Filed 7/25/18 P. v. Gonzalez CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL GONZALEZ, Defendant and Appellant.	B255725 (Los Angeles County Super. Ct. No. BA361611)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed in part, remanded in part with instructions.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yank, Deputy Attorneys General, for Plaintiff and Respondent.

In the early morning hours of October 8, 2008, Ron Hamburg and Manuel Martin were showered with bullets as they rode their motorcycles on the 2 freeway north of Los Angeles. Hamburg escaped uninjured, but Martin suffered a fatal wound to the chest.

Defendant Jose Manuel Gonzalez and codefendant Richard Dean Clayborn[1] were charged with and convicted of special circumstance murder, attempted murder, shooting from a motor vehicle, and illegal possession of a firearm in connection with the freeway shooting. The jury also found true various gang and firearm enhancements. Defendant and Clayborn were both sentenced to life without the possibility of parole, plus additional life and determinate terms.

Defendant contends that a significant portion of the prosecution's evidence—tapes of phone calls and jail visits between Clayborn and Clayborn's girlfriend, Lindsay Lilburn—was inadmissible against him. He further contends that the court improperly admitted hearsay evidence through the prosecution's gang expert and irrelevant and prejudicial evidence of an unrelated murder committed by the mother of his child. He also claims the court erroneously prevented him from impeaching a law enforcement witness. Defendant additionally argues that Lilburn's trial testimony inculpating him was inherently improbable, and, absent that testimony, there was insufficient evidence supporting his convictions. He asserts that the cumulative effect of these alleged errors deprived him of a fair trial. He also requests that we review the sealed transcript of the

---

[1] Clayborn initially was party to this appeal, but voluntarily abandoned his appeal pursuant to California Rules of Court, rule 8.316.

in camera proceedings the trial court conducted pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

We affirm the judgment of conviction in full. We remand the matter to the trial court to reconsider imposition of the gun enhancement in light of Penal Code section 12022.53, subdivision (h)[2], which was recently amended by Senate Bill No. 620. (Stats. 2017, ch. 682, §§ 1 & 2.)

PROCEDURAL HISTORY

The Los Angeles County District Attorney filed an amended information charging defendant and Clayborn with various crimes in connection with the October 8, 2008 freeway shooting of Martin and Hamburg. Count 1 charged them with the murder of Martin. (§ 187, subd. (a).) It also included three special circumstance allegations: the murder was intentional and committed by means of lying in wait (§ 190.2, subd. (a)(15)), the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21)), and the murder was intentional and committed while defendants were active participants in a criminal street gang (§ 190.2, subd. (a)(22)). Count 2 charged defendant and Clayborn with the attempted willful, deliberate, and premeditated murder of Hamburg. (§§ 187, subd. (a) & 664.) Counts 3 and 4 charged defendant and Clayborn with shooting from a motor vehicle at Martin (count 3) and Hamburg (count 4). (Former § 12034, subd. (c).)[3] Counts 5 (Clayborn) and 6 (defendant) charged possession

---

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

[3] Effective January 1, 2012, former section 12034 was recodified without substantive change at section 26100. (Stats. 2010, ch. 711, § 4 [repealed]; Stats. 2010, ch. 711, § 6 [reenacted].)

of a firearm by a felon. (Former § 12021, subd. (a)(1).)[4]

The amended information further alleged that all of the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C) (counts 1-4), § 186.22, subd. (b)(1)(B) (count 6).) It also alleged that counts 1-4 involved a principal personally using, discharging, and causing great bodily injury with a firearm (§ 12022.53, subds. (b), (c), (d), and (e)(1)). Additionally, it alleged that defendant and Clayborn both suffered a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and a serious felony conviction (§ 667, subd. (a)(1)), and served prison terms for prior offenses (§ 667.5, subd. (b)).

Defendant and Clayborn were tried jointly before a jury, which convicted them of all charges and found true all of the special allegations. Defendant waived his right to trial on his priors and admitted his prior convictions.

The trial court sentenced defendant to life without the possibility of parole on the murder count, count 1. It imposed an additional consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e). The court imposed and stayed sentences on the other gang and firearms enhancements as to count 1. On count 2, the attempted murder count, the court sentenced defendant to a consecutive sentence of seven years to life, which it doubled to 14 years to life because of defendant's prior strike conviction. The court added a consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e); it imposed and

---

[4] Effective January 1, 2012, former section 12021 was recodified without substantive change at section 29800. (Stats. 2010, ch. 711, § 4 [repealed]; Stats. 2010, ch. 711, § 6 [reenacted].)

stayed sentences on the other gang and firearms enhancements as to count 2. The court also imposed a consecutive term of five years pursuant to section 667, subdivision (a). The court added three consecutive one-year terms to defendant's count 2 sentence pursuant to section 667.5, subdivision (b).

On counts 3 and 4, shooting from a motor vehicle, the court sentenced defendant to the midterm of five years, doubled to 10 years due to his strike, plus an additional five years on each count due to the gang enhancement alleged under section 186.22, subdivision (b)(1)(C). On count 6, the felon-in-possession count, the court imposed the midterm of two years, doubled to four years due to the strike, plus the midterm of three years on the gang enhancement alleged under section 186.22, subdivision (b)(1)(B). The court stayed defendant's sentences on counts 3, 4, and 6 pursuant to section 654. In total, defendant received a sentence of life without the possibility of parole, plus 64 years to life, plus 8 years. The court also imposed various fines and fees.

Defendant timely appealed.

FACTUAL BACKGROUND

I. Background Gang Evidence

A. The Mongols Motorcycle Gang

Special Agent Darrin Kozlowski testified that he was an undercover agent with the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives. Between 2005 and late October 2008, he and two other special agents were part of an undercover operation investigating the Mongols, a motorcycle gang based in southern California. Kozlowski and his compatriots infiltrated the Mongols and were accepted as full members of the gang; Kozlowski served as the "Sergeant at Arms" of the gang's Cypress Park chapter. Kozlowski testified that the Mongols, like many gangs, engaged in various criminal pursuits, including drug and firearm trafficking.

Kozlowski testified that both victims in this case were affiliated with the Mongols. Hamburg was a "hang around," someone who associated with the gang but was not a member. Martin, whose moniker was "Hitman," was the Sergeant at Arms of the Hollywood chapter. Hamburg corroborated this testimony.

Kozlowski explained that the Mongols embraced a "mentality" that they "were the king of the hill type of a gang and they weren't going to let any other gangs or any other types of individual push them around or deal with them in any other sort of way." Thus, the Mongols maintained active rivalries with other gangs, including the Mexican Mafia, a prison gang with connections to Los Angeles street gangs. The rivalry between the Mongols and the Mexican Mafia was "at a heightened state" in 2008 because the national president of the Mongols had published a book that displeased the Mexican Mafia. According to Kozlowski, "there was a new green light put back out on the Mongols from the Mexican Mafia as a result of that."[5]

B. The Mexican Mafia

Former Mexican Mafia member Rene Enriquez testified as an expert on the Mexican Mafia. Enriquez testified that the Mexican Mafia is a prison-based gang that controls the criminal activities of Hispanic street gangs in southern California through threats and violence. "Carnales," certain full-fledged members who are imprisoned, exert control outside prison walls by supervising representatives embedded in most major southern California gangs.

Enriquez became a "carnal" in the Mexican Mafia while incarcerated in 1985, and remained one until he defected from

---

[5] Another witness, former Mexican Mafia member Rene Enriquez, testified that a "green light" on an individual or group targets them for murder.

the organization in 2002. He explained that, as a carnal, he was assigned a geographic territory outside the prison in which he had control over all illicit and illegal activities. He could request that members of Mexican Mafia-affiliated street gangs in his territory "pay tribute . . . in the form of money, drugs, or guns." He could also order violent acts and "green lights."

Though he was no longer a Mexican Mafia member, Enriquez remained familiar with the gang's activities through his role as an informant for various law enforcement organizations. As an informant, he received information that caused him to form an opinion that the Mexican Mafia was in conflict with the Mongols. Enriquez further opined that the conflict began in approximately 2004, when the Mongols began recruiting "Sureños," street gang members willing to engage in violence on behalf of the Mexican Mafia. When these Sureños became Mongols, they ceased paying financial tribute, or "taxes," to the Mexican Mafia. However, they remained Sureños in the eyes of the Mexican Mafia, which disapproved of their refusal to pay taxes. The Mexican Mafia accordingly put a "green light" on the Mongols, which lasted until as late as 2011. Enriquez noted that he had ordered "green lights" for similar infractions during his tenure as a carnal.

Enriquez was not personally familiar with defendant or Clayborn. When shown photographs of Clayborn, however, Enriquez opined that Clayborn was a Sureño based upon his tattoos. Enriquez also noted that Clayborn had tattoos indicating an affiliation with Toonerville, a gang that he knew of but did not have dealings with. Enriquez did not opine on defendant's gang affiliation.

Enriquez listened to a recorded jail call involving Clayborn. He opined that the term "hunting," which Clayborn used during the call, was used by Sureños and carnales to mean "killing." He

further opined that Clayborn's term "post up" meant "to stand ready in your gang territory," and to use violence if necessary. When given a hypothetical that the speaker on the recording had Sureño tattoos, Enriquez opined that the speaker—Clayborn—was talking about "putting in work for the Mexican Mafia, having to do so, that it was being done for the benefit of and in association with the Mexican Mafia."

C. Toonerville

Los Angeles Police Department (LAPD) sergeant John Strasner, who worked on the gang enforcement detail from 2004 to 2008, testified as an expert on the Toonerville gang. Strasner testified that Toonerville is a street gang with approximately 300 to 400 members in Los Angeles, Glendale, and Tujunga. Its members use the letters TVR, the number 13, and a train symbol to identify themselves. Their primary activities include vandalism, narcotics sales, assaults, and murder. Strasner testified that Toonerville members sell drugs to generate funds, some of which they remit to the Mexican Mafia in the form of "taxes." Strasner explained that paying taxes to the Mexican Mafia helps provide Toonerville members with protection if they become incarcerated.

Toonerville members "put in work" and earn respect in the gang by committing crimes. Strasner explained that "the more work you do that furthers the gang increases your stature within the gang" and also "increases the stature of the gang itself within the neighborhood." Toonerville members also retaliate against individuals who cooperate with law enforcement. Strasner testified that cooperation documented in "paperwork" such as police reports or court transcripts places people at risk of serious harm. He gave as an example the case of Breanne Hanna, whom he testified was killed by Toonerville members in February 2009 because the gang believed she had cooperated with a murder

investigation. Strasner identified Jizette Nahapetian and Santiago Ayala as the suspects in the Hanna murder.[6] Another law enforcement witness, Glendale Police Department (GPD) detective Arthur Frank, testified that Nahapetian was "a Toonerville associate" who had "a child together" with defendant. Clayborn's girlfriend, Lilburn, also testified that defendant and Nahapetian had a child together.

