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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FABIAN VALDEZ et al., Defendants and Appellants.	B227139 c/w B228425 (Los Angeles County Super. Ct. No. PA060563)

APPEAL from judgments of the Superior Court of Los Angeles County. Daniel B. Feldstern, Judge. Affirmed as modified.

Law Offices of John P. Dwyer, John P. Dwyer and Jin H. Kim, for Defendant and Appellant Fabian Valdez.

Thomas T. Ono for Defendant and Appellant Robert Jonathan Lopez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

In consolidated appeals, codefendants and appellants Robert Jonathan Lopez (Lopez) and Fabien Valdez (Valdez) appeal from their convictions of murder, attempted murder and other crimes. Lopez contends that the trial court erred in admitting prior testimony, as well as belatedly discovered fingerprint evidence and codefendant's out-of-court statements. Valdez contends that the trial court erred in admitting a portion of a jailhouse conversation, and that his counsel was ineffective for his failure to object on an alternative ground. Valdez also claims that he is entitled to one additional day of presentence custody credit. We modify the judgment to add the additional day of credit but otherwise reject defendants' contentions and affirm the judgment.

BACKGROUND

1. Charges against all defendants, counts 1 through 4, 8, 10, and 11

Lopez, Valdez, and two others[1] were charged in count 1 with the murder of Ronald Burgess (Burgess) in violation of Penal Code section 187, subdivision (a);[2] the attempted willful, deliberate, premeditated murder of Joshua Clewley (Clewley) and Kyrice Stanton (Stanton) in violation of section 664/187, subdivision (a) (counts 2 and 3 respectively); in count 4 with shooting at an inhabited dwelling in violation of section 246. The information specially alleged as to counts 1, 2, 3, and 4 that Lopez personally and intentionally discharged a handgun causing great bodily injury and death to Burgess; that Lopez personally and intentionally discharged and personally used a handgun, within the meaning of section 12022.53, subdivisions (b) and (c); that a principal personally and intentionally discharged a handgun causing great bodily injury and death to Burgess within the meaning of section 12022.53, subdivisions (d) and (e)(1); and that a principal personally and intentionally discharged a handgun and personally used a handgun within the meaning of section 12022.53, subdivisions (b), (c) and (e).

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[1] The two others, Andre Vallin (Vallin) and Juan Carlos Taracena (Taracena), are not parties to this appeal.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

Count 8 charged the four defendants with shooting from a motor vehicle in violation of section 12034, subdivision (c). In count 10, the four defendants were charged with the attempted willful, deliberate, premeditated murder of Rolando Garcia (Garcia) in violation of section 664/187, subdivision (a). Count 11 charged the defendants with shooting from a motor vehicle in violation of section 12034, subdivision (c).

The information specially alleged as to counts 10 and 11 that Lopez and Valdez personally and intentionally discharged a handgun, causing great bodily injury and death to Garcia, within the meaning of section 12022.53, subdivision (d); that Lopez and Valdez personally and intentionally discharged and personally used a handgun within the meaning of section 12022.53, subdivisions (b) and (c); that a principal personally and intentionally discharged a handgun causing great bodily injury and death to Garcia within the meaning of section 12022.53, subdivisions (d) and (e)(1); and that a principal personally and intentionally discharged a handgun and personally used a handgun within the meaning of section 12022.53, subdivisions (b), (c) and (e).

The information specially alleged as to counts 1, 2, 3, 4, 8, 10 and 11 that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members, in violation of section 186.22, subdivision (b)(4).

2. Charges solely against Lopez, counts 5, 6, 7, 9, and 12

In count 5 it was alleged that Lopez unlawfully drove or took a Nissan Murano SUV belonging to another, in violation of Vehicle Code section 10851, subdivision (a). Count 6 charged Lopez with evading an officer and willful disregard in violation of Vehicle Code section 2800.2, and in counts 7, 9, and 12 respectively, Lopez was charged as a felon in possession of a firearm with three prior convictions in violation of section 12021, subdivision (a)(1).

The information specially alleged as to counts 5, 6, 7, 9, and 12 that Lopez committed the crimes for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal

conduct by gang members, in violation of section 186.22, subdivision (b)(1)(A). Finally, the information alleged pursuant to section 667.5, subdivision (b), that Lopez had been convicted of three felonies for which he was sentenced to prison and that he did not remain free of prison custody for a period of five years before committing the current offenses.

3. The verdicts and judgments

Defendants Lopez, Valdez, and Taracena were jointly tried. The jury convicted Lopez of all charges against him, found the murder to be in the first degree and found true all special allegations pertaining to him.

On September 3, 2010, in the unstayed, consecutive portion of the total sentence, trial court sentenced Lopez to prison as follows:[3] in count 8, the court imposed the upper term of seven years plus five years for the gang enhancement (12 years); then a consecutive term of one year eight months for each of counts 5, 6 and 7 (five years); 25 years to life as to count 1, plus 25 years to life for one firearm enhancement; as to each of counts 2 and 3, a life term with a minimum parole eligibility period of 20 years, plus 20 years to life for a firearm enhancement; as to count 10, life plus 25 years to life for one firearm enhancement. In addition, the court ordered victim restitution, statutory fines and fees, DNA samples and fingerprint impressions. Lopez was given 1,000 days of actual presentence custody.

Valdez was convicted in counts 10 and 11 as charged, and the jury found true all special allegations included in those counts. The jury deadlocked as to counts 1 through 4 and acquitted Valdez in count 8. The trial court declared a mistrial as to counts 1 through 4, which were later dismissed. The trial court sentenced Valdez on count 10 to life in prison plus 25 years to life and imposed and stayed a consecutive prison term of seven years plus 25 years to life as to count 11. In addition, the court ordered victim

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[3] The stayed and concurrent terms were not set forth in the abstract of judgment. Lopez calculated a total of 143 years to life, while respondent calculated a total of 117 years to life plus three life terms. Lopez does not raise any issue on appeal with regard to sentencing.

restitution, statutory fines and fees, DNA samples and fingerprint impressions. Valdez was given 985 days of actual presentence custody credit plus 147 days of good time/work time credit, for a total of 1,132 days.

Both Lopez and Valdez filed timely notices of appeal.

