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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH MANCILLA, et al., Defendants and Appellants.	B268375 (Los Angeles County Super. Ct. No. BA417858)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Judgments of conviction affirmed; sentences vacated and remanded for resentencing.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Mancilla.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Rojas.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

On December 25, 2010, police received multiple reports of gunfire in the Echo Park neighborhood of Los Angeles. Witnesses saw two men shooting toward an apartment building, and then one of the men fall to the ground. A white sedan approached the gunmen, who entered the vehicle and fled the scene. Several people at the apartment building suffered gunshot wounds, including two members of a criminal street gang known as Los Crazy Mexicans (LCM). A responding officer discovered a white sedan near the scene of the shooting with a deceased man lying in the backseat. The victim, Cesar Guerrero, was a known member of the Echo Park gang.

After a multi-year investigation, law enforcement concluded that Guerrero and two other Echo Park gang members, Carlos Rojas and Joseph Mancilla, had attacked LCM members who resided at the apartment building in retaliation for a series of recent gang shootings. Investigators believed Rojas had driven Mancilla and Guerrero to the apartment building, and that Guerrero was killed in the ensuing shootout.

Mancilla and Rojas were charged with one count of murder in connection with the death of Guerrero, four counts of attempted premeditated murder, conspiracy to commit murder and conspiracy to commit a felony for the benefit of a criminal street gang. The jury found Mancilla guilty of first degree murder, Rojas guilty of second degree murder, and both defendants guilty of all remaining counts.

On appeal, Mancilla argues the trial court committed instructional error with respect to provocative act murder and the natural and probable consequences doctrine. Rojas argues there is insufficient evidence to support his conviction. Both defendants also challenge numerous evidentiary rulings, and

raise several sentencing errors. We affirm the judgments of conviction, vacate the sentences and remand for resentencing.

FACTUAL BACKGROUND

A. Summary of the Crime

1. The Echo Park and LCM gangs

"Echo Park" is a criminal street gang based in the Echo Park area of Los Angeles. As of 2010, Echo Park was estimated to have 280 to 300 total members, and 40 to 75 active members. Echo Park's gang symbols included the letters "EXP," "EP," and "EPLS" (Echo Park Locos), as well as the rhinoceros logo associated with the "Marc Ecko" clothing brand. The gang also used its symbols in conjunction with the numeral "13," a designation the Mexican Mafia bestowed upon certain Hispanic street gangs. Echo Park had a rivalry with a smaller Hispanic criminal street gang known as "Los Crazy Mexicans" or "LCM," which was comprised of ten to fifteen members.

In 2010, Charles Arellano served as Echo Park's "shot caller," meaning that he directed the gang and decided which members would participate in gang missions. Local law enforcement had identified Charles's sister, Veronica Arellano, and his step-son, Rubin Valenzuela, as Echo Park gang members.

Gang officers had also identified Carlos Rojas, Joseph Mancilla and Carlos Guerrero as Echo Park gang members. Rojas and Mancilla both had several tattoos of Echo Park gang symbols, and had identified themselves as gang members to multiple officers. Mancilla also had a three-dot tattoo on his face, a symbol referencing gang life.

2. Precursor events to the Christmas shooting

On August 14, 2010, Los Angeles police officer Robert Calzadillas responded to a report of a shooting in the Echo Park neighborhood. The victim of the shooting, Charles Arellano, had been shot in the foot. A witness directed Calzadillas to graffiti located near the scene of the shooting that showed the letters "EP-13" written over the words "Los Crazy Mexicans" and "LCM." Calzadillas believed the graffiti "looked like it had just been done."

On December 16, 2010, Charles Arellano's step-son, Ramon Valenzuela, was shot in the head while walking with another Echo Park member near the gang's territory.

One week later, on December 23, 2010, Susana L. and her daughter Aimee L. were walking back to their house in Echo Park when they noticed a car parked in front of a pink apartment building located at 1240 Innes Avenue. Susana and Aimee saw two Hispanic men, one positioned near the car and the other by the front of the building, communicating by whistling and giving each other hand signals. One of the men had a three-dot tattoo on his face, and appeared to be covering something in his hand.

Based on the conduct of the men, and her knowledge of the people who resided at 1240 Innes Avenue, Aimee believed there was going to be a "drive-by" shooting. Aimee's mother also thought the men were acting suspiciously, and told her daughter to run. Aimee and Susana fled into a nearby building and immediately heard guns shots.

That same day, Phil Nguyen, who also lived on Innes Avenue, observed a white Honda Accord parked near his residence. He saw two male Hispanics exit the vehicle, and walk toward the apartment building at 1240 Innes Avenue. The men

hit a car parked in front of the building, triggering a car alarm. When the residents of the apartment came outside, the two male Hispanics yelled "Echo Park." Nguyen heard the residents yell back another gang name, and the two groups then began shooting at each other.

3. The Christmas shooting

Sara Phillips lived at 1240¾ Innes Avenue, which was located behind the pink apartment building at 1240 Innes Avenue. Phillips's building was accessible through a pathway from Innes Avenue that ran along the right side of the building at 1240 Innes. On December 25, 2010, Phillips was at home with her brother, Jose Guerra, and several other family members. Three of Guerra's friends were also present: Arturo Wolf, Steve Castanon and Carlos Montalvan. Castanon and Maltovan were both members of LCM.

At approximately 11:40 a.m., Wolf, Castanon and Montalvan were standing in front of Phillips's building near the pathway that led to Innes Avenue. Castanon suddenly heard gunshots, and was struck by a bullet in his leg. Montalvan suffered a gunshot wound to his stomach, and Wolf suffered multiple gunshot wounds to his back and stomach. After hearing the gunshots, Guerra ran outside Phillips's building and threw himself over Wolf. Guerra then called 9-1-1 and reported that multiple assailants had approached Phillips's building from the pathway leading to Innes Avenue, and began shooting. Guerra further reported that he had seen a white car driving in reverse up Innes Avenue, with the driver continuing to shoot toward the pink apartment building.

Several residents of Innes Avenue witnessed the shooting. After hearing gunshots, Susana L. looked out her window and

saw three men exiting 1240 Innes Avenue. One of the men looked like the man with the three-dot tattoo she had seen in front of the building two days earlier.

Shortly before the shooting started, Phil Nguyen saw two male Hispanics standing outside a white Honda that appeared to be the same vehicle he had seen two days earlier. The men walked toward 1240 Innes Avenue, while the driver of the vehicle remained inside the car with the engine running. Nguyen heard several gunshots, and then saw the three men leaving in the Honda. Two of the men were in the backseat, one lying over the other.

Janet Ruiz went to her window after hearing gunshots, and saw two Hispanic males shooting toward the apartment building behind 1240 Innes. One of the men fell to the ground, appearing to have been shot. Ruiz then saw a white car come down Innes; the driver and the non-injured gunman helped the injured assailant into the car. While they were assisting the injured assailant, Ruiz saw a black item fall to the ground, which she later identified as a "black glove or something like that."

Yusseff Evereteze was driving on Innes Avenue when he heard gunshots, and saw two men running toward the street along the pathway beside 1240 Innes. The men stopped in the street, and began shooting at the apartment building. One of the men fell to the ground, and the other man started yelling for assistance. A car that had been parked on Innes Avenue drove toward them, and the driver then helped the injured assailant into the car.

Kelly Martin was awoken by gunshots and looked out his window. He saw three male Hispanics near a white Honda firing weapons toward the apartment at 1240 Innes Avenue. Martin

went to retrieve his phone, and when he returned to the window, one of the men was lying on the ground. Kelly informed the 911 operator that two men had helped the man lying on the ground into the car, and that the driver of the car was firing a weapon while driving in reverse.

4. Recovery of Cesar Guerrero's body

Leticia Ayon lived on Baxter Avenue in the Echo Park neighborhood of Los Angeles. Ayon was a childhood friend of Veronica Arellano. Her deceased husband had been a member of the Echo Park gang, and had been killed by another member of the gang one year earlier. Ayon's son was also affiliated with Echo Park. She called emergency personnel.

Veronica Arellano was notified that Cesar Guerrero, her former co-tenant, had been shot, and immediately began driving to Ayon's house.[1]

Los Angeles police officer Douglas Bowler was on patrol near Echo Park when he heard dispatchers describing the shooting that had occurred at 1240 Innes. Bowler saw an ambulance with its emergency lights on that appeared to be heading toward the scene of the shooting. A green Honda was flowing closely behind the ambulance traveling at a high rate of speed. Bowler attempted to pull the Honda over, but the vehicle did not stop. The ambulance and the green Honda stopped near Ayon's house. Bowler detained the driver of the green Honda,

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[1] At trial, an officer testified that Veronica Arellano told him Ayon was the person who informed her that Guerrero had been shot. During her trial testimony, Arellano acknowledged she had received a call notifying her that after Guerrero had been shot, but claimed she could not remember who called her. Ayon testified that she could not recall whether she called Arellano.

Veronica Arellano, and her passenger, Richard Mancilla, the brother of defendant Joseph Mancilla.

5. Veronica Arellano's statements to Maria De Los Santos

On the day of the shooting, Veronica Arellano contacted Guerrero's grandmother, Maria De Los Santos, and informed her Guerrero had been shot. De Las Santos traveled to Ayon's house, and saw police tape around a white vehicle. De Los Santos asked Arellano what had happened. According to De Los Santos, Arellano stated that Carlos Rojas had said he was driving the car, and that Joseph Mancilla was with him. Arellano also stated that Mancilla had said he was involved in the shooting, and had caused Guerrero to be shot. Arellano told De Los Santo the shooting was in retaliation for the shooting of Veronica's nephew, Ramon Valenzuela, that had occurred nine days earlier.

B. Police Investigation

1. Witness statements and identifications

Los Angeles Police Detective Sergio Ortiz was assigned to serve as the lead detective in the matter. On January 11, 2017, Ortiz interviewed Leticia Ayon. Ayon told Ortiz that on the day of the shooting, she had heard someone outside her house calling her name. She then saw Mancilla, who she knew as "Droopy" from the Echo Park gang, at her front gate. Ayon stated that Mancilla told her Guerrero had been shot, and was lying in a white car in an alley next to her house. Ayon told Ortiz she would not sign a statement regarding the information she had provided, and would deny having told him about Mancilla because she was worried she would be killed by the Echo Park gang.

Ortiz also interviewed Guerrero's grandmother, Maria De Los Santos. She told Ortiz that Sonia Rojas, the mother of Carlos Rojas, had told her Carlos Rojas admitted he was in the car with Mancilla and Guerrero on the day of the shooting. According to De Los Santos, Sonia Rojas also said Carlos had told her Veronica Arellano and Mancilla's brother had planned the shooting at 1240 Innes. Sonia explained that Carlos had said Mancilla and Guerrero were supposed to conduct the shooting, and that Rojas was responsible for driving the getaway vehicle.

Ortiz conducted six-pack photographic lineups with several of the witnesses who had seen the shooting. In March of 2011, Janet Ruiz reviewed a six-pack of photographs and was initially unable to make an identification. After further inspection, she selected Mancilla as the person who most closely resembled one of the shooters she had seen in the street, but was only 40 to 50 percent certain of her identification. Ruiz reviewed a second six-pack of photographs, and selected Rojas as a person who looked "something like [the driver]."

