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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE VILLALOBOS, Defendant and Appellant.	B275993 (Los Angeles County Super. Ct. No. TA135124)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed and remanded for resentencing.

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

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Enrique Villalobos (defendant) appeals from the judgment entered after he was convicted of murder and attempted murder. Defendant contends: the omission of an accomplice jury instruction was prejudicial; the accomplice testimony was not supported by sufficient corroborating evidence; that distinct corroborating evidence was required to support the firearm enhancements; the trial court erred in denying defendant's motion for mistrial; jury instructions CALCRIM Nos. 520 and 600 are inconsistent and confusing when read together; jury instructions using the term "awareness of guilt" permit irrational inferences; the prosecutor's use of common experiences to illustrate premeditation and deliberation was misconduct; the cumulative effect of multiple errors denied defendant a fair trial; that a restitution fine may not be lawfully imposed without a jury trial; and any omission by trial counsel resulting in forfeiture of any issue on appeal violated defendant's right to effective assistance of counsel. Defendant also asks that the matter be remanded for resentencing under the recently amended Penal Code section 12022.53, subdivision (h).[1] We remand to allow the trial court the opportunity to exercise its discretion under the amended statute. We further find that the omission of an accomplice jury instruction was harmless error, and defendant's remaining contentions are without merit. We thus affirm the judgment of conviction.

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[1] The Legislature amended Penal Code section 12022.53, effective January 1, 2018, to give the sentencing court discretion to strike the firearm enhancement in the interests of justice. (See Stats. 2017, ch. 682, § 2.)

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

BACKGROUND

In an amended information defendant and codefendant Eder Rodriguez (Rodriguez) were charged in count 1 with the murder of Joaquin Hinojos (Hinojos), in violation of section 187, subdivision (a)(1). Defendant and Rodriguez were charged in counts 2 and 3 with the attempted willful, deliberate, and premeditated murders of Ismael Lara (Ismael) and Fernando Serna (Fernando),[2] respectively, in violation of sections 664 and 187, subdivision (a). The information alleged pursuant to former section 12022.53, subdivisions (b), (c), (d), and (e)(1), that a principal and defendant personally and intentionally discharged a firearm that proximately caused great bodily injury or death to the victims, that a principal and defendant personally and intentionally discharged a firearm, and that a principal personally used a firearm in the commission of the crimes. It was further alleged pursuant to section 186.22, subdivision (b)(1)(C), and for purposes of section 186.22, subdivision (b)(5), that the crimes were committed for the benefit of, and the direction of, or in association with a criminal street gang. In addition, the information alleged that defendant had suffered a conviction for a prior serious or violent felony within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12), as well as section 667, subdivision (a)(1), and section 667.5, subdivision (b).

In a bifurcated proceeding defendant admitted the prior conviction. A jury found defendant guilty as charged, found the attempted murders to have been committed willfully, deliberately, and with premeditation, and found true all firearm allegations. The jury acquitted Rodriguez on all counts. On July 6, 2016, the trial court sentenced defendant to prison as follows:

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[2] As there were others with the surname Serna or Lara, either mentioned at trial or who testified, we refer to all those affected by their first names to avoid confusion.

as to count 1, 25 years to life, doubled as a second strike, plus 25 years to life pursuant to former section 12022.53, subdivision (d), and five years pursuant to section 667 subdivision (a)(1); as to each counts 2 and 3, a consecutive term of life in prison, with a minimum parole date of 15 years, pursuant to section 186.22, subdivision (b)(5), doubled as a second strike, plus 25 years to life pursuant to former section 12022.53, subdivision (d), and five years per section 667 subdivision (a)(1). The remaining firearm and gang enhancements were stayed. The court ordered defendant to pay mandatory fines and fees, including a restitution fine of $10,000, and calculated presentence custody credit at 531 actual days of custody. Defendant was also ordered to pay victim compensation in the amounts of $5,253 and $,1000.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

On September 7, 2014, Fernando was outside his house on 110th Street in Lynwood with his friends, Hinojos and Ismael. Fernando testified that Hinojos had ridden his bicycle to Fernando's house that day wearing a baseball cap emblazoned with the word "Compton." After amusing themselves for about 30 minutes by riding back and forth on a bike and scooter, the threesome was about to go into Fernando's house. Ismael was getting his phone charger out of the trunk of his car, when a man emerged from a silver Pontiac Vibe and fired a nine-millimeter handgun eight or nine times toward them. A neighbor called 911 at 12:40 p.m. Fernando was shot in the left hand and right thigh, Ismael was struck with four bullets, one of which left him permanently paralyzed, and Hinojos died of a single gunshot wound to the chest.

