejas had different tattoos of an "S" and "G" and a "5" and "6" on his arm and chest and an SKS assault rifle on his neck, all of which signified his Sangra gang affiliation. According to Sergeant Clift, Sendejas had been known to him since the

preliminary hearing approximately eight months earlier. Sergeant Clift opined Sendejas was an active member of the Sangra gang based on information Clift had received from Sergeant Valdez and Sendejas's gang-related tattoos.

When presented with a hypothetical based on the facts of the events leading up to the October 14, 2012 shooting and the shooting itself, Sergeant Clift opined the shooting would have been committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. Sergeant Clift reasoned because the shooter arrived at the scene with a fellow gang member as "backup," and identified his gang membership immediately prior to firing his gun, the shooter was in effect proclaiming to the neighborhood that his gang was fearless, as its members were willing to leave their own neighborhood to commit crimes.

When presented with a follow-up hypothetical based on the recorded and unrecorded conversations between Sendejas and Informant, Sergeant Clift opined the "crime" of obtaining and providing an unredacted police report of the shooting in exchange for the promise to show it to the shooting victim's fellow gang member, would have been committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. Sergeant Clift explained the hypothetical demonstrated the power of the gang because one of its members had a law enforcement contact able to supply the paperwork necessary to prove to the victim's gang that the victim was a snitch.

C. Summary of Defense Evidence

Neither defendant testified at trial. N.V.'s version of her violent argument with Robert R. was that he threw a beer bottle at her and pushed her into a shelf full of bottles.

Dr. Kathy Peck, an eyewitness identification expert, opined that S.F.'s photographic identification of Sendejas was unduly tainted by Detective Adams's suggestive behavior (as recounted by S.F. at trial): showing her a single photograph of Sendejas and telling her other witnesses had identified him as the shooter before S.F. had selected his photograph from the six-pack.

According to Sendejas's estranged wife, Irene S., Sendejas was at home on the afternoon of October 14, 2012 watching a football game. For the brief time she left, Sendejas remained at home with their younger children. He did not have tattoos on his left arm until December 2012. A family photograph taken in November 2012 showed Sendejas did not yet have tattoos on his arm.

Presented with a hypothetical based on the facts of this case, Martin Flores, a gang expert, opined that the shooting resulted from a private dispute between two people who happened to be gang members; the shooting was not gang-related.

According to Antoinette Nunez, an intelligence analyst for the California Department of Justice and an expert in cell telephone charting, the cell telephones of Sendejas and Martin V. at the time of the shooting were hitting cell telephone towers located 13.6 miles from where the shooting occurred.

D. Verdicts and Sentencing

The jury convicted Sendejas and Sanchez as charged and found true, as to Sendejas, the gang and firearm enhancements. In bifurcated proceedings, Sendejas admitted he had a prior robbery conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1).

The trial court sentenced Sendejas to an aggregate state prison term of 55 years to life. The trial court sentenced Sanchez to three years in state prison, suspended execution of sentence, and placed her on three years of probation.

DISCUSSION

I. THE VERDICTS AGAINST SANCHEZ WERE BASED ON INSUFFICENT EVIDENCE

Sanchez challenges the sufficiency of the evidence to support the verdicts.[8] The jury convicted her in count 3 of attempted dissuasion of Robert R., a witness and a victim, by the threat of force or violence and as part of a conspiracy in violation of section 136.1. Section 136.1, subdivision (a)(2) prohibits "[k]nowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." The crime is a felony "[w]here the act [of dissuading]" is "accompanied by force or by an express or implied threat of force or violence, upon the witness or victim" (§ 136.1, subd. (c)(1)) or is "in furtherance of a conspiracy." (§ 136.1, subd. (c)(2).) In the absence of evidence

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[8] Because we agree with Sanchez and reverse her convictions, we need not reach her other contentions on appeal.

that Sanchez personally attempted to dissuade Robert R., the People proceeded on the theory that Sanchez aided and abetted Sendejas in attempting to dissuade Robert R. within the meaning of section 136, subdivisions (a)(2), (c)(1) and (c)(2).

Sanchez was also convicted in count 4 of conspiracy to dissuade a witness. (§§ 182, subd. (a)(1), 136.1.) Here, the People's theory of Sanchez's criminal liability was that she conspired with Sendejas to commit the crime based on evidence of certain overt acts. The People relied on the same overt acts to prove Sanchez guilty of the attempted dissuasion count.

A. The Standard of Review

In reviewing the sufficiency of the evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44, accord, *People v. Streeter* (2012) 54 Cal.4th 205, 241 (*Streeter*).) Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*People v. Watkins* (2012) 55 Cal.4th 999, 1020.) We do not reweigh the evidence or reassess the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) We accept the logical inferences the jury might have drawn from the evidence although we may have concluded otherwise. (*Streeter*, at p. 241.)

B. The Evidence Was Insufficient To Prove Sanchez Had the Requisite Knowledge or Intent to Commit the Charged Offenses

Whether Sanchez's convictions should be reversed hinges on the sufficiency of the evidence to support the intent elements of attempted dissuasion of a witness and conspiracy to dissuade a witness with respect to Sanchez's purported role as aider and abettor or co-conspirator in the commission of the crimes. "Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.)

Attempted dissuasion of a witness is a specific intent crime. (*People v. Young* (2005) 34 Cal.4th 1149, 1210; *People v. Wahidi* (2013) 222 Cal.App.4th 802, 806.) The defendant must have acted "knowingly and maliciously." Malice, as used with this offense, is "an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice." (§§ 136, subd. (1), 136.1, subd. (a)(2); CALCRIM No. 2623.) Thus, "[u]nless the defendant's acts or statements are intended to affect or influence a potential witness's or victim's testimony or acts, no crime has been committed under [section 136.1]." (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 284.)

As pertinent here, for Sanchez to be convicted of attempted dissuasion of a witness as an aider and abettor, there first must be sufficient evidence that she acted with knowledge of Sendejas's specific intent to dissuade Robert R. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; accord, *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1283.) However, "[k]nowledge of another's criminal purpose is not sufficient for aiding and

abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.) " '[A]n aider and abettor will "share" the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' " (*In re Meagan R.* (1996) 42 Cal.App.4th 17, 22.)

On appeal, without separately addressing the attempted dissuasion and conspiracy convictions, the People assert Sanchez harbored the requisite intent for the charged offenses. In support of their claim, the People point to the following circumstantial evidence: Sanchez gave Sendejas an unauthorized copy of the shooting report prior to June 11, 2013 and altered portions of internal police department records concerning him, conduct which was prohibited by her training and at great risk to her job. Sanchez frequently monitored Sendejas's case online between November 2012 and August 2013 and accessed a fake supplemental report in September 2013. According to the People, a jury could reasonably infer from this evidence that Sanchez intended to commit the crimes.

At trial, the prosecutor's argument to the jury was more explicit as to Sanchez's knowledge and shared intent in her role as an aider and abettor: The prosecutor urged that Sanchez "had to have known," when she gave the report containing the witness identification information to Sendejas that he intended to use it to dissuade a witness. The prosecutor explained her theory as follows: "Because you have to understand that the nature of the information she was giving him proves she knew its unlawful purpose, because there's nothing else you can do with that

information. There's no other reason to have it." The prosecutor reasoned, for Sanchez to be guilty of aiding and abetting, "all she has to know is that when she's giving [the report] to him, it is because he's going to use it to intimidate a witness. Dissuade a witness. To interfere with the orderly process of justice."

The prosecutor then argued Sanchez's shared intent to dissuade a witness by aiding Sendejas was shown by evidence that she was willing to ignore her training and jeopardize her employment to give Sendejas the confidential material. "Now, add to that that [Sanchez] is related to the man accused and that she is accessing the alleged co-suspect [Martin V.] information and deleting stuff, and you have clear, circumstantial evidence of an agreement and of her intent." We find the prosecutor's position unsupported by the record.

It is undisputed that the entirety of the evidence linking Sanchez to the crime of attempted dissuasion of a witness was her unauthorized dissemination of the unredacted police report and her prohibited computer activities at the police station. The issue is whether this evidence was sufficient to prove the intent element of aiding and abetting, namely, that Sanchez *knew* Sendejas intended to commit the crime and *intended* to facilitate his commission of the crime. We conclude the evidence failed to show Sanchez's knowledge of Sendejas's specific intent and reverse her conviction of attempted dissuasion of a witness on that ground. Without the requisite knowledge of Sendejas's criminal purpose, she could not have shared his specific criminal intent.

The evidence that Sanchez left an unredacted copy of the shooting report at the home of Sendejas's mother and that it subsequently came into Sendejas's possession supported a

reasonable inference that Sanchez intended for Sendejas to receive the report. Her willingness to go to great lengths to acquire the report for Sendejas and at great personal cost suggested she was highly determined to do so. This evidence, however, failed to show why Sanchez obtained the report for her cousin. Evidence of Sanchez's reason for obtaining the report was relevant to show whether she knew of Sendejas's specific intent to use the report to dissuade a witness. Such knowledge cannot be inferred from the other evidence purportedly connecting Sanchez to the crime—her prohibited computer activity. By deleting some of Sendejas's personal information and monitoring his case, Sanchez may have been attempting to protect her cousin. This may also have been Sanchez's intent in giving the report to Sendejas. If so, her protectiveness tells us nothing about her knowledge of her cousin's criminal purpose.

Finally, there was the confidential material in the report. As noted, the prosecutor argued that knowledge of Sendejas's specific intent to dissuade a witness should be imputed to Sanchez from the nature of the material in the shooting report. Sanchez "had to have known" from the unredacted identifying information that her cousin intended to use it for an unlawful purpose. This argument is premised on the assumption that Sanchez believed or anticipated, prior to providing the shooting report, that Sendejas intended to commit the crime. Nothing in the record supports this assumption; it is based solely on speculation. For example, there was no evidence of Sanchez's relationship with Sendejas, her understanding of his gang activities, or her familiarity with gang culture and its rules governing snitching. The People's suggestion, in cross-examining Sergeant Clift, that Sanchez sought her job to enable her cousin

to have unauthorized access to confidential police records was without evidentiary support. Merely because Sanchez improperly disclosed confidential material to Sendejas, does not prove she had knowledge of his intent to use it to dissuade a witness.

The crime of conspiracy to dissuade a witness requires proof of two specific intents—a "specific intent to agree to commit the target offense, and a specific intent to commit that offense." (*People v. Jurado* (2006) 38 Cal.4th 72, 123; accord, *People v. Homick* (2012) 55 Cal.4th 816, 870.) For Sanchez to be found guilty of this offense, there must be sufficient evidence that Sanchez specifically intended to agree or conspired with Sendejas to dissuade a witness and specifically intended to dissuade Robert R., which was the object of the conspiracy.