In July of 2011, Yusseff Evereteze reviewed a six-pack of photographs and selected Mancilla as the shooter, stating that he was 80 percent certain of his identification. Over two years later, in September of 2013, Evereteze reviewed a live lineup that included Mancilla, and identified a different person as the shooter.

In March of 2011, Ortiz showed Kelly Martin a six-pack of photographs and asked whether he saw the driver. Martin selected two people, neither of whom was Rojas, and signed a statement saying they most closely resembled the driver. Later that day, Ortiz showed Martin a second six-pack of photographs, and asked whether he saw the shooter. Martin selected Mancilla

as the person who most closely resembled the shooter, and stated that he was 50 percent certain it was the person he had seen on the day of the shooting. In September of 2011, Ortiz showed Martin another six-pack, and he selected Rojas as the person who most closely resembled the driver.

In September of 2013, Martin reviewed a live lineup that included Mancilla, and selected him and two others as persons who resembled the shooter. At trial, Martin clarified he was never able to positively identify any of the suspects, and that his identifications were all about "50/50."

2. Statements between Mancilla and Rojas

After identifying Mancilla and Rojas as potential suspects, Ortiz requested that the two men participate in a live lineup. Ortiz placed a hidden camera in the area where Mancilla and Rojas were held prior to the lineup, and videotaped their conversation.

In the surreptitiously-recorded video, Mancilla told Rojas "[w]e should have run when we had the chance fool," adding: "If we do fucken dodge this one, fool, when we get out, we're just going to have to fucken just chill." After Rojas warned Mancilla the police were trying to set them up, and not to "trip," Mancilla responded: "I'm good . . . I just want to know who it was, fucken rat. And it can't be . . . Vanessa[2] – she wasn't there that day. Has to be somebody else." Later in the conversation, Mancilla stated: "the fuck are they going to try and charge us of murder . . . these fools fucken blasted us back? That's crazy huh? That's crazy?"

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2 Vanessa was the name of Guerrero's girlfriend.

After the lineup had been conducted, an officer came back into the room and informed the suspects that the witnesses were unable to identify Rojas, but did identify Mancilla. When the officer left, Rojas stated that the officer was "straight lying," asserting: "They can't really recognize me because I was the driver. Fuck. We weren't even there . . . That's how you know if they have their own little story, they made up, fool." Rojas further stated that he would "take the rap" for Mancilla. In response, Mancilla told Rojas "don't say shit," adding: "If you take it you're going to end up fucking yourself up. Because you might get out of this, fool. You said they can't recognize you." Rojas and Mancilla then both repeatedly stated they would be fine because they had not done anything wrong.

3. Forensic evidence

Forensic investigators recovered 37 cartridges from the scene of the shooting. Ballistics experts concluded the shots had been fired from at least four different weapons.

Investigators also recovered several pieces of physical evidence from the crime scenes, which included a hat and a black glove that were found in the street outside 1240 Innes Avenue, and a shirt found in the white Honda where Guerrero's body was discovered. Guerrero's DNA was detected on all three items.

Laboratory analysis revealed that the glove and the shirt contained additional DNA from multiple secondary contributors. Mancilla was excluded as a possible contributor to the glove, but Rojas was found to be a possible contributor. The forensic analysis showed that the probability of a random person in the population matching the DNA characteristics in the glove that

were found to match Rojas's DNA profile was 1 in 549.[3] Mancilla was found to be a possible contributor to DNA characteristics found on the shirt at a random probability rate of 1 in 310.

C. The Information

The District Attorney for the County of Los Angeles filed an information charging Mancilla and Ramos with one count of murder in connection with the death of Cesar Guerrero. (Pen. Code, § 187, subd. (a).[4]) The information also alleged four counts of attempted murder (one for each person who was fired upon at Phillips's apartment) (§§ 664,187, subd. (a)); one count of conspiracy to commit murder (§§ 182, 187, subd. (a)); and one count of conspiracy to commit a felony for the benefit of a criminal street gang. (§ 182.5.)

The information included special allegations on all seven counts asserting that each defendant had personally used and intentionally discharged a handgun causing great bodily injury or death, and that a principal in the offenses had personally used and intentionally discharged a handgun causing great bodily injury. (See §§ 12022.53, subds. (b)-(e)(1).) The information also alleged each offense had been committed for the benefit of a criminal street gang. (§ 186.22.)

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[3] Hereafter, when discussing the DNA evidence, we refer to this as the "random probability rate."

[4] Unless otherwise noted, all further statutory citations are to the Penal Code.

D. Trial

1. Prosecution's evidence

At trial, several of the Innes Avenue residents who had witnessed the shootings testified as to what they had seen that day. Each of the witnesses also testified about the subsequent identifications they had made to Detective Ortiz. Yusseff Evereteze was the only witness who was able to positively identify either suspect, testifying that Mancilla was the man he had seen shooting toward the apartment building on Innes Avenue.

The prosecution also called Veronica Arellano to testify. Arellano admitted she knew Rojas and Mancilla, but denied any knowledge whether they were Echo Park gang members. She admitted her husband, Michael Contreras, was an Echo Park gang member, but claimed he was no longer active. She testified that she did not belong to the gang, but admitted that she was the person shown in a photograph of a woman making an Echo Park gang hand sign, wearing Marc Ecko clothing and holding a Marc Ecko rhinoceros. The prosecution questioned Arellano at length about the gang status of several of her friends and family members, including her brother Charles Arellano.

With respect to the shooting, Arellano testified that on December 25, 2010, she had traveled to Ayon's house after learning Guerrero had been shot. Although Arellano admitted she owned a green Honda, she claimed that she had driven to Ayon's house in a brown Kia, and further claimed that she was driving alone that day, and had not followed an ambulance.

Arellano further testified that on the day of the shooting, she called De La Rosa and informed her that she needed to come speak with the police. Arellano admitted De La Rosa had asked

her what happened, but claimed that she told De La Rosa she needed to ask the police that question. Arellano denied telling De La Rosa that Rojas had said he was driving the car, or that Mancilla had said he was in the car.

Arellano acknowledged Guerrero had been living with her in December of 2010, and that she had seen him on the day of the shooting. She claimed that she worked in gang intervention, and had been trying to lead Guerrero out of gang life.

The prosecution called Sergeant Bowler and De La Rosa to rebut portions of Arellano's testimony. Bowler testified that on the day of the shooting, he had seen Arellano and Richard Mancilla driving together in a green Honda, following closely behind an ambulance. He further testified that he detained Arellano and Richard Mancilla after Arellano had stopped her vehicle near Ayon's house.

De La Rosa testified that Arellano had told her Rojas and Mancilla had both admitted they were in the car with Guerrero on the day of the shooting. De La Rosa also testified that she had refused to allow Carlos Rojas's mother to come to Guerrero's funeral because she believed Rojas had let her grandson die.

Ortiz and numerous other officers testified about their participation in the investigation. Over the defense's objection, Ortiz was permitted to testify that Ayon told him Mancilla had come to her house on the day of the shooting, and directed her to the car where Guerrero's body was found. Ortiz also testified that De La Rosa had told him Sonia Rojas said Carlos Rojas had admitted his role in the offense, and identified Mancilla as the shooter.

The prosecution called officer Felipe Neris as a gang expert. Neris provided testimony regarding Echo Park's size, territory,

gang symbols and primary activities. He also testified about predicate offenses that had been committed by other Echo Park gang members. Neris stated that Rojas had identified himself to Neris and other officers as a member of Echo Park, and that Rojas had several tattoos of Echo Park gang symbols. Neris also testified that Mancilla had several tattoos of Echo Park gang symbols, and had identified himself to other officers as an Echo Park gang member.

A second officer, Frank Zuniga, testified that he had heard Rojas identify himself as an Echo Park gang member. A third officer, Arnel Asuncion, testified that Mancilla had identified himself as an Echo Park member on multiple occasions.

2. Defense evidence

Rojas provided alibi testimony from his girlfriend, Amanda Arellano, who stated that Rojas had spent Christmas day with her at the home of her aunt, Veronica Arellano.

Mancilla called Mitchell Eisen, a forensic psychologist, to testify as an expert about various factors affecting the accuracy and reliability of eyewitness identifications, including identifications made through six-pack photographic lineups.

3. Closing argument

At closing argument, the district attorney argued that Mancilla and Rojas were both guilty of Guerrero's murder under the provocative act theory. According to the district attorney, the evidence showed Mancilla and Guerrero had attacked several LCM members, and that Guerrero had been shot in the ensuing shootout. The district attorney further asserted that Rojas had driven the getaway vehicle, and was liable for all of Mancilla's criminal acts as an aider and abettor.

*E. **Jury Verdict***

The jury found Mancilla guilty of first degree murder, and found Rojas guilty of second degree murder. The jury found both defendants guilty of all remaining counts, and found the attempted murders had been premeditated.

The jury also found all of the special allegations against Mancilla to be true, including allegations that he had personally discharged a firearm causing great bodily injury or death with respect to each crime. The jury found true all of the special allegations against Rojas to be true, except those alleging he had personally discharged a firearm causing great bodily injury or death.

The court sentenced Mancilla to an aggregate term of 90 years to life in prison, and Rojas to an aggregate term of 80 years to life in prison.

DISCUSSION

A. Any Error in the Trial Court's Instructions on Provocative Act Murder Was Harmless

Mancilla argues the trial court's instructions on provocative act murder erroneously permitted the jury to convict him of first degree murder based on a finding that Rojas had acted with premeditation in committing the underlying attempted murders. He also contends the instructions permitted the jury to convict him of first degree murder without any finding of premeditation.

1. Summary of the court's instructions

Prior to deliberations, the trial court instructed the jury on provocative act murder under CALCRIM No. 560. The instruction set forth the elements necessary to convict the defendants of murder under the provocative act theory: (1) in

committing the attempted murder, the defendant intentionally did a provocative act; (2) the defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life; (3) in response to the defendant's provocative act, suspected LCM gang members killed Cesar Guerrero; and (4) Guerrero's death was the natural and probable consequence of the defendant's provocative act.

The instruction included the following language regarding the degree of the offense:

> If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree. [¶] . . . [¶]
>
> The defendant is guilty of first degree murder if the People have proved that his provocative act was an attempted murder committed willfully, deliberately, and with premeditation. . . . [¶] . . . [¶]
>
> For a defendant to be found guilty of first degree murder, he personally must have acted willfully, deliberately, and with premeditation when the murder was committed.
>
> To prove that the defendant is guilty of first degree murder, the People must prove that:
>
> 1. As a result of the defendant's provocative act, Cesar Guerrero was killed during the commission of Attempted Murder; AND
>
> 2. Defendant intended to commit Attempted Murder when he did the provocative act.
>
> In deciding whether the defendant intended to commit Attempted Murder and whether the death occurred during the commission of Attempted Murder, you should refer to the instruction I have given you on Attempted Murder. [¶] . . . [¶]

> Any murder that does not meet these requirements for first degree murder is second degree murder.