4. Prosecution Evidence

December 7, 2007 (Counts 5, 8 & 9)

Jasmin Ruiz (Jasmin) was unavailable at trial and her preliminary hearing testimony was read to the jury.[4] Jasmin testified that in December 2007, she was Lopez's girlfriend and he drove a maroon Nissan Murano SUV.[5] Lopez was a member of the West Side Locos gang and the couple spent their days in the company of other members of the gang, some of whom Jasmin knew only by their monikers: Valdez was "Mugsy"; Taracena was "Dead Eyes" or "Lil' Dead Eyes"; Vallin was "Criminal." On December 7, 2007, Jasmin was in the right front seat of the Murano with Lopez, Valdez, and possibly others when Lopez drove to a liquor store in an area claimed by the Toonerville gang; he pulled out a gun, reached across her and fired more than once through the open passenger window toward the two or three people who were in front of the liquor store.

December 9, 2007 (Counts 1-5, 7 & 12)

Stanton, Clewley, and Burgess were walking on Samoa Avenue in Tujunga on the evening of December 9, 2007, when a burgundy-colored SUV approached them. The driver leaned over, pointed a gun and asked where they were from.[6] Stanton heard six shots as she was running away. Burgess was shot in the head and ankle and died as a result of the head wound.

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[4] We use Jasmin's first name to distinguish her from her father, who is mentioned later in this opinion and bears the same surname.

[5] Philippe Bedere testified that his Nissan Murano had been stolen from his apartment building's garage in July 2007.

[6] Meaning in gang parlance, "What gang do you belong to?"

Lopez, Jasmin, Vallin, Taracena, and Valdez went to Ryan Smith's (Smith) home on December 9, 2007. Smith met Lopez about a week earlier at a party where he overheard Lopez saying that "the fishes [Toonerville gang members] had blasted at them at some motel." Smith explained that "blasted" referred to firing a gun. While at Smith's home when Smith and Lopez were outside alone, Lopez, with a gun in his waistband, asked where the "fishes" were "kicking it"; Smith understood him to be asking where he could find rival Toonerville gang members.

Once Smith agreed to direct Lopez and the others to Toonerville territory they all got into the Murano. Jasmin was in the front passenger seat and Smith, Vallin, Taracena, and Valdez were in the back. The shotgun Valdez usually had with him was on the floor at his feet. Lopez drove them to an area in Tujunga looking for Toonerville gang members and circled around several times until they saw a woman and two men, Stanton, Clewley, and Burgess, walking on Samoa Avenue. Lopez stopped alongside them, asked them where they were from, and when one of the men said "Toonerville," Lopez reached across Jasmin with his gun and fired at them approximately seven to nine times. Just before Lopez fired Valdez and Vallin yelled out, "West Side Locos." As Lopez drove away Valdez asked him why he had not told him he was going to shoot, adding either that he would have fired the shotgun or he would have done something.

Once out of the area Lopez parked so that he could urinate on his hands and change his shirt. He explained to Smith that urine removed the gun powder from his hands.

December 10, 2007 (Counts 5, 6 & 10-12)

Witnesses testified that Lopez was again driving the Nissan Murano. His passengers were Yair Pablo (Pablo), Valdez, Jasmin, Vallin, and Taracena. Lopez drove to Bemis Street, near Chevy Chase Park, the territory of the Toonerville gang. Pablo, a West Side Locos member, testified that the Toonerville gang was an enemy of the West Side Locos gang. As they approached the area Valdez picked up the shotgun from the floorboard, held it in his hand, and said they were going to "blast the fishes" at Toonerville.

Lopez drove toward several people who appeared to be gang members in the front yard of a house, behind a gate. As they passed, Lopez fired his handgun through the passenger window across Jasmin. Valdez opened the rear passenger door and fired the shotgun at the unarmed people. As they fired, Valdez and Lopez screamed "West Side Locos." Vallin testified that he saw one man fall and the other two run away.

Garcia testified that he was the man who appeared to fall. Garcia had been conversing with some acquaintances when he saw the red SUV approach. He heard 10 to 15 gunshots as he ran away and threw himself on the ground. Garcia was shot in the abdomen and taken to the hospital in critical condition, where he underwent several surgeries. Garcia was left with a large vertical scar along his entire abdomen.

As Lopez was driving away a car coming in the opposite direction blocked the street. Lopez pointed his gun at the car, it was backed up and the way was cleared. Lopez parked on a side street so that he and Valdez could urinate on their hands. They continued on with Lopez speeding up to 80 or 90 miles per hour. Pablo testified that Lopez ignored his requests to slow down. Seeing that Pablo was nervous Taracena attempted to calm him by saying, "Don't worry. We've been doing this for awhile." Taracena then asked Pablo, "Did you hear about yesterday?"

The Murano was soon followed by a police car. Lopez ignored the police siren and drove to the freeway where Vallin and Jasmin threw the shotgun and handgun out of the car. Lopez continued to flee the police at high speeds until they were eventually stopped and apprehended in Glendale.

After their arrest, Vallin and Valdez were placed in the same jail cell and excerpts of their recorded conversation, which was in both English and Spanish, were played for the jury. Vallin testified that the translation admitted into evidence was accurate. The transcript begins with Vallin asking Valdez whether he knew that they had found the "shotie." Valdez replied, Yes, fool." Vallin then asked whether he knew where they had found Valdez's fingerprints. Valdez replied, "On the trigger." Valdez told Vallin he was being charged "for the one on Chevy Chase" and replied, "Yeah," when Vallin asked, "The one on Monday?" Later in the conversation, Valdez said, "I'm going to do some

time, dog. The damned Pescado (fish), from the park, fool, he -- he puts the fucking finger on me, that son of a bitch, I'm going to kill him when I get out, fool." Vallin paraphrased a newspaper article for Valdez as follows: "They were in a stolen car. And there was a couple shootings prior to that. Some shit like that." Valdez replied, "Shit. Son of a fucking bitch, homes. We should have burned that damned -- the clothes and the damned car, and we should have left, fool. We should have hid the guns far away, fool."