The specific intent to agree to commit a crime may be, and from the secret nature of the crime typically is, established by circumstantial evidence. Thus, it is not necessary for the People to prove the purported conspirators met or made an express agreement. (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1221.) "The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime." (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399; accord, *People v. Homick*, *supra*, 55 Cal.4th at p. 870.) It is necessary, however, for the People to establish that the known facts establish beyond a reasonable doubt the existence of an agreement to commit the underlying offense. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1607.)

Here there was no evidence, direct or circumstantial, that Sanchez made an agreement with Sendejas to dissuade Robert R. or any witness. The only agreement involving Sanchez was to furnish Sendejas with the unredacted shooting report. No

inference could logically be drawn that because Sanchez agreed to provide Sendejas with the report, she also agreed with him, expressly or tacitly, to intimidate a witness. Without sufficient evidence of an agreement, the conspiracy verdicts against both defendants on this charge must also be reversed.

II. SUFFICIENT EVIDENCE SUPPORTED THE VERDICT OF ATTEMPTED WITNESS DISSUASION AGAINST SENDEJAS

Sendejas challenges the sufficiency of the evidence to support his conviction of attempted dissuasion of Robert R., a witness and a victim, by the threat of force or violence in violation of section 136.1 as charged in count 3. Sendejas argues there was insufficient evidence he harbored the requisite intent to be found guilty of the crime.

As discussed, section 136.1, subdivision (a)(2) prohibits "[k]nowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." " 'Malice' means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice." (§ 136, subd. (1).) "Where the act [of dissuading]" is "accompanied by force or by an express or implied threat of force or violence, upon the witness or victim," the offense is a felony. (§ 136.1, subd. (c)(1).)

Sendejas is not contending his attempt to dissuade Robert R. was unknowing. Rather, he maintains his attempt was not malicious. Specifically, Sendejas argues there was no credible evidence of his intent to harm Robert R. or to prevent him from testifying. Applying the applicable standard of review (see *People v. Zaragoza*, *supra*, 1 Cal.5th 21, 44), we conclude

there was substantial evidence that Sendejas knowingly and maliciously attempted to dissuade Robert R.

According to the testimony of Informant, Sendejas was in possession of an unredacted copy of the shooting report, which Sendejas said he planned to give to Robert R.'s "home boys." Sendejas later readily agreed that Informant could have a copy of the report as "paperwork" to show one of Robert R.'s fellow gang members that Robert R. was a snitch. Sergeant Clift, the People's gang expert, testified that "paperwork" or legal documents from courts or law enforcement agencies were used by gangs to prove a gang member listed in the document was a snitch or sought help from the police. If a gang's own member was a snitch, the gang was obligated to "clean house" by retaliating against the snitch, typically killing the offending gang member. This testimony established both an intent to harm Robert R. and an intent to prevent him from testifying.

By detailing what he perceives as critical omissions and contradictions in Informant's testimony, Sendejas is inviting us to reweigh the evidence and to engage in speculation, neither of which is the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled in part on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Determining witness credibility is the exclusive province of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Nothing in the record shows that Informant's testimony was, as Sendejas suggests, inherently improbable or physically impossible. There was substantial evidence of Sendejas's malicious intent.

III. SUFFICIENT EVIDENCE SUPPORTED THE GANG ENHANCEMENTS

A. Overview of the Governing Law

The California Street Terrorism Enforcement and Prevention Act was enacted by the Legislature "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One component of the statute is a sentence enhancement for felonies 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." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined as an organization that has as one of its primary activities the commission of one or more of the crimes enumerated in section 186.22, subdivision (e) and whose members have engaged in a "pattern of criminal activity" by committing two or more of such "predicate offenses" on separate occasions or by two or more persons within a three-year period. (§ 186.22, subds. (e), (f); *People v. Loeun* (1997) 17 Cal.4th 1, 9.) "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

B. The Relevant Testimony

Sergeant Clift, the People's gang expert, testified that the goal or "primary activity" of the Sureno gangs like Sangra was to make money through selling narcotics, identity theft, automobile theft, and prostitution. Later, the prosecutor twice asked

Sergeant Clift to enumerate the kinds of crimes committed by Sangra gang members. The first time, Sergeant Clift answered with a list of crimes that included section 186.22, subdivision (e) predicate offenses, murder, assault with a deadly weapon, and dissuading a witness. The prosecutor posed the question again, this time inquiring whether Sangra gang members had "either individually or collectively engaged in a pattern of criminal activity." After Sergeant Clift answered, "Yes," the prosecutor inquired, "And what are the primary activities of that gang? We may have covered this. I apologize. But what are they again?" In response, Sergeant Clift provided a list of predicate offenses similar to his previous answer, adding burglary and robbery.

The prosecutor asked Sergeant Clift if he had "knowledge of any specific prior convictions of Sangra gang members committing or attempting to commit any of the crimes listed in . . . section 186.22, [subdivision] (b)." Sergeant Clift related Vincent Casio's conviction for murder, which he committed in April 2009, and Bobby Matters's conviction for dissuading a witness, which he committed in December 2009. The prosecutor then introduced certified copies of the trial court records supporting the convictions. Sergeant Clift acknowledged he had not been involved in investigating these cases, but he became familiar with the underlying facts from conversations with Sergeant Valdez, a gang investigator of the San Gabriel Police Department. Sergeant Clift also had read about the murder in the newspaper. Sergeant Clift opined, based on this information, that Casio and Matters were Sangra gang members.

The prosecutor introduced photographs of Sendejas's tattoos and asked Sergeant Clift to explain their significance to the Sangra gang. Among them, was Sendejas's tattoo of an SKS

assault rifle, which Sergeant Clift testified represented the Circle clique, a subset of the Sangra gang. Sergeant Clift explained a clique was "just a group of gang members that are from the main gang" and gave examples of how gang members decide to self-identify as a clique within a gang, noting "every gang is different."

Arguing the above testimony is wanting, Sendejas challenges the sufficiency of the evidence supporting the jury's gang enhancement findings on three grounds: (1) "Evidence that individual gang members [Casio and Matters] committed predicate offenses is insufficient to prove that those are the primary activities of the Sangra gang as an organization" within the meaning of *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*); (2) the evidence upon which the gang expert relied in relating that Casio and Matters were Sangra gang members constituted case-specific testimonial hearsay prohibited by *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*); and (3) the evidence established the shooting was motivated by personal enmity, not gang-related retaliation. None of Sendejas's challenges to the gang enhancement findings has merit.

C. The Standard of Review

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify

the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar*, *supra*, 51 Cal.4th at pp. 59-60.)

D. *People v. Prunty* Case

In *Prunty*, the defendant argued the People failed to introduce sufficient evidence to prove he had committed the underlying offenses for the benefit of a criminal street gang, contesting the People's theory that the relevant ongoing organization, association or group was the gang known as the Norteños in general. (*Prunty*, *supra*, 62 Cal.4th at p. 70.) Specifically, the defendant contended "the prosecution's use of crimes committed by various Norteño subsets to prove the existence of a single Norteño organization . . . improperly conflated multiple separate street gangs into a single Norteño gang without evidence of 'collaborative activities or collective organizational structure' to warrant treating those subsets as a single entity." (*Ibid.*)

The California Supreme Court agreed, holding, "[W]here the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22, [subdivision] (f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence or collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets

themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization." (*Prunty*, *supra*, 62 Cal.4th at p. 71.)

Sendejas misperceives the reach of *Prunty*. The need for the People to show sufficient associational or organizational links comes into play only when the People seek to prove the defendant committed crimes to benefit the gang as a whole with evidence of felonies committed by members of the gang's subsets. *Prunty* does not apply where, as here, the People's theory was the Sangra gang was an entity and individual gang members were acting on behalf of the entity. (See *People v. Ewing* (2016) 244 Cal.App.4th 359, 372 [*Prunty* does not apply where the People do not proffer the predicate crimes of subset gang members to prove the existence of a criminal street gang].)

Further, the People presented sufficient evidence to support their theory: Sergeant Clift testified to the primary activities of the Sangra gang as a whole, which included predicate offenses committed by Sangra gang members Casio and Matters to benefit the gang. (See *People v. Margarejo* (2008) 162 Cal.App.4th 102, 108 [gang expert's testimony that the gang's main or primary activities was to commit crimes, including murder was sufficient evidence of the gang's primary activities].) Indeed, no evidence was adduced that Casio and Matters belonged to a Sangra gang subset or had acted on behalf of a gang subset. (See *People v. Pettie* (2017) 16 Cal.App.5th 23, 49-50.) Although there was evidence of Sendejas's affiliation with the Circle clique, there was no evidence he committed the crimes

at issue for the benefit of, at the direction of, or in association with this subset.

Again, relying on *Prunty,* Sendejas maintains the People provided insufficient evidence of a pattern of criminal activity based on merely two predicate offenses. The statute, however, requires nothing more. (See § 186.22, subd.(f).)

It appears Sendejas would have us apply *Prunty* whenever there are predicate offenses committed by individual gang members or a gang subset exists. *Prunty* is limited to a discrete set of facts, and we decline to extend its holding as urged by Sendejas.

E. *People v. Sanchez* case

Sendejas argues Sergeant Clift's opinion that the defendants in the predicate Casio and Matters offenses were Sangra gang members constituted inadmissible testimonial hearsay prohibited by *Sanchez*, *supra*, 63 Cal.4th 665.[9] (*Id.* at p. 686.)

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[9] Arguably, *Sanchez* changed the law on the proper scope of expert testimony as it existed prior to Sendejas's appeal. (See *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13 [disapproving *People v. Gardeley* (1996) 14 Cal.4th 605 "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules"]). Accordingly, we do not find Sendejas forfeited this issue by failing to raise an objection at trial. (See *People v. Welch* (1993) 5 Cal.4th 228, 237 [no forfeiture "where an objection would have been futile or wholly unsupported by substantive law then in existence"]; but see *People v. Blessett* (2018) 22 Cal.App.5th 903, 925 [finding forfeiture for failure to raise "confrontation clause contention" below where "the change in the law was foreseeable

In *Sanchez*, the prosecution's gang expert testified he had worked as a gang officer for 17 years and investigated more than 500 gang cases. (*Sanchez*, *supra*, 63 Cal.4th at p. 671.) While he had never met the defendant and had never been present during any police contacts with him, the gang expert had reviewed the defendant's "STEP notice," which was provided to a suspected gang member to warn him or her of criminal exposure for participating in gang crimes. The expert also reviewed the defendant's "field identification" (FI) card chronicling his gang history. (*Id.* at pp. 672-673.) The gang expert described four reports of police contacts with the defendant and related statements contained in police documents. (*Ibid.*) The expert testified about the Delhi gang culture, its activities, territory, and the offenses committed by other Delhi gang members. (*Id.* at p. 672.) The expert opined, based on all this information, that the defendant was a member of the Delhi gang and had possessed the gun and drugs as charged to benefit the gang. (*Id.* at p. 673.)