Los Angeles Sheriff's Department (LASD) Homicide Detective David Gunner and Sergeant Troy Ewing were able to

determine that Rodriguez owned a silver Pontiac Vibe, which was located on September 17, 2014, in an auto body shop owned by Rodriguez's father. The car had been prepared for painting, and the bumper, license plate, and handles had been removed.

Rodriguez was arrested on September 17, 2014, and interviewed by detectives. At first he claimed that he had been kidnapped and forced at gunpoint to drive to the shooting. He admitted being a member of the Paragon gang, and acknowledged the others in the car were also members of the gang. Later, Rodriguez told detectives that when the man from Compton rode by on the bicycle, one of Rodriguez's companions said, "Let's go check it out." Another suggested that he was probably a "Swindle" and would serve as initiation into the big league. Rodriguez declined, suggesting instead they go to the liquor store to buy another "blunt." Rodriguez told detectives that as he drove to the liquor store, one of his companions directed him to 110th Street, told him to stop, opened the door, fired his weapon, and then got back into the car. Rodriguez then drove to Norton Street near his mother-in-law's house and dropped off his passengers. The shooter left the gun, a nine-millimeter pistol, with Rodriguez, who later hid it in an Explorer SUV parked at his apartment building. Rodriguez told the detectives that one of the three victims was associated with the Swindles "tagging crew," that he knew the victim's brother Emmanuel by his nickname "E-man,"[3] and he had told Emmanuel to warn his brother not to be outside with his friends, because there were "homies" about in the neighborhood. Paragon gang members did not get along with Swindles, and Rodriguez recounted an incident when the hostility had led to gun violence.

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[3] Rodriguez was apparently referring to Emmanuel Serna, Fernando's brother.

Rodriguez identified relevant individuals to the detectives using fabricated nicknames, claiming not to know real names, but ultimately said the shooter was "Kiki," although in his cell phone contacts "Creaky was listed."[4] Rodriguez said that Kiki's girlfriend "Desiree" [*sic*][5] was Joker's sister, and that Kiki lived with her on Lorraine and Norton Streets, in Joker's house. Rodriguez identified a photograph of defendant as Kiki.

Rodriguez was placed in a holding cell with a "*Perkins* agent"[6] dressed in jail uniform and posing as a recently arrested gang member. Their conversation was recorded, and the recording was played for the jury. Rodriguez said he was suspected of homicide, and had falsely told the police he had been forced to give someone a ride after being held at gunpoint. He confided that what actually had happened was that he was visiting two of his homies, Kiki and "Pelon," intending to watch football. Kiki's girlfriend was the sister of a "big homie" called "Joker," who was known for having a bad temper. The girlfriend lived in the "P-house" on Norton and Lorraine Streets. Intending to go in Rodriguez's Pontiac Vibe to purchase a blunt, the three of them went outside, where they saw some "fools" on a bicycle, who did not belong and looking like they were up to no good. One of Rodriguez's homies suggested that they check them out. When the threesome saw a man Rodriguez knew to be from "Tres Swindles" and his companions, Kiki told Rodriguez to stop. Kiki got out, and started shooting them with a nine-millimeter

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[4] Creaky is spelled "Kricki" and "Kri-kri" later in the reporter's transcript.

[5] Rodriguez apparently meant Desarie Delarosa, who later testified for the defense.

[6] See *Illinois v. Perkins* (1990) 496 U.S. 292.

handgun. Kiki "smoked" one of them; shot about four rounds in his belly, close and personal. Kiki hit another in the neck, and hit the one from Swindles in the hand. Kiki then hopped back into the car, told Rodriguez to "get the fuck out of here," and then gave Rodriguez the "black," telling him to get rid of it. Rodriguez told the agent that although he had told detectives Pelon was the shooter, Pelon did not exist. The homie in the back seat was "Peloc,"[7] who was older, around the same age as Kiki, all "tatted out," with "Paragons" on his forearms, and who had been in and out of prison.