Gang evidence

The prosecution's gang expert, Glendale Police Department Detective Sean Riley, testified as to the history, characteristics, behavior, activities, and rivalry of the West Side Locos and Toonerville gangs. The two gangs were once affiliated; the West Side Locos gang was a "clique" of Toonerville until a dispute caused the West Side Locos to break away. Since then, there has been an extremely bitter rivalry between the two gangs. Each gang claims a territory as its "turf" which its members live and die to protect. The gangs protect their turf by shootings, beatings, and other crimes intended to instill fear and respect in the neighborhood. The West Side Locos gang claimed the entire west side of Glendale. "Fish" is a term the West Side Locos gang used to mean a Toonerville gang member. The term is extremely disrespectful and likely to provoke violence. The West Side Locos use the expression "go fishing" to mean assault or attempt to murder a Toonerville member.

Detective Riley explained that respect was the ultimate goal of any gang member. Garnering respect elevated the individual member's status within the gang and was earned by committing crimes. Although withstanding a beating without showing cowardice was the usual method of joining a gang, new members could also join by committing a crime for the benefit of the gang. The more serious the crime, the greater the status and respect gang members earned. Shootings earned great respect not only for the shooter but also for those involved with the shooter. If a member did not retaliate for an assault by a rival gang he would lose respect and status in his own gang. Status was lost by appearing weak.

Detective Riley had been the investigator in a shooting at the Glen Capri Hotel which occurred about a month prior to the shootings in this case. He suspected that the Toonerville gang had targeted West Side Locos members, including Lopez. Detective Riley gave his expert opinion that the defendants acted in association with gang members for the benefit of the West Side Locos gang in these retaliation shootings. Detective Riley explained that shooting Toonerville gang members in retaliation for the Glen Capri Hotel shooting would benefit the entire West Side Locos gang, as tolerating assaults by rival gangs in West Side Locos territory would make the Locos appear weak, thereby diminishing their control over the community.

Fingerprint evidence

Soon after Detective Riley's testimony, the prosecutor notified the trial court that he had just learned that a fingerprint taken from a beer bottle at the Glen Capri Hotel had been matched to Lopez, and that he wished to present evidence regarding the fingerprint. Lopez's counsel moved for a mistrial or in the alternative, a brief continuance to review the reports and possibly hire an expert. Codefendants' counsel moved to exclude the evidence under Evidence Code section 352. The court ordered the prosecution to turn over all the reports regarding the Glen Capri Hotel shooting, and gave defense counsel 30 minutes to review them. After reviewing the reports, Lopez's counsel explained to the court that he had intended to argue that the People had not proven motive because there was no evidence that Lopez was present during the Glen Capri Hotel shooting. He would therefore need time to develop a response to the fingerprint evidence.

The court denied the motion for mistrial and overruled the objections. Detective Riley then testified that Lopez's fingerprint was found on a beer container inside the room at the Glen Capri Hotel.

During a jury instruction conference three days after Detective Riley's testimony, Lopez's counsel renewed his request for a continuance. Counsel had contacted two fingerprint experts but had not heard back from them. The trial court recessed for one day and assisted in locating a third expert. The expert was retained, reviewed the fingerprint evidence, and concluded that the fingerprint found in the Glen Capri Hotel

belonged to Lopez. The expert found however that mislabeling had occurred, making it appear that a print had been lifted from a beer can, rather than a soda can. Defense counsel asked for additional time to subpoena the officers who collected the evidence and the prosecution's fingerprint expert. The trial court denied the second motion for continuance.

5. Defense Evidence

Sandra De Avila (De Avila), a longtime friend of Lopez's mother, testified that Lopez stayed at her home in Glendale from approximately 4:00 p.m. on December 7, 2007, until the following Monday, December 10. It was the first time he had come to her home. Although De Avila knew by the end of 2007 that Lopez had been charged with murder, she never informed the police that he had been at her house that weekend.

Lopez testified admitting that he was a West Side Locos gang member, but denying any involvement in the shooting on December 7, 2007. He claimed that he spent that weekend with De Avila.

Lopez testified that after Vallin telephoned him on December 10, 2007, he took the train to Palmdale and met Vallin, Taracena, and Valdez at a hotel. When Vallin told Lopez that there had been some shootings and he wanted to get rid of a Nissan Murano, Lopez agreed to help him. Lopez denied that he had stolen the Nissan Murano in July 2007, as he was in prison at the time. Not knowing what to do with the car, Lopez drove it around for a while before returning to the hotel where he suggested to Vallin that they go to Glendale.

When they reached Glendale Vallin took over the driving and went to Chevy Chase park where Vallin and Pablo, whom Lopez barely knew, shot at some people. Vallin was still driving when the high-speed police pursuit ensued. There had been no conversation about fishing and Lopez had no idea there would be a shooting that day. Lopez claimed that he would not shoot at Toonerville members although they were rivals of his own gang, because his mother was a Toonerville member. He denied having urinated on his hands.

Lopez denied that Jasmin was his girlfriend and claimed that he barely knew her. He also denied ever going to Smith's home or having a conversation with him about fish or the shooting at the Glen Capri Hotel. Lopez claimed he did not know of any shooting that had occurred at the Glen Capri Hotel. Lopez admitted that he had been to the hotel with West Side Locos gang members who had rented a room for several days for parties. Lopez attended a party there but was not there at the time of the shooting.

Catherine McLaughlin testified that on December 9, 2007, she was outside her home on Samoa Street when she saw two men and a woman walking. A red car pulled up to them, stopped, and a young, light-skinned Hispanic man with black hair and a mustache yelled from the front passenger seat. She then heard six or seven gunshots.

Aysia Navarette testified that on December 10, 2007, between 3:00 and 4:00 p.m., she was in her father's car near Brunswick Avenue in Glendale when she heard gunshots. A dark-colored SUV sped past her, followed by a dark blue or dark gray mid-90's Honda. The Honda's front seat passenger, a Latino man, had a gun in his right hand and appeared to be shooting at the SUV. One gunshot hit the windshield of the car in which Navarette was riding.

DISCUSSION

I. Lopez's Appeal

A. Jasmin unavailable

Lopez contends that the trial court violated his constitutional rights to due process and confrontation by ruling that Jasmin was unavailable as a witness and admitting her preliminary hearing testimony. (See U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) Lopez claims that he was prejudiced by the ruling because Jasmin was the only witness to the December 7 shooting at the liquor store (counts 5, 8 & 9).