The California Supreme Court reversed the gang enhancement, concluding the expert testimony that the defendant was a gang member was derived from erroneously admitted evidence. (*Sanchez*, *supra*, 63 Cal.4th at pp. 670-671.) The Court "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause

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given the state of the decisional law prior to the introduction of the evidence at trial"]).

violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination or forfeited that right by wrongdoing." (*Id.* at p. 686.) The Court identified testimonial hearsay statements to be those made "primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id.* at p. 689.)

The *Sanchez* Court, however, carefully limited the reach of its holding. First, it explained, "Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in this field. . . . Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) The Court found the gang expert's testimony about general gang behavior and his descriptions of the conduct and territory of Sanchez's gang were admissible "based on well-recognized sources in [the expert's] area of expertise." (*Id.* at p. 698.)

Second, the *Sanchez* Court emphasized, "Any expert may still *rely* on hearsay in forming an opinion and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific

hearsay that does not otherwise fall under a statutory exception. [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.)

From the facts before it, the *Sanchez* Court concluded the gang expert's testimony relating case-specific information obtained from police reports was improper testimonial hearsay because it concerned case-specific facts "gathered during an official investigation of a completed crime." (*Sanchez*, *supra*, 63 Cal.4th at p. 694.) The expert testified about the portion of STEP notices retained by the police, which were signed by an officer under penalty of perjury and included the "defendant's biographical information, whom he was with, and what statements he made." (*Id.* at p. 696.) The Court held that this information was sufficiently formal to constitute testimonial hearsay. (*Id.* at pp. 696-697.)

Here, Sendejas targets evidence of the predicate offenses, and asserts "the gang membership of a person who commits an alleged predicate crime to establish a pattern of criminal gang activity is an element of a gang allegation [and] must be considered a case-specific fact." According to Sendejas, because Sergeant Clift opined that Casio and Matters were Sangra gang members after consulting with gang investigator Sergeant Valdez, Sergeant Clift was improperly relating "case specific" hearsay prohibited by *Sanchez*.

Appellate courts, including our District, have rejected this argument, although we acknowledge the split of authority among the Districts on whether gang membership of a person committing an alleged predicate offense is "case specific"

as defined by *Sanchez*.[10] Thus, in *People v. Meraz* (2016) 6 Cal.App.5th 1162, review granted on another ground March 22, 2017, S239442 with directions that the opinion remain precedential (*Meraz*), Division 8 of our District reiterated the limitation the *Sanchez* court imposed on its ruling, to wit, that "facts are only case specific when they relate '*to the particular events and participants* alleged to have been involved in the case being tried.' " (*Id.* at pp. 1174-1175, quoting *Sanchez*, *supra*, 63 Cal.4th at p. 676.) In contrast, are facts "relevant to the 'gang's history and general operations.' " (*Meraz*, at p. 1175, quoting *Sanchez*, *supra*, 63 Cal.4th at p. 698.) The *Meraz* court concluded that a gang expert's testimony about, among other topics, a gang's "pattern of criminal activities" was "general background testimony" and unrelated to the defendants or offenses tried in that case. (*Meraz*, at p. 1175.) Accordingly, *Sanchez* did not require exclusion of that testimony.

In *People v. Blessett*, *supra*, 22 Cal.App.5th 903, the Third District held that facts regarding gang membership of defendants to predicate crimes used to establish a pattern of gang activity are not "case specific." It first observed that *Sanchez* did not address predicate offenses, but instead, facts used by a gang expert to establish a defendant's gang membership. (*Id.* at p. 944.) The *Blessett* court then concluded that facts regarding predicate facts are "historical facts related to the gang's conduct and activities. These facts pertain to the gang as an organization and are not specific to the case being tried. They establish that the 'organization, association, or group' has engaged in a 'pattern of criminal gang activity' and is thus a

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[10] See, e.g., *People v. Ochoa* (2017) 7 Cal.App.5th 575 (First District).

criminal street gang (§ 186.22, subd. (f)) irrespective of the events and participants in the case being tried. A predicate offense and the underlying events are essentially a chapter in the gang's biography." (*People v. Blessett*, at pp. 944-945, italics omitted.)

Similarly here, Sergeant Clift's reliance on a conversation with gang investigator Sergeant Valdez in testifying that the defendants in the two predicate offenses—Casio and Matters—were Sangra gang members did not contravene *Sanchez*. We further conclude that even if admission of this testimony were error under *Sanchez*, it was not prejudicial beyond a reasonable doubt.[11]

Certified copies of the minute orders in the Casio (People's exhibit 67) and Matters (People's exhibit 68) cases were admitted into evidence at trial.[12] Exhibit 67 reflects that the jury found true that Casio had committed first degree murder "for the benefit of, at the direction of, or in association with a criminal street gang." (Exhibit 67, p. 30.) Exhibit 68 recites that the jury found true that Matters's offense of intimidating a witness to prevent the witness from testifying was "for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members." (Exhibit 68, p. 31.) In addition, the

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[11] We apply the more exacting federal standard of review because of Sendejas's confrontation clause challenge to the admission of Sergeant Clift's testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 689; *Meraz*, *supra*, 6 Cal.App.4th at p. 1176.)

[12] Because the record did not include those exhibits, we requested the clerk to obtain copies of the exhibits from the superior court. On our own motion, we augment the record to include the exhibits.

June 29, 2011 minute order in exhibit 68 describes exhibits admitted in Matters's criminal case, including a photograph of graffiti on a "wall: including 'Sangra' " (*id.* at p. 23) and a reference to a person appearing in an exhibit as "wearing a [hat] that bears the word 'Sangra' " (*id.* at p. 25).

Finally, Sendejas has failed to identify any hearsay statement, let alone testimonial hearsay, that would run afoul of the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36.)

F. Substantial Evidence Established the Shooting Was Gang-Related

Sendejas does not claim there was insufficient evidence to prove the attempted dissuasion of a witness offense was committed for the benefit of, or in association with, the Sangra gang. Instead, Sendejas challenges the gang enhancement on the attempted murder conviction. He argues the evidence showed the attempted murder of Robert R. was motivated by personal enmity not gang retaliation. Although his romantic rivalry with Robert R. over N.V. may have triggered their dispute, the evidence supported the jury's finding that the attempted murder was committed for the benefit of, or in association with, the Sangra gang.

The jury heard Robert R., who was gang-affiliated, acknowledge he had violated gang culture by snitching to police about his physical altercation with N.V., and, as a result, he "had an idea of what was next." The jury also heard evidence that Sendejas and his confederate Martin V. were members of the Sangra gang, and that Sendejas had prominent gang tattoos signifying his affiliation with the gang. The attempted murder of Robert R. occurred outside his home when Sendejas and

Martin V. approached, and one or both of them called out "Sangra" and started shooting. Robert R. recognized the two gang members and understood "Sangra" referred to their gang.

Given that the shooting involved two Sangra gang members acting in concert, the jury reasonably could have concluded the crime was gang-related and committed with the specific intent to benefit members of the Sangra gang. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 68 ["if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members"]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["[c]ommission of a crime in concert with known gang members . . . supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime"].)

The jury also heard Sergeant Clift's expert testimony that a gang member who allowed himself, his family member, or wife/girlfriend to be disrespected would harm the gang's reputation in the community. In response to a hypothetical drawn from the evidence in this case, Sergeant Clift opined the shooting would have been committed for the benefit of and in association with a criminal street gang. Sergeant Clift explained because the gang member was armed, arrived with "his backup," and yelled his gang name, he was broadcasting his gang's lack of fear and willingness to commit crimes outside of their neighborhood. (*People v. Albillar*, *supra,* 51 Cal.4th at p. 63 ["[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient

to raise the inference that the conduct was 'committed for the benefit of a criminal street gang' "].)

In sum, the jury's true findings on both gang enhancements were supported by substantial evidence.

IV. THE TRIAL COURT DID NOT ERR IN VIOLATION OF SENDEJAS'S SIXTH AMENDMENT RIGHT TO COUNSEL

On appeal, Sendejas argues that (1) as of June 26, 2013—the date of Sendejas's recorded conversation with Informant—Sendejas was represented by counsel on the aggravated assault charge; (2) the charges of aggravated assault and the then uncharged counts for attempted murder and firearm possession by a felon are the same offense under the analysis in *Blockburger v. United States* (1932) 284 U.S. 299 (*Blockburger*); (3) the Sixth Amendment right to counsel thus attached as of June 26, 2013 to the attempted murder as well as the firearm possession by a felon counts, and the police therefore could not employ Informant to obtain incriminating statements from Sendejas; (4) the People conceded the Sixth Amendment right to counsel attached to the attempted murder charge as of June 26, 2013 as well as that Informant was then an agent of the police; (4) under *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*), the trial court erred in refusing to give a jury instruction requested by defense counsel limiting the jury's consideration of the June 26, 2013 recorded conversation to the jury's deliberation of then uncharged witness dissuasion counts, but disallowing its consideration in deliberating on the attempted murder and firearm possession by a felon counts; and (5) the failure to give that limiting instruction was prejudicial error under *Chapman v. State of California* (1967) 386 U.S. 18.

The People did not respond to this argument on appeal, although at the jury instruction conference, they relied on *Texas v. Cobb* (2001) 532 U.S. 162 (*Cobb*) in arguing that *Massiah* is " 'offense specific,' " and does not apply merely to related offenses.

A. The Relevant Pretrial Proceedings, Contents of the Unrecorded and Recorded Conversations, and the Proposed Jury Instruction

As a result of the October 14, 2012 shooting, Sendejas was charged by felony complaint in November 2012 with aggravated assault. In January 2013, following the filing of the information, Sendejas was arrested, appointed counsel, and released on bond. Thereafter, Sendejas and Informant would apparently see each other socially because N.V., Sendejas's girlfriend, was the sister of Informant's wife.

On June 11, 2013, Informant informed the police that Sendejas had repeatedly bragged that he was in possession of a copy of the unredacted shooting report, he had obtained the report from his cousin Gina Sanchez rather than from his counsel, and he intended to show the report to Robert R.'s fellow gang members.