Rodriguez told the agent that things were not supposed to go down that way, that he was not at all prepared for what happened, and that he would not have taken his own car. "It wasn't a G-ride." If he had known, he would have at least taken the license plate off, or something. E-man, the brother of the victim from Swindles came outside, saw Rodriquez and made eye contact. Rodriguez thought E-man must have "ratted him out," because they knew each other and E-man had seen him.

Rodriguez also testified at trial. He admitted being a member of a Paragon gang and that his gang moniker was "Kronik." He identified defendant in court as Kiki. They had been introduced at a gang meeting when defendant came back from "hiatus" about six months before the shooting, but Rodriguez had not known him before his hiatus. At approximately 10:00 a.m. on the morning of the shooting, Rodriguez went to defendant's house to smoke weed and watch football with defendant and P-Loc. They finished a blunt, and were outside smoking the second one when they saw someone on a bicycle. Defendant asked whether he or P-Loc knew someone

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[7] Peloc was also spelled "P-Loc" in other parts of the reporter's transcript.

who lived near 110th Street, rolling around on a bike, baldheaded, and looking "banged up." Rodriguez replied a lot of people passed through looking like that, because they lived close to Watts. He told defendant to "just kick it," that it was not a big deal.

When Rodriguez finished the second blunt, he drove his wife's Pontiac Vibe to the liquor store to buy another. Defendant decided to go along too, and got into the passenger seat, while P-Loc got into the back seat. Rodriguez drove on Lorraine Street, but defendant directed him otherwise until he turned onto 110th Street. As he was turning onto 110th Street, Rodriguez heard defendant cock his pistol and saw him hold it close to his lower chest. Before that Rodriguez did not know that defendant had a weapon.

Rodriguez was frightened, did not know what defendant intended to do. He was afraid that defendant had discovered that he was selling drugs to rival gangs, which was forbidden by the gang. P-Loc told Rodriguez to slow down, so he took his foot off the gas pedal. The passenger door swung open before the car came to a complete stop. Within seconds defendant got out, asked a person, "Where you from?" And when the person replied, "Swindle," the gun started "popping." In shock, Rodriguez froze, saw a victim fall, but did not know there were other victims until a few hours later. Suddenly defendant was back in the car, saying, "Go, go, go." Rodriguez denied knowing that defendant was going to shoot those people, and denied that he intended for defendant to do so. When Rodriguez went to defendant's home that day, he knew there was a rifle in the house, but did not know that defendant had a handgun.

Intending to return to defendant's house, Rodriguez turned onto Lorraine Street, but defendant stopped him and directed him to Norton Avenue. He stopped in front of Rodriguez's

mother-in-law's house, about three houses down from defendant's. Defendant and P-Loc got out, but before closing the door, defendant threw the empty gun onto the passenger's seat, left it there, and told Rodriguez to take off. Rodriguez went home and sat in the car for awhile not knowing what to do. He later hid the gun in an abandoned car in the apartment building parking lot. He did not call the police because he feared arrest and for his family's safety.

Rodriguez told Emmanuel, his fairly good friend, to warn Emmanuel's brother to visit with his friends in the backyard so as not to be exposed. Rodriguez assured Emmanuel that he did have to worry about Rodriguez passing by, but that "making the 'hood hot" was not good for business, and could result in retaliation. Drug customers would stop coming to the neighborhood, and there would be police patrols flooding the streets. Rodriguez explained that the Swindles tagging crew was affiliated with the CV-3 gang, also called the Tres gang, one of the Paragon gang's rivals. There had been previous incidents of violence and retaliation between the Paragons and the Swindles.

The day of the shooting, Rodriguez called and texted defendant in order to find out what he should do with the gun. Defendant told him to hold onto it; that someone was interested in buying it. Rodriguez called so often that defendant finally showed up, but refused take the gun because his girlfriend's son was in the car. Rodriguez admitted that the cell phone number which ended in 9465 was his, although it was registered to his wife. Rodriguez deleted from the phone all text messages exchanged with defendant and changed defendant's name in his contact list to Kricki or Kri-kri.

Rodriguez was arrested on September 17, 2014, when the police served a search warrant for his home. The number identified in the contacts of Rodriguez's cell phone as belonging to

Kricki ended in the numbers 3377. Detectives in the LASD tech crimes unit extracted data from the memory chips of the cell phones used by Rodriguez (number 9465) and defendant (number 3377), including contacts, call logs, emails, text messages, photographs, videos, and internet history. The cell towers used by the two phones were mapped by LASD analyst Romy Haas and explained to the jury.