Strasner was personally familiar with both defendant and Clayborn. He had arrested defendant in 2005 and Clayborn in 2008. Strasner identified defendant in several photographs of Toonerville members, and opined that defendant was an active Toonerville member in October 2008. Strasner based this opinion on his interaction with defendant, as well as the photographs, in which defendant was throwing Toonerville gang signs, wearing Toonerville clothing, and standing alongside known Toonerville members. Another witness, Toonerville member Juan Balbaneda, also testified that defendant was in the gang and used the moniker "Whisper."

Strasner opined that Clayborn, who had "TVR" tattooed on his neck and "Toonerville" and a train tattooed on his back, was an active Toonerville member in 2008. Another witness, California Highway Patrol officer Randy Thompson, testified that Clayborn admitted his Toonerville membership during a traffic stop of a "reddish Camry" on the 2 freeway in early October 2008.

Strasner testified that he did not know of any "bad blood" between Toonerville and the Mongols in 2008. He was not aware of any "green lights" in 2008.

---

[6] Nahapetian and Ayala subsequently were convicted of the murder. Their convictions were affirmed on appeal. (See *People v. Ayala* (Jan. 11, 2018, B268699) [nonpub. opn.].)

II. The Mix

A. Location

The Mix was a bar located at 2612 Honolulu Street, west of the 2 freeway and south of the 210 freeway. GPD officer Keith Soboleski testified that Honolulu Street became Verdugo Boulevard near the 2 freeway. Soboleski further testified that if one turned right when exiting The Mix, one could enter the southbound 2 freeway via a ramp on Verdugo. That freeway entrance was south of the transition road between the southbound 2 freeway and the eastbound 210 freeway.

GPD detective Petros Kmbikyan testified that one could get to the eastbound 210 freeway by turning left from The Mix, then heading north to an onramp on "the next major street," La Crescenta.

B. Arrivals

On October 7, 2008, undercover special agent Kozlowski, in his capacity as a Mongol Sergeant at Arms, received a phone call from fellow Sergeant at Arms Martin. Martin asked Kozlowski to meet him and other Mongols members at The Mix that evening. Kozlowski testified that Martin told him "there was going to be a Mongol showing at this bar to support one of the other members who had supposedly part ownership in the bar." Kozlowski agreed to go. Later that evening, he and the other undercover agents who had infiltrated the Mongols rode their motorcycles to The Mix.

Kmbikyan testified that he reviewed surveillance videos from The Mix, which were played for the jury and admitted into evidence. The videos showed the agents arrived at The Mix at approximately 9:00 p.m. They parked their bikes in front and entered the bar at approximately 9:10 p.m.

Several other Mongols and Mongol associates, including Martin and Hamburg, arrived at The Mix around 10:30 p.m.

Martin and Hamburg came on motorcycles, which they parked in front, near the agents'. The other Mongols came in a truck.

Additional surveillance video showed Clayborn arrive at The Mix in a burgundy Camry around 11:20 p.m. Defendant arrived around the same time; the parties stipulated that he was at The Mix that evening.

Kmbikyan identified other individuals shown entering The Mix on the surveillance video: Lilburn, Juan Balbaneda, and Matthew Alvarez. Balbaneda testified that he and defendant, who was a longtime family friend and fellow Toonerville member, got a ride to The Mix on October 7, 2008 from Balbaneda's home on Jackson Avenue in Glendale. The driver was a woman whose name Balbaneda did not know; he told detectives in December 2008 that the woman's car was a white Lexus. Balbaneda knew some of the other passengers, including a woman named Jenny, who used the moniker "BooBoo."

Lilburn, Clayborn's girlfriend, testified that she and Clayborn went to The Mix every Tuesday evening. They usually drove separately. On October 7, 2008, Lilburn drove a group of people there in her champagne-colored Lexus. Lilburn recalled picking up Balbaneda and defendant, whom she knew as "Whisper" or "W," from a house on Jackson Avenue in Glendale. She also recalled driving her friend, Jenny "BooBoo" Leal. She did not drive Clayborn that night; he drove himself to The Mix in a burgundy Camry that was registered to Lilburn.

C. Departures

Kozlowski testified that he and the other agents left The Mix before closing time because there was no indication "that there was any kind of tension or any kind of elevated situation escalating between the Mongols and patrons in the bar." Hamburg, Lilburn, and Balbaneda all concurred that nothing of note happened at The Mix that evening. Kozlowski estimated

that he and the other agents left the bar at about 12:30 a.m. on October 8, 2008. They returned to their undercover residence in Altadena within half an hour.

Kmbikyan testified that the surveillance video showed defendant, Clayborn, Lilburn, Balbaneda, and Alvarez leave The Mix as a group at 1:32 a.m. However, Kmbikyan pointed out defendant and Clayborn walking alone together in the parking lot at 1:33 a.m. He further testified that surveillance videos, which the jury watched, showed a burgundy Camry driving through the parking lot around 1:35 to 1:36 a.m. The Camry did not exit the lot; Kmbikyan testified that "it actually makes a 180-degree turn and reverses into one of the spots right over here in the southeast corner of the parking lot . . . and then it turns its headlights off."

Lilburn testified that she left The Mix when it closed. She, BooBoo, and Balbaneda got into her champagne-colored Lexus. She testified that defendant and Clayborn were not in her car, and she did not see Clayborn before she left. Lilburn testified that she turned right out of The Mix's driveway and drove toward the freeway entrance. Lilburn could not remember how far she had driven before Clayborn called her cell phone and asked her to go back to The Mix to "check and see if there was cops" nearby. Lilburn turned around and returned to The Mix. She drove through the parking lot, looking for police officers, and then again turned right out of the parking lot and drove toward the same freeway entrance. Kmbikyan testified that surveillance video showed a Lexus enter, drive around, and leave The Mix parking lot at 1:46 to 1:47 a.m. The Lexus turned right onto Honolulu when it exited.

Lilburn testified that she got on the freeway. She soon noticed the burgundy Camry drive past her, from the north. GPD detective Arthur Frank testified that Lilburn showed him where the Camry passed her; he determined that location was a three-

minute, 1.5-mile drive from The Mix. Lilburn testified that Clayborn was in the driver's seat and defendant was in the passenger seat of the Camry. Although she only saw their silhouettes, Lilburn said she recognized their bald heads and "big ears." Lilburn testified that she dropped off the passengers in her car and arrived at the Chatsworth residence she shared with Clayborn around the same time Clayborn arrived home.

Balbaneda testified that he left The Mix with the same people with whom he arrived, including defendant. Balbaneda testified that Lilburn drove to his house first and dropped him and defendant off. Balbaneda initially testified that he did not remember telling detectives that defendant left The Mix separately. Balbaneda later denied telling law enforcement officers that defendant stayed at the bar and did not ride home with him in Lilburn's car. He said that he told the detectives who interviewed him that defendant came home with him.

Hamburg testified that he and Martin left The Mix just before its closing time of 2:00 a.m. Kmbikyan testified that video surveillance showed them leaving on their motorcycles at 1:44 a.m. Hamburg testified that he and Martin turned left from the parking lot and got onto the 210 freeway a few minutes later.

Kmbikyan testified that the burgundy Camry's brake lights, but not its headlights, came on at around 1:45 a.m. The Camry "slowly creeped out from the parking space" and left the parking lot just after Hamburg and Martin left on their motorcycles. It turned left, the same way the motorcycles went. Kmbikyan testified that Hamburg's and Martin's motorcycles would have been visible from where the Camry was parked.

III. The Shooting and Immediate Aftermath

Hamburg testified that he and Martin were riding side-by-side on the eastbound 210 freeway before merging onto the transition road to the southbound 2 freeway. Martin passed

Hamburg on the right and pulled ahead of him as they traversed the sweeping curve of the ramp.

Shortly after he and Martin "straightened up" from the curve, Hamburg heard popping noises. He looked to his left and saw muzzle flashes coming from the passenger side of a car about two car lengths to his left. The flashes continued until the car passed. Hamburg did not remember the make or color of the car. He did not remember telling law enforcement that he "wanted to say dark brown," but agreed that "[s]ounds like something that I would probably say."

Once the car passed, Hamburg noticed that Martin's bike was wobbling and pulling off to the side of the road. As Hamburg pulled his own motorcycle over, he saw Martin "just kind of keel over into the iceplant."

Hamburg ran over to Martin, pulled his motorcycle off of him, and saw blood on Martin's chest. Hamburg tried to resuscitate Martin, called his friends who were still at The Mix, and then called 911.

Hamburg's friends arrived on the scene in a truck shortly thereafter. GPD officer Soboleski testified that he later searched their truck. He found a bloody jacket and a leather vest with a Mongols patch on it. The vest had a bullet hole in the left chest panel. Kozlowski, the agent who infiltrated the Mongols, opined that Martin's friends removed his Mongols vest and patch "so in the event he was buried he would be buried with his patch."

Kozlowski further testified that he received a call from the Mongols' National Sergeant at Arms around 1:55 a.m. on October 8, 2008. The Sergeant at Arms told him "Hitman [Martin] had been killed on the side of the freeway and to report back to that area to meet with him and the . . . national chapter president and other members to discuss what we had seen in the bar that night, to kind of go over what could have led up to this." Kozlowski

returned to the area and met with several high-ranking Mongols in a CVS parking lot near the juncture of the 2 and 210 freeways.

Several hours later, around 5:00 a.m., Kmbikyan was dispatched "[t]o the area of southbound 2 freeway, by the Verdugo Road on-ramp" to investigate a murder. The area was north of the Verdugo Boulevard onramp to the southbound 2 freeway. When he arrived, he noticed "a male lying on his back with an apparent gunshot wound to his upper torso" on the "gore point"[7] between the eastbound 210 and southbound 2 freeways. The man was wearing a motorcycle helmet with a Mongols insignia on it. The motorcycle near him, which also had a Mongols insignia, had seven bullet holes and strikes on its left side.[8]

Kmbikyan walked around the area and recovered 13 nine-millimeter cartridge casings. He also found two bullet fragments and a bullet projectile. None of the cartridge casings was south of Martin's body; they were found in various lanes of the freeway and "led up to where the body was."