On or about June 11, 2013, at the detectives' request, Informant agreed to try to obtain the unredacted shooting report from Sendejas. Informant came up with the idea of contacting Sendejas and offering to show the report to Stranger, a member of Robert R.'s former Metro 13 gang. The report would serve as paperwork or proof that Robert R. had told the police about Sendejas's involvement in the attempted murder. The detectives approved of Informant's idea, and Informant telephoned Sendejas in their presence from the police station. During the telephone

call, Sendejas agreed to have the report shown to Stranger "for cleaning house."

On June 26, 2013, Informant met with Sendejas and surreptitiously recorded their conversation for the Montebello Police Department. On the recording, Sendejas could be heard discussing Informant's offer to show the shooting report to Stranger, Robert R.'s fellow gang member: Sendejas admonished Informant, "Do me a favor dog, when [you] show this to him— [¶] . . . . [¶] I don't want this getting out of your hands." Sendejas states, "You got to give me your word, bro. If this gets caught up. Homes, that means it's going to get come back to me, dog." Informant asks if he is receiving the "complete report," and Sendejas says it "is all Robert." Informant inquires, "You don't want to shoot me the whole thing?" He tells Sendejas, "You showed it to me last time." Sendejas replies, "Yeah, I mean, if you want it, dog." Informant suggests, "That way there's no question. That's the entire thing. [¶] . . . [¶] . . . 'Cause I don't want him getting pissed off at me saying I'm making shit up, you know?" Sendejas states he "wasn't even supposed to have this, dog. [¶] . . . [¶] I tried asking my lawyers and all that, dog, and they're just like, 'No. No.' "

On or about January 20, 2014, the People dismissed the information and filed a complaint charging Sendejas with the gang-related attempted murder of Robert R. Based on the record and Sendejas's counsel's representations in his opening brief, on April 2, 2014, the People filed an amended information charging

Sendejas with gang-related attempted murder, firearm possession by a felon, and attempted dissuasion of a witness.[13]

In response to Sendejas's pretrial motion to suppress the statements he made to Informant, the People filed an opposition on November 3, 2014 in which they conceded that "as of June 26, 2013, the defendant's Sixth Amendment right had attached to the attempted murder charge that is the basis of Count 1." The People "also conced[ed] that the CRI (confidential reliable informant) was working as a police agent in questioning Defendant Sendejas." Relying on *Blockburger*, the People contended that because the offenses of attempted murder and witness dissuasion "require the proof of very different facts," Sendejas's Sixth Amendment right had not attached to the attempted witness dissuasion charge on June 26, 2013, and his statements made to Informant during the recorded conversation were admissible against him.

At the jury instructions conference, Sendejas's counsel proposed a limiting instruction: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. Evidence of a tape-recorded conversation between [Informant] and defendant Arthur Sendejas is not to be considered in connection with your deliberations on count one and two, which are charges of attempted murder and felon in possession of a firearm. You may only consider the tape-recorded conversation in your deliberations on counts three and four, the charges of dissuading a witness and conspiracy to dissuade a witness."

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[13] The information was repeatedly amended; defendants Sendejas and Sanchez were ultimately tried on the fourth amended information.

The prosecutor opposed the instruction because *Massiah* is " 'offense specific' " and does not apply to counts that are merely related. The trial court agreed with the prosecutor.

B. *Massiah* and Progeny

In *Massiah*, the United States Supreme Court held that "once a judicial proceeding has been initiated against an accused and the Sixth Amendment right to counsel has attached, any statement the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against the defendant." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 66-67; see *Massiah*, *supra*, 377 U.S. at pp. 206-207.) "The Sixth Amendment right, however, is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, ' "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ' " (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175.)

In *Cobb*, the Supreme Court reiterated that the Sixth Amendment right to counsel is offense specific. (*Cobb*, *supra*, 532 U.S. at p. 168.) The Court rejected the argument that the right to counsel attaches not only to the charged offense, but also to other offenses that are closely related factually to the charged offense. The Court then stated, "[T]he definition of an 'offense' is not necessarily limited to the four corners of a charging instrument. In *Blockburger v. United States*, 284 U.S. 299 (1932), we explained that 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which

the other does not.' [Citation.] We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment Double Jeopardy Clause, which prevents multiple or successive prosecutions for the 'same offence.' [Citation.] We see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test." (*Cobb*, *supra*, at p. 173.) Thus, the Sixth Amendment did not bar the police from interrogating the defendant concerning the murders because when he confessed to the murders, he had been indicted for the burglary, but had not been charged in the murders, and as defined under Texas law, burglary and capital murder were not the same offense. (*Id.* at p. 174.)[14]

C. Under *Blockburger*, Sendejas's Sixth Amendment Right Had Not Yet Attached to the Then Uncharged Attempted Murder and Firearm Possession by a Felon Charges at the Time of His Recorded Conversation with Informant

Although Sendejas had been charged with assault with a firearm and not yet with attempted murder or firearm possession by a felon on June 26, 2013, the time of his recorded conversation

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[14] Accord, *People v. Martin* (2002) 98 Cal.App.4th 408, 424 ("This is true even if the facts relating to the witness intimidation were inextricably intertwined or closely related to the charged offense of murder.").

with Informant, the People conceded at the previously described suppression hearing that for purposes of *Massiah*, Sendejas's Sixth Amendment right to counsel had already attached to the subsequently filed attempted murder charge. We reject the People's concession, finding it erroneous as a matter of law. (Cf. *In re Daniel K.* (1998) 61 Cal.App.4th 661, 666; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1166, fn. 17; and *People v. Howard* (1996) 47 Cal.App.4th 1526, 1539, disapproved on an unrelated ground by *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.)

Under the *Blockburger* test, assault with a firearm and attempted willful, deliberate, and premeditated murder cannot be considered the same offense. Assault with a firearm requires proof that the defendant attempted, and had the present ability, to apply force against another person using a firearm. (See §§ 240, 245, subd. (a)(2).) In contrast, attempted willful, deliberate, and premeditated murder requires proof that the defendant engaged in a direct but ineffectual act toward killing the victim with the specific intent to kill. (§ 188; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, disapproved on an unrelated ground by *People v. Mesa* (2012) 54 Cal.4th 191, 199.) Each offense requires proof of a fact that the other does not: Aggravated assault mandates proof that the defendant attempted and was able to apply force using a gun, whereas attempted murder does not; it can be committed without the use of physical force or a gun. Attempted willful, deliberate, and premeditated murder requires proof that the defendant specifically intended to kill the victim; whereas assault with a firearm does not. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) Aggravated assault "only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its

nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.)

Sendejas cites no authority for his argument that the crime of firearm possession by a felon under section 29800, subd. (a)(1) is considered the same offense as aggravated assault under the *Blockburger* test. The conclusion that it is not is patent from the pertinent language of § 29800, subd. (a)(1) itself: "Any person who has been convicted of . . . a felony . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony."

In light of these differences between the offenses, Sendejas's Sixth Amendment right to counsel was not implicated with respect to the then uncharged attempted murder and firearm possession by a felon offenses at the time Informant recorded his conversation with Sendejas. Accordingly, the trial court correctly determined there was no *Massiah* violation and properly declined to give the proposed limiting instruction. Because there was no *Massiah* error, we do not address Sendejas's claim of prejudice.

V. THE TRIAL COURT DID NOT IMPROPERLY LIMIT IMPEACHMENT OF ROBERT R.

Sendejas contends the trial court abused its discretion and violated his right to present a defense by limiting his opportunity to impeach Robert R.'s credibility with a prior act of moral turpitude.

A. The Relevant Testimony

Robert R. testified on direct examination that during an argument in September 2012, N.V. threw a beer bottle, striking

him in the head. Robert R. demanded that she leave and reported the incident to the Montebello Police Department.

On cross-examination, Robert R. denied he was the aggressor during the argument and testified N.V. pushed him into a shelf and threw a beer bottle. He also denied brandishing a gun. At the time, there were no guns in his home.

Detective Paul Antista of the Montebello Police Department testified that, following an investigation, the reported incident was presented to the district attorney's office for prosecution, and the office declined to pursue it.

N.V. testified on direct examination that during their September 2012 argument, Robert R. pushed her into a shelf, threw a beer bottle at her, and retrieved a gun from his room. N.V.'s mother was visiting and saw what happened.

At this point in N.V.'s testimony, the trial court interrupted and had the jury and N.V. leave the courtroom. The trial court asked Sendejas's counsel why it should allow further questioning about the September 2012 incident "during this already too long trial under the guise of impeaching [Robert R.]," so that the jury could decide a "dispute between two people that is totally unrelated to the charges here?" Sendejas's counsel explained he was offering N.V.'s testimony to impeach Robert R.'s credibility, noting that Robert R. had denied the claims made by N.V. and it was Robert R.'s "word against [N.V.]." Counsel explained that N.V.'s mother would corroborate her daughter's version of the argument.

The trial court ultimately ruled the evidence that Robert R. threw the bottle and brandished a gun was inadmissible collateral impeachment, and the "time it will take to explore these issues is not justified by the potential impact, which is only

if the jury uses it properly to conclude perhaps they should not believe [Robert R.] because he engaged in domestic violence, not because he lied about the gun."

Sendejas's counsel then urged that the proffered evidence was also admissible to support the defense theory that Robert R. had framed Sendejas for the shooting. The trial court stated the evidence was collateral, time-consuming and of no assistance to the jury in deciding the case. The trial court advised that the defense could elicit testimony from N.V. that Robert R. had a motive to lie about the September 2012 incident. The trial court told Sendejas's counsel that it would not permit N.V.'s mother to testify, if she would be testifying solely about the September 2012 incident. Counsel acknowledged that was her anticipated testimony.

Finally, the trial court concluded Robert R. could not be impeached for the purported criminal act of brandishing a gun in violation of section 417 because the offense did not reflect a readiness to do evil. When the trial reconvened, the trial court instructed the jury to "disregard the testimony of Ms. N.V. about supposedly seeing a gun. Don't consider that for any purpose." N.V.'s mother did not testify.

B. The Standard of Review

" 'A trial court's ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." ' " (*People v. Lucas* (2014) 60 Cal.4th 153, 240, disapproved on another ground by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53.)

C. The Trial Court Properly Exercised its Discretion and Did Not Violate Sendejas's Right to Present a Defense by Excluding Proposed Impeachment Evidence on Collateral Issues

Misconduct not resulting in a felony conviction may be admissible to impeach credibility if it involves moral turpitude, because such conduct bespeaks a willingness to lie or a readiness to do evil. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.) The trial court's discretion to exclude evidence of witness misconduct is broad. (*Id.* at p. 296.) Trial courts are empowered "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Ibid.*) The California Supreme Court has determined, "impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Id.* at pp. 296-297; accord, *People v. Doolin* (2009) 45 Cal.4th 390, 443.)