In addition to the instruction above, the court provided the following instruction on attempted premeditated murder under CALCRIM No. 601:

> If you find the defendant guilty of attempted murder under counts two, three, four or five, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation.
>
> The defendants acted willfully if they intended to kill when they acted. The defendants deliberated if they carefully weighed the considerations for and against their choice and, knowing the consequences, decided to kill. The defendants acted with premeditation if they decided to kill before completing the act[s] of attempted murder.

During deliberations, the jury informed the court it was having difficulty deciphering the provocative act murder instruction. The court allowed the parties to present further argument to the jury, and then supplemented its prior instructions with CALCRIM No. 561 ("Provocative Act by an Accomplice"). With respect to the degree of the murder, the instruction provided:

> If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree murder.
>
> To prove that the defendant is guilty of first degree murder, the People must prove that:
>
> (1) As a result of Joseph Mancilla or Carlos Rojas's provocative act, Cesar Guerrero was killed during the commission of Attempted Murder; AND

(2) Joseph Mancilla or Carlos Rojas intended to commit Attempted Murder when he did the provocative act.

In deciding whether Joseph Mancilla or Carlos Rojas intended to commit Attempted Murder and whether the death occurred during the commission of Attempted Murder, you should refer to the instruction I have given you on Attempted Murder. Any murder that does not meet these requirements for first degree murder is second degree murder.

2. Any error regarding the court's cross-reference to the attempted premeditated murder instruction was harmless

Mancilla argues that, considered in their entirety, the court's instructions on provocative act murder misstated the mens rea requirement by directing the jury that it could convict him of first degree murder based on a finding that Rojas had acted with premeditation in the commission of the attempted murders that provoked a lethal response.

Mancilla acknowledges the court's instruction under CALCRIM No. 560 correctly informed the jury that to convict either defendant of first degree murder under the provocative act theory, it had to find the defendant's "provocative act was an attempted murder committed willfully, deliberately, and with premeditation," and that the defendant "personally . . . acted willfully, deliberately, and with premeditation when the attempted murder was committed."

Mancilla argues, however, that subsequent language in the instruction created confusion by incorporating the court's instructions on attempted murder: "In deciding whether the defendant intended to commit Attempted Murder. . ., you should refer to the instruction I have given you on Attempted Murder."

The court's instruction on attempted premeditated murder, in turn, informed the jury that the attempted murders were premeditated if "the defendants" acted willfully, and with premeditation and deliberation. Mancilla contends that by referring to the defendants collectively, rather than individually, the attempted premeditated murder instruction created the impression that the jury could "find[] premeditation or deliberation . . . not based on Mancilla's personal premeditation and deliberation but on that of his co-defendant Rojas."

In *People v. Gonzalez* (2012) 54 Cal.4th 643 (*Gonzalez*), the Supreme Court found an analogous set of instructions regarding provocative act murder to be erroneous. As in this case, the trial court's instruction included language "properly inform[ing] the jury that . . . a first degree murder conviction required a finding that [the defendant] *herself* acted with an intent to kill formed after deliberation, and with premeditation, when she committed the [attempted murder]." (*Id.* at p. 661 [emphasis in original].) The instruction, however, included additional language that "cross-referenced CALCRIM No. 601's instruction on attempted murder," which stated that "[t]he attempted murder was done willfully and with deliberation and premeditation if either the defendant or [his co-participant], or both of them acted with that state of mind." (*Id.* at pp. 661, 662.)

The court found the instruction erroneous: "[W]hen a provocative act theory is relied on, the jury should be instructed that first degree murder requires proof that the defendant personally premeditated and deliberated the attempted murder that provoked a lethal response. [¶] Here, the jury was properly instructed in detail about the mental state [the defendant] was required to have in order to be convicted of the first degree

murder. . . . However, because the court cross-referenced CALCRIM No. 601's instruction on attempted murder, they were also told that the mens rea requirement for this conviction could be satisfied if [a co-participant] acted with premeditation and deliberation in attempting to kill. . . . [This language was] an incorrect statement of the mens rea required for first degree murder under the provocative act doctrine." (*Gonzalez*, *supra*, 54 Cal.4th at p. 662.)

The Attorney General concedes the trial court committed a similar error here by cross-referencing an instruction on attempted premeditated murder that suggested the jury could convict Mancilla of first degree under the provocative act theory based on the mens rea of either himself or his co-defendant. The Attorney General argues, however, that the error was harmless. We agree.

The type of instructional error at issue here "is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18. [Citations.] In general, the *Chapman* test probes 'whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [Citations.]' [Citation.]" (*Gonzalez*, *supra*, 54 Cal.4th at p. 662 [applying *Chapman* standard to "incorrect statement of the mens rea required for first degree murder under the provocative act doctrine"].) Although Mancilla contends the court's instructions allowed the jury to convict him of first degree murder based on Rojas's mens rea, he was the only defendant the jury found guilty of first degree murder; Rojas was found guilty of second degree murder. Under the court's instructions, which we must presume the jury followed (*People v. Edwards* (2013) 57 Cal.4th 658, 746 ("'We of course presume "that jurors understand and follow the

court's instructions"""]), if the jury had found Mancilla guilty of first degree murder based on Rojas's personal premeditation of the attempted murders, it would have also been required to find Rojas guilty of first degree murder. The fact that only Mancilla was convicted of first degree murder shows beyond a reasonable doubt that the jury based its finding of premeditation on his mens rea, not Rojas's. (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 (*Guiton*) [instructional error harmless where the "verdict [shows] that the jury necessarily found the defendant guilty on a proper theory"]; *People v. Driscoll* (1942) 53 Cal.App.2d 590, 595 ["a defendant may not complain of erroneous instructions . . . where the verdict clearly shows that he was not prejudiced thereby"].)

3. Any error in including language implying that first degree murder did not require a finding of premeditation was harmless

Mancilla also argues the court's instructions on the provocative act theory of murder included language that "essentially advised the jurors that they could convict [him] of first degree murder without any finding of premeditation or deliberation whatsoever." In support, Mancilla cites a portion of the court's instruction under CALCRIM No. 560:

> To prove that the defendant is guilty of first degree murder, the People must prove that:
>
> (1) As a result of the defendant's provocative act, Cesar Guerrero was killed during the commission of Attempted Murder; AND
>
> (2) Defendant intended to commit Attempted Murder when he did the provocative act.

Mancilla also cites similar language appearing in the court's instruction under CALCRIM No. 561, which the court provided during deliberations:

> To prove that the defendant is guilty of first degree murder, the People must prove that:
>
> (1) As a result of Joseph Mancilla or Carlos Rojas's provocative act, Cesar Guerrero was killed during the commission of Attempted Murder; AND
>
> (2) Joseph Mancilla or Carlos Rojas intended to commit Attempted Murder when he did the provocative act.

Mancilla argues that "both instructions setting forth the elements of proof of first degree provocative act murder . . . [told the] jury that first degree murder liability could be reached without any finding of premeditation and deliberation." Considered in isolation, the cited portions of the CALCRIM Nos. 560 and 561 instructions do appear to have invited the jury to make a finding of first degree murder without finding the underlying attempted murders were premeditated. However, other language in the CALCRIM No. 560 instruction, as well as the court's general instruction on first degree murder (CALCRIM No. 521), specifically directed the jury that it could only convict a defendant of first degree murder if it found the defendant acted willfully, deliberately, and with premeditation.

Even if we assume the portion of the instructions Mancilla cites did constitute error, we conclude the jury's verdict demonstrates the error was harmless. As summarized above, the attempted premeditated murder instruction under CALCRIM No. 601 directed the jury that if it found the defendants guilty of attempted murder, it then had to decide whether the prosecution had proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. The

jury found all of the attempted murders were premeditated. As a result, it necessarily found premeditation with respect to the attempted murders that served as the basis for the provocative act murder charge.

Moreover, as explained above, the fact that the jury found Mancilla guilty of first degree murder, and Rojas guilty of second degree murder, shows that the jury's premeditation finding was predicated on Mancilla's mens rea, not Rojas's.

B. Any Error in the Court's Instruction on the Natural and Probable Consequences Doctrine Was Harmless

Mancilla also argues the trial court erred in instructing the jury on the natural and probable consequences doctrine. Mancilla contends the court's instruction failed to clarify that a defendant cannot be convicted of first degree murder under the doctrine, thus inviting the jury to find him liable of the nontarget offense of first degree murder based on Rojas's commission of that crime.

1. Summary of the court's instructions on the natural and probable consequences doctrine

The court provided the following instruction on the natural and probable consequences doctrine:

> The defendants are charged in Counts TWO, THREE, FOUR and FIVE with Attempted Murder and in Count ONE with Murder.
>
> You must first decide whether a defendant is guilty of Attempted Murder. If you find the defendant is guilty of this crime, you must then decide whether he is guilty of Murder.

> Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.
>
> To prove that the defendant is guilty of Murder, the People must prove that:
>
> 1. The defendant is guilty of Attempted Murder;
>
> 2. During the commission of Attempted Murder a co-participant in that Attempted Murder committed the crime of Murder; AND
>
> 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of Murder was a natural and probable consequence of the Attempted Murder.
>
> A co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] . . . [¶]
>
> To decide whether the crime of Murder was committed, please refer to the separate instructions that I gave you on that crime.

The court provided a separate instruction on first degree murder under CALCRIM No. 521, directing the jury that it could only find a defendant guilty of first degree murder "if the People have proved that he acted willfully, deliberately, and with premeditation."

2. The verdict demonstrates any error was harmless

In *People v. Chiu* (2014) 59 Cal.4th 155, the California Supreme Court held that "a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine," reasoning that "punishment for second degree murder is commensurate with a defendant's culpability

for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder." (*Id*. at p. 167.)

Mancilla argues that the court's instruction violated *Chiu* because it did not include language clarifying that a defendant cannot be convicted of first degree murder under the natural and probable consequences doctrine. Mancilla further contends the error supports reversal because "a review of the record fails to disclose" whether the jury convicted him of first degree murder under the provocative act doctrine (a permissible theory of liability), or the natural and probable consequences doctrine (an impermissible theory). (See generally *People v. Green* (1980) 27 Cal.3d 1, 69 ["when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand"] [overruled on another ground by *People v. Martinez* (1999) 20 Cal.4th 225].) Although Mancilla acknowledges "the prosecution . . . emphasized provocative act murder as its primary theory of culpability," he contends that "on the present record, this court cannot determine that the jury's verdict was not based on the jury's erroneous employment of the natural and probable consequences theory."

We agree that the court's instruction should have included language clarifying that a defendant cannot be convicted of first degree murder based on the natural and probable consequences doctrine. We disagree, however, with Mancilla's additional assertion that the record provides no basis to determine whether or not his first-degree murder conviction was predicated on an

erroneous employment of the natural and probable consequences doctrine.