On the day of the shooting beginning at 11:37 a.m., several contacts with Rodriguez's 9465 number utilized a cell tower located near his home and the El Granero Restaurant in the City of Bell. At 12:51 p.m., it used a tower closer to the area of defendant's home on Norton Avenue and the area of the shooting on 110th Street in Lynwood, south of Bell. At 12:55 p.m., 12:57 p.m., and 1:00 p.m., Rodriguez's phone used cell towers to the north and successively closer to his home, suggesting that he was moving in that direction. Between 1:06 p.m. and 3:15 p.m., his phone used the cell towers closest to his home and the restaurant.

The cell tower records showed that the cell phone with the 3377 number was used near defendant's home and the scene of the shooting several times between 12:20 p.m. and 1:05 p.m. Between 1:05 p.m. and 1:15 p.m., that phone used towers on a northerly route successively closer to the El Granero restaurant, and then used towers close to the restaurant for several calls until shortly after 3:20 p.m., including several calls to or from Rodriguez's phone between 1:30 and 2:06 p.m. Around 2:18 p.m., several calls used a tower closer to Rodriguez's residence. Shortly before 4:00 p.m., defendant's phone began to use towers along a southerly route successively closer to his home; then, around 4:45 p.m., there were calls from defendant's phone which used a tower located between his home and the Downey Regional Hospital in Downey, east of defendant's home. Finally, between 5:14 p.m.

and 5:50 p.m., there were several calls using towers close to the hospital. The parties stipulated that on September 7, 2014, there were two searches on the 3377 phone for breaking news, one at 3:08 p.m. and one at 3:45 p.m., and that the phone was not used at any other time for a similar search.

Defendant was arrested on September 18, 2014, at an Irvine hotel, about 36 miles away from defendant's home. Cell phone records show that from 10:00 p.m. on September 17 until about midnight, defendant's phone used cell towers beginning near his home and ending near the hotel.

LASD Detective Carolina Roman testified as an expert in gang culture and Lynwood gangs, including the Lynwood Varrio Paragon criminal street gang (Paragons or Paragon gang). She explained that criminal street gangs benefitted by "money, power, and fear." Creating fear in the gang's neighborhood by victimizing the residents made the residents reluctant to speak to law enforcement, which gave the gang's members the power to commit their crimes freely. Commission of some crimes led to money which was used to buy weapons to share among gang members. Violence also served to maintain a reputation among rival gang members, so that the gang is not viewed as weak. Weakness would encourage other gangs to invade the neighborhood. A strong reputation is maintained by demanding respect through violence; disrespect requires retaliation by means of a physical assault or shooting.

Rivals of the Paragon gang include the Compton Varrio Trece gang, also known as CV-3, the Swindles, the Neighborhood Crip gang and the Compitas gang. For the Paragon gang, an example of disrespect would include someone riding through the gang's territory wearing clothing relating to a rival gang, such as something with "Compton" written on it. The area where this shooting took place was within the territory claimed by the

Paragon gang. The 2700 block of Norton Avenue, which is near the shooting scene, was also in Paragon gang territory.

Detective Roman explained that photographs depicting defendant and other men (including one who was in the audience) forming the letter P with their fingers, was a way to signify the Paragon gang. Some men in the photographs wore Pittsburgh Steelers attire, which is indicative of the Paragon gang. Detective Roman listened to a jail telephone call in which defendant identified himself as Kiki from Paragons.[8] Detective Roman also reviewed photographs of defendant's tattoos, and explained their connection to the Paragon gang, including the words, "Lynwood" and "Paragons," and the initials, "LWD." In addition, "Sureno" was tattooed on defendant's back, signifying his gang's alliance with the Mexican Mafia. Based upon the photographs and the recording, Detective Roman opined that defendant was a Paragon gang member. In Detective Roman's opinion, Rodriguez was also a member of the Paragon gang, based on photographs of his tattoos, and an audio recording in which he admitted being a member of the gang and known by the moniker, Kronik.

Given a hypothetical question mirroring the facts in evidence, Detective Roman opined that the shootings were committed for the benefit of and in association with the Paragon gang, to protect the gang's territory from rival gangs.