Sendejas's counsel sought to impeach Robert R.'s testimony that he was the aggressor with the testimony of N.V. and, presumably, her mother. Counsel also intended to show with N.V.'s testimony that Robert R. lied when he denied brandishing a firearm and the act of brandishing a firearm evinced moral turpitude. The trial court made a decision that any further evidence from N.V. and her mother would be more prejudicial

than probative under Evidence Code section 352.[15] We find no abuse of discretion.

The nature of the misconduct at issue, brandishing a firearm, involved potential violence rather than bearing directly on Robert R.'s veracity. (See *People v. Castro* (1985) 38 Cal.3d 301, 315 [" 'convictions which are assaultive in nature do not weigh as heavily in the balance favoring admissibility as those convictions which are based on dishonesty or some other lack of integrity' "].) Additionally, the decision by the district attorney's office not to prosecute the September 2012 incident weakened any inference of moral turpitude and thus its probative value. Furthermore, having witnesses continue to testify and be cross-examined about the domestic violence incident had the potential to be both time consuming and distracting. Whether Robert R. brandished a firearm during the incident was tangential to the issues in this case. The trial court's concern was the jury would feel compelled to resolve what happened in the collateral domestic violence dispute, rather than consider whether the acts of domestic violence purportedly committed by Robert R. against N.V. were a reason to doubt his credibility in this case.

Given the collateral nature of the disputed issues in the domestic violence incident, we also fail to see how the exclusion of the purported misconduct in that incident implicated Sendejas's right to present a defense. (See generally *Holmes v. South*

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[15] Evidence Code section 352 provides that it is within the trial court's discretion to exclude evidence if it finds that the probative value of the evidence 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."

Carolina (2006) 547 U.S. 319, 324 [" 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ' "].) Although this right can be abridged "by evidence rules that 'infring[e] on a weighty interest of the accused' and are ' "arbitrary" or "disproportionate to the purposes they are designed to serve" ' " (*Holmes,* at p. 324) the ordinary rules of evidence generally do not impermissibly infringe on the accused's right to present a defense. (*People v. Lucas*, *supra,* 60 Cal.4th at p. 270; *Holmes,* at pp. 326-327.)

VI. THE TRIAL COURT DID NOT IMPROPERLY LIMIT SENDEJAS'S CROSS-EXAMINATION OF S.F.

Sendejas claims the trial court abused its discretion in refusing to allow S.F. to be cross-examined concerning her knowledge of the kind of people she had seen visiting Robert R.'s home. Sendejas further argues this inability to cross-examine S.F. also violated his constitutional right to confrontation and to present a defense.

A. The Relevant Testimony

On direct examination, S.F. testified that two men approached Robert R.'s backyard and attempted to open the gate. When the gate would not budge, the men stood facing each other, just talking. S.F. stated that she thought the men were Robert R.'s friends.

On cross-examination, Sendejas's counsel asked S.F. why she thought the two men at the gate were Robert R.'s friends. In response, S.F. testified "I was in Montebello and I know—I'd only

met [Robert R.] one or two times before then. But I'd seen people coming and going when I would visit my cousin [in the front house]." Sendejas's counsel then inquired, "What kind of people?" The trial court interjected, "[C]an you give me an idea where this is going, 'what kind of people'? Do we have kinds of people?" Sendejas's counsel responded, "By description, your honor." The trial court continued, "So the ethnicity of the people? Or their fashion choices? Or their age? 'Kinds of people' always worries me.' " Sendejas's counsel said, "Maybe I can rephrase." The trial court added, "The kinds of people who put people into kinds of people worry me too. . . . Do you have much more with this witness?" Sendejas's counsel answered, "I have a little bit more." The trial court decided to take a lunch recess.

During the lunch recess, the trial court asked if Sendejas's counsel was attempting to elicit from S.F. that she had seen gang members visiting Robert R.'s home. Counsel answered, "Yes, Your Honor. His visitors, in Robert [R.]'s home." The trial court admonished that such testimony would be speculative; S.F. would not be able discern whether a person is a gang member simply by observing their appearance or movements. The trial court concluded Sendejas's counsel could impeach Robert R.'s testimony that he was not associated with gang members by other means, rather than by stereotyping or "putting him in a group like that."

Sanchez's counsel then stated S.F. had apparently testified during the preliminary hearing that she assumed the two men who walked up to the gate were gang members based on their tattoos and "the type of people that [Robert R.] had coming to and from the house." The trial court declined to change its ruling.

B. The Trial Court Properly Exercised its Discretion and Did Not Violate Sendejas's Right to Cross-Examine S.F.

In *People v. Ayala* (2000) 23 Cal.4th 225, 301, the California Supreme Court explained that " 'not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.' "

To impeach Robert R.'s testimony that he no longer associated with gang members, Sendejas's counsel attempted to elicit testimony from S.F. that she saw gang members visiting Robert R.'s home. Given that the question "What kind of people?" was vague, and no foundation had been laid either as to S.F.'s personal knowledge of these individuals' gang membership (Evid. Code, §§ 403, 702) or her expertise in that area (Evid. Code, § 801), the trial court could reasonably have found that the question raised speculative issues that were more prejudicial than probative. (See Evid. Code, § 352.) We conclude that the trial court did not abuse its discretion or infringe on Sendejas's constitutional rights to present a defense. " ' "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." ' " (*People v. Gurule* (2002) 28 Cal.4th 557, 620.)

VII. THE ADMISSION OF THE PHOTOGRAPHIC IDENTIFICATION OF SENDEJAS DID NOT VIOLATE HIS DUE PROCESS RIGHTS

Sendejas argues his due process rights were violated by an unduly suggestive photographic identification of him as the shooter.

A. The Relevant Proceedings and Testimony

On the day of the shooting, S.F. met Montebello Police Detective Adams at the police station. He showed her a six-pack photographic lineup that included Sendejas's photograph. What transpired after S.F. viewed the photographic lineup was the subject of conflicting evidence presented at the preliminary hearing.

S.F. testified that she was not able to identify Sendejas from the photographic lineup until Adams showed her a single photograph of him. She then reexamined the six-pack and identified Sendejas as the shooter.

Detective Adams testified at the preliminary hearing that S.F. selected Sendejas's photograph from the photographic lineup and identified him as the shooter. Adams then showed S.F. a more recent driver's license photograph of Sendejas and asked whether it looked more like the photograph she had chosen. S.F. told him, "Yeah that looks more like the person who shot." Adams told her it was the same person in both photographs.

Based on S.F.'s preliminary hearing testimony, Sendejas filed a pretrial motion to suppress any photographic and in-court identifications of him as the shooter as infringing his due process rights. The People opposed the motion.

Following a hearing, the trial court denied the motion. In explaining its ruling, the trial court observed that the conflicting evidence of what occurred during the photographic lineup procedure involved a "subject of credibility." Detective Adams's testimony was believable and S.F.'s testimony was "not very probative." The trial court concluded the photographic lineup procedure "was not suggestive, let alone impermissibly suggestive," but advised that the parties were not precluded from presenting the conflicting evidence of the photographic lineup procedure at trial. The trial testimony of S.F. and Detective Adams was similar to their preliminary hearing testimony.

B. The Governing Law and Standard of Review

To " ' "determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." [Citation.] "We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive." [Citation.] "Only if the challenged identification procedure is unnecessarily

suggestive is it necessary to determine the reliability of the resulting identification." ' " (*People v. Thomas* (2012) 54 Cal.4th 908, 930-931.)

C. S.F.'s Photographic Identification of Sendejas Was Not Unduly Suggestive

In determining whether the photographic identification procedure was unduly suggestive, the " 'question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943.) Sendejas relied on S.F.'s account of the photographic identification procedure as evidence it was unduly suggestive. Showing S.F. a single updated photograph after she failed to identify him from the six-pack certainly would have caused Sendejas to stand out from the others when she reexamined the six-pack and selected his photograph. The trial court discredited S.F.'s version of photographic identification procedure in favor of Detective Adams's account. Based on Adam's testimony, S.F. was not shown the single photograph of Sendejas until she had already reviewed the six-pack and had identified him as the shooter.

In *People v. Gordon* (1990) 50 Cal.3d 1223 (overruled on another ground in *People v. Hamilton* (2009) 45 Cal.4th 863 and *People v. Tully* (2012) 54 Cal.4th 952), the eyewitness to a robbery made a tentative identification of one of the robbers in a live lineup. Upon reflection while driving home, the eyewitness became certain of her identification of the shooter. She later received a telephone call from one of the detectives in which he

assured her that she had picked the right person.[16] (*Id.* at pp. 1241-1242.) The California Supreme Court held that the detective's comment was not retroactively suggestive, and the identification procedure did not violate the defendant's due process rights. (*Id.* at p. 1243.) Similarly, here, the photographic identification of Sendejas as the shooter was not unduly suggestive, and the trial court did not err in admitting it.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING S.F.'S TESTIMONY CONCERNING HANG-UP TELEPHONE CALLS AND THE IMMEDIATE NEED TO MOVE FROM HER HOME

Sendejas contends the trial court abused its discretion by admitting S.F.'s testimony about hang-up telephone calls she had received and the Montebello Police Department's insistence she move out immediately. According to Sendejas, the testimony was improper lay opinion evidence of his guilt.

A. The Relevant Testimony

Resolving the issue of the admissibility of S.F.'s challenged testimony necessitates that it be considered in the context of other related testimony elicited by the prosecutor. As set forth above, at trial, S.F. testified she did not initially identify anyone

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[16] Detective Adams showed S.F. the single photograph because he "wanted to show her that she picked the right person that we believed was our suspect." Adams, who had been a detective for about five months at the time, testified he knew that was a mistake.

from the six-pack photographic lineup shown to her on October 14, 2012. She eventually selected Sendejas's photograph only after she was shown a single photograph of him, was told that other witnesses had identified him, and that his photograph was in the six-pack.

To impeach this aspect of S.F.'s testimony, the prosecutor questioned her about her telephonic interview with a defense investigator on March 11, 2013. S.F. testified she did not recall telling the investigator that (1) before Detective Adams showed her the six-pack, he had told her not to guess because the suspect may or may not be in the lineup; (2) she could still identify the suspect on March 11, 2013; and (3) she had described the shooter to the police as a male Hispanic, tall with dark hair, a moustache, and a patch of hair below his lip.