Based on the language of the court's instruction, the only way the jury could have found Mancilla guilty of first degree murder under the natural and probable consequences doctrine is if it found that, during Mancilla's commission of the target crime of attempted murder, his co-participant, Carlos Rojas, committed the nontarget offense of first degree murder.[5] As explained above, the jury found Rojas guilty of second degree murder, not first degree murder. Accordingly, there is no reasonable possibility it convicted Mancilla of first degree murder under the natural and probable consequences doctrine. (See *Guiton, supra,* 4 Cal.4th at pp. 1130-1131 [error stemming from instruction on two theories of an offense, one correct and the other legally incorrect, is harmless where verdict necessarily shows jury found guilt on the proper theory].)

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[5] Under the court's instructions, Rojas was the only possible "co-participant" of Mancilla who could have committed the nontarget offense of murder. Rojas and Mancilla were each charged with the murder of Guerrero, who was allegedly killed during the shootout with LCM members. The court instructed the jury that to convict the defendant of Guerrero's murder under the natural and probable consequences doctrine, it had to find (among other things) that, "[D]uring the commission of Attempted Murder a co-participant in that Attempted Murder committed the crime of Murder." The instruction further directed, "A co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander." Because Guerrero was the victim of the murder, he could not have been the "co-participant" who committed the crime of murder.

C. The Trial Court Had Authority to Admit Evidence that Had Been Excluded at the Defendants' Prior Trial

The defendants argue the trial court erred in overruling a decision made in their prior trial that excluded an incriminating statement set forth in the prosecution's proposed transcript of the surreptitiously-recorded conversation between Mancilla and Rojas at the live lineup.

1. Factual background

a. Exclusion of the statement at the first trial

At the defendants' first trial, presided over by Judge Robert Perry, the prosecution called Detective Ortiz to testify about what he heard on the videotape of the conversation that occurred between Mancilla and Rojas during the live lineup. Ortiz informed the jury that because Mancilla and Rojas had been communicating in a low, secretive tone, he had been required to "enhance the volume and read his lips in order to try to get the full conversation." To aid the jury, the prosecution provided a transcript setting forth the language of the statements Ortiz had purportedly heard on the video. The transcript included the following statement by Mancilla: "How the fuck are they going to try and charge us of murder dog, if these fools fucken blasted us back? That's crazy huh? That's crazy?"

During a recess, defense counsel objected to the inclusion of the statement in the transcript, and moved for a mistrial. Counsel argued that he had never heard that statement on the video, and that the prosecution failed to provide any notice it intended to include the statement in the transcript it gave to the jury. In response, the prosecution argued that Detective Ortiz had testified he could hear the statement when he listened to the

videotape with headphones. The prosecution acknowledged it did not inform the defense of the statement, but argued that it had provided a copy of the video (which was over two hours long), and that the defense therefore had reason to know of the statement.

Judge Perry directed the prosecution to play the segment of the video where Mancilla was alleged to have made the statement. After listening to the segment, Judge Perry indicated he could not make out the words that had been included in the transcript. The prosecution maintained, however, that the statement could be heard with headphones. In response, Judge Perry explained that he believed the prosecution had acted inappropriately by presenting a statement in the transcript that could only be heard with headphones, and providing the defense no notice of its intent to do so.

After listening to the video three more times, Judge Perry confirmed he still could not hear the statement, and found that a "person with reasonable hearing" would not be able to hear the statement when played in the manner the prosecution had presented it to the court. Based on the content of the statement, which Judge Perry found highly prejudicial, and the manner in which the prosecution had elected to present the transcript to the jury, the court declared a mistrial.

b. Inclusion of the statement in the current trial

In the defendants' second trial, presided over by Judge Michael Carter, the parties raised the issue of the disputed statement at a pretrial hearing. The prosecution provided Judge Carter the language of its proposed transcript, and a copy of the segment of the video where Mancilla had allegedly made the statement. Judge Carter informed the parties he would review

the video and make a determination as to whether it could decipher what was said.

Following a recess, Judge Carter stated that he had listened to the statement 10 to 15 times, using both speakers and a headset, and was able to hear a substantial portion of the words set forth in the prosecution's proposed transcript: "So I start with the first word of 'How.' I can't really hear the word 'How.' I can hear the phrase 'fuck' and the phrase, 'going to try to charge us with murder.' I cannot hear the 'dog' or 'if.' You can hear, 'these fools fucking blasted us back,' and you can hear, 'that's crazy.' . . . . It's something you really have to listen to, but, again, it will be up for the jury to decide. So my ruling is that, People, you need to change the transcript where the word 'how' . . . must be inaudible because I just can't hear it. And the word 'dog if' is also inaudible." Pursuant to the court's ruling, the prosecution amended its transcript of the statement to read: "[Inaudible] the fuck are they going to try to charge us with murder, [inaudible] these fools fuckin' blasted us back. That's crazy, uh. That's crazy."

At trial, Judge Carter admonished the jury that, with respect to "audiotapes and videotape[,] . . . [w]hat you see and what you hear is the evidence in this case. . . ., and the transcripts are simply there to help you follow along. What is written on those transcripts is not evidence in the case. So if you are listening to something on one of the audiotapes or viewing something on the videotape and it contradicts with what you are reading in the transcript, it's what you hear and what you see [that] is the evidence. . . . I just want to make it clear to everyone that you have to listen to the evidence as its presented, and you have to make your determination as to what you hear."

2. The trial court was not bound by the prior court's ruling

Defendants argue Judge Carter "improperly overruled" Judge Perry's decision to exclude the disputed statement from the transcript. According to defendants, Judge Carter was bound by Judge Perry's prior ruling, and "exceeded his authority" in electing not to follow it.

"It is often said as a general rule one trial judge cannot reconsider and overrule an order of another trial judge." (*People v. Riva* (2003) 112 Cal.App.4th 981, 991 (*Riva*).) In *Riva*, however, this court recognized an exception to that general rule for pretrial evidentiary rulings: "[P]retrial rulings on the admissibility of evidence . . . [are] reviewable by another judge following a mistrial because they are intermediate, interlocutory rulings subject to revision even after the commencement of trial." (*Id*. at p. 992.)

We further observed, however, that "[t]his authority . . . is not unlimited. It must be exercised in conformity with the defendant's right to due process of law. . ., which means the defendant must be given notice and an opportunity to be heard, and the revised ruling cannot be arbitrary or made without reason. . . . [¶] Furthermore, for reasons of comity and public policy . . ., trial judges should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so—mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made and whether the previous order is

reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law." (*Riva, supra,* 112 Cal.App.4th at pp. 992-993.)

Applying the test set forth in *Riva*, we find no error in Judge Carter's decision. The record makes clear that Judge Carter exercised its authority to review Judge Perry's decision "in conformity with the defendant's right to due process of law." (*Riva, supra,* 112 Cal.App.4th at p. 991.) Prior to trial, the defendants received notice that the prosecution intended to include the statement in the transcript, and were provided an opportunity to argue the issue. Moreover, Judge Carter's decision cannot be said to have been "arbitrary" as the record shows he spent a considerable amount of time and effort listening to the video to determine whether the transcript accurately reflected what Mancilla had said.

The record also demonstrates there was a "change in circumstances" that supported Judge Carter's decision to allow the statement. In the first trial, the prosecution presented the statement to the jury without any prior notice to the defense or to the court. Judge Perry emphasized this lack of notice in his ruling, explaining that he believed the defense had been unfairly "surprised" by the prosecution's decision to submit the transcribed statement to the jury without prior warning. In the second trial, however, the defendants suffered no such surprise, as the issue was presented to the court and decided prior to trial.

Moreover, unlike Judge Perry, Judge Carter had the opportunity to carefully review the video using both speakers and headphones. After listening to the statement 10 to 15 times, Judge Carter made a determination as to what portion of the

statement was decipherable, and what portion was not. This is not a case where a trial judge overruled a prior order simply because he disagreed with the ruling. Indeed, Judge Carter made no findings with respect to whether Judge Perry was incorrect in concluding he could not decipher the statement. Instead, Judge Carter concluded only that after personally listening to the recording with both speakers and headphones, he was able to make out a portion of what was said on the video. Judge Carter also admonished the jury that it had to make its own determination whether the transcript accurately reflected what was said during the conversation.

Based on the record before us, we find no basis to conclude Judge Carter exceeded his authority in admitting the transcript of the alleged statement.[6]

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[6] Defendant Mancilla also argues that even if Judge Carter had authority to revisit Judge Perry's ruling, he abused his discretion by providing the jury a "speculative and uncertain transcript of the jailhouse video." Mancilla appears to propose that we listen to the disputed portion of the video, and make an independent determination whether we can hear the language that Judge Carter heard. Mancilla, however, has cited no authority that allows us to reweigh Judge Carter's finding as to what he personally heard on the video. (See generally *People v. Culver* (1973) 10 Cal.3d 542, 548 "[t]he reviewing court does not perform the function of reweighing the evidence"].) Moreover, although defendants have provided a DVD of the surreptitiously-recorded conversation, we have no way of knowing whether, and if so how, the sound quality of Judge Carter's listening devices differed from our own. To the extent the defendants believed the transcript misrepresented what was said on the video, they were permitted to make that argument to the jury, which was specifically instructed that the transcript was not evidence.

D. ***De La Rosa's Testimony Regarding Veronica Arellano's Statements About Rojas's Admissions Was Admissible***

Defendants argue the trial court erred in allowing Guerrero's grandmother, De Las Santos, to testify that Veronica Arellano had told her Rojas admitted he was driving the car in which Guerrero died, and that Mancilla had also been in the car. Defendants contend these statements amounted to hearsay, and should have been excluded on that basis.

"Multiple hearsay is admissible for its truth . . . if each hearsay layer separately meets the requirements of a hearsay exception." (*People v. Arias* (1996) 13 Cal.4th 92, 149.) The defendants do not dispute that Rojas's statements to Arellano meet the requirements of the hearsay exceptions for party admissions (Evid. Code, § 1220) and statements against penal interest (Evid. Code, § 1230). The only question, therefore, is whether the second layer of hearsay—Arellano's transmission of those statements to De Las Santos—also meets the requirements of a hearsay exception.

Under Evidence Code section 1235, "a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . ." In this case, Arellano testified at trial that she did not tell De Los Santos that Rojas had admitted he was the driver, and that Mancilla was with him. Thus, under section 1235, De Los Santos was permitted to present testimony that Arellano had in fact previously made such statements. (See *People v. Zapien* (1993) 4 Cal.4th 929, 953 (*Zapien*) [approving the admission of "multiple hearsay consisting of a prior inconsistent statement and an admission of the defendant"].)

In their appellate briefing, defendants argue that De Los Santos's testimony should have nonetheless been excluded because it "lacked all indicia of reliability." Defendants contend De Los Santos's testimony was unreliable because her trial testimony showed she was "intent on blaming gang members – any gang members – for [the] loss [of] her grandson." In support, they cite testimony in which De Los Santos stated that she had forbid Rojas's mother, Sonia Rojas, from attending Guerrero's funeral because De Los Santos felt Rojas had left Guerrero to die in the car.