The constitutional right to confront witnesses is not absolute, but subject to an exception which permits the admission of prior testimony, such as preliminary hearing testimony, when a witness is unavailable at trial. (*People v. Herrera* (2010) 49 Cal.4th 613, 621 (*Herrera*), citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 295, and *People v. Cromer* (2001) 24 Cal.4th 889, 897 (*Cromer*).) The exception is codified in Evidence

Code section 1291, subdivision (a)(2), which "provides that 'former testimony,' such as preliminary hearing testimony, is not made inadmissible by the hearsay rule if 'the declarant is unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' Thus, when the requirements of section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation." (*Herrera*, *supra*, at p. 621, fn. omitted.)

Before the exception can be applied, the prosecution must demonstrate that the witness is unavailable, and that a good faith effort was made to obtain the witness's presence at trial. (*Ohio v. Roberts* (1980) 448 U.S. 56, 65; *Cromer*, *supra*, 24 Cal.4th at p. 897.) "[U]nder California law the prosecution must show reasonable or due diligence in locating the witness." (*Cromer*, at p. 897, fn. omitted.)

We review the trial court's determination of due diligence de novo, considering "'the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' [Citations.]" (*Herrera*, *supra*, 49 Cal.4th at p. 622.) "[D]iligence has been found when the prosecution's efforts are timely, reasonably extensive and carried out over a reasonable period." (*People v. Bunyard* (2009) 45 Cal.4th 836, 856.) In contrast, diligence has been found lacking where the prosecution's efforts were "perfunctory or obviously negligent." (*Id*. at p. 855.) To the extent the evidence is disputed, "the trial court's resolution of disputed factual issues, often by determining the credibility of witnesses, is reviewed deferentially on appeal under the substantial evidence standard." (*Cromer*, *supra*, 24 Cal.4th at p. 902.)

The prosecution called Detective Jose Martinez, the lead investigator in this case. We agree with the trial court that Detective Martinez's testimony established due diligence. He testified that he was present at the preliminary hearing which Jasmin attended with her father. At that time, she agreed to keep Detective Martinez informed of her whereabouts. Jasmin lived near the police station where Detective Martinez worked

and he would check her residence periodically, to confirm she still lived there. On or shortly before April 13, 2010,[7] Detective Martinez went to Jasmin's home and spoke to her parents. It was then he learned that Jasmin had moved to Mexico. Jasmin's father, Jose Alfredo Ruiz (Ruiz), told Detective Martinez that Jasmin had left for Mexico soon after the preliminary hearing, but returned after six months. Later, she married and moved to Mexico City with her husband and her parents lost contact with her. The parents claimed that although they had spoken to her by telephone they did not have her number; and although Ruiz had family in Mexico he claimed that he had no telephone numbers for his relatives. Detective Martinez did not believe they were telling the truth, and knew that Jasmin was afraid to testify. Detective Martinez did not check with the Mexican consulate, embassy, or other government agency because he had no contact information that could be traced.

Shortly after trial began Ruiz took his brother's ashes to Mexico for burial. Before he left Detective Martinez asked him to find Jasmin and tell her that she was needed in court. Detective Martinez had Ruiz's cell phone number and remained in contact. During one call, Ruiz told him that he had seen Jasmin and had given her Detective Martinez's telephone number. After that, Detective Martinez had several messages from Jasmin on his answering machine, and eventually spoke with her on May 8, 2010, two days before the due diligence hearing. Jasmin said she was living in Mexico City and claimed that she had not lived at her present home long enough to know the address or have a telephone.[8] Detective Martinez told her that she needed to come to court and that the district attorney would pay for her travel expense. She replied that she would call him later. On the morning of the hearing, Jasmin left a message that she would call the next day.

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[7] The preliminary hearing took place in October 2008. Trial did not begin until April 2010. The first witness was sworn April 29, 2010.

[8] Detective Martinez could tell that Jasmin was in fact calling from Mexico, as the sounds of the operation of Mexican telephones were distinctive.

Lopez contends that the efforts to locate Jasmin were unreasonably delayed and perfunctory. We disagree. "The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case . . . .' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) Although not required to do so, Detective Martinez did in fact keep periodic tabs on Jasmin. He knew where she was employed and monitored the home where she lived with her parents.

Further, investigation into a witness's whereabouts begun just before trial does not establish an unreasonable delay unless the prosecution had reason to believe that the witness had changed residence. (See *Herrera*, *supra*, 49 Cal.4th at pp. 629-630.) Nor is the prosecution "required, absent knowledge of a 'substantial risk that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing. [Citations.]" (*People v. Wilson*, *supra*, 36 Cal.4th at p. 342; see, e.g., *People v. Louis* (1986) 42 Cal.3d 969, 989 [prosecution should not have agreed to release witness on his own recognizance, knowing he was a criminally insane, convicted felon who habitually failed to appear in court], disapproved on other grounds in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.) Detective Martinez's information did not suggest that Jasmin would move to Mexico and fail to appear. She had family and a job in Los Angeles and claimed to be an American citizen. Although fearful, she had testified at the preliminary hearing and had agreed to testify at trial.

Citing *People v. Sandoval* (2001) 87 Cal.App.4th 1425 (*Sandoval*), Lopez argues that the prosecution did not make a reasonable effort to find Jasmin and bring her back for trial because Detective Martinez did not seek the assistance of Mexican authorities under a treaty with the Mexican government, excerpts of which he has attached to his opening brief. From our review of the attached documents and as stated in *Sandoval*, the treaty provides that Mexico would relay the California court's request that the witness appear for trial at the prosecution's expense. (*Id* at p. 1439.) Here there was no need to relay a request through Mexican authorities because Detective Martinez was able to speak to Jasmin by telephone, request that she appear and offer to pay her expenses. As

there was no benefit to using the Mexican authorities to contact Jasmin, he was not required to do so. (See *Herrera*, *supra*, 49 Cal.4th at p. 627.)

There is no merit to Lopez's argument that Detective Martinez's efforts were less diligent than the efforts found unreasonable in *Sandoval*. In *Sandoval*, the witness had disclosed at the preliminary hearing that he was in the country illegally and though the prosecution located him after he was deported, they refused to pay his expenses or arrange for a visa. (*Sandoval*, *supra*, 87 Cal.App.4th at p. 1432.) Here, in contrast, Detective Martinez reached Jasmin by telephone. There was no indication that she would need a visa and Detective Martinez offered to pay her expenses.