Los Angeles County Sheriff's deputy Edmund Anderson, a firearms expert, testified that all 13 of the cartridge casings were fired from a single nine-millimeter, semiautomatic gun. He opined that the cartridges could have come from a Beretta 92F but not a Smith and Wesson.

Deputy medical examiner Pedro Ortiz performed an autopsy on Martin. He testified that Martin was killed by a

---

[7] Kmbikyan explained that a "gore point" is "the triangular area on the freeway that helps connect two merging lanes."

[8] Hamburg testified that his motorcycle also "got shot a few times, got a few bullet holes in it." Hamburg found a bullet fragment in his boot the day after the shooting but did not sustain any physical injuries.

single bullet wound to the chest, which caused him to bleed to death within minutes. Ortiz further testified that the bullet, which he removed from Martin's body and gave to law enforcement, traveled through Martin's body "from left to right, front to back, and downwards," through his heart, diaphragm, liver, and back muscles. Anderson examined the bullet and concluded it was of nine-millimeter caliber; he could not draw any conclusions about the gun that fired it due to the bullet's condition.

IV. The Gun Exchange

John Rios, a former gang member and friend of Clayborn's, testified that Clayborn called him the evening after the freeway shooting. Clayborn told Rios he wanted to trade a gun, a Beretta 92F with a "double stack" magazine that could hold 10 to 15 rounds of ammunition, for "something different." Rios arranged a trade for a single-stack Smith and Wesson gun owned by another friend of his, Playboys gang member Abraham Khan. Clayborn arrived at Rios's house in a burgundy Camry, and then Rios drove him to Sylmar to effect the trade with Khan.

LAPD officer James Fillmore testified that he arrested Rios for weapons violations in March 2010. The arrest occurred at a Sylmar home, where Fillmore also arrested the home's other residents, Khan and Zambrano, for narcotics and ammunition violations. Fillmore testified that Rios expressed interest in cooperating with law enforcement and provided information that implicated Khan and Zambrano in the murder of Sergio Hernandez.[9] Rios also told Fillmore that he had facilitated a

---

[9] The gun that was used in the Hernandez murder was the same one that fired the bullets in this case. Khan and Zambrano were convicted of the Hernandez murder, and we affirmed their convictions on appeal. (See *People v. Zambrano* (Sept. 8, 2016,

firearm trade between Khan and Clayborn. Rios testified that Khan committed the Hernandez murder "with the Beretta," which "tied Mr. Clayborn into it." Both Rios and Fillmore testified that Rios did not receive any benefit in exchange for his cooperation with law enforcement. Fillmore further testified that Rios told him that "it was a death sentence for him to testify in this case."

V. The Investigation

A. Clayborn Arrested and Camry Impounded

GPD detective Arthur Frank testified that the LAPD and the GPD formed a joint task force to investigate the Martin murder and other unsolved crimes involving the Toonerville gang. "Early on," Frank began to suspect that Clayborn was involved in the murder and ordered the task force to surveill him.

GPD officer Jeff Newton testified that he arrested Clayborn in a burgundy Camry on October 13, 2008, within days of the freeway shooting. Newton and Frank testified that the Camry was impounded and towed to the GPD for processing. Newton and fellow GPD officer Soboleski searched the Camry and found a loaded nine-millimeter Smith and Wesson pistol, ammunition, and a bandana containing plastic baggies of methamphetamine.

GPD sergeant Tony Darby testified that he contacted Lilburn to inform her that the GPD had the Camry, which was registered to her. He did not tell her about the items found in the car, however, to avoid compromising the investigation. Lilburn subsequently provided Darby with information about Toonerville members and their drug activities, but she refused to provide information about Clayborn.

B. 2008 Jail Calls and Visits

While in jail after his arrest, Clayborn made numerous

B262756) [nonpub. opn.].)

phone calls to Lilburn and others. Lilburn also visited Clayborn at the jail. These calls and visits were recorded, with Clayborn's knowledge. Many of the recorded calls and visits were played for the jury and admitted into evidence along with transcripts.

On October 14, 2008, Lilburn told Clayborn that someone at GPD told her the car was being held for three days. She assured Clayborn, "[t]hat does not mean that it's being searched, though." During a visit two days later, on October 16, 2008, Clayborn told Lilburn, "You need to get that car out." He also told her "when you get my gun, give it to Lil P"; Toonerville expert Strasner testified that Lil P was the moniker of Gabriel Serna, a Toonerville member who served as the gang's "gun guy" by acquiring and disposing of firearms. When Lilburn offered to hold the gun instead, Clayborn cautioned her that the gun was loaded. He also told her, "[t]here's a 8-ball and like 20-20's" in "the bandana." In a phone call that same day, Lilburn told Clayborn that the police were "considering" returning the car to her, and assured him that she "played the stupid role with them . . . . Like, the dumb girlfriend. . . ." In another October 16, 2008 call, Clayborn told Lilburn, "Just calm down. You'll be all right. . . . From all this shit, me fucking shooting motherfuckers, and you're going to fucking break on this shit? Come on, stop." In a third call, Clayborn told Lilburn, "The ones that, I went out to go kill with, those are my friends."

Clayborn and Lilburn had another phone conversation on October 18, 2008. Clayborn directed Lilburn, "don't sell my gun, don't fucking get rid of my gun, all right?" He told her he wanted it "[f]or protection," "[n]ot for hunting" or "posting up." Clayborn also told Lilburn he was going to "be an honest man" when he got out and was "going to work for [his] money" instead of selling drugs. He refused to promise that he would stop "hunting," however, telling Lilburn, "If I got to go out and kill, I'm going to

go out and kill. But I won't go look for it like I did this time."

On October 20, 2008, Clayborn and Lilburn revisited their previous discussions of the gun and Clayborn's promise to "hunt" "only if it's necessary." In a three-way call involving Clayborn, Lilburn, and another party that same day, Clayborn explained "we're banned from" The Mix. The third party replied, "You must have did something." Lilburn said, "[i]t wasn't like that, until he did it, until he made it like that," and remarked that she could not take Clayborn anywhere. Clayborn interjected, "I've been nowhere. They were looking at your ass Lindsay, that's why I got fucking fatal."

On November 1, 2008, Lilburn visited Clayborn. Clayborn asked her to "give that to P," and to "tell him to put it away for me," "just in case . . . your dad sells my car." Lilburn assured Clayborn that her father could not sell the car, because it was in her name. During a phone call that same day, Lilburn told Clayborn that someone named "Big Bird" asked her if he could have "the dirty one." Clayborn told her, "[t]hat shit's already gone. I already traded for that." When Lilburn clarified she meant "the one from the freeway," Clayborn reiterated "[t]hat shit's gone."

During a November 10, 2008 call with someone other than Lilburn, Clayborn remarked that "we're banned" from The Mix because "[s]omething happened on the Two Freeway." The other person responded, "It wasn't with that Mongol was it?," to which Clayborn replied, "I don't know, but figure it out mama."

On or about November 20, 2008, GPD sergeant Darby told Lilburn that he found drugs and a gun in the Camry. Lilburn visited Clayborn on November 21 and told him that the police found the contraband. Clayborn assured Lilburn that the gun was "clean"; she proposed taking the blame for it and the drugs. The next day, Clayborn advised Lilburn to tell the police that he

was "very secretive" and did not let her know anything. Lilburn responded that she told the police that she did not "know shit" and said they were "not gonna get me to say shit" about Clayborn.

On December 4, 2008, Lilburn visited Clayborn and told him that Whisper—defendant—texted her that morning. Clayborn cautioned Lilburn that even though he did not know Whisper, he suspected Whisper would "try to fuck you too." Lilburn responded, "You don't know him but you're willing to go do things with him?" Clayborn responded, "That was just a fluke in a mirror of time. 'Cause he tried to pull, pull my bluff, that's why." Clayborn continued, "he just. . . came up on me, like to see if I was a weenie or something, you know."

C. Lilburn Interviews

Lilburn was arrested on an unrelated theft charge on January 2, 2009. GPD detectives Frank and Newton interviewed her that same day. During that interview, a recording of which was played for the jury and admitted into evidence, Lilburn told the detectives she did not know where defendant or Clayborn were when she left The Mix on the evening of the freeway shooting, even though defendant "was supposed to go with me." Lilburn said she called Clayborn's phone. When he did not answer, she became angry and left The Mix, turning right to get on the freeway. Clayborn contacted her while she was driving and asked her to go back to The Mix and look for police. Lilburn told Frank and Newton she did that, then called Clayborn. He told her he was already on the freeway. So she went back to the freeway "and I see him go—phew—speeding past me . . . and it was him and Whisper . . . ." Clayborn was driving; Lilburn "saw his head and the ears."

Lilburn told Frank and Newton that Clayborn later told her, "we got one." She asked Clayborn why he was shooting at

people, and he responded that the Mexican Mafia had a green light on the Mongols. Clayborn refused to tell Lilburn why there was a green light, but told her that was the reason "he put the work in." Lilburn further told Frank and Newton that Clayborn had a "second story" about the incident, which he told her from jail: "Whisper didn't think that they could do something together." Frank testified that Lilburn also told him that he should be looking for Whisper, "because somebody was killed."

Frank and another GPD officer, Soboleski, interviewed Lilburn a second time on January 3, 2009. A recording of the interview was played for the jury and admitted into evidence. Lilburn told the officers that Clayborn and Whisper passed her on the left on the freeway. She sped up to catch up with them, at which point she saw Whisper in the front passenger seat. She explained, "Whisper has pretty big ears too so I could tell it was him, you know." Frank testified that Lilburn "had excellent recollection" and was "very coherent and precise in her answers" during the interviews.

D. Balbaneda Interview

GPD officers Newton, Frank, Soboleski, and Wentz interviewed Balbaneda on December 29, 2008. A recording of the interview was played for the jury and admitted into evidence. Balbaneda told the officers that he went to The Mix about two months earlier with several people, including defendant. Balbaneda told the detectives that defendant "took off on his own" from The Mix because "[h]e didn't want to" leave when Balbaneda and the others left. Balbaneda went home in a white Lexus with "the girls" and Alvarez, but not defendant. Balbaneda told the detectives he was the first one dropped off, and there was no one else at his house when he got there. Balbaneda said he did not see defendant that night after leaving The Mix.

E. Defendant's Phone Calls

Frank testified that he talked to defendant around December 30, 2008. He told defendant he wanted to talk about The Mix and showed defendant photographs of him at The Mix. Frank told defendant he did not believe that defendant left the bar with Balbaneda.