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[8] The recorded call was also played for the jury. Before the actual conversation began, an automated voice said, "Hello, this is a prepaid call from--," and defendant's voice added, "Kiki." The call was then accepted, and defendant said, "What's up baby? A woman's voice is heard, and then a male voice is heard saying, "Say that again homie." Defendant replied in Spanish, "This is Kiki from Lynwood Paragons," and then some unintelligible words, followed by "Hello?"

Defense evidence

Defendant's girlfriend, Desarie Delarosa (Delarosa), testified that in 2014, she lived with defendant on Norton Street. Other adults living in the house included her brother Mario "Joker" Delarosa and her grandfather. Defendant and her brother had both been members of the Paragon gang, and she assumed that all her brother's friends were members of the gang. She further claimed that defendant left the gang in October 2013, when he was paroled, and was no longer involved in any type of gang life. Delarosa denied their home was a "gang hang-out," but acknowledged many people visited the house.

Delarosa had been acquainted with Rodriguez for about seven years, but did not see him leave the house with Rodriguez or any Paragon gang members on the day of the shooting. She claimed that she and defendant left the house around 11:45 a.m. or noon to go to a hospital emergency room, and the only time during that morning she did not have defendant in her sight was when he was in the living room or outside the house sweeping with the children. Delarosa explained that the day before the shooting, her old surgical wound began to swell with pus, and she was treated at St. Francis Medical Center. When she woke up on September 7, 2014, she felt worse. Her leg felt like it was on fire and she could not stand. When nothing helped, defendant insisted she go back to the hospital, and helped her to the car. She was unable to reach her friend Sendy by phone so she and defendant went to Sendy's house to ask her to check on the children after work. When Delarosa pulled into Sendy's driveway, she parked, got out, went to the gate and called for Sendy's children to come out. Later, Delarosa testified that defendant drove there, and when he pulled into the driveway, she got out and hopped to the fence. When two of the children came to the gate and told her that Sendy was working that day,

Delarosa left them her keys, and eventually reached Sendy sometime later. The couple went to St. Francis, but the emergency room was crowded, so they left to have lunch at the El Granero Restaurant.

After lunch, they drove around, went to a shopping center, got a snow cone, parked, stood outside the car to smoke a joint, dropped her four-year-old with her brother's girlfriend, and then went to the Downey Regional Hospital (southeast of Lynwood). Delarosa denied they ever went to Rodriguez's house that day. She claimed that when Rodriguez called, it was not about a shooting or about hiding a gun, he simply asked where she was, because he wanted marijuana. She said they arrived at the hospital a little after 4:00 p.m. When faced with the call made at 4:45 p.m. using a tower somewhere between her home and the hospital, she testified that they arrived at 5:00 p.m., but the nurse did not call her name from the sign-in sheet or give her a wristband until about 5:39 p.m. In sum, Delarosa testified that she and defendant left the house at 11:40 a.m. to go to the hospital, traveled north to an area near Bell, and then south and east to Downey, arriving at the hospital around 5:00 p.m.

Delarosa claimed that the 3377 number belonged to her cell phone, the only one in the family, and that defendant did not use it. Any calls to or from Paragon gang members were her calls. Shown the photographs on her phone of defendant with other Paragon gang members, she surmised that they were probably taken by her brother or sent to her by someone else. Delarosa thought a photograph taken in January or February 2014 depicted defendant forming a gang sign, a "P" for Paragons, must have been taken when defendant "first got out" because his hair was short.

Sendy Lara (Sendy) testified that she knew defendant, who lived nearby with her friend, Delarosa on Norton Avenue. She

received a call from Delarosa one day in September 2014, between noon and 1:00 p.m. at her workplace. Delarosa asked Sendy to check on Delarosa's children when Sendy got off work at 2:00 p.m., adding that Delarosa would drop her keys at Sendy's house. After work Sendy found the keys and checked on the children.

Sendy's son Miguel testified that in September 2014, when he was 13 years old, he got a call from his mother regarding keys. He recalled that Delarosa came to their home between noon and 1:00 p.m., although his previous statement to the defense investigator was that she came at noon. She walked up to the gate and passed keys to him. He saw Delarosa arrive in a car driven by a man he did not recognize. He could not remember the man's appearance. Miguel knew Delarosa, but did not know defendant.