This argument fails for multiple reasons. First, defendants did not object to De La Rosa's testimony at trial on the basis that it lacked sufficient indicia of reliability. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21 [""""defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable""""].) Second, our Supreme Court has clarified that although "the proponent of hearsay evidence [generally] has the burden of establishing that the evidence bears 'sufficient indicia of reliability . . .,' . . . . this requirement applies only if the prosecution is unable to produce the declarant [at the time of trial]." (*Zapien, supra,* 4 Cal.4th at p. 957.) In this case De Los Santos testified at trial, and thus the defendants had an opportunity to cross-examine her with respect to her testimony that Arellano had made the disputed statements. Third, defendants have presented no legal authority in support of their assertion that the court was required to exclude De Los Santos's statements based on testimony showing she was resentful of Rojas. Their conclusory assertion to that effect is insufficient to show the trial court abused its discretion. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836,

852 ["conclusory presentation, without pertinent argument or an attempt to apply the law to the circumstances of this case, is inadequate" and deemed forfeited]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 337 [trial court's determination regarding "indicia of reliability" is reviewed for "abuse of discretion"].)

E. The Court Did Not Abuse its Discretion in Allowing the Prosecution to Cross-Examine Veronica Arellano Regarding Her Gang Affiliations

Defendant Rojas argues the trial court erred in allowing the prosecution to question Veronica Arellano "with respect to Arellano's family [and] friends['s] . . . . purported gang ties." According to Rojas, the only "real issue [at trial] with [r]espect to [his innocence or guilt] was identity: Was he . . . [the] gang member who drove the white car. . . . [Arellano's] alleged gang membership, plus that of her extended family and friends was . . . irrelevant, collateral to the issue of Rojas' guilt, and useless to prove the identity of the driver."

In rejecting this argument at trial, the court explained that Arellano had denied telling De Los Santos that "Rojas and Mancilla [had] admit[ted] to being in the car," and therefore her credibility was a key issue in the case: "I think that the whole key is the believability of [Arellano] . . . . And if she is believable in her statement in court that she didn't say any of those things [to De Los Santos], then the jury may take that as . . . her previous statement not being true. If they believe that her statements in court were not believable then they may believe that she really did make the statement. . . . Everyone agrees the statement [to De Los Santos] is very important in this case. So the real issue is whether she is believable in her testimony. I think what the prosecution is doing at this point is going into

[her] background to really question the things that she said on the stand."

"'[T]he trial judge has broad discretion to control the ultimate scope of [examination] designed to test the credibility . . . of a witness [citation], [and] wherever possible that examination "should be given wide latitude . . ."'" (*Jennings v. Superior Court of Contra Costa County* (1967) 66 Cal.2d 867, 877 (*Jennings*).) As the trial court recognized, Veronica Arellano was an important witness in this case because she allegedly told another witness (De Los Santos) that the defendants had admitted to participating in the offenses. At trial, however, Arellano denied making those statements. Her credibility was therefore a key issue.

Given that the defendants were allegedly Echo Park gang members who had committed the crimes for the benefit of the gang, Arellano's status as an Echo Park gang member and her affiliations with other gang members were relevant to assessing her credibility. Moreover, the prosecution's theory at trial was that Arellano had coordinated the Christmas day shooting in retaliation for acts that LCM had perpetrated against other Echo Park gang members. Thus, evidence regarding her gang affiliations was also relevant to establish the prosecution's narrative of how and why the crimes had occurred. (See *People v. Bolin* (1998) 18 Cal.4th 297, 320 (*Bolin*) [affirming admission of evidence that "was relevant primarily" to establish a portion of "the [prosecution's] overall narrative" regarding the offense].)

Allowing the prosecution to examine Arellano with respect to her gang affiliations fell within "wide latitude" trial courts are permitted in determining the appropriate scope of examination. (*Jennings*, *supra*, 66 Cal.2d at p. 877.)

F. The Court Did Not Abuse its Discretion in Admitting the DNA Evidence

Defendants argue the trial court erred in admitting DNA evidence extracted from a black glove found at the scene of the shooting,[7] and a shirt found in the vehicle where Guerrero's body was discovered. Forensic analysis revealed that both items contained the DNA of Guerrero and multiple secondary contributors. Rojas was found to be a possible contributor of the DNA on the glove at a random probability rate of 1 in 549. Mancilla was found to be a possible contributor of the DNA on the shirt at a random probability rate of 1 in 310.

At trial, defense counsel argued the DNA evidence pertaining to Mancilla and Rojas should be excluded under Evidence Code section 352 because the statistical value was "more prejudicial than probative." When asked to clarify the nature of the objection, defense counsel asserted that because the probabilities were not in "the trillions or at least millions," the jury might "take [the probabilities] in the wrong way and use it to convict [the defendants] simply because there is scientific evidence." The trial court denied the motion, explaining that the statistical value of the DNA evidence was an issue the defense could argue to the jury through cross-examination of the prosecution's DNA expert, "or by calling their own expert . . . [I]t [is] a matter of weight, not admissibility. I think both sides will argue the weight and [the] jury will make the determination."

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[7] Janet Ruiz informed Sergeant Ortiz that when the driver of the getaway vehicle was helping the injured assailant into the car, she saw a black item fall into the street, which she described as a "black glove or something like that."

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 (*Rodrigues*).) "'We will reverse only if the court's ruling was 'arbitrary, whimsical or capricious as a matter of law. [Citation.]' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282; see also *Rodrigues*, *supra*, 8 Cal.4th at p. 1125.)

Defendants raise several arguments in support of their contention that the trial court should have excluded the DNA evidence. First, they assert that the statistical probabilities – 1 in 310 with respect to Mancilla, and 1 in 549 with respect to Rojas – were of such "such minimal probative value as to be irrelevant." In *People v. Poggi* (1988) 45 Cal.3d 306 (*Poggi*), the California Supreme Court affirmed the trial court's admission of a blood test analysis that showed the defendant "was one of three persons in every one hundred who could have produced" a blood sample found at the crime scene. (*Id.* at p. 317.) In rejecting the defendant's assertion that the evidence was "irrelevant," the Supreme Court explained that "statistical . . . evidence [showing] . . . the accused [falls] within the class of possible donors" is generally probative and admissible. (*Id.* at p. 324.)

The statistical significance of the DNA evidence in this case is far greater than the blood analysis found admissible in *Poggi*. As the Attorney General notes, less than one fifth of one percent of the population shared the DNA that was found on the glove, and less than one third of one percent of the population shared the DNA that was found on the shirt. Thus, under *Poggi*, the evidence was clearly probative.

Defendants also contend that any probative value the DNA evidence might have had was outweighed by the potential risk of jury confusion. Defendants identify two avenues of potential juror confusion. First, they argue that because jurors frequently associate DNA evidence with random probability rates in the millions and trillions, the jury in this case may have been lead to believe the DNA evidence against Mancilla and Rojas was more significant than it actually was. As the trial court noted, however, the defense had an opportunity to clarify the statistical significance of the DNA evidence through the cross-examination of the prosecution's DNA witnesses. We are aware of no authority suggesting that DNA evidence is admissible only if the random probability rates are in the millions or trillions.[8]

Defendant Mancilla also argues the DNA evidence tying him to the shirt was potentially confusing to the jury because Guerrero's DNA was also found on the shirt at a random probability rate of one in 400 quintillion. Mancilla contends the district attorney increased the likelihood of juror confusion at closing argument when he asserted that Mancilla and Guerrero's DNA were both found on the shirt. According to Mancilla, "[b]y conflating [his] DNA and Guerrero's DNA, the district

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[8] Defendants have cited no case from any jurisdiction that has excluded DNA evidence involving random probability rates in the range of those at issue here. Indeed, the only case defendants cite in which DNA was excluded for lack of statistical value involved a random probability rate of one of every two persons in the African-American population. (See *United States v. Graves* (E.D. Pa. 2006) 465 F.Supp.2d 450.) Moreover, the issue in that case was whether the district court abused its discretion in excluding the evidence; there was no finding that the court would have abused its discretion had it allowed the evidence.

attorney[] . . . [attempted to] confuse the jury into according the evidence of [his] potential DNA contribution with the almost certain presence of Guerrero's DNA on the shirt."

The record shows, however, that the district attorney's closing argument explained that the DNA evidence related to Mancilla resulted in random probability rate of only 1 in 310. Moreover, if Mancilla believed there was a risk the jury might conflate the DNA evidence in the manner he asserts, his attorney had an opportunity to clarify that issue during cross-examination of the prosecution's DNA experts and at closing argument.

G. The Gang Expert's Limited Use of Testimonial Hearsay Evidence Was Not Prejudicial

Mancilla argues we must strike his gang enhancements, and reverse his gang-related conspiracy conviction, because the prosecution's gang expert violated his Sixth Amendment right to confrontation by relying on testimonial hearsay evidence in formulating his opinions as to Mancilla and Rojas's membership in the Echo Park gang, and the gang's primary activities. In support, Mancilla relies on the California Supreme Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).[9]

1. The Sanchez decision

At the time of the defendants' trial, Supreme Court authority conferred broad latitude on gang experts to rely upon statements by fellow officers and gang members in opining on the gang membership status of the accused, and on whether the committed crime involved gang-related activity. (See *People v.*

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[9] Rojas's brief contains a statement indicating that he joins in this argument. His brief, however, does not contain any independent analysis of the issue.

Gardeley (1996) 14 Cal.4th 605, 611-613, 619; *People v. Stamps* (2016) 3 Cal.App.5th 988, 993 (*Stamps*).) Trial courts, in turn, possessed "broad discretion to determine whether particular facts to which an expert was prepared to testify were sufficiently 'reliable' to come before the jury." (*Id.* at p. 994.)

In *Sanchez*, the California Supreme Court considered the extent to which *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and its progeny[10] preclude an expert witness from relating case-specific hearsay in explaining the basis for an opinion, and the proper application of California hearsay law to the scope of expert testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 670.) 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 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.

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10 In *Crawford*, the United States Supreme Court held that the Sixth Amendment right of confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at pp. 53-54.)

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 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.)

Second, the Court emphasized that "[a]ny 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.)

The gang expert in *Sanchez* testified that he had never met the defendant. The expert relayed information regarding the defendant's past police contacts from three sources: police reports regarding past crimes; a "STEP notice" warning the defendant that law enforcement believed he faced criminal

exposure for participating in gang crimes (see generally *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1414, fn. 1 [a "STEP notice informs suspected individuals that law enforcement believes they associate with a criminal street gang"]); and a field identification card (FI card) reflecting a prior police contact with defendant.

The Court concluded the information in the police reports and the STEP notice were testimonial in nature, and that the expert's testimony relaying the information set forth in those documents therefore violated the Confrontation Clause. The Court concluded there was insufficient information in the record to determine whether the statements in the FI card were testimonial in nature, and therefore made no finding whether the statements were admissible.

2. Summary of the gang expert's testimony

The prosecution's gang expert, Felipe Neris, testified that he had served as a gang investigator between 2011 and 2013, and that his assignment included the Echo Park gang. Neris provided extensive background testimony about general gang behavior. He also provided background information about the Echo Park gang, including its size, territory, symbols, primary activities and rival gangs.

With respect to the defendants, Neris testified that Mancilla and Rojas both had several tattoos of Echo Park gang symbols. Neris further testified that the number, size and placement of the tattoos demonstrated both defendants were active members of the Echo Park gang.