Frank testified that Lilburn agreed to "engage in a ruse to get information from Mr. Gonzalez," whose phone had been tapped as part of the task force's investigation. Lilburn called defendant's phone number on January 4, 2009, and left a voice mail telling him that the police were looking for her and asking him to "call me back and tell me what I need to tell these motherfuckers cause they keep on coming around, and I'm getting worried." Defendant's phone number made several return phone calls to Lilburn but did not leave a message for her.

Defendant called Nahapetian on January 8, 2009. He told her he was "getting sweated over some bullshit" and was "trying to find out what the fuck's going on." He asked Nahapetian to go to The Mix "[a]nd look at the parking lot, and tell me if—just to see if there's . . . anything like on the roofs or anything like little cameras." Defendant told Nahapetian that he knew there were cameras in the back, and just wanted to know if there were "like tube ones" on the side. Nahapetian later called defendant from The Mix parking lot and told him she did not see anything. Defendant reminded her she was looking for "little cameras," "just like little tubes, like, like little pens. Like big fat markers." When Nahapetian again stated she did not see anything, defendant told her to check the front, back, and driveway exit area. Nahapetian reported that she only saw one camera, in the front. Defendant responded, "they're bullshitting. They're telling me I'm lying, when they're the ones lying."

F. 2009 and 2010 Jail Calls

Lilburn was released from custody September 17, 2009. Clayborn resumed calling her from jail almost immediately.

During a September 22, 2009 call, Lilburn answered the phone as "Lindsay's friend, Whitney." As "Whitney," she told Clayborn that Lilburn was "[t]ripping."

On September 28, 2009, Lilburn told Clayborn that she spoke to the police when she was arrested. She assured him that her mother had told her "nothing that you said to them, nothing matters, . . . because you were extremely high." Lilburn also mentioned to Clayborn for the first time that she had "a long, long history of mental problems."

In a later call on September 28, 2009, Clayborn told Lilburn that the police had nine disks of them "talking in the beginning," presumably the 2008 calls and visits. Lilburn said that they had been talking about "the music stuff" that Clayborn had left in the car. Clayborn said, "I didn't even think of that," and "that's even better." Lilburn also reiterated that she was "high as fuck" and "very delusional" during her interview with the police, and told Clayborn that she "was getting high at that point if anybody asks." She also said, however, that she was not in fact getting high "all that time." Clayborn responded, "Oh, you're a fucking snake." Clayborn asked Lilburn if the police asked her who she went home from The Mix with; Lilburn said she told them she did not remember, but said "[t]hey know" "[b]ecause of the cameras." Clayborn then asked Lilburn if she said anyone went home with him. Lilburn said yes, "W," to which Clayborn responded, "Oh no. Man."

On October 6, 2009, Lilburn told Clayborn that detective Frank was "going to make" her testify against him. Clayborn suggested she "disappear" before subpoenas were sent; Lilburn countered with a suggestion that she appear but "don't know any

of the answers, you know what I mean?" She reiterated that she was under the influence during her interviews and had "a long history with, with drinking and using." Clayborn told her not to say any more, "cause they're probably fucking listening to this." Clayborn nevertheless continued, "I need to know what you said," "[y]ou know, whatever fucking incriminates me." Lilburn told him she said who was there and which way they drove upon leaving The Mix. She also reassured Clayborn that she was "so high" she was "off the fucking chain" during the interview.

On October 16, 2009, Clayborn told Lilburn "they're basing the whole . . . case on wiretaps. No, no witnesses, no, no gun, no nothing." He continued, "they told my crimey that the gun. . . that I got busted with . . . that's the gun to that, that, um, murder." Lilburn assured him, "no part of that gun that they found. . . had anything to do with that night." Clayborn again cautioned Lilburn to be careful on the phone: "[i]f it's not lovey-dovey shit, then don't say nothing at all."

During a November 7, 2009 call, Clayborn told Lilburn she was suspected of being an informant in another gang member's case. Lilburn responded, "Look what happened to Br[e]anne. That's not funny."[10] On November 17, 2009, Clayborn told Lilburn the police had a recording of things "Jizette's baby daddy"—defendant—"said to Jizette on the phone." He reiterated that he did not "want to talk on the phone because they've already got enough on us." He also said that his "crimey" had a "paid lawyer" that would let him know "[w]hat's hurting us,

---

[10] LAPD sergeant Strasner testified that Breanne Hanna provided information about a murder for which Toonerville member Isael Aguirre was convicted. Lilburn confirmed that Breanne Hanna subsequently was murdered "because they had paperwork on that bitch."

what's what, what's not."

On December 1, 2009, Clayborn advised Lilburn that his defense investigator would be calling her to talk about the freeway shooting and reminded her that they merely did "the basic thing that we do almost every Tuesday night, baby." On December 4, 2009, Clayborn told Lilburn "there might be . . . someone telling but there's only two people in my mind who would do that and you're not doing it and the other one is Boo Boo, you know?" Clayborn remarked that he would "love to hear what she told them but I don't want to hear it because they'll think I'm trying to coach you or some shit." Lilburn told Clayborn she had looked up the freeway shooting on the internet and learned that Martin's nickname was "Hitman," which surprised her since the prosecution was "trying to make it like he was some innocent guy." Clayborn asked, "How can he be an innocent guy if he's a Mongol?"

On December 9, 2009, Clayborn complained to Lilburn that his and defendant's names had come up in another person's preliminary hearing. According to Clayborn, there was "paperwork" that he "and Whisper fucking went and did something then met up with Lil P at fucking somewhere." Clayborn also told Lilburn that Lil P and others had been arrested: "[t]hey got everybody, all fucking 30 of us they're all fighting murders." He also asked Lilburn again to tell him "exactly what you said that day," "[w]hatever they tricked you into saying so I can be prepared to let my lawyer know that you were fucking on drugs." Lilburn asked him, "Why are you worrying about it nobody did anything." Clayborn responded, "I feel like there's something that you didn't tell me you know." On December 24, 2009, Clayborn told Lilburn to testify that she was scared by dirty cops during her interview. He also suggested that they get married so she would not be called to testify against him.

On January 28, 2010, Lilburn told Clayborn that her parents were sending her to San Diego because the words "I'll get you" had been written on her truck in "gang writing." A year earlier, Lilburn had confided in her father that she believed she would be killed if she told the police what they wanted to hear; he had encouraged her to give "them the information they need, so that you don't go down as an accessory."

G. Cell Phone Records

Chad Fitzgerald testified that he was a special agent with the Federal Bureau of Investigation and member of the Cellular Analysis Survey Team. In that capacity, he reviewed call detail records for three cell phones: a Verizon phone subscribed to Lilburn's father, Alexander Lilburn ("the Lilburn phone"), a Sprint phone subscribed to defendant ("the Gonzalez phone"), and a Sprint phone subscribed to Richard Clayborn ("the Clayborn phone"). Fitzgerald clarified that the subscriber is the person who is responsible for the bill, not necessarily the person using the phone.

Fitzgerald explained that cell phones "speak" to towers maintained by their service carrier. The towers send out signals that are monitored by phones; the phone looks for the "strongest, clearest signal," and the towers "hand off" the phone call to different sectors of the same tower or entirely different towers as the phone changes location. Fitzgerald explained, "as I start in one tower and I drive away, my signal quality is going to get worse and another tower signal quality is going to get better. As that gets close to even and slightly overtakes the previous signal, the network is going to do a hand-off to the new signal, and it's just going to continue to get - - until that signal quality degrades and it has to hand off to another tower or sector." By determining which tower's signal a phone used during a call, Fitzgerald could opine about the general location of the phone at

the time of the call. The towers that gave the strongest signals at The Mix were Verizon tower 87 and Sprint tower 48.

Fitzgerald testified that the Lilburn phone used Verizon tower 87, the one nearest The Mix, to connect with the Clayborn phone at 1:43, 1:50, 1:51, and 1:53 a.m. on October 8, 2008. At 1:58 a.m. and 1:59 a.m., the Lilburn phone used a tower that was south of tower 87.

The Clayborn phone used Sprint tower 48, the one nearest The Mix, from 1:43 to 1:53 a.m. on October 8, 2008. Fitzgerald testified that the Clayborn phone then "moves down to [tower] 47, starting on sector 2, moving to 3, then to 4; and then it ends up on sector 3 of 121, which is slightly to the west of 47." At 2:01 and 2:02 a.m., it used sector 2 of tower 254, which was further west, to make two phone calls to a phone number ending in 3779. The Gonzalez phone called the same 3779 number, using the same tower, one minute later. Detective Frank testified that the 3779 number belonged to Lil P, the Toonerville "gun guy."

The Gonzalez phone used Sprint tower 48, the one nearest The Mix, between 11:35 p.m. on October 7, 2008 and 12:35 a.m. on October 8, 2008. The parties stipulated that the Gonzalez phone received text messages from a phone number associated with defendant's then-girlfriend at 1:31:17, 1:33:21, and 1:35:18 a.m. At 2:03 and 2:04 a.m., the Gonzalez phone used sector 3 of tower 254, the same tower the Clayborn phone used minutes earlier. Fitzgerald opined that the Gonzalez phone was not located on Jackson Street in Glendale when it used tower 254, because that area was served by tower 30. The Gonzalez phone used tower 30 to call the Clayborn phone at 3:17 a.m.; the Clayborn phone used tower 196, which serves Chatsworth, to take the call.

The Gonzalez and Clayborn phones called one another several times in the next few weeks. They connected at 8:54 a.m.

and 9:59 a.m. on October 8, 2008; at 1:13 p.m. on October 9, 2008; and several more times through October 25, 2008. The Clayborn phone also recorded several calls to a phone number associated with John Rios on the evening of October 8, 2008.

VI. Defense Evidence

Lilburn's father, Alec Lilburn (Alec), testified that Lilburn used methamphetamine in 2008. He said that Lilburn became confused, forgot things, and "would state things as though they were fact" when she was on methamphetamine. Alec further testified that methamphetamine caused Lilburn to hallucinate people who were not there and make up things that did not happen. Alec testified that Lilburn's memory improved when she was not on methamphetamine, but that she still had "the same problem of forgetting things." Alec further testified that Lilburn was diagnosed with borderline personality disorder in 2011. According to Alec, the disorder caused Lilburn to experience symptoms similar to those she suffered when using methamphetamine; additionally, her methamphetamine use exacerbated her mental health symptoms. (8RT 2513-2514)~

Clayborn also called Lawrence DeLosh, a private investigator. DeLosh testified that he acted as a defense investigator for Abraham Khan. During the course of his investigation in the Khan case, DeLosh spoke to John Rios. Rios told DeLosh he first met Khan in 2009 and Clayborn in 2010, well after the gun exchange he allegedly brokered between them in this case. DeLosh testified that Rios denied being a paid informant.