Delarosa's 14-year-old daughter Leila testified that she remembered that day because her mother had gone to the doctor the day before. It was a Sunday, and she was at home with her brothers, sister, mother, and her stepfather (defendant). Leila got up at 7:00 a.m. and watched defendant rake leaves between 8:30 to 10:30 a.m. When she and defendant went back inside the house, her mother was crying due to the pain in her leg. Defendant and her mother left to see a doctor in her grandfather's car. Leila knew Rodriguez, as a former neighbor, but she did not see him that day, nor did she see any other men visiting the house that day.

Rebuttal

Detective Gunner testified that the 3377 phone included Sendy in its contact folder, and he found several calls to her. The first such call from the 3377 phone to Sendy's phone on September 7, 2014, was placed at 3:48 p.m., and lasted three seconds. The next contact with Sendy's phone was at 5:57 p.m.

There was call from Delarosa's phone to Rodriguez's phone at 1:44 p.m.

DISCUSSION

I. Accomplice instruction

Defendant contends that the trial court should have given a sua sponte accomplice jury instruction such as CALCRIM No. 334, which tells the jury that the defendant may not be convicted on the testimony of an accomplice alone, without some corroborating evidence connecting him to the crime, and to view accomplice testimony with caution.

"'If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 302 (*Gonzales and Soliz*).) The instruction is derived from section 1111, which provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." As Rodriguez was charged with the identical offenses as defendant, he fell within this definition.

Relying on *People v. Brown* (2003) 31 Cal.4th 518, 556, respondent counters that no accomplice instruction was required here, because Rodriguez's statements made to the *Perkins* agent were admissible as statements against penal interest under Evidence Code section 1230. Defendant replies that Rodriguez's statements to the agent were insufficiently reliable to qualify as statements against penal interest, as they were partially

exculpatory. (See *People v. Duarte* (2000) 24 Cal.4th 603, 614.) However, the trial court resolved that issue in the prosecution's favor when it denied defendant's motion in limine to suppress Rodriguez's jailhouse statements or to sever trials, following extensive discussion of the requirements of the penal interest exception by counsel and the court. Defendant has not assigned error to that ruling, and indeed, fails to mention it. Thus, Rodriguez's jailhouse statements and testimony were admitted as declarations against interest, and no corroboration was required.

Regardless, if the trial court had erred, the failure to give an accomplice instruction was harmless as there was sufficient corroboration to show defendant's connection to the crime. "A trial court's error in instructing on accomplice liability under section 1111 is harmless if the record contains 'sufficient corroborating evidence.' [Citation.] Corroborating evidence may be slight, entirely circumstantial, and entitled to little consideration when standing alone. [Citations.] It need not be sufficient to establish every element of the charged offense or to establish the precise facts to which the accomplice testified. [Citations.] It is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 147-148.)

To test to determine whether evidence is sufficiently corroborative is less stringent than the harmless error analysis of *People v. Watson* (1956) 46 Cal.2d 818, 836, which would require a determination whether a different result would have been reasonably probable absent the alleged error. (*Gonzales and Soliz, supra*, 52 Cal.4th at p. 303.) Upon application of this less stringent standard, it is only "*in the absence of sufficient corroboration* [that] we will submit the omission of accomplice

instructions to the harmless error analysis for state law error under [*Watson*]." (*Gonzales and Soliz*, at p. 304.)

That standard may be met with evidence independent of the accomplice's statements showing that the defendant had motive, opportunity, and a discredited alibi, all of which were shown here. (See *People v. Vu* (2006) 143 Cal.App.4th 1009, 1022 (*Vu*).) As in *Vu*, defendant had a gang motive to commit the crimes. Detective Roman testified that defendant was a member of and lived in the territory claimed by the Paragon gang, which needed to maintain its violent reputation so that rival gang members would not perceive weakness and invade the neighborhood. Paragon rivals included the Swindles crew. The gang's reputation was maintained by demanding respect and violently retaliating for any perceived disrespect. A show of disrespect would include riding through the gang's territory wearing clothing relating to a rival, such as clothing emblazoned with "Compton." Fernando testified that Hinojos had ridden a bicycle to Fernando's house that day wearing a baseball cap printed with the word "Compton," and they had amused themselves for 30 minutes in the street in front of the house.