Neris also testified he had reviewed FI cards prepared by other officers that reported Mancilla had identified himself as a member of Echo Park. In addition, Neris had seen a video in

which Mancilla admitted his membership in the gang. Neris acknowledged he had not met Mancilla, but asserted that he had seen him 10 to 15 times during his assignment as a gang officer.

With respect to Rojas, Neris testified that he had 11 to 20 "personal contacts" with the defendant, and that Rojas had admitted his gang membership to him on multiple occasions. Neris also relayed the contents of an FI card he had prepared that stated Rojas had identified himself to Neris as an Echo Park member during a contact on March 9, 2012. The FI card also stated that at the time of the contact, Rojas had been with two individuals, Anthony Brito and Justin Montelongo, who had also identified themselves as Echo Park gang members. Neris additionally testified that Brito and Montelongo had identified themselves to him as Echo Park members on other occasions.

Neris also identified records showing that Andre Upshaw and Juan Gutierrez had previously been convicted of murder. He further testified that in his "expert opinion," and based on his "background, training and experience as a gang officer," he believed both men were Echo Park gang members.

At the end of Neris's direct examination, the prosecution asked him a hypothetical question summarizing the evidence that had been presented in the case. Neris concluded the crimes described in the hypothetical were committed for the benefit of a street gang.

On cross-examination, Neris was asked to identify what sources he had relied on in forming his opinions. In response, he explained that he had reviewed police reports, FI cards, prior minute orders, and also obtained information by "talking to senior detectives" and other "department resources." Neris

clarified he had also relied on his "personal experiences . . . and [the] investigations he conducted as a gang officer."

3. Neris's limited use of testimonial hearsay was not prejudicial

Mancilla argues that Neris violated *Sanchez* by relying on and relaying testimonial hearsay evidence in support of his opinions regarding the defendants' status as Echo Park gang members, and the gang's primary activities. Mancilla does not specify exactly which of Neris's statements he is challenging. Instead, his brief sets forth generalized arguments regarding the categories of materials Neris relied on in forming his opinions, asserting, for example: "In forming his opinions in this case, Officer Neris relied on his contacts with gang members in the community, police investigations, information provided by other law enforcement officers recorded on field identification cards . . ., as well as other 'department resources'" Mancilla further asserts "[t]he record indicates that Officer Neris's testimony about the gang membership of the defendants, as well as the primary activities of the Echo Park gang, came from field identification cards and similar reports prepared by law enforcement during contacts with gang members. . . . Since Neris was not a percipient witness to many of these events he recounted to the jury, much of his testimony based on field identification cards, investigative reports and other department resources involved out-of-court statements by third parties concerning gang activity."

These broad-based challenges to Neris's testimony misperceive the scope of *Sanchez*: "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Sanchez*, *supra*,

63 Cal.4th at p. 684.) In contrast, expert testimony that merely relies on testimonial hearsay is still admissible provided the expert only tells the jury in general terms the bases for his or her opinion, and does not relate as true case-specific facts asserted in hearsay statements. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.) Thus, Neris's general acknowledgment that he relied on various sources of hearsay in forming his opinions, including statements in police reports and information provided from other officers, does not violate *Sanchez*.

Our independent review of Neris's testimony does reveal, however, that he did relate some "case-specific" out-of-court statements that, if testimonial in nature, would violate *Sanchez*. First, Neris testified that he had reviewed an FI card prepared by another officer that stated Mancilla had admitted his membership in the gang. Second, he testified that Rojas, Anthony Brito and Justin Montelongo, had all identified themselves to him or other officers as Echo Park gang members. Each of these statements relayed "case-specific" out-of-court statements showing that the declarants had identified themselves as Echo Park Gang members, and treated the content of those statements to be true.

Given the lack of information in the record regarding the circumstances under which the above admissions of gang membership were made, it is difficult to assess whether the statements were testimonial in nature, and therefore subject to exclusion under the Confrontation Clause. (See *Sanchez*, *supra*, 63 Cal.4th at p. 697 [electing not to decide whether statements in an FI card were testimonial where record failed to disclose "the circumstances surrounding the preparation of the FI card"].) However, even if we assume the statements were testimonial

(and therefore inadmissible), we conclude their admission did not amount to prejudicial error.

The "case-specific" hearsay statements Neris made at trial related to Mancilla and Rojas's status as Echo Park gang members.[11] Neris did not relate any "case-specific" hearsay statements while providing his opinions as to Echo Park's primary activities, the predicate offenses underlying the gang allegations or in rendering his conclusion that the crimes at issue were committed for the benefit of the gang. (See *Sanchez*, *supra*, 63 Cal.4th at p. 685 ["Gang experts . . . can rely on background information accepted in their field of expertise. . . . They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven"].)

A review of the record shows the prosecution provided a substantial amount of "competent" evidence establishing Mancilla and Rojas's status as gang members that was independent of Neris's "case-specific" testimonial hearsay statements. (See *Sanchez*, *supra*, 63 Cal.4th at pp. 685-686 ["an expert cannot . . . relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence"; "when a prosecution expert relies upon, and relates as true, a testimonial statement . . . the fact asserted as

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11 The primary purpose of Neris's testimony that Brito and Montelongo had identified themselves as Echo Park gang members during a contact with Rojas appears to have been to show Rojas affiliated with Echo Park gang members, and was therefore more likely to be a member himself. Brito and Montelongo were not alleged to have been involved in the Christmas shooting, or any of the predicate offenses underlying the prosecution's gang charge.

true ha[s] to be independently proven to satisfy the Sixth Amendment"].)

With respect to Mancilla, Neris testified that the defendant had numerous tattoos of Echo Park gang symbols on his body and face. He explained that, standing alone, these tattoos demonstrated Mancilla was an active member of Echo Park. Neris also testified he had seen a video in which Mancilla self-admitted himself as a member of Echo Park. A second officer, Arnel Asuncion, also testified at trial that he had heard Mancilla identify himself as an Echo Park gang member on multiple occasions. These statements did not implicate the Confrontation Clause because the officers were merely relaying Mancilla's own admissions. (See *U.S. v. Brown* (11th Cir. 2006) 441 F.3d 1330, 1358-1359 [admission of defendant's own statements does not violate the confrontation clause]; *U.S. v. Romo-Chavez* (9th Cir. 2012) 681 F.3d 955, 961; *U.S. v. Nazemian* (9th Cir. 1991) 948 F.2d 522, 525-526 [defendant's own out-of-court statements do not implicate "confrontation clause . . . since [defendant] cannot claim that she was denied the opportunity to confront herself"]; *U.S. v. Moran* (9th Cir. 1985) 759 F.2d 777, 786 ["Since the out of court statements introduced through these documents were made by [defendant] himself, he can claim no confrontation clause violation"].)

The prosecution also provided competent, nonhearsay evidence that Rojas was an Echo Park gang member. Neris testified that, like Mancilla, Rojas had numerous tattoos depicting Echo Park gang signs, and that these tattoos showed he was an active member of the gang. In addition, the prosecution provided photographs of Rojas making Echo Park hand signs. Veronica Arellano confirmed that the signs Rojas was making in

one photograph were Echo Park gang signs, and also confirmed that he associated with Echo Park gang members.[12]

In sum, because the prosecution provided competent evidence apart from any testimonial hearsay that independently proved Mancilla and Rojas's gang membership, we find no error under *Sanchez*.

H. Substantial Evidence Supports Rojas's Conviction

Rojas argues we must reverse his conviction on all counts "because there is insufficient evidence to establish [his] identity as the getaway driver beyond a reasonable doubt."

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Bolin, supra,* 18 Cal.4th at p. 331.) We presume the "existence of every fact that the trier of fact could reasonably deduce from the evidence" to support the judgment. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) To overturn a conviction on this ground, "it must clearly appear that upon no hypothesis whatever is there

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[12] Neris also testified that he had heard Rojas admit his membership in the Echo Park gang on numerous occasions. Although the admission of these out-of-court statements would not violate Rojas's right to confrontation, the admission of such statements against Mancilla would (if testimonial) presumably violate his confrontation rights because Rojas could not be compelled to testify at their trial. (See *People v. Duarte* (2000) 24 Cal.4th 603, 609 ["Having invoked his Fifth Amendment right not to incriminate himself, [the co-defendant] was . . . not available as a witness"].)

sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Rojas argues there was insufficient evidence to find he was the getaway driver because: (1) law enforcement did not recover any physical evidence connecting him to the getaway vehicle; (2) none of the witnesses were able to positively identify him as the driver, and (3) his physical characteristics varied from some of the witnesses' description of the driver.

Rojas overlooks, however, several categories of evidence that did implicate him in the crimes. First, Maria De Los Santos testified that Veronica Arellano told her Rojas had identified himself as the driver of the vehicle. In addition, Detective Ortiz testified that De Los Santos told him Rojas's mother said Rojas had admitted he was in the car with Mancilla.[13]

Second, during the surreptitiously-recorded conversation at the live lineup, Mancilla made a series of incriminating statements to Rojas. Specifically, Mancilla told Rojas they should "have run when [they] had the chance," and that they would need to "lay low" if they were able to "dodge this one." Mancilla also stated he wanted to know who the "fucken rat" was, but excluded "Vanessa" (the name of Guerrero's girlfriend) because "she wasn't there that day." The record also contains evidence that Mancilla stated he did not believe they could be charged with murder because "these fools fucken blasted us back." Moreover, when Rojas proposed that he would "take the rap" for Mancilla, Mancilla directed him not to because there was still a chance they might "get out of this."

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[13] Neither defendant has challenged the admissibility of Detective Ortiz's testimony regarding the statements that De Los Santos made to him about her conversation with Rojas's mother.

Third, the prosecution presented evidence that Janet Ruiz had seen a black item resembling a glove fall to the street when the driver of the white sedan was helping the assailants into the vehicle. Investigators recovered a black glove from the area Ruiz had described. Forensic evidence showed Rojas was a possible contributor to DNA evidence found on the glove at a random probability rate of approximately 1 in 549.

Moreover, there was extensive evidence that Rojas and Mancilla were both active members of the Echo Park gang, and that the shooting had been perpetrated by Echo Park gang members against rival members of LCM. Based on all of that evidence, a rational jury could conclude Rojas was the driver of the getaway vehicle, and guilty of the charged crimes.

I. The Trial Court Did Not Err in Sustaining Objections to Hypothetical Questions Posed to the Defendants' Eyewitness Identification Expert

At trial, the prosecution introduced evidence that several witnesses who had reviewed six-pack photographic lineups selected Rojas and Mancilla as persons who resembled the driver and the shooter. However, only one witness, Yusseff Evereteze, was able to positively identify either defendant, testifying that Mancilla was the person he had seen shooting toward the apartment building.

Defendant Mancilla called Mitchell Eisen to testify as an eyewitness identification expert. Although the trial court permitted Eisen to testify about a wide range of factors affecting the accuracy and reliability of eyewitness testimony, it sustained objections to several hypothetical questions that the defense posed to him. Defendants argue the trial court's refusal to allow

Eisen to answer these hypothetical questions constituted an abuse of discretion.