Relying on *Herrera*, *supra*, 49 Cal.4th at pages 618-620, Lopez argues that Detective Martinez should have enlisted the assistance of Interpol or the local police in Mexico, as the detective did in that case. However, Detective Martinez succeeded in contacting Jasmin, while in *Herrera*, the detective had no contact with the witness. The California Supreme Court expressly declined to "decide what additional efforts, if any, might be constitutionally required to establish good faith in the event contact with an absent witness is made. [Citations.]" (*Id*. at p. 627, fn. 8.)

Lopez also argues that if Jasmin was in fact a United States citizen and had registered with the Mexican authorities *and* if Detective Martinez had used Interpol or Mexican police to find her exact location, he could have obtained a subpoena in federal court under section 1783 of title 28 of the United States Code. Relying on *People v. St. Germain* (1982) 138 Cal.App.3d 507 (*St. Germain*), Lopez suggests that the failure to seek a federal subpoena precluded a finding that Jasmin was unavailable. In that case, a federal subpoena was held to be the "*sine qua non* completely missing from the proof . . ." because Evidence Code section 240, subdivision (a)(5) required the People to present evidence of an attempt '"to procure his attendance by the court's process."' (*St. Germain*, *supra*, at p. 517.)

Lopez's comparison falters on its facts, as they are very different in each case. In *St. Germain*, despite knowing at the time of the preliminary hearing that the witness was a lawful United States resident who lived outside the United States, and despite knowing

her foreign address, the People made no effort to secure a subpoena. (See *St. Germain*, *supra*, 138 Cal.App.3d at pp. 516-517.) Four months after the witness left the United States and 10 days before trial, the district attorney's office wrote to the witness to determine whether she was available to appear in court, and in essence, assuring her that if not, the court would permit the use of her prior testimony. (*Id*. at p. 516 & fn. 5.) Three days prior to trial the witness telephoned and said that returning to the United States was "'totally out of the question . . . .'" (*Id*. at p. 516.)

Here, by contrast, Jasmin lived in Los Angeles with her parents, was employed, claimed to be a United States citizen, and had told Detective Martinez that she would testify at trial. Detective Martinez had checked on her periodically between the preliminary hearing and trial and had no information until shortly before trial that she might not be available. Despite Detective Martinez's regular and timely efforts, there was insufficient time to search embassy records, obtain the cooperation of local police in finding Jasmin, file an action in federal court, and have a subpoena served. The law does not require the People to attempt the impossible, but only to make a reasonable, good faith effort to obtain a witness's presence at trial. (*Herrera, supra*, 49 Cal.4th at p. 622, citing *Ohio v. Roberts*, *supra*, 448 U.S. at p. 74.) We conclude that Detective Martinez did just that, and that the trial court did not err in finding due diligence.

B. Fingerprint evidence

1. No *Brady* violation

Lopez contends that the tardy disclosure of fingerprint evidence resulted in a denial of his due process right to a fair trial by impairing his constitutional rights to effective assistance of counsel, confrontation, and a jury trial.

These constitutional claims have no merit.

The failure of the prosecution to disclose favorable evidence to the defendant results in a denial of due process under the United States Constitution if the favorable evidence was material to the issue of guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*).) This obligation encompasses both impeachment and

exculpatory evidence, and exists regardless of whether the defendant has made a specific request for the evidence. (*Strickler v. Greene* (1999) 527 U.S. 263, 280.)

The belatedly discovered fingerprint evidence supported the expert's opinion that the Glen Capri Hotel shooting provided a retaliatory motive for the West Side Locos gang. It also supported the prosecution's argument in summation that Lopez's presence at that shooting provided Lopez with a personal retaliatory motive. The prosecution has no federal constitutional duty to disclose evidence that is unfavorable to the defense. (*People v. Burgener* (2003) 29 Cal.4th 833, 875.) In particular, evidence of the defendant's motive is not exculpatory and its nondisclosure is not a *Brady* violation. (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1210-1211.)

2. No statutory violation

Lopez also contends that the trial court should have excluded the fingerprint evidence under California's criminal discovery statute because it prejudiced his defense strategy. (See § 1054 et seq.)

California statute requires the prosecution to disclose before trial certain materials and information, including reports regarding physical evidence, statements of experts, and the results of comparisons. (§ 1054.1.) We review the court's ruling for an abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Although the trial court may consider a wide range of sanctions for the prosecution's failure to comply with the statute, excluding evidence is not an appropriate remedy absent a showing of willful conduct and significant prejudice. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758; § 1054.5, subds. (b) & (c).) As Lopez made no assertion of willful misconduct at trial and does not claim prosecutorial misconduct on appeal, we cannot find an abuse of discretion in the trial court's refusal to exclude the fingerprint evidence.

Regardless, Lopez has not shown significant prejudice. He argues that if the fingerprint evidence had been disclosed in a timely manner, he would have been able either to contest the results or adjust his defense strategy. Lopez's argument has no merit, as the defense expert confirmed that the fingerprint belonged to Lopez. Further, Lopez fails to explain how his strategy was impaired. Before the fingerprint evidence

came to light, Detective Riley testified that he had investigated the Glen Capri Hotel shooting and suspected that Toonerville gang members had targeted Lopez and others. Smith had already testified that he had overheard Lopez say that Toonerville members had shot at him at the Glen Capri Hotel. Jasmin also testified that she had overheard Lopez and other gang members discussing a shooting by Toonerville members two weeks before December 9, 2007; one of them said that Lopez had been a target of the shooting. Thus Lopez's fingerprint merely substantiated evidence previously admitted against him.

3. Continuance

Lopez contends that the trial court should have granted him a further continuance due to the fingerprint evidence. A continuance in a criminal proceeding "shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) A trial court has broad discretion in determining whether good cause exists for a continuance. (*People v. Riggs* (2008) 44 Cal.4th 248, 296.) It is the defendant's burden to establish an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

It is important for the trial court to consider whether a continuance would be useful; a defendant must demonstrate usefulness on the record with a showing that additional time would yield material evidence. (*People v. Beeler*, *supra*, 9 Cal.4th at pp. 1003-1004.) Speculative need does not establish good cause for a continuance. (*Id*. at p. 1004.)