The prosecutor subsequently questioned S.F. about possible hang-up telephone calls and moving from her home: "And prior [to] the preliminary hearing, where you testified on October 28th, 2013, did you begin to receive phone calls on the phone number that you had given the police that concerned you?" Sendejas's counsel objected, on the ground the testimony would be irrelevant "without any foundation as to the defendant." The trial court overruled the objection, noting the prosecutor was "not making that contention at the moment." S.F. then testified she began receiving hang-up telephone calls around March 2013 from a private number to the phone number she had provided the police. S.F. did not think the hang-up calls were significant until October 2013, when Detective Calleros asked whether she had been receiving any inappropriate telephone calls. The prosecutor then asked, "Now, Ms. [S.F.], at some point did you learn that it was possible that your information had been given to the

defendant?" Sanchez's counsel initially objected without stating the grounds and then withdrew his objection. Without any further objection, S.F. answered, "Yes." S.F. further testified the Montebello Police Department relocated her and her family for a month. She was not permitted to return home that day, and her "whole life has been turned upside down" because of the case.

The prosecutor later called Alfonso Kotero, an investigator for the public defender's office, to testify about his March 2013 interview with S.F. During that interview, S.F. told Kotero that prior to being shown the six-pack, Detective Adams admonished that she should not guess and should inform him if she identified the shooter. S.F. gave Kotero no indication that the photographic identification procedure was suggestive or involved pressure.

Detective Adams testified on direct examination that on October 14, 2012, the day of the shooting, he showed S.F. a six-pack photographic lineup, which included Sendejas's photograph, and she identified him as the shooter.

Detective Antista testified S.F. told him that she was concerned about receiving blocked telephone calls; she believed the calls were related to her preliminary hearing testimony. S.F. received one of the blocked calls on October 8, 2013 while waiting to testify at the preliminary hearing. Antista made several attempts to have S.F. come to the police station and examine a photographic lineup containing Martin V.'s photograph. S.F. insisted she was unable to identify him and would not view the lineup.

B. The Testimony was Properly Admitted as Relevant to S.F.'s Credibility

Sendejas argues the trial court erred by failing to sustain his counsel's hearsay objection to the challenged testimony. According to Sendejas, because the testimony amounted to improper lay opinion evidence by detectives that Sendejas was guilty of attempted dissuasion of a witness, it was more prejudicial than probative under Evidence Code section 352. He maintains that S.F.'s testimony about the hang-up telephone calls and the urgent need to relocate effectively conveyed to the jury that S.F. was in danger from Sendejas because he knew her identifying information. Sendejas relies on *People v. Melton* (1988) 44 Cal.3d 713 (*Melton*), *People v. Smith* (1989) 214 Cal.App.3d 904 (*Smith*), and *People v. Sergill* (1982) 138 Cal.App.3d 34 (*Sergill*) to support his argument.

Pursuant to Evidence Code section 800, a lay witness's "testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) [r]ationally based on the perception of the witness; and [¶] (b) [h]elpful to a clear understanding of his testimony." Pursuant to Evidence Code section 780, "[e]xcept as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) [t]he existence or nonexistence of a bias, interest, or other motive[;] [¶] . . . [¶] (h) [a] statement made by him that is inconsistent with any part of his testimony at the hearing[;] [¶] . . . [¶] (j) [h]is attitude toward the action in which he testifies or toward the giving of testimony." (See also

People v. Humiston (1993) 20 Cal.App.4th 460, 479 ["unless precluded by statute, any evidence is admissible to attack the credibility of a witness if it will establish a fact that has a tendency in reason to disprove the truthfulness of the witness's testimony"].)

Lay opinion regarding "the veracity of particular statements by another," however, is generally "inadmissible on that issue." (*People v. Melton*, *supra*, 44 Cal.3d 713, 744.) Similarly, opinion testimony as to the guilt or innocence of the defendant is inadmissible. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47; *People v. Clay* (1964) 227 Cal.App.2d 87, 98-99.) These rules are meant to ensure that it is the trier of fact who determines witnesses' credibility and the issue of the defendant's guilt. (See *People v. Torres*, *supra*, 33 Cal.App.4th at p. 47; *Sergill*, *supra,* 138 Cal.App.3d at p. 41.) "A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' [citations], i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed." (*Melton*, *supra*, 44 Cal.3d at p. 744.)

In *Melton*, the prosecutor elicited testimony from defense investigator Carpenter that he made no effort to find a person named Charles, who had been mentioned by witness Boyd as possibly involved in the killing at issue. (*Melton*, *supra*, 44 Cal.3d at p. 742.) The purpose of the inquiry was to suggest "that Carpenter *did not believe* Boyd." (*Id.* at p. 744.) The California Supreme Court held the trial court had erred by admitting Carpenter's testimony "to indicate his assessment of Boyd's credibility" because the evidence was essentially irrelevant and incompetent given Carpenter was not an expert on

judging credibility and he "knew nothing of Boyd's reputation for veracity." (*Id.* at pp. 743-745.) The *Melton* Court, nonetheless, found the error was harmless. Carpenter had answered only four questions on this matter, the prosecutor did not exploit the matter in closing argument, and there was strong evidence of the defendant's guilt. (*Id.* at p. 745.)

In *Smith*, the Court of Appeal similarly found inadmissible the testimony of Deputy Rifkin that he believed the victim's dying declaration that "Spodie did it." (*Smith*, *supra*, 214 Cal.App.3d at pp. 914-915.) Rifkin based his opinion of the victim's veracity on their acquaintanceship, the victim's tendency to be honest and open, and the concern in the victim's voice when he named his killer. (*Id.* at p. 914.) The court noted Rifkin's opinion may have been rationally based on his perceptions of the victim's physical condition and mental state, but "it was not necessary to elucidate his testimony," which tended to invade the province of the jury. (*Id.* at p. 915.) The court, however, concluded the error was harmless. Independent facts strongly linked the defendant to the killing and, given Rifkin had known the victim for two years and the victim apparently trusted him, Rifkin "may also have been qualified to render an opinion as to the victim's character for honesty and veracity." (*Id.* at pp. 914-915.)

In *Sergill*, two police officers gave opinion testimony as to the victim's credibility in a child molestation case; each told the jury that he or she believed the girl was telling the truth. The Court of Appeal concluded the officers' opinions did not qualify as expert testimony. They were not experts in judging truthfulness and their "opinions on the child's truthfulness during their limited contacts with her did not have a *reasonable* tendency to

prove or disprove her credibility and were therefore not relevant." (*Sergill*, *supra*, 138 Cal.App.3d at p. 40.) Additionally, the appellate court reasoned the trial court in effect had declared to the jury that one of the officers "was especially qualified to render his opinion as to whether a person reporting a crime was telling the truth." (*Id.* at p. 41.) In reversing the judgment, the *Sergill* court concluded, "It is reasonably probable that the combined effect of the [trial] court's comment and the improperly admitted opinion testimony was the usurpation of the jury's function as fact finder." (*Ibid*.)

Unlike *Melton*, *Smith*, and *Sergill,* the present case did not involve the prosecutor simply asking a law enforcement officer/lay witness to give an opinion about the guilt of the defendant or the credibility of the victim's statements. The challenged testimony that Sendejas claims was tantamount to an opinion by the police was not opinion testimony at all. Rather, it was part of the People's effort to explain S.F.'s differing accounts of the identification procedure, which were relevant to her credibility. Considered in context with the related evidence discussed in the previous section of this opinion, S.F.'s testimony about the hang-up telephone calls and her immediate relocation by the Montebello Police Department was admissible to show that she had a motive not to tell the truth at the preliminary hearing and the trial, and to clarify the reason for her reluctance to testify.

More specifically, S.F. initially identified Sendejas on October 14, 2012, was certain of her identification, and felt no pressure from Detective Adams to identify Sendejas as the shooter. After the hang-up telephone calls began in March 2013, S.F. learned her identifying information had been provided to

Sendejas and she was immediately relocated by the police department. At the preliminary hearing in October 2013 and at trial, S.F.'s account of the identification procedure changed; she purportedly felt uncertain and pressured about her identification of Sendejas.

As the California Supreme Court stated, " '[E]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible.' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084.) " ' An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court.' " (*Ibid.*) "Moreover, evidence of a 'third party' threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant." (*Ibid.*) Thus, a "trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness." (*Id.* at p. 1085.) The challenged testimony did not usurp the jury's fact-finding function, but instead, elucidated S.F.'s testimony and assisted the jury to understand her attitude toward the case at the time of trial.

IX. INFORMANT'S REASONS FOR TELLING DETECTIVES THAT SENDEJAS HAD THE UNREDACTED SHOOTING REPORT AND SENDEJAS'S OUT-OF-COURT STATEMENTS TO INFORMANT WERE PROPERLY ADMITTED

Sendejas objects to the admission of a statement that Informant made during trial as well as several out-of-court statements Sendejas made to Informant.

On direct examination of Informant, the prosecutor sought to establish Informant's motivations for telling Montebello Police Detectives that Sendejas had a copy of the unredacted shooting report. The prosecutor asked Informant, "At some point did you feel like you needed to tell the Montebello Police Department about the fact defendant Sendejas had an unredacted police report?" Informant answered, "Yes." The prosecutor inquired, "Why?" Without objection, Informant answered, "The public was at risk." The prosecutor asked, "And in what way was the public at risk?" Informant replied, "Witnesses were being intimidated." The trial court sustained a foundational objection to this last answer, struck it, and asked the jury not to consider it. The prosecutor then asked Informant, "Without telling us about what you thought had happened in this case, just knowing that he had an unredacted police report, what were your concerns?" Informant replied, "The safety of the witnesses."

Sendejas contests the admission of Informant's testimony, "the public was at risk," as unduly prejudicial under Evidence Code section 352. Because no objection was interposed to that testimony, Sendejas has forfeited this claim on appeal. (Evid. Code, § 353; *People v. Crittenden* (1994) 9 Cal.4th 83, 127 [requiring "a specific objection, directed to a particular, identifiable body of evidence" to preserve an evidentiary issue for appeal].) In any event, any error was harmless in light of Informant's subsequently admitted testimony that he was concerned for the safety of the witnesses in this case.

On direct examination, Informant also testified about several out-of-court unrecorded statements Sendejas made to him. Specifically, Sendejas told Informant that he was in possession of a copy of the unredacted shooting report, he

obtained the report from his cousin Gina Sanchez rather than from his counsel, he planned to share the report with Robert R.'s fellow gang members, and he knew "the general area" where Detective Omar R. lived and that the detective had children.

Whether Sendejas is now objecting to those statements as inadmissible hearsay is unclear. Assuming he is, we conclude Sendejas's out-of-court statements to Informant were admissible under Evidence Code section 1220, which creates an exception to the hearsay rule for statements of a party offered against that party.