Matthew Alvarez testified that he was a Toonerville member who went to The Mix on the evening of October 7, 2008. Lilburn drove him and several other people, including defendant, to the bar that evening. Alvarez testified that he and the others stayed at The Mix until closing time, at which point Lilburn

"drove us all home." Alvarez testified that Lilburn "just took off"; she did not return to The Mix and drive around the parking lot. Alvarez denied seeing Clayborn in a car behind them at any point. He further denied seeing any "downed motorcycles" on the way home. Alvarez was one of the last people Lilburn dropped off; he testified that defendant and Balbaneda were the first. Alvarez conceded he had been drinking that night and was "pretty wasted," but maintained that he "was fully aware."

Gary Cooper, a retired LAPD sergeant, testified that defendant's defense team employed him as a private investigator. In that capacity, he interviewed Lilburn, who told him she had been offered immunity from the prosecution during the preliminary hearing phase of the case. Lilburn also told Cooper that defendant was not a trusted Toonerville member in October 2008 because he had just been released from prison a few weeks earlier. Lilburn additionally reported to Cooper that she was "terrible with directions" and had to take the same route to and from The Mix every Tuesday to avoid getting lost. She told Cooper she got on the freeway across from a Rite-Aid and had driven about a mile on the freeway when a car passed her on the left. She also told Cooper that she "felt that the police had tricked her and she thought she was helping Clayborn[ ] by telling them where she had seen the Camry."

Cooper measured the distance from The Mix to different areas. He testified that the distance between The Mix and the Verdugo Boulevard onramp to the 2 freeway was one mile. There was no Rite-Aid by that onramp, but there was a CVS. Cooper testified that there was a Rite-Aid on Glendale Avenue, 6.2 miles away from The Mix. The distance between The Mix and Balbaneda's Jackson Avenue home in Glendale was 7.1 miles, and it was an additional 1.1 miles from there to Alvarez's home. Cooper testified that it would be "much longer than 5 miles" to go

from The Mix to the southbound 2 freeway via the ramp near the Rite-Aid, then to get off the freeway, turn around, and head north back to The Mix.

Defendant took the stand on his own behalf. He admitted that he was a member of Toonerville in 2008. At that time, he lived on Jackson Street in Glendale with Balbaneda. He was not aware there was a "green light" on Mongols.

On October 7, 2008, defendant went to the tattoo shop where Clayborn worked. Clayborn invited defendant to go to The Mix that evening. Defendant accepted the invitation, and Lilburn picked him and Balbaneda up from his house later that evening. They drove to The Mix, where defendant saw a lot of bikers but did not encounter any problems.

Toward the end of the evening, defendant loaned his phone to Alvarez. At closing time, defendant got into Lilburn's car with Balbaneda, Alvarez, BooBoo, and Breanne Hanna. Defendant realized he did not have his phone with him. Someone told him that the phone was in Clayborn's car. Defendant told Lilburn he needed the phone, and Lilburn turned her car around and drove back to The Mix so he could get the phone from Clayborn. When they got back to The Mix, however, Clayborn was no longer there. Lilburn left The Mix a second time and dropped defendant and Balbaneda off at defendant's house in Glendale. About 30 or 40 minutes later, Lilburn returned to defendant's house and dropped off his phone. Defendant never got into a car with Clayborn and did not "go out and kill some motorcycle people."

On December 30, 2008, defendant was interrogated by GPD detective Frank. The next day, "the police department raided" his house. Over the next few days, Frank texted defendant with Lilburn's phone and had Lilburn leave messages for him. One of those messages was "they have you on camera, shooting." That prompted defendant to ask Nahapetian to go look at the cameras

at The Mix. Defendant expected that if there were cameras, they would "show [him] not shooting someone." Defendant admitted that he had five prior felony convictions.

DISCUSSION

I. Admissibility of Recorded Conversations

Defendant contends the trial court erred in admitting against him the recorded conversations between Lilburn and Clayborn and the recorded interviews between Lilburn and the police. He claims that his constitutional rights to confrontation and due process were violated, as were various state evidentiary rules. He frames his challenges broadly, asserting that none of the Clayborn-Lilburn conversations should have been admitted against him. However, defendant objected only to the admission of a limited number of the conversations below, in a written motion in limine filed before trial. We limit our analysis to those conversations to which defendant objected below; evidentiary objections not raised in the trial court are forfeited on appeal. (Evid. Code, § 353; *People v. Stevens* (2015) 62 Cal.4th 325, 333.)

"We review the trial court's determination as to the admissibility of evidence (including the application of the exceptions to the hearsay rule) for abuse of discretion [citations] and the legal question whether admission of the evidence was constitutional de novo." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553; see also *People v. Seijas* (2005) 36 Cal.4th 291 304 [review of a constitutional challenge, such as whether the admission of extrajudicial statements violated the confrontation clause, is de novo]; *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964 ["[w]e review de novo a claim under the confrontation clause that involves mixed questions of law and fact"].)

A. December 4, 2008 Conversation

1. Statements at Issue

In a December 4, 2008 conversation, Lilburn and Clayborn discussed a text message Lilburn received from Whisper. Clayborn opined that Whisper—defendant—whom he claimed he did not know, would "try to fuck you too." Lilburn responded by asking Clayborn, "You don't know him but you're willing to go do things with him?" Clayborn answered, "That was just a fluke in a mirror of time. Cause he tried to pull my bluff, that's why." "[H]e just . . . came up on me, like to see if I was a weenie or something."

2. Bases for Admission

The prosecution sought to admit at least Clayborn's portion of the conversation for its truth as a declaration against penal interest or an adoptive admission. It further argued that the statements were more probative than prejudicial because they showed Clayborn's motive and were not inflammatory. Defendant opposed its proffer, arguing that the statements made during the conversation were testimonial in nature and therefore barred by the confrontation clause.[11] He further argued that the adoptive admission exception to the hearsay rule did not apply, and that the "extremely vague context" of the statements would render them unduly confusing and prejudicial under Evidence

---

[11]Defendant pursued his confrontation clause argument in his appellate briefs. Specifically, he contended that the trial court should have analyzed the statements under *Bruton v. United States* (1968) 391 U.S. 123 even though it concluded Clayborn's statements were not testimonial. At oral argument, defendant's attorney acknowledged that this argument is no longer valid. (See *People v. Cortez* (2016) 63 Cal.4th 101, 129; *People v. Gallardo* (2017) 18 Cal.App.5th 51, 69.) We accordingly do not address it here.

Code section 352. The trial court rejected all of defendant's arguments. It found that the statements were not testimonial or unduly prejudicial and admitted the conversation pursuant to Evidence Code sections 1220 (party admission), 1221 (adoptive admission), and 1230 (declaration against penal interest). We find no error.

3. Adoptive Admission

Defendant also argues that Clayborn's statements were not admissible against him as adoptive admissions. He emphasizes that he was not party to the conversation, and contends that "[i]n so far as any accusations were made that Clayborn[ ] failed to deny does not mean that Gonzalez would not have denied them."

The hearsay exception for adoptive admissions is set forth in Evidence Code section 1221, which provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." A statement is admissible as an adoptive admission if sufficient evidence shows the defendant heard and understood the statement, that it would call for a response, and the defendant by words or conduct adopted the statement as true. (*People v. Davis* (2005) 36 Cal.4th 510, 535.) This standard is not met as to defendant here, as he was not party to the Clayborn-Lilburn conversations. However, the prosecution used this exception to admit the evidence against Clayborn, not defendant. Defendant did not ask for a limiting instruction, and the trial court "has no duty to give a limiting instruction absent a request." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 647-648.)

4. Declaration Against Penal Interest

The prosecution also invoked another hearsay exception to admit these statements: declaration against penal interest. That

exception provides, in relevant part, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him 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." (Evid. Code, § 1230.) "[T]he rationale underlying the exception is that 'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements." (*People v. Grimes* (2016) 1 Cal.5th 698, 711.) To establish admissibility under this exception, the proponent must show: (1) the declarant is unavailable, (2) the declaration was against the declarant's penal interest when made, and (3) the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*Ibid.*; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

In the trial court, defendant argued only that the statements could not be used against him because they violated the confrontation clause. Defendant now argues that the statements were not sufficiently reliable to merit admission under the declaration against penal interest hearsay exception. This argument was not raised below and accordingly is forfeited. (See Evid. Code, § 353.)

5. Undue Prejudice

Defendant argues that the probative value of the statements is outweighed by their prejudicial effect. He "contends that there is a danger of undue prejudice due to the extremely vague context of Clayborn's statements. In fact, it is clear that the only affirmative statement that was made in the conversation was that the defendant was attempting to seduce

Lilburn." We disagree.

The trial court has broad discretion to exclude evidence "if its probative value is substantially outweighed by the probability that is admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The trial court did not abuse that discretion by finding that Clayborn's December 4, 2008 statements did not meet that standard. They were highly probative of Clayborn's motive, and the risk that they would mislead or inflame the passions of the jury was minimal. (See *People v. Cortez*, *supra*, 63 Cal.4th at pp. 128-129 [explaining that "prejudice" in the context of Evidence Code section 352 is "the tendency of evidence to evoke an emotional bias against a party because of extraneous factors unrelated to the issues"].)

B. September 22, 2009 Conversation

1. Statements at Issue

Lilburn posed as "Whitney" when answering a phone call from Clayborn. As "Whitney," she reported that Lilburn was "[t]ripping."

2. Bases for Admission

The prosecution sought to introduce this conversation to demonstrate consciousness of guilt and to "explain the coded way that Lilburn and Clayborn speak to each other in future calls." Defendant opposed its admission on the ground that Lilburn's remarks were not "party opponent statements and adoptive admissions because the defendant was not the person who made the statements." He also argued that the conversation was testimonial and would violate his right to confrontation. The trial court admitted the conversation to show consciousness of guilt and "an alleged attempt by defendant Clayborn[ ] and his girlfriend to deceive potential listeners to their conversation."

Defendant did not request a limiting instruction.