1. Summary of Eisen's testimony

a. The court's limitations on Eisen's testimony

After learning that the defense intended to call an expert on eyewitness identification, the prosecution filed a motion in limine arguing that Eisen's testimony should be limited to "a discussion of [psychological] factors that may affect visual memory" and the "reliability and accuracy of eyewitness identification." The prosecution contended Eisen should not be permitted to testify "whether any of the specific facts of the case" undermined the reliability of the witnesses' identifications, or provide his "personal opinions of any the evidence, including preparation of photo lineups, interview procedures, interpretations of witness statements or the like."[14]

The record does not indicate whether the defendants opposed the prosecution's motion, nor does it disclose how (or whether) the court actually ruled on the motion. However, immediately prior to Eisen's testimony, the court did instruct him there were certain topics he should avoid. Specifically, the court told Eisen he should not testify about things that had occurred "in other cases," and should not provide opinions on "whether or not the identification witnesses [made] in this particular case were good or bad." The court further clarified, "What I expect, as far as the testimony is concerned, is [the] scientific information. . . . I understand that there are studies that have been done and you can address the studies and explain to the jury how they

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[14] The prosecution raised additional limitations that are not relevant here.

affect identification." Defense counsel then confirmed that the only questions he intended to ask were "about the science."

b. Summary of Eisen's testimony

Eisen testified that people frequently "reconstruct[]" their memories based on new information that is presented to them regarding an incident. According to Eisen, if a witness accepts the new information as true, the information becomes a part of his or her memory regardless of whether it is correct or not.

Eisen further testified that trauma and stress diminish the reliability of memories. As stated by Eisen, trauma acts as an "enormous distraction that preoccupies our consciousness instinctively and keeps us from forming detailed memories . . . as we normally would." Eisen described research showing that when a weapon is brandished during an event, witnesses often have difficulty recalling "other details of" what occurred.

Eisen also testified that witnesses who are interviewed multiple times about an event are likely to make "minor additions and omissions" regarding what they saw. Eisen explained that although additions and omissions are not indicative of unreliability, "contradictions" in a witness's memory of an event, which he described as "telling a story one way one time and then contradict[ing] themselves later," are potentially indicative of weak or inaccurate memory.

In response to this statement, defense counsel began to ask a hypothetical question: "What if right after an event is freshest in a witness's mind and they tell the police they remember the shooter's car being green . . ., and that they were huddled behind a car during a shooting . . ." The prosecution objected to the hypothetical, and the court called the parties to a sidebar conference. The court explained that it appeared the defense's

hypothetical was going into the specific facts of the case. Defense counsel, however, asserted that he was merely attempting to use car color as an example of how a person's memory might change over several interviews. The court concluded that unless the expert had conducted or read research involving car color, "he is just kind of guessing." The objection was then sustained.

After resuming his testimony, Eisen described how "systems variables," which he defined as "the procedures used to collect and preserve the eyewitness evidence," can affect the reliability of an identification. According to Eisen, the use of substandard systems variables can "open the door to alternative plausible reasons why the evidence came out the way it did. . . . If I pick somebody, maybe I'm picking them because of something suggestive in the task and the way it was conducted led me to pick that over another." Eisen identified several mechanisms that an administrator of an identification can use to "compromise the reliability of the evidence," including the "instructions given to people prior to a task, any behaviors or interaction with the witness during the identification task, . . . the selection of the [lineup] photos . . ., any information people are given before or after the identification task . . . and . . . leading [a witness] to believe the police likely have the right guy or . . . confirming [the witness's] choice."

Defense counsel asked Eisen to describe "how a person administering a six-pack can influence the witness inadvertently or purposefully." In response, Eisen stated that the administrator can influence the subject's identification based on the questions he or she asks. Over the prosecution's objection, Eisen further testified that research showed that when the administrator of the lineup knows "what the right choice is[,] that

choice gets picked more often either inadvertently or otherwise." Eisen explained that as a result of these findings, scientists in the field "universally recommended . . . that six-packs be administered in a double blind manner [so] the person who is administering does not know who the suspect is so they can't inadvertently [or] purposefully influence the task."

Defense counsel then attempted to ask a hypothetical involving a witness who signals to the administrator that several of the photographs "look close," and the administrator knows who the suspect is. The court sustained an objection, explaining that the expert had already testified about this area in enough detail, and had offered examples of how an administrator could affect an identification.

Eisen also testified about the use of "fillers" in six-pack photographic lineups. Defense counsel asked Eisen whether there are any overriding principles that should be used in selecting fillers. Over the prosecution's objection, Eisen explained that each filler should share any specific characteristic that the witness had previously provided regarding the suspect. As an example, Eisen stated that if the witness had said the suspect was bald, all of the fillers should also be bald. Eisen further testified that a "suggestive six-pack" is one in which the suspect is the only one who truly matches the characteristics that the witness previously identified.

Defense counsel attempted to ask a hypothetical question about selecting fillers for a lineup involving a suspect with a specific characteristic. The court sustained an objection, explaining that Eisen had already explained the need to "match the descriptors," and had provided an example. Over the prosecution's objection, however, the court permitted the defense

to ask whether and how a tester could "create procedures . . . where many people pick the same wrong picture." In response, Eisen explained that "you can make it so only one person is a viable choice . . . If I'm looking for someone . . . with a thin face make sure everybody else is round. You can make sure that the person administering is not blind so they might guide to the right picture. There is a number of ways that you can create a situation where most everybody will pick the same wrong pick."

Finally, Eisen testified that a witness's confidence in a selection can be impacted by the examiner's feedback. According to Eisen, when a witness receives feedback suggesting his or her identification was correct, the witness's confidence in the identification "can be boosted dramatically." In contrast, if the person receives information suggesting he or she picked the wrong person, that may "drive . . . confidence down." The defense counsel then attempted to ask a hypothetical involving a person who selects one or two fillers, and is then shown a second six-pack of photographs after being told he had failed to make an identification. The trial court sustained an objection, explaining that the specific hypothetical was not within Eisen's expertise.

2. The trial court did not commit prejudicial error in sustaining objections to the hypothetical questions

In *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*), the California Supreme Court held that expert testimony describing "psychological factors that may impair the accuracy of a typical eyewitness identification" is generally admissible in cases where "an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability." (*Id.* at p. 377 [overruled on another ground by *People v. Mendoza*

(2000) 23 Cal.4th 896]; see also *People v. Jones* (2003) 30 Cal.4th 1084, 1112 ["[e]xclusion of . . . expert testimony [on eyewitness identification] is justified only if other evidence is presented corroborating the eyewitness identification and giving it independent reliability"].)

The Court cautioned, however, against the use of expert testimony that effectively "tell[s] the jury a particular witness is or is not truthful or accurate in his identification of the defendant." (*McDonald, supra,* 37 Cal.3d at p. 370.) The Court also emphasized "that the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion," and that, "in the usual case the appellate court will continue to defer to the trial court's discretion in this matter." (*Id*. at p. 377.)

As our factual summary above demonstrates, the trial court permitted Eisen to testify on a wide array of factors that may affect the accuracy of eyewitness identification, including identifications made during a six-pack photographic lineup. Defendants nonetheless assert the trial court abused its discretion by: (1) prohibiting Eisen from testifying about "how an examiner's conduct could skew an identification and lead to error"; (2) excluding Eisen's testimony regarding the use of "fillers . . . in six-packs"; and (3) forbidding the use of any form of hypothetical questions.

Contrary to the defendants' assertions, the record shows the trial court permitted Eisen to testify at length about how an examiner's suggestive conduct may affect an identification. The court also allowed substantial testimony about the proper

selection of fillers, and how an examiner might manipulate fillers to cause a false identification.

Defendants' claim that the court precluded defense counsel from asking any form of hypothetical question is likewise predicated on an inaccurate representation of the record. The court never imposed any such blanket prohibition. Although the court did sustain objections to four separate hypothetical questions, in each instance it provided an explanation for that decision.

In two instances, the court concluded the hypothetical questions were unnecessary because the expert had already provided extensive testimony on the subject matter of the hypothetical. This occurred in response to a hypothetical question involving an examiner who knew the identity of the suspect, and a hypothetical involving an examiner's selection of inappropriate fillers. Again, our summary of Eisen's testimony shows he was permitted to testify at length about the importance of administering an identification "in a double-blind manner," and selecting non-suggestive fillers. Accordingly, we find no abuse of discretion in the court's decision that hypothetical questions regarding those subjects was unnecessary.

In the other two instances, the court concluded that the hypothetical questions were not helpful to the jury, or otherwise were not a matter within Eisen's expertise. In the first hypothetical, defense counsel attempted to ask Eisen about a witness of a shooting who had reported seeing two different car colors. This question was asked after Eisen had testified about how contradictions in a witness's statements might signal weakness in the memory. In the second question, defense counsel attempted to ask how an investigator's statement to a witness

that he had failed to make an identification in an initial photographic lineup might impact the witness's performance in a subsequent lineup. The question was asked after Eisen had testified that an examiner's negative feedback can substantially decrease a witness's confidence level in his or her identification.

In both instances, the trial court reasonably concluded that given the information Eisen had provided regarding contradictory witness statements and the effects of negative feedback, the jury was capable of drawing its own conclusions about the type of facts presented in the hypothetical questions. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 546-547 ("'Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]"'].)

Moreover, even if the court should have allowed Eisen to answer each of the hypothetical questions that were posed to him, "no prejudice appears; it is not reasonably probable that a result more favorable to defendant[s] would have been reached in the absence of the erroneous exclusion." (*People v. Sanders* (1995) 11 Cal.4th 475, 510 [applying harmless error to exclusion of expert testimony on eyewitness identification].) Eisen was permitted to testify at length about each of the factors affecting the accuracy of eyewitness identification at issue in defense counsel's proposed hypothetical questions. Defendants also had the opportunity to cross-examine each witness about the accuracy and reliability of their individual identifications, and to cross-examine Ortiz about the methods he had used in administering the lineups. Moreover, the court instructed the jury under CALCRIM No. 315, which directed the jurors to consider various factors in evaluating identification testimony, including many of

the same factors Eisen had described in his testimony. In light of the foregoing factors, it is not reasonably probable that the jury would have reached a different result had Eisen been permitted to answer each of the hypothetical questions posed to him.[15]

J. The Court Did Not Abuse its Discretion in Excluding the Defendants" Proposed Expert on Police Identification Procedures

Defendants also argue the trial court abused its discretion when it exclude an expert who intended to testify that the procedures Detective Ortiz used to administer the six-pack photographic lineups violated the Los Angeles Police Department's (LAPD) written policies and procedures.

At trial, defense counsel explained to the court that the expert did not intend to testify about his own opinions regarding how photographic lineups should be conducted, but rather whether Ortiz had followed the LAPD's policies and procedures. More specifically, the expert intended to testify that Ortiz had violated the LAPD's policies and procedures by (among other things): writing out statements for witnesses to sign; using suggestive photographs in six-pack lineups; and steering witnesses toward a particular photo. In response, defense counsel confirmed it only intended to use the expert to show Ortiz

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[15] Rojas's appellate brief also asserts "the court should have allowed the expert to expound on the fairness of the six-pack arrays" that Ortiz used in the case, and permitted defense counsel to "pose a hypothetical . . . based on this evidence to [allow Eisen to] express his opinion as to the fairness of the procedures the detectives used to procure what the prosecutor argued were actual identifications." Rojas, however, has cited no portion of the record indicating he ever made such a request in the trial court.

had violated the LAPD's written policies and procedures, and acknowledged that it had received a copy of the those policies.