Sendejas's counsel objected to Informant's testimony expressing his concern that Sendejas knew generally where Detective Omar R. lived and that he had children. Counsel asserted the testimony was unduly prejudicial. The trial court overruled the objection and instructed the jury, "[T]his particular line of questioning is being presented so that you'll understand the state of mind of this witness and his motives in undertaking whatever conduct is going to follow. Not necessarily to prove the truth or non-truth of what he heard, but so that you'll understand what he says was his motivation."

Sendejas contends the statements were improperly admitted as more prejudicial than probative. We disagree. The testimony was relevant to show Informant's motivation for going to the police about what Sendejas had told him. The trial court instructed the jury on the limited purpose for which it was to consider the evidence, and the jury is presumed to have followed the limiting instruction. (*People v. Clark* (2016) 63 Cal.4th 522, 589 [jury is presumed to follow court's limiting instruction following Evidence Code section 352 objection].)

X. EVIDENCE REGARDING SENDEJAS'S SKS ASSAULT RIFLE TATTOO WAS PROPERLY ADMITTED

A. The Relevant Testimony

Before Sergeant Clift testified, Sendejas's counsel objected to any expert testimony concerning the assault rifle tattoo as more prejudicial than probative under Evidence Code section 352. The trial court agreed with the prosecutor that the tattoo was relevant to show that Sendejas's status in the Sangra gang was higher than the average member, because of his affiliation with the Circle clique, a dangerous gang subset.

At trial, Sergeant Clift was asked on direct examination to explain the significance of the SKS tattoo on Sendejas's neck. Sergeant Clift testified that "within the Sangra gang is an additional clique. It's another subculture within the gang. Those that sport that tattoo, they're called the Circle clique. And the acronym for that is S-K-S. What that represents is that is an image of an SKS assault rifle." Sergeant Clift additionally testified that the location of the tattoo on Sendejas's neck made it easier for him to show "who he is" to fellow or rival gang members.

B. The Trial Court Did Not Abuse its Discretion by Admitting Evidence of the SKS Tattoo

The tattoo's meaning and visibility were relevant to prove the gang allegation; the tattoo displayed Sendejas's affiliation with the Sangra gang and his willingness to intimidate others and to engage in violence on behalf of the gang. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, disapproved on another ground by *People v. Prieto* (2003) 30 Cal.4th 226, 263,

fn. 14 [murder defendant's "187" tattoo and gang expert's testimony explaining its meaning admissible to show defendant's admission of his conduct and consciousness of guilt]; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 46-48 [evidence of meaning of tattoos properly admitted as relevant to prove intent and motive].) Nor was exclusion of the evidence compelled by Evidence Code section 352. Both Sendejas, the alleged perpetrator, and Robert R., the alleged victim, had gang affiliations. The SKS tattoo was just one of several and varied gang-related tattoos on Sendejas's body; the significance of each Sergeant Clift explained to the jury.

XI. THE TRIAL COURT DID NOT COMMIT INSTRUCTIONAL ERROR

Sendejas presented an affirmative defense of entrapment to the charge of attempted dissuasion of a witness.[17] He contends the trial court prejudicially erred by failing to instruct the jury with CALCRIM No. 3409 as part of his entrapment defense that no act done by police agent Informant may be attributed to him.

A. The Governing Law and Standard of Review

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 744, overruled on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919), that is, " ' " 'those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the

[17] Sendejas and Sanchez also relied on this affirmative defense as to the charges of conspiracy to dissuade a witness, which charges we have reversed.

case.' " ' " (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) A court may, however, " 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.' " (*People v. Burney* (2009) 47 Cal.4th 203, 246.) We review a defendant's claims of instructional error de novo. (*People v. Posey, supra*, 32 Cal.4th at p. 218.) "In assessing a claim of instructional error, 'we must view a challenged portion "in the context of the instructions as a whole and the trial record" to determine " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." ' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 831.)

Entrapment is established when the conduct of law enforcement or an agent of law enforcement is likely to induce a normally law-abiding person to commit the offense, either by generating in such a person a motive for the crime other than ordinary criminal intent or by making the commission of the crime unusually attractive. (*People v. Barraza* (1979) 23 Cal.3d 675, 689-690.) Entrapment is normally a question for the trier of fact, and an appellate court will only find that it exists as a matter of law "where the evidence is so compelling and uncontradicted the jury could draw no other reasonable inference." (*People v. Thoi* (1989) 213 Cal.App.3d 689, 694.) A defendant bears the burden of proving entrapment by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 480.)

B. The Relevant Proceedings

During the conference on jury instructions, the trial court agreed to charge the jury with CALCRIM No. 3408, which

provides in pertinent part, "A person is entrapped if a law enforcement officer [or his/her agent] engaged in conduct that would cause a normally law-abiding person to commit the crime. [¶] Some examples of entrapment might include conduct like badgering, persuasion by flattery or coaxing, repeated and insistent requests, or an appeal to friendship or sympathy. [¶] . . . [¶] If an officer [or his/her agent] simply gave the defendant an opportunity to commit the crime or merely tried to gain the defendant's confidence through reasonable and restrained steps, that conduct is not entrapment."

Sendejas's counsel also asked the trial court to instruct the jury with CALCRIM No. 3409, which states in pertinent part, "If, while acting for a law enforcement purpose, an officer [or (his/her) agent] pretends to be an accomplice of a defendant, then no act done by the officer [or agent] may be attributed to the defendant or held against the defendant, unless the defendant, using (his/her) independent will, directed the officer [or agent] to do the act."

Sendejas's counsel told the trial court the instruction was necessary as part of Sendejas's affirmative defense of entrapment. The trial court asked counsel to explain what act was done by Informant that could be attributed to Sendejas within the meaning of CALCRIM No. 3409. Counsel explained Informant had solicited Sendejas to hand over the unredacted shooting report under the false pretense that Informant would then show the report to Stranger, Robert R.'s fellow gang member. Counsel argued the instruction was necessary so the jury would understand Informant's plan to dissuade Robert R. could not be attributed to Sendejas. The trial court rejected the instruction.

C. The Trial Court Did Not Err by Declining to Charge the Jury with CALCRIM No. 3409

On appeal, Sendejas contends, as he did before the trial court, that the instruction was necessary to his entrapment defense. Pursuant to *People v. Goldberg* (1957) 152 Cal.App.2d 562 (*Goldberg*) and *People v. Lanzit* (1925) 70 Cal.App. 498 (*Lanzit*) upon which CALCRIM No. 3409 is based, the purpose of the instruction is to ensure the jury understands that "no act done by a feigned accomplice may be imputed to the criminal actor at the trial. In any event, where an accused is encouraged by the officers, it must be clear that the commission of a crime was not suggested by the officers or their agent." (*Goldberg*, at p. 571, citing *Lanzit*, at p. 509.) According to Sendejas, Informant initiated the scheme to put the shooting report in the hands of Stranger, Robert R.'s fellow gang member. Sendejas only released the report at Informant's insistence and never directed Informant to give it to Stranger.

The trial court's ruling was correct in refusing to instruct pursuant to CALCRIM No. 3409. Although Informant came up with the idea of giving the shooting report to Stranger, he did so only after Sendejas had indicated he planned to show the report to Robert R.'s fellow gang members. On cross-examination, Sendejas's counsel asked Informant, "Now, prior to your coming up with that idea, Mr. Sendejas had never talked to you about giving the report to anyone, did he?" Informant answered, "Yes." Counsel inquired, "And who was he going to give it to? Who did he say he was going to give it to, before you came up with the idea—the idea of approaching him about giving the report to someone?" Informant answered, "He said he was going to give it to Robert[R.]'s homeboys." Informant then testified he told the

police when he subsequently met with them what Sendejas intended to do with the report. Sendejas's counsel asked, "And at that [June 11, 2013] meeting you didn't tell any police officers that Mr. Sendejas had told you of a plan to give the report to other members of Robert [R.]'s gang, did you?" Informant replied, "He did." Counsel asked, "He told—Mr. Sendejas told that to you, but at that meeting, three weeks before the tape-record[ed] meeting, at that earlier meeting you didn't tell the police that Mr. Sendejas had told you that Mr. Sendejas, on his own, was going to give the report to members of Metro 13 gang, did he?" Informant answered, "Yes, I told him." Counsel asked, "You told that to the police?" Informant replied, "Yes."

Further, the jury was adequately instructed pursuant to CALCRIM No. 3408 on the affirmative defense of entrapment. Based on CALCRIM No. 3408, Sendejas's counsel argued to the jury that Informant came up with the idea of showing the shooting report to Stranger and proceeded to cajole Sendejas to provide the entire unredacted report for that purpose by appealing to their friendship and familial relationship.

In short, the trial court did not commit instructional error in failing to instruct the jury with CALCRIM No. 3409.

XII. REMAND IS REQUIRED FOR THE TRIAL COURT TO CONSIDER WHETHER TO STRIKE THE FIREARM ENHANCEMENT

Sendejas was sentenced to an aggregate state prison term of 55 years to life: An indeterminate life term for attempted willful, deliberate, and premeditated murder, with a minimum parole eligibility date of 15 years under section 186.22, subdivision (b)(5), doubled to 30 years under the Three Strikes law; plus 20 years for the firearm enhancement under section

12022.53, subdivision (c); plus five years for the prior serious felony enhancement under section 667, subdivision (a)(1); a concurrent indeterminate life term for attempted dissuasion of a witness, with a minimum parole eligibility date of seven years, doubled under the Three Strikes law to 14 years. The trial court dismissed the section 667, subdivision (a)(1) enhancement attendant to the attempted dissuasion of a witness count in the interest of justice and stayed imposition of the sentences on the remaining counts and enhancements.

On October 11, 2017, Governor Brown signed Senate Bill 620, which amended sections 12022.5 and 12022.53 to provide trial courts with the discretion to strike a firearm enhancement or finding. (Stats 2017, ch. 682.) Senate Bill 620 added the following language to both statutes: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats 2017, ch. 682, §§ 1-2.)

On May 14, 2018, we requested supplemental briefing on the impact of Senate Bill 620 on the firearm enhancement in Sendejas's sentence. In their respective supplemental briefs, Sendejas and the People agree that the case should be remanded so that the trial court may exercise its discretion under Senate Bill 620 to strike the firearm enhancement in section 12022.53, subdivision (c).

Because there is no final judgment in this case and in order to give the change in legislative policy "full effect" (*People v. White* (1969) 71 Cal.2d 80, 83-84), we remand the case

to the trial court to exercise its discretion whether to strike the firearm enhancement.