Also as in *Vu*, cell phone records served to discredit defendant's alibi. (*Vu, supra*, 143 Cal.App.4th at p. 1023.) Delarosa testified that the phone with the 3377 number was hers, and that defendant did not use it. However, that number was identified in Rodriguez's contacts as belonging to Kricki, a nickname very similar to defendant's. Delarosa claimed that she and defendant left their house around 11:45 a.m. or 12:00 noon to go to a hospital, and that she called her friend Sendy before stopping at Sendy's house, but received no answer. Sendy testified that she lived in close proximity to Delarosa's house, but received the call between noon and 1:00 p.m. at her workplace. Cell phone records showed that the 3377 number was used near

defendant's home and the scene of the shooting several times between 12:20 p.m. and 1:05 p.m. However, the first call on that phone to Sendy's phone on the day of the shooting was placed at 3:48 p.m., and lasted just three seconds. The next call to Sendy's phone was at 5:57 p.m.

Cell phone records also demonstrate that defendant had the opportunity to commit the crimes, as the 3377 phone was still in the neighborhood at the time the crimes were committed, shortly before 12:51 p.m. In addition, independent of Rodriguez's statements, the cell phone records established that Rodriguez's phone was in the area of defendant's home and the shooting. The phone records corroborate Rodriguez's claim that he called defendant multiple times that afternoon regarding the gun, and that defendant then came to Rodriguez's apartment that afternoon when defendant refused to take the gun. There were several calls between defendant's and Rodriguez's phones between 1:30 p.m. and 2:06 p.m., and at 2:18 p.m., when defendant's phone used a tower close to Rodriguez's residence.

Unusual interest in the crime can provide additional corroboration. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1272.) Here, although defendant's phone had not been used to search online sources for breaking news in the past, there were two such searches on September 7, 2014, one at 3:08 p.m. and one at 3:45 p.m., providing strong circumstantial evidence that the breaking news of interest was the gang shooting in defendant's neighborhood.

Finally, "evidence of defendant's flight after the crimes were committed supports an inference of consciousness of guilt and constitutes an implied admission, which may properly be considered as corroborative of the accomplice testimony. [Citation.]" (*People v. Williams* (2013) 56 Cal.4th 630, 679.) Rodriguez was arrested in the early morning of September 17,

2014. Defendant was arrested on September 18, 2014, at an Irvine hotel, about 36 miles from defendant's Norton Street home. Cell phone records shows that defendant's phone used cell towers between the two locations from 10:00 p.m. on September 17 until about midnight, beginning near Norton Street and ending near the hotel. As respondent observes, such facts strongly suggest that defendant fled in the night after learning of Rodriguez's arrest, thus demonstrating a consciousness of guilt and providing evidence corroborating Rodriguez's statements and testimony.

We conclude that the corroborating evidence was sufficient to render the omission of an accomplice instruction harmless. Further, we reject defendant's contention that if the instruction had been given, it was reasonably probable that the jury would have disregarded Rodriguez's testimony, as well as defendant's contention that failure to give the instruction amounted to federal constitutional error. The trial court thoroughly instructed the jury with CALCRIM Nos. 226, 302, and 318, regarding the evaluation of witness credibility. CALCRIM No. 226 included in part: "If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says, or, if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest." In light of these instructions, any failure to give the accomplice cautionary instruction was not prejudicial and did not implicate the constitutional right to due process. (*People v. Valdez*, *supra*, 55 Cal.4th at p. 148 [equivalent CALJIC instructions]; *People v. Lewis* (2001) 26 Cal.4th 334, 370-371 [same].)

II. Sufficiency of the evidence

Defendant contends that the judgment should be reversed for insufficiency of the evidence because there was no credible,

independent evidence corroborating the accomplice testimony pointing to defendant as the shooter, or that he aided and abetted the shootings.

To support a conviction, accomplice testimony must be corroborated by independent evidence which, without aid or assistance from the accomplice's testimony, tends to connect the defendant with the crime charged. (*People v. Szeto* (1981) 29 Cal.3d 20, 27.) "'[C]orroborative evidence may be slight and entitled to little consideration when standing alone.' [Citation.]" (*People v. Perry* (1972) 7 Cal.3d 756, 769, overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 27-28.) To determine whether corroborating evidence was sufficient, the reviewing court views the evidence in the light most favorable to the judgment. (*Perry*, at p. 774.)