The need for the first continuance during trial was to retain a fingerprint expert and review all reports regarding the Glen Capri Hotel shooting. The 24-hour delay permitted by the trial court served that purpose.

In making the second motion for continuance defense counsel cited his expert's observation that mislabeling had occurred in the reports, making it appear that a print had been lifted from a beer can, rather than a soda can. Counsel claimed that he needed time to subpoena the officers who collected the evidence and the prosecution's fingerprint expert. Counsel explained that after cross-examination of those witnesses he would confer with the defense expert about developing "certain issues." In denying the motion to continue, the trial court gave Lopez the opportunity to reopen his defense in order to

call his fingerprint expert. Defense counsel declined as that expert would only reinforce the prosecution's theory.

As this record demonstrates, defense counsel did not establish that a continuance would yield material evidence and thus any need for a continuance was speculative. As Lopez failed to show that a continuance would have been useful, denial of the continuance was not an abuse of discretion. (See *People v. Beeler, supra,* 9 Cal.4th at pp. 1003-1004.)

Moreover, reversal is not warranted without a showing of prejudice. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) Lopez argues that he was prejudiced by his inability to prepare his case sufficiently to rebut the prosecution's motive theory after it was buttressed by the fingerprint evidence. Again, he has failed to demonstrate how additional time would have changed the fingerprint evidence which the defense's own expert found to match Lopez's.

In addition, even if Lopez had successfully cast doubt on the suggestion that he harbored a personal motive, there would remain Detective Riley's opinion that every West Side Locos gang member had a motive to shoot at Toonerville gang members. Detective Riley opined that such shootings enforced the gang's power to control its territory and brought respect and status to any member who participated in the shooting. As Lopez admitted that he was a member of the West Side Locos gang, he had a motive to participate in the shootings irrespective of any personal motive.

Finally, the jury necessarily rejected Lopez's alibi and believed the testimony of the eyewitnesses to the shootings, Smith, Vallin, Pablo and Jasmin, that defendant had fired at the victims. Whatever Lopez's motive, it is not reasonably probable Lopez would have achieved a more favorable result without the fingerprint evidence. Lopez has thus failed to demonstrate that he was prejudiced by the denial of a continuance. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837 (*Watson*).)

C. Adoptive admission

Lopez contends that the trial court abused its discretion in admitting Pablo's testimony that Taracena told him in the Murano, "Don't worry. We've been doing this

for awhile"; and asked, "Did you hear about yesterday?" Lopez argues that the admission of the testimony resulted in a violation of his constitutional right to confront and cross-examine witnesses against him.

The prosecution offered the testimony both as an adoptive admission and as a coconspirator statement made during an ongoing conspiracy. Lopez and the other defendants objected to the testimony as a violation of the *Aranda*/*Bruton* rule, which precludes the admission of a statement or confession of a nontestifying defendant that inculpates another defendant or defendants. (See *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518.)

The trial court admitted the testimony as an adoptive admission and read CALCRIM No. 357 to the jury.[9] "[T]he admission of an out-of-court statement as the predicate for an adoptive admission does not violate the principles enunciated in . . . in *Aranda* and *Bruton*. [Citations.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 662.) Adoptive admissions are an exception to the hearsay rule and do not violate the Sixth Amendment right to confrontation. (*People v. Cruz* (2008) 44 Cal.4th 636, 672.)

"In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence sufficient to sustain a finding that: (a) the defendant heard and understood the statement under circumstances that normally

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9 The jury was read CALCRIM No. 357 as follows (in relevant part): "You have heard testimony that . . . Taracena made a statement to Yair Pablo after the shooting on December 10, 2007, which they were inside the vehicle and while the other defendants were present. If you conclude that . . . Taracena made such a statement . . . that tended to connect himself and the other defendants with the commission of a crime and the other defendants did not deny it, you must decide whether each of the following is true: one, the statement was made to the defendants or made in their presence; two, the other defendants heard and understood the statement; three, the other defendants would, under all the circumstances, naturally have denied the statement if they thought it was not true; and, four, the other defendants could have denied it but did not. If you decide that all of these requirements have been met, you may conclude that the defendants admitted the statement as -- was true. If you decide that any of these requirements has not been met, you may consider the statement against defendant Taracena, but you must not consider the statement against the other defendants . . . or the other defendants' response for any purpose."

would call for a response; and (b) by words or conduct, the defendant adopted the statement as true. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 535.) Whether a statement is admissible as an adoptive admission is determined in the first instance by the trial court as a preliminary fact pursuant to Evidence Code section 403. (*People v. Pic'l* (1981) 114 Cal.App.3d 824, 860, disapproved on another point in *People v. Kimble* (1988) 44 Cal.3d 480, 498.) "To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. [Citation.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

In determining the existence of preliminary facts, the trial court applies a preponderance of the evidence standard. (*People v. Pic'l, supra,* 114 Cal.App.3d at p. 860.) We review the trial court's determination of preliminary facts for an abuse of discretion. (See *People v. Lucas* (1995) 12 Cal.4th 415, 466 ["whether the foundational evidence is sufficiently substantial is a matter within the court's discretion"].)

Lopez argues that there was no evidence that he adopted Taracena's admission either by word or conduct because he said nothing in response to Taracena's words to Pablo. Silence, however, may be sufficient to imply an adoptive admission so long as it does not appear that the defendant was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution. (*People v. Preston* (1973) 9 Cal.3d 308, 314.) As the Fifth Amendment was not at issue here, the trial court could reasonably infer adoption by silence.

Lopez also argues that Taracena's statement was inadmissible because there was insufficient evidence to support an inference that Lopez heard the statement. He points out that in both *People v. Jennings, supra*, 50 Cal.4th at page 662, and *People v. Combs* (2004) 34 Cal.4th 821, 841-843, the declarant had been sitting next to the defendant in a joint interview; and in *People v. Jurado* (2006) 38 Cal.4th 72, 116-117, the defendant sat next to the declarant on the same couch; it was unlikely that the defendants did not hear in those cases. Here Lopez was driving and the speaker was in the back seat. Lopez thus

concludes that there was no evidence that he "necessarily" heard the comments or had an opportunity to respond to them.