XIII. REMAND IS NOT NECESSARY FOR THE TRIAL COURT TO CONSIDER WHETHER TO STRIKE THE GANG ENHANCEMENT

When a jury finds an alleged gang enhancement to be true, the trial court must generally impose the consequent punishment "in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted." (§ 186.22, subd. (b).) When the punishment for the underlying felony is life in prison, the additional punishment for the gang enhancement is "a minimum of 15 calendar years" before the defendant is eligible for parole. (§ 186.22, subd. (b)(5).)

Although the gang enhancement is mandatory and consecutive, a trial court has the broad discretion to dismiss (or fully strike) the enhancement in the interests of justice under section 1385, subdivision (a); in fact, a court can exercise such discretion before, during or after a trial. (*People v. Fuentes* (2016) 1 Cal.5th 218, 221.) The trial court also has the discretion to "strike the additional punishment" for a gang enhancement. (*Id.* at pp. 227-228; § 1385, subd. (c)(1) ["the court may instead strike the additional punishment for [an eligible] enhancement"], § 186.22, subd. (g) ["the court may strike the additional punishment for the enhancements provided in this section"].)

Sendejas's counsel asserted in his sentencing memorandum that the trial court had discretion to strike the gang enhancement, citing *People v. Torres* (2008) 163 Cal.App.4th 1420, 1433, fn. 6 and section 1385. At the outset of the sentencing hearing, the trial court advised counsel that it had read and considered the parties' sentencing memoranda. The

trial court did not comment on its ability to strike the gang enhancement; indeed, neither the trial court nor the parties raised the question of striking the gang enhancement.

On a silent record, a trial court is presumed to have known and followed the applicable law (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114), and that rule applies to sentencing choices (*People v. Fuhrman* (1997) 16 Cal.4th 930, 945 [remand unnecessary "in the absence of any affirmative indication in the record" that the trial court erroneously believed it lacked discretion to strike a prior conviction under section 1385]). Because there is nothing in the record indicating that the trial court believed it lacked the authority to strike the gang enhancement, there is no need to remand this matter to give the trial court another opportunity to exercise that discretion.

XIV. THE PARTIAL DENIAL OF THE *PITCHESS* MOTION WAS PROPER

A. The Governing Law and Standard of Review

Although police officer personnel records are generally confidential (§§ 832.7-832.8), a criminal defendant is entitled to the discovery of the contents of those records if the information contained therein is relevant to his or her ability to obtain a fair trial or to defend against pending charges. (*Pitchess v. Superior* Court (1974) 11 Cal.3d 531, 536-538.) The process by which a criminal defendant may discover personnel records is codified in Evidence Code sections 1043 to 1045. Initially, the defendant must submit a motion accompanied by an affidavit or declaration "showing good cause for the discovery or disclosure sought" and "setting forth the materiality thereof to the subject matter involved in the pending litigation." (Evid. Code, § 1043,

subd. (b)(3); see *People v. Gaines* (2009) 46 Cal.4th 172, 179.) In other words, "a showing of good cause requires a defendant seeking *Pitchess* discovery to establish . . . a logical link between the defense proposed and the pending charge, [and] to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021 (*Warrick*); see *People v. Gaines*, *supra,* 46 Cal.4th at p. 179.)

"If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance." (*Warrick*, *supra*, 35 Cal.4th at p. 1019; accord, *Gaines*, *supra*, 46 Cal.4th at p. 179.)

Appellate courts review a trial court's decision on the discoverability of material in police personnel records for abuse of discretion standard. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; accord, *Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 657.)

B. The *Pitchess* Motion and Relevant Proceedings

Prior to trial, Sendejas filed a *Pitchess* motion seeking discovery of information in the personnel records of Montebello Police Detectives Adams, Calleros, Antista and Omar R. pertaining to "illegal detentions and arrest, fabrication of evidence, filing of false police reports, perjury and false statements."

In support of the motion, Sendejas's counsel's declaration stated, that Robert R. was "using the Montebello Police Department to pursue a false claim that [Sendejas] fired shots at him," and the named detectives were "pursuing the false charges because the alleged shooting victim, Robert R[.], [was] the

brother of Montebello Police [Detective] Omar R[.]" The declaration stated, "Because of that relationship, when Robert R[.] was investigated for domestic violence [involving N.V.], no charges were filed and the domestic violence case, investigated by Detective Antista, was dropped."

The declaration also alleged when Robert R. claimed Sendejas shot at him, the incident was investigated by Detective Omar R.'s partner Detective Adams, who "coached a witness to pick Defendant Sendejas from a six pack of photos." Adams also received information from a confidential informant that Robert R. "was lying about Defendant Sendejas's involvement in the shooting and was attempting to frame Sendejas. Detective Adams ignored this report and did no follow-up investigation of the C.I.'s information."

The declaration further stated, "Detective Calleros pursued an investigation of [defendant] Gina Sanchez and Defendant Sendejas for releasing confidential police reports based in part on the fact that Sanchez had excessively viewed the Robert R. police reports on the Department computer. Detective Calleros had information that Detective Omar R[.], who was not an investigator on the case, had also excessively viewed the same police reports on the Department computer, and took no action" against Detective Omar R. "Detective Calleros also prepared a false police report as a ruse in a sting operation against Gina Sanchez. The report falsely claimed there was a new eyewitness implicating Defendant Sendejas in the Robert R[.] shooting." Attached to the declaration were police reports and excerpts of the preliminary hearing transcript. Sanchez's counsel joined the *Pitchess* motion and filed a similar declaration.

At the hearing on the motion, the trial court announced its tentative ruling was to grant the *Pitchess* motion as to Detective Adams only. The trial court explained it did not "see any specific allegations of wrongdoing" by the other three detectives. As to Detective Calleros, the trial court reasoned the preparation of "the false police report in connection with a sting operation" was "an investigative tool," not a report submitted in support of "any charges to be filed." With respect to Detective Antista, the trial court stated the allegation that the domestic violence incident he investigated was declined for filing for inappropriate reasons is not proper impeachment evidence and the detective's involvement was "really tangential to this case."

As to Detective Omar R., the trial court noted, other than his repeated viewing of the police reports, there was no wrongful conduct attributed to him, such as coercing his colleagues into taking certain action, dissuading witnesses, or writing false reports, or that he otherwise participated in the investigations involving Sanchez and Sendejas. "[T]here is certainly an allegation of bias and sort of brotherhood among the Montebello Police Department which [has] led to pursuing the wrong people in this case, but I think that's a jury issue."

In its final ruling, the trial court granted the motion as to Detective Adams and denied it as to the remaining detectives. The trial court determined the allegations that Detective Omar R. had convinced the others to commit misconduct were unsubstantiated, and there was an insufficient factual basis in the declarations to support the requested discovery.

C. Defendants Failed To Establish Good Cause for the Production of the Personnel Records of Detectives Antista, Calleros, and Omar R.

Sendejas contends the trial court abused its discretion by restricting the requested discovery to the personnel records of Detective Adams. Sendejas argues he presented a plausible factual scenario "that Detective [Omar R.] and/or his colleagues may have lied, skewed evidence, or ignored evidence in the investigation of this case, and that they may have committed similar acts of misconduct in the past."[18]

Although the threshold for establishing entitlement to *Pitchess* discovery is low, it is defendant's burden to bear. In *Garcia v. Superior Court* (2007) 42 Cal.4th 63 (*Garcia*), the California Supreme Court echoed its earlier decision in *Warrick* by explaining that a *Pitchess* motion may be supported by an affidavit from counsel describing on information and belief, "a factual scenario that would support a defense claim of officer misconduct. [Citation.] 'That factual scenario, depending on the circumstances of the case, may consist of . . .' 'defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' [Citation.] Corroboration of or motivation for alleged officer misconduct is not required.

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[18] Sanchez, joined by Sendejas, advances this argument on appeal.

[Citation.] Rather, 'a plausible scenario of officer misconduct is one that might or could have occurred.' [Citation.] A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. [Citation.] 'A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial.' " (*Garcia*, *supra*, at p. 71.)

As noted by the trial court, the defense theory that the four detectives committed misconduct by aiding Robert R. in his retaliatory efforts to frame Sendejas for the shooting was articulated by counsel in their declarations. However, in accordance with *Garcia*, while plausibility, not ascertained facts, is the linchpin under *Warrick,* the defense theory must be supported by a specific factual foundation for the asserted officer misconduct. Here, with the exception of Detective Adams, defendants did not meet this requirement.

Counsels' declarations failed to allege any specific acts committed by Detectives Antista, Calleros and Omar R. showing they had lied, skewed evidence, or ignored evidence in favor of Robert R. What the declarations do provide in terms of factual allegations are the following: (1) Detectives Antista, Calleros, and Omar R. were colleagues; (2) Detectives Antista and Calleros had investigated various aspects of this then evolving case; and (3) Detective Omar R. was Robert R.'s brother and Detective Adams's partner; and (4) Detective Omar R. had accessed the pertinent police reports on numerous occasions.

When considered in conjunction with the attached transcript excerpts and police reports, the allegations in the declarations do not reflect specific acts of misconduct committed by the three detectives. With respect to Detective Antista's

investigation of the domestic violence incident, his report stated Robert R. and N.V. each blamed the other as the aggressor. Robert R. declined to cooperate with any prosecution of N.V., but N.V. stated she wanted Robert R. to be prosecuted. Antista ended his report stating he planned to submit the case for prosecution of Robert R. Detective Calleros's report described the ruse the police used while investigating Sanchez. In an excerpt of his preliminary hearing testimony, Calleros acknowledged on cross-examination that Detective Omar R. had accessed the shooting report 53 times. When asked whether that was proper conduct under the circumstances, Calleros answered, "I cannot speak on that." Sanchez's appellate attorney asserted, "Adams' actions support the inference that Detective [Omar R.] *and detectives with whom he worked* may also have had a motive to skew evidence against Sanchez and Sendejas, or in [Robert R.]'s favor." This assertion, however, is mere argument, and does not constitute the showing of good cause required by *Pitchess* to discover Detective Omar R.'s personnel records.

Where, as here, the supporting declarations fail to establish a plausible factual foundation for the alleged officer misconduct when read in light of the other pertinent documents, the trial court did not abuse its discretion in denying the *Pitchess* motion as to Detectives Antista, Calleros, and Omar R. (*Warrick*, *supra*, 35 Cal.4th at p. 1025; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1099, disapproved in part on another ground in *People v. French* (2008) 43 Cal.4th 36.)

DISPOSITION

The judgment as to Sanchez is reversed. Sendejas's convictions for attempted premeditated murder and dissuasion of a witness are affirmed. Sendejas's conviction for conspiracy to dissuade a witness is reversed, and the case is remanded for resentencing consistent with this opinion.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.