3. Admitted for Nonhearsay Purpose

The trial court admitted the statements not for their truth, but rather as probative of Lilburn and Clayborn's consciousness of guilt. Demonstrating consciousness of guilt is not a hearsay purpose. (*People v. Curl* (2009) 46 Cal.4th 339, 362.) The statements accordingly were not required to come within a hearsay exception to be properly admitted. Defendant's contentions that the statements do not fall within the adoptive admissions exception therefore lack merit.

C. September 28, 2009 Conversation

1. Statements at Issue

During one of several phone calls on September 28, 2009, Clayborn and Lilburn discussed Lilburn's conversations with law enforcement. Clayborn asked Lilburn if the police asked her who rode home from The Mix with him. She initially told Clayborn she told the police, "I don't remember. I go there every Tuesday night. How are you going to expect me to pick one day out of all the days that we went there for six months?" When Clayborn pressed the issue, Lilburn said the police knew anyway "[b]ecause of the cameras." When he asked a third time, she said she told the police "W" went home with Clayborn. Clayborn responded, "Oh no. Man."

2. Bases for Admission

The prosecution argued that Clayborn's statements were admissible for their truth as a party admission (Evid. Code, § 1220) or statements against penal interest (Evid. Code, § 1230). It contended that Lilburn's statements were "not offered to prove the truth of the matter asserted, but rather to give context to the statements that Clayborn makes in response." The prosecution further asserted that the statements were "probative of the credibility of both Lilburn and Clayborn, and . . . confirm

Lilburn's version of the events given to detectives in December and January." Defendant disputed the prosecution's assertion that Lilburn's statements were not being offered for their truth; he argued they were relevant only because they showed W—defendant—went home with Clayborn on the night of the freeway murder. He also reiterated his contention that all of the Clayborn-Lilburn conversations were testimonial and therefore barred by the confrontation clause. In addition, defendant contended that these statements posed the danger of misleading and confusing the jury, because of the uncertainty Lilburn expressed during the call.

The trial court rejected defendant's confrontation clause argument and admitted the statements pursuant to Evidence Code sections 356 and 1220. It continued, "With regard to the argument that Ms. Lilburn made statements that were unsure and/or uncertain, as defense counsel sets forth, that argument goes to the weight of the evidence and not to its admissibility."

3. Trustworthiness

Defendant contends the trial court erred in stating that the allegedly "uncertain" nature of Lilburn's statements to Clayborn was an issue of weight rather than admissibility. He argues that "[i]t was up to the trial court to determine the trustworthiness of the statements before ruling on admissibility," and asserts that Lilburn's statements should not have been admitted because "it is unknown whether Lilburn had any actual knowledge of what transpired or was simply tossing bait to Clayborn."

Defendant points to case law holding that a trial court should consider trustworthiness when admitting evidence under the declaration-against-penal-interest exception to the hearsay rule. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 607; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.) This case law is not applicable, as Lilburn's statements were not admitted as

declarations against her penal interest; the trial court cited only Evidence Code sections 356[12] and 1220 in admitting the statements. The court did not abuse its discretion by allowing the jury to consider the reliability of Lilburn's statements in the first instance.

4. Undue Prejudice

Defendant also argues that the probative value of Lilburn's statements was outweighed by their undue prejudice to him. He contends their probative value was minimal, because "it does not tend to prove that it was true that Gonzalez left with Clayborn[],"and that the uncertain nature of her statements was likely to confuse the jury.

The court did not abuse its discretion in concluding otherwise. The court admitted the statements to provide context for Clayborn's statements; as half of a conversation, they were highly relevant for that purpose. Assessing the weight to give a witness's statements is squarely within the province of the jury, and these statements were not likely to inflame the passions of the jury.

D. December 4, 2009 Conversation

1. Statements at Issue

During a December 4, 2009 jail call, Clayborn told Lilburn that he suspected "BooBoo" was providing information to law enforcement.

---

[12]Defendant now contends that the court erred by relying on Evidence Code section 356, which provides that an adverse party may inquire into the whole of a document or conversation when the other party introduces only a portion. (See Evid. Code, § 356.) This argument is forfeited because defendant did not raise it below. (See Evid. Code, § 353.)

2. Bases for Admission

The prosecution sought to admit this statement (and other portions of the conversation) for its truth as a party admission. In addition, the prosecution argued the statement was admissible for the non-hearsay purpose of showing Clayborn's consciousness of guilt. Defendant opposed the admission on the ground that the statement would cause him undue prejudice, "since there is nothing to suggest that the defendant ever went by the moniker, Boo Boo. . . . As a result, the evidence isn't probative of the defendant's guilt since the defendant is not mentioned in the statement either by name, or alleged moniker." The trial court admitted the conversation, including this statement, "pursuant to Evidence Code 1220, showing a consciousness of guilt and the attempt by defendant Clayborn[] to purportedly influence testimony." The court further ruled that the conversation was not unduly prejudicial.

3. Undue Prejudice

The trial court did not abuse its discretion in admitting this statement. While minimally relevant to defendant, it was highly probative of Clayborn's consciousness of guilt and in no way prejudiced defendant, as all of the evidence identified "BooBoo" as Jenny Leal.

E. December 9, 2009 Conversation

1. Statements at Issue

On December 9, 2009, Clayborn complained to Lilburn that his and defendant's names had come up in another person's preliminary hearing. Clayborn stated there was "paperwork" that he "and Whisper fucking went and did something then met up with Lil P at fucking somewhere."

2. Bases for Admission

The prosecution argued that the conversation, including this statement, was highly relevant because it confirmed

defendant's identity as Whisper and aligned with the phone records showing that both defendant and Clayborn called Lil P shortly after the shooting. The prosecution sought to admit it as a statement by a party opponent or a statement against penal interest that was sufficiently trustworthy to warrant admission against defendant as well. Defendant opposed admission on confrontation clause grounds. He also argued the statements were not against penal interest because they were "not inculpatory but rather a simple regurgitation of the prosecution's accusations against Clayborn that he relayed to Lilburn." Defendant did not interpose a double hearsay objection. The trial court admitted the conversation.

3. Declaration Against Penal Interest

Defendant contended below only that the statement was not sufficiently inculpatory as to Clayborn to be against his penal interest. Even if we assume this is true, the trial court did not abuse its discretion in admitting the statement for the nonhearsay purpose of showing Clayborn's consciousness of guilt. The jury reasonably could infer from Clayborn's concern that his name was being mentioned in other proceedings that he participated in the events that were being discussed.

F. Lilburn Police Interview

While Detective Frank was on the stand, the prosecution played excerpts of his January 2, 2009 interview with Lilburn for the jury. Those excerpts included Lilburn's statement that she "didn't know where Richard [Clayborn] or Whisper was" when she left The Mix, even though "Whisper was supposed to go with me." She also said she saw Clayborn and Whisper speed past her on the freeway, and that Clayborn responded to her query, "why are you shooting at them people for," by explaining that the Mexican Mafia had a "green light" on them. Frank also testified that Lilburn told him during the interview that he should be

looking for Whisper, "because somebody was killed"; that portion of the interview was not played for the jury.

Defendant did not object to the playing of the interview. Defendant's contention that the interview was inadmissible under the prior inconsistent statement exception to the hearsay rule (Evid. Code, § 1235) because Lilburn "basically cooperated with the prosecution" accordingly is forfeited. (See Evid. Code, § 353.)

Defendant preserved his arguments that Frank's statement that Lilburn told him to look for Whisper because someone was killed was not admissible to impeach Lilburn and was highly prejudicial as to him. He further argues that the statement was "highly unreliable because she "had a motive to name someone else in order not to implicate Clayborn[] while at the same time placate Frank and extradite [*sic*] herself from a dire situation" and also "because by Frank's own admission she [Lilburn] was under the influence of drugs" during the interview. Defendant's record citations do not support the latter assertion. Our review of the record indicates that Frank said the opposite; he testified that Lilburn "had excellent recollection" and was "very coherent and precise in her answers." Lilburn, not Frank, stated that she was "super-high" during the interviews and did not remember her statements. Which witness to believe was a credibility question for the jury.

Even if the statement was not proper impeachment, any error in its introduction was harmless. The jury knew that someone had been killed, and that law enforcement officers were monitoring numerous Toonerville members, including defendant. Moreover, Lilburn implicated defendant several other times, and other evidence, including the surveillance video from The Mix, the cell phone records, and Balbaneda's interview suggested defendant was with Clayborn at the time of the murder. There is

no reasonable probability that the result would have been more favorable to defendant had Frank's statement been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Partida* (2005) 37 Cal.4th 428, 439 ["state law error in admitting evidence is subject to the traditional *Watson* test"].)

II. Admissibility of Breanne Hanna Evidence

LAPD officer Strasner testified that "paperwork" was important to the Toonerville gang, in that it provided gang members a basis upon which to retaliate against individuals who cooperated with law enforcement. Over defendant's relevance objection, Strasner identified Breanne Hanna as a specific target of retaliation by the Toonerville gang. Strasner testified that Hanna was murdered because Toonerville members believed she cooperated with a murder investigation involving her boyfriend. Over another relevance objection, Strasner testified that Toonerville members Santiago Ayala and Jizette Nahapetian were on trial for the Hanna murder. Lilburn testified that Hanna was murdered "because they had paperwork on that bitch." She and Frank both identified Nahapetian as the mother of defendant's child. The jury also heard a phone call in which defendant asked Nahapetian to investigate whether The Mix had surveillance cameras.

Defendant contends that the introduction of evidence relating to the Hanna murder, particularly that tying him to then-suspect Nahapetian, "was not relevant to any fact in issue and was extremely prejudicial to Gonzalez." He asserts that "[t]he fact that the woman who was mother of his son and still a person he trusted and depended on was involved in a gang related murder in February 2009, was, [*sic*] something that the jury could not have helped focusing on when they decided whether to believe Gonzalez's testimony or Lilburn's inherently improbable tale of what she saw on the freeway." We find no

abuse of discretion by the trial court.

Evidence is relevant if it has any tendency to prove or disprove any disputed fact of consequence to the determination of the action. (Evid. Code, § 210.) Only relevant evidence is admissible. (Evid. Code, § 350.) The trial court has broad discretion in determining whether evidence is relevant. (*People v. Cain* (1995) 10 Cal.4th 1, 32.) It did not abuse that discretion here.

The prosecution sought to demonstrate that Lilburn, who sought to distance herself from some of her earlier statements, was doing so because she was fearful of retaliation. Her knowledge of the Hanna murder was highly relevant to that issue. "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear likewise is relevant to her credibility and is well within the discretion of the trial court. [Citations.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "Evidence of possible intimidation would help explain why the witnesses might repudiate earlier truthful statements." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.)