The test for admissibility is not, as Lopez's argument suggests, whether the preliminary facts establish that the defendant *actually* heard the statement, but whether the circumstances reasonably support an inference that he heard and understood the statement. (*People v. Preston*, *supra*, 9 Cal.3d at p. 314.) We agree with respondent that such circumstances may be found in this case: Lopez's location in the front seat of the car was close enough to have heard the conversation in the back. It then became a question for the jury whether Lopez did in fact hear and understand the statement and had a fair opportunity to respond to it. (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1011; *People v. Preston*, *supra*, at p. 316.)[10] We find no abuse of discretion.

We also agree with respondent that if any error had occurred it was harmless under either the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); or the standard of *Watson*, *supra*, 46 Cal.2d at pages 836-837. First, the jury's use of the statement was very restricted: the jurors were instructed not to consider the statement for any purpose unless it was found that Taracena made the statement, the statement connected *all* the defendants to the crime, *all* the defendants heard, understood and would naturally have denied it, and that the defendants could have denied the statement but did not. We presume the jurors understood and followed the trial court's instruction. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Second, this was not a close case as Lopez suggests. Three eyewitnesses, Smith, Jasmin, and Vallin testified that Lopez fired his weapon from the car at the victims of the December 9 shooting. Stanton, one of the

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10 The trial court could also have admitted Taracena's statement as that of a coconspirator made in furtherance of the conspiracy, without running afoul of *Aranda*/*Bruton*. (See *People v. Brawley* (1969) 1 Cal.3d 277, 286; Evid. Code, § 1223.) The trial court rejected this theory because it believed that the conspiracy had ended once the shooting had been accomplished and the coconspirators were leaving the scene. However, a conspiracy may be found to have continued during the conspirators' flight from the scene. (*People v. Davis* (1962) 210 Cal.App.2d 721, 735; *People v. Buono* (1961) 191 Cal.App.2d 203, 233-234.)

victims in that shooting, identified Lopez from a six-pack photographic lineup as the shooter. Under such circumstances the court's ruling was harmless under any standard. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1197 [one eyewitness plus evidence placing the defendant at the scene].)

II. Valdez's appeal

A. Jailhouse conversation

1. Assistance of counsel

In a motion in limine Valdez's counsel objected under Evidence Code section 352 to the admission of the recorded conversation between Valdez and Vallin in which Valdez said: "I'm going to do some time, dog. The damned Pescado (fish), from the park, fool, he -- he puts the fucking finger on me, that son of a bitch, I'm going to kill him when I get out, fool." Valdez now contends that his counsel was ineffective because he failed to object to the evidence under Evidence Code section 1101, subdivision (a), which, with exceptions, prohibits "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion." Valdez targets the words, "I'm going to kill him when I get out," arguing that because they demonstrate a propensity to plan or deliberate a murder, they amount to inadmissible character evidence.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) It is the defendant's burden to demonstrate that counsel's performance was inadequate. (*People v. Lucas, supra,* 12 Cal.4th at p. 436.) He must also demonstrate that prejudice resulted from counsel errors. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Counsel's failure to make unmeritorious motions or objections does not demonstrate ineffective assistance. (*People v. Price* (1991) 1 Cal.4th 324, 387.) Thus Valdez must demonstrate that his jailhouse admissions were inadmissible under Evidence Code section 1101, subdivision (a), and that a more

favorable outcome would have resulted from an appropriate objection to them. (See *Strickland v. Washington*, *supra*, at p. 694; *People v. Rodrigues*, *supra*, at p. 1126.)

Evidence of uncharged misconduct is not excludable under Evidence Code section 1101, subdivision (a), when such evidence is relevant to establish some fact other than the defendant's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*); Evid. Code, § 1101, subd. (b).) Evidence of uncharged misconduct may be admissible to show a consciousness of guilt. (*People v. Farnam* (2002) 28 Cal.4th 107, 154.) A statement of intent to engage in future misconduct is relevant evidence of a consciousness of guilt if it relates to the facts of the crime for which the defendant is on trial. (Cf. *People v. Pollock* (1939) 31 Cal.App.2d 747, 753, 756 [defendant told wife after murder that he would return to '"finish the job"'].) Further, any conduct that evinces an intent or desire to dispose of evidence implies a consciousness of guilt. (*People v. Wong* (1973) 35 Cal.App.3d 812, 831; see *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007 [request that brother kill witness].)

Valdez argues that any such inference is speculative because it concerned future misconduct and the threat could simply have been an expression of anger that the victim had falsely identified him as a shooter. Threats of possible future criminal conduct are inadmissible when they are too general or generic, or relate only to a hypothetical situation. (See *People v. Karis* (1988) 46 Cal.3d 612, 634, 636 [broad, generic threat].) Here Valdez's threat was specifically directed to the victim of the December 10 shooting, and the entirety of the recording made clear that Valdez had been in the van holding the shotgun on that day. There was nothing generic or hypothetical, and thus nothing speculative, about the threat.

Quoting *Ewoldt*, *supra*, 7 Cal.4th a page 404, Valdez concludes that the statement lacked the "*substantial* probative value" required for admissibility. We disagree. The circumstances surrounding an admission may be considered to provide context which demonstrates its relevance to the particular case. (*People v. Robinson* (2000) 85 Cal.App.4th 434, 444-445.) The circumstances provided such context here: in other parts of the jailhouse conversation, Valdez acknowledged that the shooting had taken

place on Monday, the "shotie" had been recovered, his fingerprint was on the trigger, and that the van had been stolen.

We conclude that because Lopez's threat to kill the shooting victim implied a consciousness of guilt when considered with the entire jailhouse recording, the challenged admission was admissible under subdivision (b) of Evidence Code section 1101. Valdez has thus failed to demonstrate that counsel should have based his objection on Evidence Code section 1101, subdivision (a).

Moreover, Valdez has failed to establish prejudice. Valdez argues that because propensity evidence may be "highly inflammatory" (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007), the evidence of his propensity to plan murder probably caused the jury to infer that he deliberated the attempted murder of Garcia.[11] Valdez argues that without such evidence there was a reasonable probability that at least one juror would not have found true the deliberation allegation in count 10.