The trial court informed the parties it would allow the defense to recall Detective Ortiz, and cross-examine him about his compliance with the LAPD's policies and procedures. The court was disinclined, however, to permit the expert to testify: "The problem that I have with what was presented is that, if there is a policy and procedure, if there is a book that said this is the policy and procedure, then that is what the evidence is, not somebody's interpretation of what the policy and procedure is."

After hearing further argument, the court sustained the prosecution's objection: "The court believes that the actual policies and procedures . . . are what is at issue here and it's not an opinion issue. It's a question of whether or not, as defense made the argument, whether Detective Ortiz followed the policies and procedures and whether that will be . . . helpful to the jury." The court continued: "Someone's opinion as to whether or not [Ortiz] followed the procedures under 352 would be time consuming and confusing to the jury because the focus needs to be the policies and procedures. And the detective has presented the policies and procedures to the defense, and I am allowing the defense to cross-examine the detective with that."

Defendants argue the trial court's decision constituted an abuse of discretion because the jury "would not be privy to the do's and don'ts of proper [identification] procedure[s]," and was unable "to assess . . . the potential for [identification] mistakes generated by Ortiz's unorthodox procedures." Defendants further contend the expert testimony was necessary to "test the reasonableness of the tactics [Ortiz] used to steer witnesses to specific photos."

These arguments fail to acknowledge the limited scope of the expert's intended testimony, or the basis for the trial court's ruling. As summarized above, defense counsel specifically asserted that the expert would not be offering any of his own opinions as to proper identification procedures or the general reasonableness of Ortiz's tactics. Instead, defense counsel argued the expert would testify only that Ortiz had committed various acts that violated the LAPD's own written policies.

Defendants have provided no argument addressing why the trial court abused its discretion in concluding that the actual written policies, rather than expert testimony regarding the nature of those policies, was necessary to show what the LAPD's policies were, or which policies Ortiz violated. As the trial court noted, if defendants believed Ortiz had committed any act that violated a specific provision of the LAPD's policies, they were free to cross-examine Ortiz with the written policy. We find no abuse of discretion in the court's determination that the defense's proposed expert was unnecessary given the availability of the policies themselves.

K. Issues Regarding Sentencing

1. The defendants are entitled to a hearing regarding their firearm enhancements

Defendants argue they are entitled to a hearing under recently-passed Senate Bill 620, which allows "the court, in the interest of justice and at the time of sentencing, to strike a firearm enhancement." (Sen. Com. On Public Safety on Sen. Bill No. 620 (2017-2018 Reg. Sess.) Apr. 25, 2017.) The new law, which went into effect on January 1, 2018, deleted language in former section 12022.53, subdivision (h) that prohibited a trial court from striking a firearm allegation or finding. As amended,

section 12022.53, subdivision (h) now provides: "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." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.)

Defendants contend, and the Attorney General concedes, that because the statute mitigates punishment for criminal conduct, it applies retroactively to all cases not yet final on the statute's operative date. (See generally *In re Estrada* (1965) 63 Cal.2d 740; *People v. Brown* (2012) 54 Cal.4th 314, 323 [*Estrada* established an " important . . . qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date"].)

The Attorney General argues, however, that "remand is not appropriate in this case . . . [because] no reasonable court would exercise its discretion to strike the firearm enhancements." In support, the Attorney General cites the violent nature of the defendants' offenses, and their extensive past criminal history.

Our Supreme Court has explained, however, that "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citation.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based

on misinformation regarding a material aspect of a defendant's record.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [remand appropriate where the record did not clearly indicate the trial court would have imposed the same sentence had it been aware of the full scope of its discretion after a change in the law].) When the trial court sentenced defendants, section 12022.53, subdivision (h) prohibited it from striking the firearm enhancements at issue. The new law gives the trial court discretion to strike the enhancements "in the interest of justice." Because the trial court sentenced defendants without the benefit of this discretion, remand for resentencing is appropriate.[16]

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16 The sole decision the Attorney General cites in support of its argument that we need not remand this issue to the trial court is *People v. Gutierrez* (1996) 48 Cal.App.4th 1894. In that case, the defendant received a sentence enhancement for a prior serious or violent felony conviction. While his appeal was pending, the Supreme Court held that trial courts have discretion to strike a serious or violent felony conviction. *Gutierrez* concluded that in light of the Supreme Courts' ruling, resentencing was required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Id.* at p. 1896.) The court further concluded that the record showed remand would not serve any purpose because the trial court had "stated that imposing the maximum sentence was appropriate. [The trial court] increased [the defendant's] sentence beyond what it believed was required by the three strikes law, by imposing the high term . . . and by imposing two additional discretionary one-year enhancements." (*Ibid.*) Here, in contrast, the trial court did not express an intention to impose the maximum possible sentence, nor did it provide any indication that it would not exercise discretion to strike the enhancement even if it had discretion to do so. (Cf. *People v. Belmontes* (1983)

2. Defendants are entitled to a Franklin hearing

Defendants also argue that, under the Supreme Court's decision in *People v. Franklin* (2016) 63 Cal.4th 261, they are entitled to a hearing to make a record of information relevant to their eventual youth offender parole hearing. (See § 3051.)

a. Summary of the youth offender parole hearing provisions

In 2013, the Legislature established "a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity.' [Citation]." (*Franklin*, *supra*, 63 Cal.4th at p. 277.) At the time of enactment, section 3051 provided: "[a] person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (Former § 3051, subd. (b)(3), Stats. 2013, ch. 312, § 4.) In 2015, however, the Legislature amended the provisions to make them

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34 Cal.3d 335, 348, fn. 8 ["[t]he petition [for resentencing] may . . . be summarily denied if the record reflects that the sentencing court clearly indicated that it would not have exercised discretion to sentence under [the more lenient statute] even if it had been aware that it had such discretion"].)

applicable to persons who were under 23 years of age at the time of their offense. (*Franklin*, *supra*, 63 Cal.4th at p. 277.)[17]

Section 3051, subdivision (f) describes various types of evidence the Board may consider at a youth offender parole hearing, including statements from "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime." (§ 3051, subd. (f)(2).)

Section 4081 directs that, when reviewing the parole suitability of a youth offender, the board must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

b. People v. Franklin

In *Franklin*, *supra*, 63 Cal.4th 26, a juvenile offender argued that his sentence of 50 years to life in prison qualified as a de facto life sentence in violation of the Eighth Amendment. The Court held that the defendant's constitutional challenge to his sentence had been mooted by the Legislature's enactment of the youth offender parole provisions. (*Id.* at p. 277.)

The Court further held, however, that although the defendant "need not be resentenced," it was unclear "whether [he] had sufficient opportunity to put on the record the kinds of

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17 The Legislature recently amended the provisions again, making them applicable to persons who were under 25 years of age at the time of the offense. (See Stats. 2017, c. 675 (A.B.1308), § 1, eff. Jan. 1, 2018.)

information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) The Court explained that because the defendant had been sentenced before the Legislature enacted the youth offender parole hearing provisions, "the trial court understandably saw no relevance to . . . evidence [of youth-related factors] at sentencing." (*Id.* at p. 269.) In light of the "changed legal landscape," the Court concluded the case should be remanded "so that the trial court may determine whether [the defendant] was afforded sufficient opportunity to make such a record at sentencing." (*Ibid.*)

The Court directed that if the "the trial court determines that [the defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony. . . . [The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

c. Defendants are entitled to a Franklin hearing

At the time they committed their offenses, Mancilla was 18 years old, and Mancilla was 19 years old. Thus, under current law, they are eligible for a youth offender parole hearing. At the time of their sentencing, however, both defendants were ineligible for such a hearing because the provisions then in effect only applied to persons who were under the age of 18 when they committed the offense. Moreover, the Supreme Court had not yet

decided *Franklin*. (See *People v. Jones* (2017) 7 Cal.App.5th 787, 819. ["Prior to *Franklin*, . . . there was no clear indication that a juvenile's sentencing hearing would be the primary mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future"].)

The Attorney General concedes that as a result of these two factors, the defendants did not have a sufficient opportunity to place on the record the kinds of information that are relevant at a youth offender parole hearing. Thus, in accordance with *Franklin*, we remand the matter to the lower court for the purpose of providing the defendants an opportunity to create a record of information pertinent to their eventual youthful offender parole hearings.[18]

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[18] In *Franklin*, the Court held that when "it is not clear" (*Franklin*, *supra*, 63 Cal.4th at p. 284) whether a defendant had a sufficient opportunity to put on the record the kinds of information contemplated under sections 3501 and 4806, the proper remedy is to remand to the trial court with directions to: (1) make a determination whether the petitioner had such an opportunity, and (2) if the trial court determines the petitioner had no such opportunity, it shall then hold an evidentiary hearing. In this case, however, it is undisputed the defendants did not have any such opportunity. "Thus, rather than direct the trial court to make the determination whether [the defendant] had sufficient opportunity at sentencing to make a record of 'information that will be relevant to the Board as it fulfills its statutory obligations under [Penal Code] sections 3051 and 4801' [citation], we will direct the trial court to conduct a hearing at which Petitioner will have the opportunity to make such a record." (*In re Cook* (2017) 7 Cal.App.5th 393, review granted April 12, 2017, No. S240153.)

3. *The abstracts of judgment shall be modified with respect to the issue of restitution and fines*

Defendants argue that their abstracts of judgment should be modified to reflect the joint and several nature of their restitution liability to the Victim Compensation and Government Claims Board, which totaled $14,563.20. The Attorney General concedes the issue, and we agree. The record shows the trial court ordered joint and several liability on the part of Mancilla and Rojas, but the abstracts of judgment fail to reflect the joint and several nature of their liability. The judgments should therefore be modified to expressly state that the restitution order is joint and several as to the defendants. (See *People v. Neely* (2009) 176 Cal.App.4th 787, 800 [ordering modification of judgment to reflect joint and several nature of the restitution order].)

Defendants also argue their abstracts of judgment misstate the amounts of the restitution and parole revocation fines the trial court ordered them to pay. Again, the Attorney General concedes error, and we agree. The record shows the court ordered each of those fines in the amount of $200, but the abstracts of judgment show the fines were set at $300. The judgments shall be modified accordingly.

DISPOSITION

The judgments of conviction of Joseph Mancilla and Carlos Rojas are affirmed. The sentences are vacated. The matter is remanded for the limited purposes of allowing the trial court to conduct a resentencing hearing under Senate Bill No. 620, to conduct a hearing at which defendants will be given the opportunity to make a record of mitigating evidence tied to their youth at the time the offenses were committed and to correct the

errors in the abstracts of judgment regarding the defendants' fines and restitution.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.