Defendant did not object to the Hanna evidence, or the identification of Nahapetian as a suspect or the mother of defendant's child on prejudice grounds. His current argument to that effect accordingly is forfeited. (Evid. Code, § 353.) Even if it were not, the few mentions of Hanna, Nahapetian, and the ties between them did not unduly prejudice defendant. Defendant suggests that, absent this evidence, the jury might have seen him "as a young man who just wanted to go dancing and meet girls but went out with the wrong people on the wrong evening." This ignores defendant's testimony that he was a gang member who had been convicted of five felonies, as well as eyewitness

testimony, surveillance video, and cell phone data suggesting that he was with Clayborn at the time of the murder. There is no reasonable probability of a different outcome had the jury not heard the limited evidence linking defendant to Nahapetian. (See *People v. Partida*, *supra*, 37 Cal.4th at p. 439 ["state law error in admitting evidence is subject to the traditional *Watson* test"].)

III. Admissibility of Expert Testimony

Former Mexican Mafia member Rene Enriquez testified that he became familiar with the conflict between the Mexican Mafia and the Mongols "[t]hrough various investigations conducted by the California Department of Corrections, F.B.I., A.T.F., and D.E.A., in evaluating communications and documentation that detailed the conflict between the Mexican Mafia and the Mongols." In addition to reviewing documents and communications, Enriquez testified that he spoke to federal and state prosecutors. He testified, over defense objection, that these sources led him to opine that the longstanding conflict between the Mexican Mafia and the Mongols stemmed from the Mongols' refusal to pay taxes to the Mexican Mafia. Enriquez further opined that the conflict began in approximately 2004 and resulted in the Mexican Mafia putting a green light on the Mongols through at least 2011.

Defendant contends Enriquez's testimony violated the confrontation clause because it "was based on hearsay most of which was necessarily testimonial and impossible to cross examine."[13] He further argues that the error was prejudicial

---

[13] Although the seminal case now governing this issue, *Sanchez*, *supra*, 63 Cal.4th 665, was decided after defendant's trial and briefing in this case, defendant preserved the issue by objecting below and briefing the issue for this court. Both sides

because Enriquez's testimony "provided a motive" for the shooting, the green light on the Mongols.

In *Sanchez*, *supra*, 63 Cal.4th 665, the California Supreme Court clarified the extent to which the confrontation clause and state evidentiary law limit an expert witness from relating case-specific hearsay in explaining the bases for his or her opinion. The court held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but does not allow the expert to rely on case-specific hearsay to support his or her trial testimony. (*Sanchez*, *supra*, 63 Cal.4th at pp. 670-671.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) An expert only may supply facts about which he or she has personal knowledge. (*Ibid.*)

Sanchez "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. omitted.) The expert "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by

---

addressed *Sanchez* at oral argument.

competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

Enriquez testified that he "spoke[] to investigators, . . . listened to communications, . . . [and] talked with prosecutors, including United States attorneys and local prosecutors" to familiarize himself with the relationship between the Mongols and the Mexican Mafia. He then opined that the Mexican Mafia imposed a "green light" on the Mongols. We need not decide whether Enriquez relied on or relayed to the jury case-specific facts, because any *Sanchez* error was harmless beyond a reasonable doubt. (See *Sanchez*, *supra*, 63 Cal.4th at p. 698; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

"'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision." (*People v. Neal* (2003) 31 Cal.4th 63, 86.) Here, the jury decided that defendant and Clayborn committed special circumstance murder, as well as attempted murder. Their motive for doing so was "not an element of the crime in the first instance." (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Indeed, the inference of an intent to kill is not dependent upon a showing of any particular motive to kill; "[a]n inference of intent to kill drawn on evidence of a purposeful shooting with lethal force under all the attendant circumstances can support a conviction of attempted murder even without evidence of motive." (*Id.* at p. 742.)

Yet evidence of motive is relevant to criminal prosecutions (see, e.g., Evid. Code, § 1101, subd. (b)) and may have been relevant to the jury's determination here. Assuming that the jury considered the "green light" on the Mongols to be important,

there were at least two other sources of the same information in the record. Lilburn told the police during one of her interviews that Clayborn told her he "put in the work" due to a "green light" on Mongols. And Kozlowski testified that the Mexican Mafia issued a "green light" on Mongols a few months before the shooting due to anger over a recently published book. The jury also had before it evidence of two other possible motives, stated by Clayborn to Lilburn during their recorded conversations. The first was to punish the victims for ogling Lilburn; Clayborn told Lilburn, "They were looking at your ass Lindsay, that's why I got fucking fatal." The second was a dare or challenge by defendant to Clayborn; Clayborn explained that defendant "tried to pull, pull my bluff, that's why. . . . [H]e just . . . came up on me, like to see if I was a weenie or something, you know."

Defendant testified that he was unaware of any "green light." His counsel also told the jury, during his opening statement, that Enriquez probably was not aware either, due to his defection from the Mexican Mafia. Defendant did little to cast doubt on the other possible motives, however. His theory of the case was that he was not at the scene of the shooting, and that Lilburn's testimony to the contrary was false.

Nothing in the record suggests that the jury's decision was swayed by Enriquez's testimony about the "green light," or that the jury would have interpreted the evidence differently had the testimony been excluded. We accordingly conclude that any error in admitting his testimony about the "green light" did not contribute to the jury's verdict and was harmless beyond a reasonable doubt.

IV. Lilburn's Testimony and Sufficiency of the Evidence

Defendant contends that his conviction was not supported by substantial evidence. He asserts that, aside from "the ambiguous unreliable hearsay statements" discussed above, "the

only piece of evidence that purports to implicate Gonzalez is Lilburn's statement that she saw Clayborn[] driving and Gonzalez in the passenger seat. What Lilburn claimed she saw and how she saw it was . . . so improbable as to be incredible." Defendant thus argues Lilburn's testimony should be discounted, and that, in its absence, the record lacks sufficient evidence to support his conviction. We disagree.

In reviewing the sufficiency of the evidence, "the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) In conducting this review, we presume in support of the judgment every fact the jury reasonably could deduce from the evidence. (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

Evidence is substantial if it is reasonable, credible, and of solid value. (*People v. Avila*, *supra*, 46 Cal.4th at p. 701.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "The inherently improbable standard addresses the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying. Hence, the requirement that the improbability must be 'inherent,' and the

falsity apparent 'without resorting to inferences or deductions.' [Citation.]" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729.) Testimony must be physically impossible, unbelievable per se, or wholly unacceptable to reasonable minds to meet this standard. (*Ibid.*)

Lilburn's testimony that she saw defendant and Clayborn drive past her on the freeway was not inherently improbable. She testified at trial that she could not remember how far she had driven before Clayborn called and asked her to return to The Mix. Surveillance video showed a Lexus enter, circle, and leave The Mix parking lot at 1:46 to 1:47 a.m., about fifteen minutes after Lilburn initially exited the bar at 1:32 a.m. The Lexus turned right, toward the 2 freeway onramp, and Lilburn testified that she got on the 2 freeway. The victims' motorcycles and the Camry had left The Mix parking lot approximately one or two minutes earlier. Those vehicles all turned left, toward the 210 freeway onramp. Lilburn said she saw the Camry drive by her on the 2 freeway at a location about three minutes away from The Mix and south of the transition road between the 210 and 2 freeways on which the shooting occurred. This sequence and timeline of events is not physically impossible, given the configuration of the freeways and the proximity of The Mix to both of them. Even though Lilburn testified that the Camry was traveling at a high rate of speed, her familiarity with the car she owned and with its driver, her boyfriend, lent credibility to her testimony that she recognized both the car and driver. There was no dispute that Lilburn drove defendant to The Mix and spent several hours with him there, so it was reasonable for the jury to infer she recognized him as well.

Defendant ignores Lilburn's trial testimony and points to her police interview, during which she said she got on the freeway before returning to The Mix at Clayborn's request. He

asserts, "from the time the Camry leaves the Mix till the Lexis [*sic*] returns is 1:00 minute or one minute 20 seconds. . . . This time differential is consistent with Gonzalez's testimony that as they were leaving he remembered that Clayborn[] or someone in his [Clayborn's] car had Gonzalez's phone and Lilburn went back to find Clayborn[] and retrieve the phone but Clayborn[] was already gone. [Citation.] If Lilburn had already been on the freeway and was asked to return to the Mix it would, from all accounts have taken her much longer than one minute to get back to the parking lot." The problem with this assertion is that it is unclear from the record when the Lexus first left The Mix; the testimony about the surveillance videos focused on the Camry. The jury reasonably could have inferred that Lilburn left the parking lot shortly after exiting The Mix itself at 1:32 a.m., which could have given her up to fifteen minutes to drive away and return to the parking lot—plenty of time to enter and exit the nearby freeway. Moreover, the testimony about the lapse of one minute or one minute and 20 seconds relates to the time between the *Camry* leaving the parking lot and the Lexus returning to it, not the Lexus initially leaving and returning.

Even if the jury did discount Lilburn's testimony, other evidence in the record supported the inference that defendant was in Clayborn's car at the time of the shooting. Officer Kmbikyan testified that the surveillance video showed defendant and Clayborn walking together when they left The Mix, apart from the other people with whom they exited the bar. Balbaneda initially told law enforcement that defendant did not ride home in Lilburn's car. Clayborn told Lilburn that defendant called his bluff. The Clayborn and Gonzalez phones moved in tandem with one another, and both made phone calls to Toonerville's "gun guy," Lil P, immediately after the shooting. Defendant also enlisted Nahapetian to investigate whether there were

surveillance cameras at The Mix, from which the jury could infer he was afraid there might be camera footage implicating him. The jury could draw the same inference from the eight hang-up calls made from defendant's phone number in response to Lilburn's January 2009 phone call; the repeated calls and failure to leave a message suggest defendant wanted to talk to Lilburn personally about what the police had asked her. In short, there was sufficient evidence from which the jury could conclude defendant was involved in the shooting.

V. Impeachment Evidence Against Detective Frank

Prior to trial, defendant and Clayborn moved in limine to allow evidence of a federal civil rights lawsuit involving Detective Frank. Specifically, they sought to call the plaintiff in that lawsuit and his attorney to "testify as to the investigation/lack thereof prior to an arrest being made, misstatements made in a search warrant and/or arrest warrant, fabrications used to hold people in custody, and how a jury awarded over $1 million to the plaintiff for wrongful arrest and for actions done by detectives . . . of the Glendale Police Department in wrongfully accusing someone of murder."