We find no such reasonable probability. Quite apart from any propensity to plan murder, there was overwhelming evidence of deliberation in each of the three categories of evidence that point to deliberation: planning activity, motive, and manner of killing. (See *People v. Pride* (1992) 3 Cal.4th 195, 247.) After the shooting of the day before, Valdez told Lopez that Lopez should have told Valdez of the plan to shoot, because Valdez would have shot the victim with the shotgun. In the van on December 10, Valdez said that they were going to "blast the fishes," meaning Toonerville gang members, the enemies of the West Side Locos gang. As they approached the park Valdez took the shotgun from the floorboard, held it in his hand and opened the rear passenger door in order to fire at unarmed people while screaming "West Side Locos." When a gang

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[11] Lopez suggests that the prosecutor's argument made the evidence all the more inflammatory. As respondent notes, however, the prosecutor did not argue that the evidence showed a propensity to plan a murder or that it was evidence of deliberation. The prosecution argued that the jailhouse conversation alone showed that Valdez fired his shotgun at Garcia, and made the apt observation that the admission was "damning" proof of guilt.

member fires multiple shots at a group of people in rival gang territory it is reasonable to infer that he deliberated. (See *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192.)

Valdez complains that the evidence of the shooting came primarily from Pablo's testimony which Valdez describes as so inconsistent and uncorroborated that without propensity evidence, at least one juror could have found that "Valdez heedlessly followed and emulated Lopez without deliberating about the consequences."[12] On the contrary, evidence of deliberation also came from the testimony of Vallin and Smith. Both Vallin and Smith testified that the day before Valdez had asked Lopez why he had not told Valdez he was going to shoot, adding either that Valdez would have fired or would have done something. Both Pablo and Vallin testified that Valdez opened the van door in order to shoot. Vallin testified that Valdez fired three or four times.

"'[T]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 332.) Nevertheless, the evidence here shows long reflection inconsistent with a quick or heedless reaction. Valdez kept his shotgun close, remained with Lopez despite the previous day's shooting, rode in the van with gang members into rival gang territory, expressed a desire to shoot rival gang members, opened his door in order to point his shotgun and fired several times.

We conclude that the evidence of deliberation was so overwhelming that there was no reasonable likelihood that Valdez would have obtained a more favorable outcome had the jury not heard his threat against the victim of that shooting. (See *Chapman*, *supra*, 386 U.S. at p. 24.) As Valdez has failed to show that counsel's performance was inadequate or that he was prejudiced by the admission of the jailhouse threat, his claim of ineffective assistance of counsel has no merit.

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[12] Valdez cites no authority requiring deliberation of *consequences*. Deliberation means "careful weighing of considerations in forming a course of action." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

2. Evidence Code section 352

Valdez contends that the trial court abused its discretion in admitting the jailhouse threat over his objection pursuant to Evidence Code section 352. He further contends that the admission of his statement rendered the trial so unfair as to violate his right to due process under the federal Constitution. Substantial prejudice is inherent in evidence of a defendant's criminal disposition. (*People v. Ewoldt*, *supra*, 7 Cal.4th a p. 404.) Thus, although otherwise admissible, such evidence should be excluded unless the trial court finds "substantial probative value" which is not "'substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citation.]" (*Ibid*., quoting Evid. Code, § 352.)

Valdez argues that as propensity evidence the statement was extremely inflammatory and that its probative value was small, as it was cumulative of the remainder of the jailhouse conversation and of eyewitness testimony. Respondent counters that the threat was corroborative of the accomplices' testimony, not cumulative. We agree. ""'Cumulative evidence is additional evidence of the same character, to the same point," while "Corroborative evidence is additional evidence of a different character, to the same point."' [Citation.]" (*People v. Monteverde* (1952) 111 Cal.App.2d 156, 163, italics omitted.) An admission is of a very different character from the accusatory testimony of accomplices, which is historically viewed as suspect, untrustworthy and unreliable. (See *People v. Belton* (1979) 23 Cal.3d 516, 526.)[13]

Valdez also argues that prejudice outweighed probative value because the threat was cumulative of the admission that preceded the threat: "The damned Pescado from the park, fool -- he puts the fucking finger on me, that son of a bitch." At the same time, however, Valdez argues against this point by complaining that the threat had little probative value because it was ambiguous and could have been merely an expression of anger over a false accusation. The expression of a desire to eliminate a witness goes a

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[13] Here the jury was instructed to view accomplice testimony with caution.

long way in clarifying any ambiguity. As respondent points out, "[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis*, *supra*, 46 Cal.3d at p. 638.)

In any event, the question is not whether we agree with the discretionary ruling of the trial court, but whether the trial court abused its discretion. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) The trial court's discretion will not be disturbed unless it was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.) The record demonstrates that the trial court carefully weighed prejudice against probative value out of the jury's presence, gave careful consideration to Valdez's objection, heard the prosecution's explanation of the relevance of the statement, and concluded that the threat had substantial probative value. We drew the same conclusion and rejected the claim of prejudice in our discussion of Valdez's claim of ineffective assistance of counsel. Thus whether we agreed or disagreed with the result, we do not conclude that the trial court acted arbitrarily, capriciously or in a patently absurd manner in finding that the substantial probative value outweighed the potential prejudice.

Moreover, we agree with respondent that if the trial court had abused its discretion, the jury's verdict would have been the same due to the overwhelming evidence of Valdez's guilt, premeditation, and deliberation as discussed in the previous section. Valdez was thus not prejudiced under any standard. (See *Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

Because we find no abuse of discretion in the trial court's evidentiary ruling, we also reject Valdez's federal due process contention. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

B. Additional presentence custody credit

Valdez contends that he is entitled to one additional day of presentence custody credit. Respondent agrees. Valdez was arrested on December 15, 2007, sentenced on

August 26, 2010, and awarded 985 days of presentence custody credit and 147 days of conduct credit for a total of 1,132 days. As the calculation did not take into account that 2008 was a leap year with an additional day, we will modify the judgment and order the abstract corrected.

DISPOSITION

The judgment against Valdez is modified to include an additional day of presentence custody credit, for a total of 1,133 days. The trial court is directed to prepare a new abstract of judgment reflecting the modified judgment and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST