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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KELVIN VELADO et al., Defendants and Appellants.	B279955 (Los Angeles County Super. Ct. No. BA420990)

APPEAL from the judgments of the Superior Court of Los Angeles County. Edmund W. Clarke, Jr., Judge. Affirmed in part, reversed in part and remanded.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant Kelvin Velado.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant Edward Amilcar Chavac.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendants and appellants Kelvin Velado and Edward Amilcar Chavac guilty of first degree murder, and found true allegations of firearm use and that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang. The court sentenced both defendants to an indeterminate term of 25 years to life on the substantive offense, and a consecutive term of 25 years to life on the firearm enhancement pursuant to Penal Code section 12022.53, subdivisions (d) and (e)(1).[1]

Defendant Chavac asserts various errors related to the admission of the recorded jailhouse statement of codefendant Velado as a declaration against penal interest pursuant to Evidence Code section 1230, and also joins in the arguments of Velado. Defendant Velado asserts numerous claims of instructional error.

In supplemental briefing, both defendants argue that, even if their respective convictions are affirmed in whole or in part, remand for resentencing is warranted in light of the passage of Senate Bill No. 620 during the pendency of this appeal which amended section 12022.53, granting trial courts the discretion to dismiss or strike firearm allegations.

We conclude a limited remand is warranted to allow the trial court the opportunity to exercise its sentencing discretion as now afforded by the amended version of section 12022.53, subdivision (h). We affirm defendants' convictions in all other respects.

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[1] All further undesignated section references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Murder

George Ramos was fatally shot in the early morning hours of April 29, 2013. Several residents near the intersection of 23rd Street and 9th Avenue in Los Angeles awoke to the sound of gunshots. Richard S. heard four to six gunshots in fairly quick succession, and then heard laughter. He looked out his window and saw two figures walking east along 23rd Street. Dione D. heard about five gunshots, and then the sound of a car with a "loud muffler" driving away, but she did not see anything when she looked out her window.

Los Angeles Police officer Daniel Rodriguez, on patrol in the vicinity of the crime scene, responded to a radio call of shots fired shortly after 4:15 a.m. He found Mr. Ramos laying on 23rd Street with multiple gunshot wounds, including an obvious wound to his face. Officer Rodriguez called for an ambulance and marked various shell casings he found in the street near the victim.

Detectives Terence Keyzer and Armando Acero responded to the scene around 6:15 a.m. Among other things, they recovered eight 9-millimeter shell casings, two expended bullets and one live round.

An autopsy revealed Mr. Ramos suffered seven gunshot wounds, including one to his face, one through his heart and one that severed his spine. With the exception of the wound to the face, the wounds appeared to be "back to front," indicating Mr. Ramos was shot from behind. The gunshot wound to his face had stippling around the entrance which indicated it was shot at close range (probably within one foot). Three bullets were removed from Mr. Ramos's body, and no defensive wounds were

noted. The toxicology report showed he had alcohol and marijuana in his system at the time of his death.

2. The Investigation

Following various leads, Detectives Keyzer and Acero interviewed Wendy Villalta on April 30, 2013, the day after the shooting. Ms. Villalta, who knew both defendants, initially denied any knowledge of the shooting. She eventually admitted she saw Chavac shoot the victim. She said he fired a couple of shots, and then his gun jammed. Chavac cleared the jam and then continued shooting. Ms. Villalta denied Velado had anything to do with it.

Ms. Villalta was reinterviewed in June 2013. During this second interview, she provided additional details and also acknowledged Velado's involvement. She said the apartment at 21st Street and 10th Avenue where they had all been together before the shooting was a casita (hereafter the 21st Street casita).[2] She did not know Mr. Ramos and had never seen him before the night of the shooting. Ms. Villalta heard Mr. Ramos say he had a cousin called Risky from Playboys (she knew this to be a gang reference). After Mr. Ramos made the reference to Playboys, defendants went into a back bedroom. When they came back out, Chavac and another man called Flash told everyone it was time to leave. Ms. Villalta then heard Velado say to Chavac, "you or me, but I need some shoes." Velado told Ms. Villalta to take his car and drive around the block to see if anyone suspicious was hanging around. When she was driving

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[2] According to expert testimony, *post,* a casita is an apartment or house where alcohol and drugs are sold, and where gambling and prostitution are sometimes offered as well.

back to the casita, Ms. Villalta saw Chavac and Mr. Ramos in the street. Chavac shot Mr. Ramos several times, including in the face, and then ran toward Ms. Villalta and jumped into the car. They drove to another casita located on Constance Street. There, she saw defendants wrap up some guns in a backpack, one of which was a black semiautomatic handgun.

In August 2013, the detectives interviewed another individual known to have been at the 21 Street casita named Anna Arana. She told them she was driving Velado's white van when the shooting occurred. Velado and two other men she knew as Gordo and Flash were in the van with her. Velado told her to drive and directed her around the block. Ms. Arana saw Chavac shoot Mr. Ramos in the street. She said Ms. Villalta was driving another car and after the shooting, they all drove to a casita on Constance Street.

Both defendants were arrested. When Chavac was taken into custody, two cell phones in his immediate presence were also seized.

In January 2014, the detectives arranged for defendants to be placed in a holding cell that was wired for sound. Two undercover agents, dressed as inmates, were also placed in the cell. The agents were former gang members working for the Los Angeles Police Department who were compensated for their time. The detectives monitored and recorded three different conversations. One conversation involved Chavac with the two agents. The second involved Velado with the same two agents, and the final conversation involved only defendants.

Before the conversations took place, Detective Acero separately interviewed both defendants. Detective Acero accused Chavac of shooting Mr. Ramos and told him there was a witness

who confirmed as much. Detective Acero also accused Velado of being guilty of the shooting. Before they were placed in the holding cell, Detective Acero arranged for them to see that Flash had also been taken into custody.

We have summarized the material portions of the redacted versions of the three conversations.[3]

a. Chavac's jailhouse statement with agents

The conversation began with one of the agents asking Chavac where he was from. Chavac said he was from the Normandie clique of Mara Salvatrucha. The agent asked Chavac about his cell phone and purported to explain how cell phone tower records can show where he was on the night of the incident. Chavac said the police took all of the phones he had when he was arrested.

Chavac talked about the gang's casita business and that he made rounds collecting "taxes." He said the casita business was good, with some visitors wasting their "whole paycheck" there. They made a lot of money "because of the drugs." Chavac explained that someone always had to be in charge at the casita, "a homie or something." He said that way "[i]f anything happens, there are no shenanigans there, nothing like that. Any trouble, you settle that and stuff. And what happens with that, that's what I imagine happened, that someone came who . . . who was an enemy and this shit happened." One of the agents responded, "Oh! The one they're accusing [you with]?" Chavac said yes and the other agent then said that if the victim was an enemy then

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[3] Certain words, such as homeboy, were capitalized in the transcripts. We have deleted the capitals as unnecessary for our purposes.

"f--k it. He's coming into your own—in your territory." Chavac said the casita where the incident happened was actually in enemy territory but the "moron didn't know." "He just went there to get drunk . . . . But, f--k! I don't know anything." His answer was followed by laughter.

In the next excerpt of the conversation, Chavac told the agents that "[a]pparently, all the gunshots were to the face." One agent asked how many shots were fired. Chavac said "[a]pparently" 10. The agent expressed surprise, telling Chavac he was "f--king tough! Right, fool?" Chavac replied "Your momma!"

In the final portion of the conversation Chavac expressed confusion, saying the police told him there was video, but he was not sure where. One agent said he should only worry about "hard evidence." Chavac said the police told him they already had "several statements" and that they wanted his statement to see how it fit in with the others and maybe he could help himself.

b. Velado's jailhouse statement with agents

As with Chavac, the conversation began with one of the agents asking about Velado's gang affiliation. Velado stated he was from the Normandie clique of Mara Salvatrucha and was called Directo.[4] Velado then sought to confirm with the agents whether there were cameras in the cell. "There are no cameras here, you said?" One of the agents said "No." Velado then continued talking.

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[4] Throughout the testimony, Velado and Chavac are interchangeably referred to by their nicknames (Directo and Nino, respectively). For the sake of clarity, we refer to them only as Velado and Chavac.

The agent asked if the police were only "hitting" Velado with a murder. Velado responded that it was not "exactly" what he was being accused of "but I do have something to do with that . . . . [¶] . . . [¶] . . . The same shit." The agent followed up by asking if the police had the gun. Velado said no, "[a]nd right now we're gonna make all that disappear."

In the next excerpt, Velado exclaimed, "Ay! If these—one of these two guys talks, that's it, I'm gonna get f--ked." Velado said he knew what to expect from Chavac, but was worried about the other guy (Flash). The agent asked, "does that fool know all your activities, what you do and everything?" Velado responded, "[t]hat's why I got nervous right now that I saw him, 'cause he was doing a job." He then clarified, "all three of us were doing a job, all three. [Chavac], me and him." The agent asked if Flash knew about the murder. Velado said yes, Flash was doing the job with them and "I'm telling you, if he talks—"

Velado explained that Chavac and Flash were new to the gang, having been "jumped" in only about a year before and that he was training them. He said Chavac was "crazy," was always ready to go, but Flash had turned out to be "good-for-nothing." Velado said Chavac, "after doing a job," would stare at the "toy" (gun) and say it turned him on. The statement was followed by laughter.

Velado said he had been making good money running the casitas for the past couple of years, even though he had to share the money "every which way." He said he only had two "whores" living at the casitas to whom he rented rooms.

Velado expressed concern that his "woman" who had been the driver on the job had been arrested as well because she had

not come to see him. He said, "I'm desperate." Velado suspected Flash had "burned" her as well.

The next excerpt began with Velado saying the "first one was a guy from Playboys." He went on to say that the detective told him they knew that "you guys" killed this guy in the street on April 29 who was a Playboy, but they did not know for sure if he was from that gang.

Velado then returned to discussing how he was training Chavac and Flash because they were relatively new to the gang. Chavac had come from Guatemala and all of his previous "jobs" had been done with "nothing but knife." Velado explained that he gave Chavac a gun as a present, along with some ammunition, and that Chavac would carry the gun around all day and constantly return asking for more "peanuts" (ammunition). Velado said Chavac reacted like a kid taken to Disneyland for the first time when he gave him the gun. Velado said the other "moron would also fire" the gun.

After one of the agents made another inquiry about the shooting, Velado interjected that "one cannot talk about things, in case one is not safe." He said he had not heard anything bad coming "from out there" yet, so he was going to leave it alone.

One of the agents asked if Chavac was the one who "wasted" the "guy from Playboys." Velado responded, "[a]nd another guy who—I also think he . . . he may be a rat." Velado said that "[Chavac] gets out [of the car] to do a job with a Beretta and the other homeboy gets out with the .357." Velado said the victim was high so "[y]ou keep hit him, and hit him, and hit him and it's like he can take it."

Velado said Chavac was fighting and going after the victim, and then "my girl came by." The conversation was interrupted by

an announcement over the jail's public address system. Velado paused and asked the agents again about the speakers. One agent reassured Velado they could not be heard. Velado continued, saying that his girl hit the victim with her car and then Chavac delivered the final shot, saying "this is for MS, you motherf----r!"

One of the agents asked Velado if they had thrown the guns away. Velado responded, "No, they've been hidden." The agent said, "[a]s long as they don't find them, fool. Get rid of them." Velado said again, "They're far, and buried." He explained he had a "homeboy" who had a mechanic shop and he was going to have him cut them up.

The agent then asked what happened to the car, saying he should get rid of it too. Velado said the car his "lady" was driving, a gray Honda, was taken by the police.

Velado lamented that "one of us blabbered their mouth." After an apparent pause in the conversation, Velado referred to something (unclear in the transcript) being done "with the same toy used with . . . with the Playboy." The agent asked, "[w]hat kind of shooter was it?" Velado responded, "that Beretta."

c. Jailhouse conversation between defendants

The conversation between defendants began with Velado telling Chavac "It was [Anna Arana], fool." He asserted it was not Villalta[5] because she told the police she did not know anything "about the Playboy." Velado reiterated that Arana and Shorty (her boyfriend) were "the ones who were saying shit."

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[5] The context of the transcript appears to indicate Velado is referring to Wendy Villalta, although the reporter notes only that the name spoken sounded like "Huella."

Chavac told Velado he needed to "send a message to homie to find—tell him to testify for us. That's the only way out." Velado responded that "[h]e's already gone." He said Arana and Shorty were running away. Chavac said "if these people don't show up, we're fine. But if these people show up, fool." They then discussed that both Arana and Shorty had given statements already; that "someone talked." Chavac mentioned that Shorty "made up" that Chavac was "taller and stuff."

In the next excerpt, Chavac said he told the police he knew there was a gun at the casita, but that he did not know Velado and did not know anything about what happened that night. Velado responded, "So then I'm gonna say that I don't know nothing either." There are several portions of the conversation that are noted as unintelligible or that defendants were whispering. Chavac then said, without reference to names, "[a]ll three of them . . . should make the same statement."

Defendants returned to talking about Chavac's discussion with the detectives. Chavac said they told him that "all the people" had given their statements and they wanted to know "my part of the case." Velado asked again what he told the detectives. Chavac reiterated that he told them he did not know "Directo" and that he could not remember anything. The detectives asked how he could not remember and he said, "Well, I'm telling you I wasn't there. . . . I don't know anything about that."

Chavac told Velado that "[e]verybody knows me as Nino" so he said he was going to start telling people to call him "Bicho" instead. He expressed concern about a witness "pointing" at him because "that's enough for those f--kers. . . . That's why I'm saying, if . . . if you don't . . . if we eliminate all these witnesses." Velado interrupts him, "But practically, who are the witnesses

right now?" Chavac responded, "the people who were at the casita."

In the final passage of the conversation, Velado said "Everything got real hot for me, fool! Everything got real hot! That's when I started to—when I felt the presence of the cops real bad, f--k! . . . I thought about toning it down . . . the whole business . . . until I lost everything. And all for nothing. . . . I end up in jail." Chavac responded, " 'Cause that job, we did it just so-so." Velado said the job was done "just fine," but there were a lot of people, people that "didn't stood ground."

3. The Charges

Defendants were charged by information with the first degree murder of Mr. Ramos (§ 187, subd. (a)). It was alleged that Chavac personally discharged a firearm causing the death of Mr. Ramos (§ 12022.53, subd. (d)), and that a principal personally discharged a firearm within the meaning of section 12022.53, subdivisions (d) and (e)(1).[6] It was further alleged the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22.

4. The Trial

In addition to the testimony and documents establishing the facts we have described above, the evidence at trial included the following.

a. The gang evidence

Detective Frank Flores testified as an expert on the Mara Salvatrucha gang, also known as MS or MS-13. In April 2013,

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[6] The allegations regarding subdivisions (b) and (c) of section 12022.53 were dismissed during trial.

Velado was the "shot caller" of the Normandie clique of Mara Salvatrucha, and Chavac was a known member. MS members identify with a hand sign of the index finger and pinky finger held up representing devil horns or the devil's pitchfork. The Normandie clique also identified with the acronym NLS for Normandie Locos.

Detective Flores explained, among other things, that MS operated illegal businesses known as casitas. The casitas provided a large income stream for the gang from the sale of alcohol and drugs, gambling and prostitution, and they were protected accordingly. Because of neighborhood complaints, police activity or other issues, a particular casita location sometimes would be shut down, but its operations would be transferred and re-opened at another location fairly soon thereafter.

In April 2013, there were at least two casitas being run by the MS Normandie clique, including the 21st Street casita,[7] and a second location on Constance Street, near Pico Boulevard. The 21st Street casita encroached into territory claimed by the Playboys gang, an MS rival. At the time, the Playboys had an active member with the moniker Risky or Little Risky.

Detective Flores explained that gangs like MS collected "taxes" from legal and illegal businesses operating in their claimed territory. They had their own slang terms and often referred to guns as "toys," and ammunition as "peanuts." He believed Velado "fell out of favor" with other MS leaders sometime in November 2013, after the shooting.

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[7] The casita was also sometimes referred to as the 10th and Washington casita, referencing another nearby street.

Several photographs of Velado holding a nine-millimeter handgun were shown to the jury. Chavac was in some of the photographs, and several photographs depicted either or both defendants throwing MS hand signs.

b. The stipulations

Among other things, the parties stipulated to the following facts: (1) Mara Salvatrucha is a criminal street gang within the meaning of section 186.22. (2) The shell casings and two projectiles recovered from the crime scene were all fired from the same nine-millimeter semiautomatic firearm, and six days before the murder of Mr. Ramos that firearm was located in the 21st Street casita.

c. The recorded jailhouse conversations

During the three recorded jailhouse conversations, the participants spoke in Spanish. The conversations were translated into English and transcribed. The parties stipulated to the accuracy of the Spanish to English translations. Redacted excerpts of the three conversations were prepared as transcripts for the jury and marked as exhibits 120, 121 and 122. All three exhibits were admitted into evidence.

d. Testimony of Anna Arana

Ms. Arana knew Velado by the nickname Directo. Velado wore a bracelet with Directo engraved on it, along with the letters "M" and "S" signifying Mara Salvatrucha. She knew Chavac as well and his nickname or gang moniker was Nino.

Velado used to work for Ms. Arana's former boyfriend at their apartment on Santa Monica Boulevard which was operated as a casita. Sometime in early 2013, both Ms. Arana and her former boyfriend were arrested on charges related to the running

of the casita. Ms. Arana was released on bail, but her boyfriend was deported.

Thereafter, Ms. Arana moved into the 21st Street casita with her new boyfriend, known as Shorty (*Chaparro* in Spanish). Velado ran the 21st Street casita and Shorty worked for Velado. Another man called Gordo sold drugs (mostly crystal meth) for Velado at the casita. Ms. Arana did not know Ms. Villalta well.

Ms. Arana often saw defendants together at the 21st Street casita, along with another man she knew as Flash. Ms. Arana was aware of two shotguns kept in the bedroom of the casita.

On the evening of April 29, 2013, Ms. Arana and Shorty were at the 21st Street casita. Defendants were also there, along with Flash, Gordo, Ms. Villalta, a man called Chuy, and two other women, Crystal and Wicked. Everyone was just hanging out and some people were using meth. Ms. Arana and Shorty went outside on the back porch where there was a couch. Ms. Arana fell asleep.

At some point, Shorty woke her up and told her something was going on inside. When she went back inside the casita, she noticed that Ms. Villalta and the other women were no longer there. She saw Velado talking, in an "aggressive" tone, to Mr. Ramos, whom she did not recognize. Velado asked Mr. Ramos "where are you from?" Ms. Arana understood that to be a question asking him what gang he was in. Mr. Ramos, who was holding a beer, said he was from nowhere, that he was just looking for the woman he thought lived there.

Everyone went out to the front of the casita. Velado handed Ms. Arana the keys to his van and told her to get in the driver's seat. Velado and Flash got into the back. Chavac, Chuy, Shorty, and Gordo started walking down the street with

Mr. Ramos. They "supposedly" were going to look for Mr. Ramos's wallet because he said he had lost it and could not pay for the beer he drank. As Ms. Arana was about to start driving, Gordo went to the van and got into the back. Velado told her to get going. He told her to follow Ms. Villalta but she did not see her anywhere. Velado told her to drive straight and then continued telling her to turn in a circle around the block. Velado then told her to make a U-turn. At that point, Ms. Arana noticed Chavac and Mr. Ramos in the street. She stopped the van. Shorty appeared, ran towards the van, and jumped into the front passenger seat. Chuy was nowhere to be seen.

Chavac and Mr. Ramos appeared to be fighting. Mr. Ramos was waving his arms around, ducking and trying to walk away. Chavac was following him. Chavac looked like he was throwing punches at the man. Ms. Arana could not tell if Chavac had a gun, but she heard gunshots. Mr. Ramos fell to the sidewalk. Chavac jumped into a silver Honda and it drove off.

Velado started yelling at Ms. Arana, screaming about why she had stopped the van. He told her to start driving and directed her to the freeway. She heard him talking on the phone with Ms. Villalta. Velado told Ms. Arana to drive to the Constance Street casita, but he had to give her directions because she did not know where it was.

After they got to the Constance Street casita, Ms. Arana heard Chavac tell Velado he thought he killed Mr. Ramos. She noticed Shorty looked upset, like he was going to cry, which was unusual. Velado told Ms. Villalta to drive back to the 21st Street casita, and take Gordo, Ms. Arana, Shorty, Crystal and Wicked with her. Velado told them to stop at McDonald's to buy some

food so that if the police showed up, they would have an alibi about where they had been.

The day after the shooting, Ms. Arana saw Velado when he came to the 21st Street casita. They went outside and Velado pointed out a bullet hole in the driver's side of the van. Velado told her that if she had not moved, the bullet "could have been for [her]."

Ms. Arana testified she was eventually arrested and charged with the murder of Mr. Ramos. Pursuant to a plea agreement, she pled guilty to being an accessory after the fact and served time in prison. She was released shortly before the start of defendants' trial. Ms. Arana said she did what Velado told her to do that night because she was afraid of him.

e. Testimony of Wendy Villalta

Ms. Villalta testified she met Velado in early April 2013, shortly before the night of the shooting, and they immediately began a romantic relationship. She knew he was a member of MS and his moniker was Directo. She had Directo tattooed across her chest. Ms. Villalta admitted she had prior drug-related convictions and that she began to help Velado run the casita, including collecting money that was owed to the gang, but she was not a member of the gang. She said she knew Chavac as Nino. Chavac, Shorty and Flash were members of MS.

Velado gave orders about how the 21st Street casita was run and people always obeyed his orders. Ms. Villalta was aware that Ms. Arana and Shorty lived at the 21st Street casita and were romantically involved. Ms. Villalta identified a photograph of Velado taken at the 21st Street casita in which he is holding a nine-millimeter handgun. She also confirmed that his cell phone number at the time ended in the numbers -1443.

Early on the morning of April 29, 2013, there was a knock on the door of the 21st Street casita. Ms. Villalta looked out the window but did not recognize the Hispanic male standing outside. She told the others, including Velado, there was a stranger outside. Ms. Villalta then went into the bathroom to smoke some meth. When she came back out, the stranger, who she later learned was Mr. Ramos, was inside asking for someone named Martha. He also said he had a cousin named Risky who was from the Playboys.

Velado then announced that everyone had to leave the casita. Once outside, Ms. Villalta heard Velado tell Chavac, "You or me, but if it's me, I need [your] shoes." Velado turned to Ms. Villalta and told her to take his Honda and drive around the block to see if she saw anything suspicious, like gang members or law enforcement hanging around. Velado gave her his keys and she got into the Honda. Wicked and Crystal went with her. Ms. Villalta drove around the block and then texted Velado that she did not see anything suspect.

She drove back to the 21st Street casita and pulled over near Velado's white van. Ms. Villalta saw Chavac, Flash, Gordo and Chuy walking down the street with Mr. Ramos, heading in the direction of 23rd Street. Ms. Villalta started to follow them in the Honda. Chavac started shooting at Mr. Ramos as he tried to run away. Chavac's gun then appeared to jam. Chavac cleared the gun, and started shooting again. He grabbed Mr. Ramos's shirt, pulled him around and shot him in the face. Chavac then ran over to the Honda and jumped in. Ms. Villalta saw that Chavac had what appeared to be the nine-millimeter handgun from the casita (the same one Velado was holding in the photograph).

Velado called from the van and told her to drive to the Constance Street casita and meet him there. After they arrived, Ms. Villalta saw Chavac put the gun into a backpack. She heard Chavac tell Velado that he told Mr. Ramos "this is for *La Bestia*" as he shot him. *La Bestia* was a reference to the beast or devil often used by MS members. Velado later told her he was angry at Shorty because he did not "help [Chavac]."

Ms. Villalta admitted she had been charged with the murder of Mr. Ramos, but she agreed to plead guilty to manslaughter. She received an 11-year prison sentence and was still serving her sentence. She explained she initially did not tell the detectives the complete truth about what happened because she was afraid of Velado. She was worried because he knew where her family lived. On cross-examination, Ms. Villalta admitted she was regularly using meth in April 2013 and was "always high." She also admitted that after her arrest she wrote several "love letters" to Velado. The defense also pointed out several inconsistencies between her original statements to the detectives and her trial testimony (e.g., Velados's involvement, who ordered everyone out of the casita). Ms. Villalta denied that using meth affected her memory.

f. Other evidence

In April 2013, the last four digits of Velado's cell phone number were -1443. One of the two cell phones seized at the time of Chavac's arrest had a number ending with -9395.

Detective Sean Hansen, a robbery-homicide detective who is also assigned as a federal task force officer working with the FBI's cellular analysis survey team, provided expert testimony in historical cell site analysis. Working with records from the service providers, Detective Hansen explained that the relevant

cell phone tower records obtained during the investigation indicated the phones ending in -1443 and -9395 were in the coverage area near the crime scene at the time the shooting occurred. Thereafter, the records indicated that Velado's cell phone moved in the direction of the Constance Street casita.

Detective Keyzer testified to his knowledge of firearms and explained that sometimes when a semiautomatic weapon is not properly cleaned and lubricated, it will jam when the trigger is pulled because two rounds enter the chamber at the same time. The jam can be cleared by working the slide, which results in a live round being ejected.

5. Defense Case

Both defendants exercised their right not to testify. Neither defendant presented any witnesses.

6. The Verdict and Sentencing

The jury found defendants guilty of murder in the first degree, and found true the allegation that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang. As to Velado, the jury found true the allegation that a principal was armed with a firearm within the meaning of section 12022.53, subdivision (d), and as to Chavac, that he personally used and discharged a firearm causing the death of Mr. Ramos within the meaning of section 12022.53, subdivision (d).

The court sentenced defendants each to a term of 25 years to life on the substantive offense, plus a consecutive term of 25 years to life on the firearm enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1). The court ordered defendants jointly liable for victim restitution in the amount of $9,871.60, and made further orders not at issue in this appeal.

This appeal followed.

DISCUSSION

1. The Admission of Velado's Jailhouse Statement as a Declaration Against Interest

Chavac challenges the admission into evidence of Velado's recorded jailhouse statement under the hearsay exception for declarations against interest. (Evid. Code, § 1230.) He contends the statement, despite numerous redactions, was inadmissible because it was unreliable and was not sufficiently disserving of Velado's interests. We disagree.

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. [Citations.] Whether a trial court has correctly construed Evidence Code section 1230 is, however, a question of law that we review de novo." (*People v. Grimes* (2016) 1 Cal.5th 698, 711-712 (*Grimes*).) Thus, "the application of the against-interest exception 'to the peculiar facts of the individual case' is reviewed for abuse of discretion" (*ibid.*), but a conclusion of law underlying the court's ruling is reviewed de novo.

The court and counsel discussed the content and admissibility of the jailhouse statements at great length over several different days. The parties eventually agreed to various redactions. Chavac strenuously argued that significant portions of Velado's statement were not disserving of Velado's interests, contained fabrications and were not reliable. The court disagreed, finding the statements were inculpatory when read in context and were therefore admissible under the against-interest exception to the hearsay rule.

Our Supreme Court recently summarized the relevant principles for assessing the admissibility of declarations against

interest in *Grimes*, *supra*, 1 Cal.5th 698. Applying those principles, as we must, we conclude that a reasonable person in Velado's position " 'would not have made the statement[s] unless he believed [them] to be true.' " (*Id.* at p. 716.) Given the context in which the statements were made, we find they were nontestimonial, inculpatory and reliable, and therefore properly admitted under Evidence Code section 1230.

Grimes begins with a few basic principles. Evidence Code section 1230 "permits the admission of any statement that 'when made, . . . so far subjected [the declarant] to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.' " (*Grimes*, *supra*, 1 Cal.5th at pp. 710-711.)

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' " (*Grimes*, *supra*, 1 Cal.5th at p. 711, quoting *People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).)

" 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, *the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant*.' " (*Grimes*, *supra*, 1 Cal.5th at p. 711, italics added.)

Grimes then discusses, at some length, what has become known as the *Leach* rule, namely that Evidence Code section

1230 is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441 (*Leach*).) *Grimes* observed that "the proper application of the *Leach* rule appears to have generated some confusion." (*Grimes*, *supra*, 1 Cal.5th at p. 713.)

Grimes clarified the *Leach* rule, concluding that "the nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' " (*Grimes*, *supra*, 1 Cal.5th at p. 716.)

Grimes rejected a more narrow construction of the *Leach* rule. "A rule that permitted admission of no more of a declarant's statement than was necessary to expose him to criminal liability, requiring courts to mechanically sever and excise the rest, certainly might be easier to apply. But . . . this is not the rule we have: Under the law as it has developed in California, as in the federal system, context matters in determining whether a statement or portion thereof is admissible under the against-interest exception. This contextual approach accords with the rationales underlying the modern expansion of the rule governing the admission of statements against interest." (*Grimes*, *supra*, 1 Cal.5th at p. 717; accord, *Williamson v. United States* (1994)

512 U.S. 594, 603-604 ["Even statements that are on their face neutral may actually be against the declarant's interest. . . . The question . . . is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances."].)

Chavac pays lip service to the contextual approach, but nonetheless urges a narrow construction of the *Leach* rule despite *Grimes*'s clear rejection of that approach. As both the United States and California Supreme Courts instruct, we do not dissect each individual statement and look at it in a vacuum. Rather, we look at the totality of circumstances under which the statements were made.

We disagree with Chavac's contention that Velado's statements were largely self-serving and that he consistently assigned all the blame for the assaultive behavior to others (including Chavac), "reserv[ing] for himself the role of mere observer" of the shooting. Reading the statements made by Velado in context, we have no trouble concluding they were " 'inextricably tied to and part of a specific statement against penal interest.' " (*Grimes*, *supra*, 1 Cal.5th at p. 715.)

From start to finish, Velado identified himself as the man in control at the 21st Street casita where the murder plot was conceived, and the man with authority over Chavac and Flash as new members of the gang he was "training." While certain segments speak to more specific conduct by Chavac and Flash, they are nonetheless tied to Velado's consistent description of the "job" as one undertaken by all three of them. Velado did not attempt to minimize his role in the murder. His comments about

Chavac being "crazy" and always ready to do a job were part and parcel of his statements about getting the job done, as were his comments acknowledging his disappointment in Flash for not doing what he was told. Velado made repeated references to destroying evidence (the gun) and expressed concern over his situation if one of them gave in and talked to the detectives. Given the foregoing, his failure to place the gun in his own hand cannot reasonably be characterized as minimizing his role in the murder.

People v. Cortez (2016) 63 Cal.4th 101 (*Cortez*) is similar. There, the defendant's accomplice (Bernal) spoke to his nephew (Tejada) about a drive-by shooting in which he, Bernal, was involved. Bernal identified the defendant as the driver. (*Id*. at pp. 107-108.) In a taped interview, Tejada told the police about Bernal's statements. (*Ibid*.) At trial, the defendant sought to exclude Bernal's out-of-court statements. (*Id*. at pp. 122-123.) In concluding Bernal's statements were properly admitted as declarations against interest, the Supreme Court explained: "Bernal's references to defendant, along with the other evidence, suggested that he and defendant had engaged in a joint, planned drive-by shooting, thus showing premeditation and implicating him in a conspiracy to commit murder by means of a drive-by shooting. [Citation.] Moreover, Bernal's statement that the person he went with to shoot 'some 18s' did the driving provides evidence of one of the elements of a conspiracy conviction: 'the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.' [Citation.] In these respects, the portion of the statements referring to a criminal companion were against Bernal's penal interest." (*Id.* at p. 126.)

Cortez continued: "Bernal's identification of defendant by name, viewed in context, specifically disserved his penal interest in several respects. When Bernal spoke to Tejeda, he said that, after the shooting, he 'left the car' and 'went in [a] building,' that the woman who was driving the car 'waited for him while he went in that building,' and that she was 'caught' while she was in the car' '[w]aiting' for him 'to come back out.' Thus, according to Tejeda's statement, when Bernal said that defendant was the one driving, he knew she and her car were already in police custody. He thus also knew that, by identifying her, he was increasing the likelihood that evidence connecting him to the shooting would be found. Indeed, as noted above, police found on the floor of the passenger side of defendant's car a live round matching the caliber and brand of several found at the scene of the shooting. Finally, Bernal knew that 'being linked to' defendant 'would implicate' him in a drive-by shooting for which defendant had been arrested. [Citation.] For these reasons, Bernal's identification of defendant by name specifically disserved his penal interest." (*Cortez*, *supra*, 63 Cal.4th at p. 127.)

People v. Gallardo (2017) 18 Cal.App.5th 51 (*Gallardo*), relied on by Chavac, does not change our analysis. In *Gallardo*, our colleagues in Division Seven held it was error to admit, as a declaration against interest, a defendant's jailhouse statement to two paid informants in which he identified his codefendants as the shooter and the driver in a gang murder case. We have no quarrel with the reasoning or the result in *Gallardo*. Indeed, it demonstrates the controlling principle in determining whether a statement is admissible under the against-interest exception: "context matters." (*Grimes, supra,* 1 Cal.5th at p. 717.)

In *Gallardo*, "the jailhouse conversation shows [the declarant] was angry that authorities were attempting to blame him for the entire crime," and "repeatedly assert[ed] that law enforcement and a 'snitch' were trying to 'pin' the entire crime on him." (*Gallardo, supra,* 18 Cal.App.5th at pp. 75, 73.) Further, "throughout the discussion [the declarant] provided conflicting versions of what had occurred, further mitigating his role in the offense with each successive telling." (*Id.* at pp. 75-76, 74-75.) And, the declarant "only identified [his codefendants as the shooter and the driver] at the prompting of the informants, and after already having implicated himself in the crime." (*Id.* at p. 75.)

None of these circumstances bears any similarity to the context in this case. From the beginning of his conversation with the undercover agents, Velado knew that he, Chavac and Flash had all been taken into custody and were the apparent focus of the detectives. He consistently asserted that the three of them had been doing a "job" together. Velado did not provide conflicting versions of the incident, nor did he attempt to back-peddle his own participation. Velado did provide a few facts that were not consistent with the physical evidence (e.g., that Ms. Villalta hit Ramos with the car before the fatal shot by Chavac). But, viewed in context, these relatively minor deviations appear to have been mere embellishment to impress the agents who he viewed as fellow gang members, and who were enjoying and laughing along with him as he explained what happened. Nor did Velado sit silently and speak only when prodded by the agents. The agents did ask questions, but the transcript overall reflects the give and take of an ordinary

conversation, with Velado supplying much of the information without prompting by the agents.

Further, we also disagree with Chavac's characterization of the circumstances under which the statement was made. Chavac asserts the transcript demonstrates Velado was suspicious of the agents, or at least of the location in which they were speaking, because he asked several times about whether the holding cell was being monitored by cameras or they could be heard on speakers.

Velado's statements do not reflect distrust of the agents, nor were they " 'made in the coercive atmosphere of official interrogation.' " (*Duarte, supra,* 24 Cal.4th at p. 617.) Indeed, the transcript reflects a fairly uninhibited conversation between the three men. Velado believed he was talking to two fellow gang members, such that his statements were not motivated by an attempt to curry favor or obtain lenient treatment. Viewing the totality of Velado's statements and given the noncoercive context in which they were made, the trial court correctly determined they were against his penal interest and properly admitted under the against-interest exception.

2. The Admission of Velado's Jailhouse Statement as Substantive Evidence of Chavac's Guilt

Chavac further argues the trial court erred in allowing the unrestricted use of Velado's jailhouse statement as substantive evidence of Chavac's guilt without instructing the jury that Velado was an accomplice, and that his statement therefore required corroboration. Chavac contends the court also erred by failing to define accomplice for the jury. Chavac contends the magnitude of these errors was compounded by the prosecutors' closing arguments. Once again, we disagree.

The court and counsel discussed the accomplice instructions at length. Ultimately, the court indicated it would instruct with CALCRIM No. 335 pertaining to accomplice testimony and would include language that witnesses Arana and Villalta were accomplices as a matter of law. All parties agreed to the instruction. At no time did Chavac request that Velado also be identified as an accomplice, or that the term accomplice should be defined for the jury.

"A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*); accord, *People v. Jones* (2013) 57 Cal.4th 899, 969 [a " 'party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' "].)

In any event, there was no error. As we have already explained above, Velado's jailhouse statement to the undercover agents was properly admitted as a declaration against interest pursuant to Evidence Code section 1230. It was not, as Chavac argues, made under suspect circumstances. It was reliable, admissible evidence, and the court was under no duty to instruct that corroboration was necessary.

" 'The usual problem with accomplice testimony—that it is consciously self-interested and calculated—is not present in an out-of-court statement that is *itself sufficiently reliable* to be allowed in evidence.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 555-556 (*Brown*) [finding accomplice's hearsay

statement properly admitted as declaration against interest; therefore corroboration was not required and court need not instruct that statement had to be viewed with caution]; see also *People v. Williams* (1997) 16 Cal.4th 635, 681 (*Williams*) [out-of-court statements by accomplice made in furtherance of a conspiracy admissible under Evid. Code, § 1223 properly admitted]; *People v. Sully* (1991) 53 Cal.3d 1195, 1230 [hearsay statement by accomplice properly admitted as excited utterance not subject to corroboration requirement of § 1111].)

Even assuming there was error, it was manifestly harmless. " 'A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]" . . . The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." [Citation.]' " (*Brown*, *supra*, 31 Cal.4th at p. 556; accord, *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

There was ample corroborative evidence connecting Chavac to the shooting, not the least of which were his own statements to the undercover agents and his jailhouse conversation with Velado. "The necessary corroborative evidence for accomplice testimony can be a defendant's own admissions." (*Williams*, *supra*, 16 Cal.4th at p. 680.) The gang evidence, the testimony related to the firearm used in the shooting (including the parties' stipulation), the autopsy evidence and the cell phone evidence provided additional corroboration.

3. The Failure to Instruct That Chavac's Jailhouse Statement Could Not Be Used Against Velado

The first of Velado's numerous challenges to the jury instructions concerns the trial court's failure to instruct the jury that Chavac's jailhouse statement could not be used against Velado.

During one of the discussions finalizing the jury instructions, the court and counsel discussed the instructions pertaining to statements made by defendants and adoptive admissions. The court indicated it would add language to CALCRIM No. 357 regarding adoptive admissions to instruct the jury not to consider a statement as an admission by a defendant if he was not present when it was made. The prosecutor, not Velado, then raised the issue of limiting the use of Chavac's jailhouse statement (exhibit 120) to the case against Chavac. When the court asked if such an instruction was desired by all, Velado agreed the limiting instruction would be appropriate. As such, the court indicated it would add an additional sentence to CALCRIM No. 357 as follows: "None of the statements of Mr. Chavac, in People's 120, are being offered against Mr. Velado for any purpose, and you may not consider them against Mr. Velado for any purpose."

The next day, the court provided a copy of the final written instructions to counsel for their review. CALCRIM No. 357 contained the modification about a defendant needing to be present in order to conclude a statement was an admission, but did *not* include the limiting language about exhibit 120. When the court asked the parties if they agreed with the modifications, all counsel agreed. As such, neither the written or oral

instructions given to the jury contained the previously agreed-upon limiting language.

The record is not adequate to determine the reason why the limiting language was not included in the instructions given to the jury. But, even assuming the omission was court error, it was harmless by any standard. There was nothing in Chavac's jailhouse statement to the undercover agents that directly implicated Velado. More importantly, the other evidence (including the testimony of the gang expert and Velado's known status as a "shot caller"), and Velado's own statements were powerfully incriminating of his role in the murder. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1042 [failure to give limiting instruction about admission of hearsay statement implicating the defendant was harmless given the other evidence at trial and because there was "no reasonable probability that the court's refusal to instruct affected the outcome of the trial"].)

4. The Accomplice Instructions

a. CALCRIM No. 301

Velado next argues the court's modified version of CALCRIM No. 301 was an incorrect statement of the law. He contends the instruction, as given, was prejudicial and legally erroneous, instructing the jury that *any* facts attested to by Ms. Arana or Ms. Villalta required corroboration, not just incriminating facts.

The court instructed with a modified version of CALCRIM No. 301 as follows. "Except for the testimony of Wendy Villalta and Anna Arana, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all of the evidence."

Velado concedes no objection to the instruction was raised in the trial court, nor was clarifying language sought. Respondent argues the challenge to the modified version of CALCRIM No. 301 has been forfeited. (*Lee*, *supra*, 51 Cal.4th at p. 638.) Velado contends the instructional error is cognizable on appeal because it affected his substantial rights. (§ 1259.) Velado cites to *People v. Smith* (2017) 12 Cal.App.5th 766 (*Smith*) in which the court concluded that a modified version of CALCRIM No. 301, similar to the one here, was legally erroneous and no objection was necessary to preserve an appellate challenge. "Once the court determined that it would instruct the jury with respect to accomplice testimony, it was obligated to provide instructions that correctly stated the law." (*Id*. at p. 778, fn. 5; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1012 [forfeiture rule does not apply when "the trial court gives an instruction that is an incorrect statement of the law"].)

We will consider the merits of Velado's claim. Section 1111 provides in relevant part that "[a] conviction can not [*sic*] be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." "Exculpatory testimony, by definition, cannot be said to support a conviction and, thus, need *not* be corroborated." (*Smith*, *supra*, 12 Cal.App.5th at p. 780.)

As given here, CALCRIM No. 301 did not specifically instruct that only incriminating statements made by Ms. Arana and Ms. Villalta required corroboration. As worded, the jury could have wrongly believed that any testimony by an accomplice, including neutral and exculpatory testimony, required corroboration. Nevertheless, any error was harmless by any standard.

Unlike in *Smith*, Ms. Arana and Ms. Villalta did not attest to any material exculpatory facts. Velado urges us to conclude that both women gave "a considerable amount of uncorroborated testimony which cast doubt on the notion that Velado ordered Chavac to kill Ramos." Velado contends the instruction dissuaded the jury from properly considering the evidence that demonstrated he was merely an accessory after the fact. We are not persuaded.

Though Velado argues Ms. Arana and Ms. Villalta gave uncorroborated exculpatory testimony, in actuality, Velado's argument is that these witnesses did not give as much incriminating testimony as they might have. For instance, that Ms. Arana and Ms. Villalta testified they never heard a direct order from Velado, and did not see him hand a gun to Chavac to shoot Mr. Ramos that evening, does not mean their testimony was exculpatory.

Moreover, any conceivable prejudice was harmless by any standard. In *Smith*, the court concluded the error was prejudicial because "it was clear" the accomplice testimony did exculpate the defendant. (*Smith*, *supra*, 12 Cal.App.5th at p. 781.) And, the impact on the verdict was not merely an abstract possibility. The instruction "became a point of disagreement between a lone hold-out juror and the other 11 jurors," (*ibid.*) and the hold-out juror was eventually dismissed "in part because the other jurors believed that this juror was unwilling to follow the court's erroneous instruction regarding the need for corroboration of *any* accomplice testimony, regardless of whether that testimony was inculpatory or exculpatory." (*Ibid.*)

There is no similarity to *Smith* here. There was no exculpatory testimony by either Ms. Arana or Ms. Villalta. There

was no indication from the jury that the jury instruction was a point of contention. There was also strong, compelling evidence of both defendants' guilt, including Velado's own incriminating jailhouse statements. Nothing in Chavac's statement was more damning to Velado than his own admissions.

b. The instruction that Ms. Villalta and Ms. Arana were accomplices as a matter of law

Velado contends it was error to instruct the jury that Ms. Villalta and Ms. Arana were accomplices as a matter of law. Velado contends it was "undisputed" that both women acted at his direction. Therefore, instructing the jury they were accomplices to the murder necessarily imputed guilt to Velado for directing their actions.

As we already noted above, the court and counsel discussed at some length the relevant accomplice instructions, including both CALCRIM No. 334 and No. 335. At the conclusion of those discussions, all parties agreed the court should instruct the jury that Ms. Villalta and Ms. Arana were accomplices, and that CALCRIM No. 335, as opposed to No. 334, was the appropriate instruction. The bench notes to CALCRIM No. 335 state: "Give this instruction only if the court concludes that the witness is an accomplice as a matter of law *or the parties agree about the witness's status as an accomplice*." (Italics added.)

The court instructed with CALCRIM No. 335 as follows. "If the crime of murder was committed, then Wendy Villalta and Anna Arana were accomplices to that crime. [¶] You may not convict a defendant of murder based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice's testimony is supported by other evidence that you believe; [¶] 2. That

supporting evidence is independent of the accomplice's testimony; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice. [¶] Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

The court also gave a pinpoint instruction requested by Velado: "You have heard testimony that co-defendants Anna Arana and Wendy Villalta have entered pleas of guilty or no contest in this case. You are not to consider any plea of guilt or no contest by a co-defendant as evidence of the guilt of either Kelvin Velado or Edward Chava[c]."

The pinpoint instruction as given was slightly different from that requested by Velado. The court eliminated a proposed sentence that stated that any plea by Ms. Arana or Ms. Villalta was not evidence and could not be used for "any purpose." The court reasoned the pleas could be considered by the jury, for instance, as relevant to the credibility of either woman. Velado agreed to the court's modification and did not seek any further

clarification or modification of the pinpoint instruction or CALCRIM No. 335.

Velado has therefore forfeited any claim of error regarding the instruction. (*Lee*, *supra*, 51 Cal.4th at p. 638.)

In any event, any prejudice was harmless by any standard.

CALCRIM No. 335 benefitted both defendants by instructing the jury that the testimony of Ms. Villalta and Ms. Arana had to be corroborated by other independent evidence of guilt.

Moreover, "[i]n reviewing a claim of instructional error, the ultimate question is whether 'there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' [Citation.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] 'Moreover, *any theoretical possibility of confusion [may be] diminished by the parties' closing arguments* . . . .' [Citation.] ' " 'Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.' " ' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220 (*Hajek*), overruled in part on other grounds as stated in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, italics added; accord, *People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

The arguments of counsel helped mitigate against any possible harm. Defense counsel in particular underscored for the jury the relevance of the guilty pleas of the two women and that the law did not allow them to simply assume Velado's guilt as a result. As we already noted above, there was also strong corroborative evidence of defendants' guilt.

5. The Aiding and Abetting Instructions

a. CALCRIM No. 401

Velado challenges the adequacy of CALCRIM No. 401, arguing it failed to instruct the jury that the crime of murder ends with the death of the victim, and that an intent to aid and abet murder therefore must be established prior thereto. Velado concedes (as he did below) that he was an accessory after the fact. He argues the timing of his formation of the requisite intent to aid Chavac was therefore crucial to his defense given the state of the evidence. He contends the instructions on aiding and abetting allowed the jury to wrongly believe the requisite intent for aiding and abetting the murder could be formed after the death of the victim while defendants were fleeing the scene.

The jury was instructed with CALCRIM No. 401 which provides, in relevant part, as follows. "To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. *Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime*; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." (Italics added.)

Velado did not request any modification or clarification of the instruction in the manner he now contends was paramount to his defense. Velado has therefore forfeited this argument. (*Lee*, *supra*, 51 Cal.4th at p. 638.)

In any event, there was no error. Velado's reliance on *People v. Sedillo* (2015) 235 Cal.App.4th 1037 (*Sedillo*) is misplaced. There, the defendant challenged the trial court's use

of CALJIC No. 3.01, instead of CALCRIM No. 401, to instruct on aiding and abetting liability. CALJIC No. 3.01 did *not* include the crucial language that is contained in CALCRIM No. 401 that in order to be guilty as an aider and abettor, a defendant must form the requisite intent "[b]efore or during the commission of the crime." *Sedillo* therefore concluded the trial court "erred in failing to instruct that the intent to aid and abet needed to be formed prior to the shootings." (*Sedillo,* at p. 1067.)

Nevertheless, *Sedillo* found the error harmless beyond a reasonable doubt. "[E]ven with the omission in the given the [*sic*] instruction, under the facts of this case—defendant waiting in the getaway car while [her codefendant] approaches the [victim's] home with a rifle—it is not reasonably likely the jury concluded that defendant only formed the intent to aid [her codefendant] *after* he had shot the victims." (*Sedillo*, *supra*, 235 Cal.App.4th at p. 1067.)

Here, the jury was properly instructed with CALCRIM No. 401 that told the jury Velado's intent had to be formed *before or during* the commission of the murder. Further, additional instructions mitigated any possible confusion. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016 (*Castillo*) [" ' "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." ' "].) CALCRIM No. 520 instructed that in order to prove a defendant guilty of murder, it must be proved that a defendant committed "an act that caused the death of another person." CALCRIM No. 521 instructed that a defendant acts with premeditation "if he decided to kill before completing the act that caused death."

The instructions, read as a whole, properly informed the jury the intent to aid and abet a murder had to be formed before

or during the commission of the act that caused the death of the victim. In addition, there were far more facts here, than in *Sedillo*, of pre-shooting conduct by Velado that supported a finding he formed the requisite intent to aid and abet the murder well before the conspirators fled the scene.

b. Mens rea for first degree murder

Velado contends the aiding and abetting instructions were deficient in another aspect. He contends the instructions allowed the jury to find him guilty of first degree murder without requiring the jury to conclude that he personally harbored malice and acted willfully, deliberately and with premeditation in the murder of Mr. Ramos.

Velado concedes he did not object or seek a modification of CALCRIM No. 401 in the manner he now urges. Respondent contends the contention has been forfeited. (*Lee*, *supra*, 51 Cal.4th at p. 638.) In response, Velado urges us to find that the instructions were deficient and allowed the jury to find him guilty of first degree murder based on Chavac's mental state, not his own. If that were true, the instructions would indeed be erroneous and the forfeiture rule would not apply. (See *People v. Johnson* (2016) 62 Cal.4th 600, 639; see also § 1259.) However, we conclude, on the record before us, there is no reasonable likelihood the instructions could be construed as allowing the jury to convict Velado of first degree murder based on Chavac's mental state as the shooter, as opposed to Velado's mental state in aiding and abetting the shooting.

"First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty. [Citation.]

That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*).)

"[A] defendant is liable for murder when the actus reus and mens rea elements of murder are satisfied. The defendant or an accomplice must proximately cause an unlawful death, and the defendant must personally act with malice. Once liability for murder is established . . . , *the degree of murder liability is determined by examining the defendant's personal mens rea*." (*People v. Concha* (2009) 47 Cal.4th 653, 663.)

Velado primarily focuses his argument on the fact that CALCRIM Nos. 400 and 401 do not specifically embrace the concept that an aider and abetter in a first degree murder prosecution must be judged solely on his own mental state.

The argument is unavailing. As we have already noted, it is well established that jury instructions are not considered in isolation. (*Hajek*, *supra*, 58 Cal.4th at p. 1220 [the " 'correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction' "].) We do not assess the validity of a particular instruction untethered from the balance of the instructions provided to the jury. Other instructions may supply clarification, amplification or other relevant principles that assist the jury in properly applying the law. (*Castillo*, *supra*, 16 Cal.4th at p. 1016.) And, any possible confusion may be further mitigated by the arguments of counsel. (*Hajek,* at p. 1220.)

Here, in addition to the instructions on aiding and abetting generally (CALCRIM Nos. 400 and 401), including that an aiding and abetting defendant must know of the perpetrator's specific intent and intend to aid that unlawful purpose, the court also instructed with CALCRIM No. 520. The concluding paragraph of CALCRIM No. 520 stated "[i]f you decide that a defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521."

The court also instructed with a modified version of CALCRIM No. 521 as follows:

"[A] defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder with Malice Aforethought*. [¶] The People

have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

The jury was also instructed that it "must separately consider the evidence as it applies to each defendant," "must decide each charge for each defendant separately," and unless instructed otherwise, that "all instructions apply to each defendant."

The jury instructions properly instructed on the necessary mens rea for each defendant in order to convict them of first degree murder. Velado's contention is without merit.

6. The Instructions Pertaining to the Uncharged Conspiracy

Velado contends the instructions regarding the uncharged conspiracy improperly allowed the jury to convict him of first degree murder if it found the murder was the natural and probable consequence of an assault. Once again, Velado concedes no objection on this ground was raised below, but argues there is no forfeiture because his substantial rights were affected. Citing *Chiu*, *supra*, 59 Cal.4th 155, he contends the court instructed on a legally invalid theory. We disagree.

Chiu held 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 under the natural and probable consequences doctrine." (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

The jury was instructed with CALCRIM No. 416 which stated, in relevant part, that "[t]o decide whether a defendant

and one or more of the other alleged members of the conspiracy intended to commit murder, please refer to the separate instructions that I will give you on that crime." As explained above, the jury was instructed with CALCRIM Nos. 520 and 521, which defined the degrees and elements of murder.

The court instructed with a modified version of CALCRIM No. 402. That instruction informed the jury that while defendants were not charged with an assault, the prosecution may argue that either or both defendants were guilty of murder under the natural and probable consequences doctrine; specifically, that an assault may have originally been intended, but a murder resulted.

As relevant here, CALCRIM No. 402 included the following language: "To decide whether the crime of murder was committed, please refer to the separate instructions that I will give you on that crime. If you find the defendant guilty of murder under this theory, all twelve of you must agree to it. *Only the coparticipant who commits the murder may be guilty of murder in the first degree. Any coparticipant who did not commit the murder can only be guilty of murder in the second degree, if you base your verdict on this theory. A finding of first degree murder must be based on the elements set forth in instruction CALCRIM 521.*" (Italics added.)

The instructions thoroughly and correctly stated the law and did not run afoul of *Chiu*. Moreover, the instructions were bolstered by the argument of counsel, including the prosecutor who specifically told the jury that if they concluded Velado was guilty under the natural and probable consequences doctrine, "that can only be a second degree murder."

7. The Failure to Instruct on the Foreseeability of a Principal's Use of a Firearm

Velado's final challenge to the jury instructions concerns the firearm use allegation. He contends that if the jury found him guilty under the natural and probable consequences doctrine, it would not be consistent with *Chiu* or the Constitution that he could be "saddled" with an additional 25-year term for the firearm enhancement without the jury having specifically found that the use of a firearm by Chavac was foreseeable.

This contention need not delay us long. Velado did not raise this objection below so the claim is forfeited. Velado also fails to cite any authority supporting his theory that firearm use must be found by the jury to have been foreseeable. Our Supreme Court has observed, "[w]e have never held that the application of the natural and probable consequences doctrine depends on the foreseeability of every element of the nontarget offense." (*Chiu*, *supra*, 59 Cal.4th at pp. 164-165.)

Perhaps most importantly, the record does not support the conclusion the jury found Velado guilty under the natural and probable consequences doctrine. As we have explained several times above, the jury was correctly instructed on the degrees of murder and the natural and probable consequences doctrine. The jury found Velado guilty of first degree murder, a verdict that is supported by substantial, even compelling, evidence.

8. Cumulative Error

Velado contends the combined errors in the jury instructions deprived him of due process. "In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. [Citation.] *A predicate to a claim of cumulative error is a finding of error*. There can be no

cumulative error if the challenged rulings were not erroneous." (*Sedillo*, *supra*, 235 Cal.App.4th at p. 1068, italics added.)

9. A Limited Remand Is Warranted in Light of the Passage of Senate Bill No. 620

On January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) took effect, which amended section 12022.53, subdivision (h), removing the prohibition against striking the gun use enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.) The statute in effect at the time of sentencing mandated imposition of the enhancement.

The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) It is undisputed defendants' appeals were not yet final on January 1, 2018, and they are therefore entitled to the benefit of the amendment. (See, e.g., *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; and, *People v. Vieira* (2005) 35 Cal.4th 264, 305-306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"].)

Respondent concedes that a limited remand is appropriate, and we have found nothing in the record of the sentencing proceedings that would indicate a remand would be futile. Accordingly, we remand to allow the trial court the opportunity to exercise its newly granted discretion under subdivision (h) of

section 12022.53. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

On remand, the trial court may exercise its discretion under section 12022.53, subdivision (h), to strike all of the firearm enhancements or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subds. (f) & (h).) For example, the court may choose to impose the 25-year-to-life enhancement under subdivision (d). If so, it should impose and stay the enhancements under subdivisions (c) and (b). If the court imposes the 20-year enhancement under subdivision (c), it must then strike the 25-year-to-life enhancement under subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). If the court imposes the 10-year enhancement, it must then strike the 20-year and 25-year enhancements under subdivisions (c) and (d). Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443-1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).) If the trial

court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant's criminal record, and may affect the award of custody credits. Specifically, subdivision (c)(22) of section 667.5 provides that a violent felony is "[a]ny violation of Section 12022.53." As a violent felony, the defendant would be entitled to a maximum of 15 percent conduct credits. (§ 2933.1, subd. (a).)

DISPOSITION

The sentences on the firearm enhancement pursuant to Penal Code section 12022.53 are reversed as to both Kelvin Velado and Edward Amilcar Chavac. The case is remanded to the superior court for the limited purpose of allowing the court to conduct further sentencing proceedings consistent with this opinion. The superior court is directed to exercise its sentencing discretion under section 12022.53, subdivision (h) as to both defendants. Thereafter, the superior court is directed to prepare and transmit abstracts of judgment to the Department of Corrections and Rehabilitation.

The judgments of conviction as to Kelvin Velado and Edward Amilcar Chavac are affirmed in all other respects.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. ROGAN, J.*

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.