The trial court ruled that the witnesses could not testify, because their testimony would result in undue consumption of time under Evidence Code section 352. However, it allowed "the impeachment of Detective Frank[ ] regarding his alleged misconduct and/or misrepresentations made in relation to the federal lawsuit in question, if they were ever made, with the strict proviso that any issue presented with regard to the federal civil lawsuit is relevant or bears a nexus regarding a particular identical and/or a very similar issue in the instant criminal trial, such as, to challenge a contention that he, Detective Frank[ ], somehow fabricated Mr. Clabyorn[ ]'s and/or Mr. Gonzalez's arrest and/or search warrants involved in this case, or

manipulated Mr. Clayborn[]'s and/or Mr. Gonzalez's bail amount or witness statements against them, just to name a few. [¶] However, should such nexus and/or relevancy be established with respect to the federal civil suit versus the instant criminal case, such evidence regarding the federal lawsuit cannot be based upon testimony of witnesses from the federal case which are premised upon hearsay, speculation, or mere conclusions. [¶] Any witness from the federal lawsuit that may wind up testifying in the underlying criminal trial should be relevant - - I should say, relevancy should first be established in order to be able to testify based upon firsthand and/or personal knowledge, not opinions, that they believe the investigation was shoddy or that affidavits in support of search warrants and/or arrest warrants were fabricated or untruthful. There has to be something based on personal knowledge and an exception to the hearsay law. [¶] Otherwise, to simply offer evidence that a monetary verdict resulted in a federal lawsuit wherein Detective Frank[] was one of many law enforcement officers involved in the case, is my understanding, would serve no probative value and only result, in the end, of having a substantial prejudicial effect on Mr. Clayborn[ ]'s and Mr. Gonzalez's criminal case, under Evidence Code section 352."

Defendant contends this ruling "set an impossible standard for the defense to meet and unreasonably established different rules for defense witnesses than prosecution witnesses." He further contends he had both a statutory and constitutional right to introduce the testimony of the plaintiff and his attorney, which he characterizes as reputation evidence pertaining to Frank, because it was relevant and crucial to his defense.

Evidence of immoral conduct is admissible for impeachment, even if the conduct did not constitute a criminal offense. (*People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn. 7.)

"Admission of such prior misconduct evidence remains subject to the trial court's discretion under Evidence Code section 352, which 'empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' ([*Wheeler*, *supra*,] at p. 296.)" (*People v. Rivera* (2003) 107 Cal.App.4th 1374, 1380.) Where a party seeks to prove a witness's misconduct for impeachment by direct evidence of the acts committed, as defendant sought to do here, "fairness, efficiency, and moral turpitude become more complicated issues," which the court must take into account. (*Wheeler*, *supra*, 4 Cal.4th at p. 297, fn. 7.) "Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Id.* at pp. 296–297.)

"Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*People v. Clark* (2011) 52 Cal.4th 856, 932.)

The trial court exercised its discretion appropriately here. It considered the nature of the evidence defendant sought to introduce—the testimony of two witnesses totally unrelated to this case about events wholly extraneous to this case—and concluded that allowing the testimony would cause undue consumption of time. This ruling was reasonable in light of the disconnect between the witnesses and the instant case. Defendant asserts the proposed testimony was "no less reliable than the opinions offered by the prosecution's gang experts which consisted of a police officer and a Mexican Mafia drop out." The court's concern with the proffered testimony was not its

reliability, however, but its tenuous connection to the case and its marginal probative value. There is no indication that the trial court applied different standards to defense witnesses than prosecution ones. In any event, defendant ignores the remainder of the court's ruling, in which it permitted the defense to impeach Frank's testimony with evidence of the federal civil lawsuit if it could demonstrate a nexus between the two unrelated matters and Frank's conduct therein. This was an appropriate exercise of the court's discretion, and we note that defendant made no attempt to introduce impeachment evidence in conformity with the trial court's ruling.

In light of our ruling that the trial court did not abuse its discretion under Evidence Code section 352, we also reject defendant's underdeveloped constitutional claims. "The routine and proper application of state evidentiary law does not impinge on a defendant's due process rights. [Citation.] Additionally, 'reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value . . . generally does not contravene a defendant's constitutional rights to confrontation and cross-examination.' [Citation.] 'Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 809-810, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

VI. Mention of Defendant's Custody Status

During recross-examination of Balbaneda, the prosecutor asked him whether he liked the way the Glendale Police Department treated Toonerville members. After Balbaneda answered that he did not care how the police treated Toonerville members, the prosecutor asked, "And Mr. Gonzalez was sitting in jail since July of '09 and you couldn't be bothered to come forward

and tell anybody that, 'Hey, you got the wrong guy, because he went home with me'?" Clayborn's counsel objected on the basis that "it's an improper question to say that someone has been in custody since then." The trial court said it agreed, and the prosecutor segued into another area. At sidebar shortly thereafter, Clayborn's counsel reiterated his objection that it was "totally improper to tell a jury that someone is in custody and has been in custody for the last five years." Defendant's counsel joined the objection, which the trial court again sustained. Both defense counsel moved for a mistrial, which the court denied. The court noted, however, "[t]here is a curative instruction as well."

The court later instructed the jury with CALJIC No. 2.29: "The mere fact that a witness is in custody or is in physical restraint must not prejudice you for or against any party. Do not speculate as to why a witness is in custody or is in physical restraint. [¶] That a witness is in custody or subject to physical restraint is not by itself evidence that a witness is or is not believable." The court also instructed the jury that statements made by attorneys are not evidence. (CALJIC No. 1.02) It further instructed the jury that defendant and Clayborn were presumed innocent, and the prosecution bore the burden of proving them guilty beyond a reasonable doubt. (CALJIC No. 2.90.)

Defendant contends that the mention of his custodial status "cut against the presumption of innocence and diluted the state's burden," in violation of his due process rights and right to a fair trial. He argues that he was prejudiced, and reversal is required under *Chapman v. California* (1967) 386 U.S. 18, 24.

Defendant is correct that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes."

(*Estelle v. Williams* (1976) 425 U.S. 501, 512.) The rationale for this rule is that prison clothes serve as a constant reminder to the jury that he defendant is in custody, thereby tending to undercut the presumption of innocence by creating a risk that the jury will impermissibly consider that factor. (*Id.* at pp. 504-505.) In addition, the jury may speculate about the reason for the defendant's custody status, which may further distract it from the evidence presented. (*People v. Taylor* (1982) 31 Cal.3d 488, 494.) Defendant points out that our Supreme Court has observed that "[i]t may be inferred that other information, having the same tendency to remind the jury that a defendant is in custody, might have a similar effect." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336.)

However, "the mere fact that the jury is made aware of a defendant's custodial status does not deprive the defendant of his constitutional rights." (*People v. Valdez* (2004) 32 Cal.4th 73, 121.) In some cases, the jury inevitably will learn a defendant is in custody by listening to jail calls involving that defendant. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1336.) That was true of Clayborn but not defendant in this case. When defendant took the stand, however, he specifically testified, "2009, I was put in jail for this case." Given defendant's affirmative testimony regarding his custody status and the curative instructions given to the jury, which we presume it followed (*People v. Yeoman* (2003) 31 Cal.4th 93, 139), any arguable constitutional error injected into the proceedings by the prosecutor's query was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 26.)

VII. Cumulative Error

Defendant contends that all of the alleged errors discussed above resulted in cumulative error sufficient to deprive him of due process and warrant reversal of his convictions. We disagree.

"To the extent there are a few instances in which we have found error or assumed its existence, no prejudice resulted. The same conclusion is appropriate after considering their cumulative effect." (*People v. Valdez* (2012) 55 Cal.4th 82, 181.) Similarly, the cumulative effect of any errors in this case was not prejudicial.

VIII. *Pitchess* Request

Defendant requests that we conduct an independent review of the sealed records of the trial court's in-camera hearing on Clayborn's *Pitchess* motion seeking discovery of Detective Frank's personnel records. The Attorney General does not oppose the request. As a general matter, we are authorized to conduct such a review to determine if the trial court abused its discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1231.) We are not persuaded review is proper here, however, because defendant neither joined Clayborn's motion nor filed his own *Pitchess* motion below. (Cf. *People v. Superior Court* (2015) 61 Cal.4th 696, 717-722 [reconciling *Pitchess* and *Brady v. Maryland* (1963) 373 U.S. 83 and emphasizing a defendant's right to bring a *Pitchess* motion, as well as his or her obligation to use the *Pitchess* procedures to do so].)

In an abundance of caution, given the joint nature of the trial and an inaccurate suggestion in one of the minute orders that defendant joined the motion, we have conducted the requested review. We find no abuse of discretion in the trial court's ruling that no discoverable material existed.

IX. Section 12022.53, subdivision (h)

Defendant was sentenced to a term of 25 years to life under section 12022.53, subdivisions (d) and (e). At the time of his sentencing, the trial court was required to impose that sentence. Senate Bill No. 620, effective January 1, 2018, amended section 12022.53, subdivision (h) to give the trial court, for the first time,

the discretion to strike a section 12022.53 enhancement. The amendment applies to all cases, like defendant's, not yet final on appeal when the amendment took effect. (See *People v. Chavez* (2018) 21 Cal.App.5th 971, 1020; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The parties provided supplemental briefing to address the effect of S.B. 620 on this case.

Defendant contends that the amendment is applicable to his case and that we should remand the case for the trial court to exercise its discretion under section 12022.53, subdivision (h). The Attorney General concedes the amendment is retroactive but contends remand would be futile because the record shows the trial court would not have exercised discretion to strike the firearm enhancement. Specifically, the Attorney General argues the trial court is unlikely to strike the enhancement in light of defendant's criminal history and the violent nature of his crimes. (See P*eople v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand is required "unless the record shows that the sentencing court clearly indicated that it would not . . . have exercised its discretion to strike the allegations"].)

We conclude that a remand is appropriate. The court's comments at the sentencing hearing were brief and do not permit us to conclude categorically that the court would not exercise its discretion under section 12022.53, subdivision (h) to strike the subdivision (d) enhancement in favor of a lesser enhancement of 20 years under subdivision (c), a 10-year term under subdivision (b), or perhaps no term at all. By remanding, we are not suggesting that the court should exercise its discretion to reduce the section 12022.53 enhancement or strike it entirely. We simply decline to presume that any exercise of discretion other than refusing to reduce the section 12022.53 enhancement would be an abuse of discretion.

DISPOSITION

The judgment is affirmed and the case is remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.