Contrary to these governing principles, defendant points to several isolated bits of evidence which, standing alone, merit little consideration. Defendant singles out three areas of evidence. First, defendant argues that the cell phone records showed merely that defendant was in the area where he lived at the time of the shooting and that evidence of opportunity alone is insufficiently corroborative. Second, defendant urges that that the prosecution was required to present independent evidence of defendant's identity as the gunman in the crimes. Third, Defendant contends that evidence of flight is not probative, because there could be an innocent reason for defendant to have gone to a hotel in Irvine the very night after Rodriguez was arrested.

It is not the law that "each bit of evidence standing alone [be] sufficient to connect the defendant to the crime. . . . If the *sum total* of all of the evidence (other than the accomplice's testimony), connects the defendant to the commission of the offense the requirements of Penal Code section 1111 are

satisfied." (*People v. Manson* (1977) 71 Cal.App.3d 1, 36, italics added.) Contrary to defendant's summary dismissal of the cell phone evidence, when the details set forth in section I above are reviewed, not only does it show that defendant had the opportunity to commit the crime, it also discredited his alibi evidence, exposed defendant's interest in breaking news, and suggested that he fled the area to avoid arrest. In addition, contrary to defendant's suggestion that reversal is required absent independent evidence of defendant's identity as the gunman, "[t]he evidence 'need not independently establish the identity of the victim's assailant.' [Citation.]" (*People v. Romero and Self* (2015) 62 Cal.4th 1, 32.) "[E]vidence of defendant's flight after the crimes were committed supports an inference of consciousness of guilt and constitutes an implied admission, which may properly be considered as corroborative of the accomplice testimony. [Citation.]" (*People v. Williams, supra*, 56 Cal.4th at p. 679.) Further, "the existence of explanations -- other than consciousness of guilt of the crime charged -- for conduct which may be interpreted as flight is relevant to the *weight* of the evidence showing flight, but *not* to its admissibility or sufficiency for the purposes of corroboration." (*People v. Perry, supra*, 7 Cal.3d at pp. 773-774.)

Defendant contends that flight was not shown here, because there was insufficient evidence that defendant knew that Rodriguez was arrested. If defendant did not know that Rodriguez had been arrested, leaving town on the very night of the day of the arrest would be a surprising coincidence. Regardless, independent evidence gave rise to a reasonable inference that defendant knew that Rodriguez had been arrested. Specifically, defendant's girlfriend, Delarosa, testified that defendant lived with her and her brother Mario, a Paragon gang member. Most of Mario's friends were Paragon members, and his

friends visited frequently. Rodriguez was a member of Paragon whom Delarosa had known for six or seven years. Delarosa's daughter knew Rodriguez since he used to live across the street. The neighborhood clearly included Paragon gang members who were often in contact. We thus decline to give no weight to evidence of flight, and conclude that Rodriguez's testimony was sufficiently corroborated.

III. Firearm enhancement - corroboration

Defendant contends that even if the corroborative evidence was sufficient to support the convictions of the underlying offenses, the firearm enhancements must be stricken due to insufficient corroboration of Rodriguez's statements that defendant was the shooter.

Respondent points out that accomplice corroboration is not required to prove a gun use allegation. (*People v. Maldonado* (1999) 72 Cal.App.4th 588, 597.) As explained in *Maldonado*: "Penal Code section 1111, requiring corroboration, applies by its terms to 'conviction' of an 'offense.' An enhancement for personal use of a firearm is not an 'offense,' and a true finding on an enhancement allegation is not a "conviction." (*People v. Morris* (1988) 46 Cal.3d 1, 16 ['Firearm enhancements, like special circumstances, are not substantive crimes'].)" (*Maldonado*, at p. 597.)

Defendant contends that *Maldonado* is flawed, and asks this court to enunciate a new rule requiring accomplice corroboration which relates specifically to the defendant's gun use and identifies the defendant as the shooter. We find no flaw in *Maldonado*, and observe that defendant's new rule would depart from longstanding California Supreme Court precedent interpreting the requirements of section 1111. The court has long held that the evidence need not corroborate every fact to which the accomplice testified, or support each element of the offense,

but merely "'connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth . . . .' [Citations.]" (*People v. Szeto, supra*, 29 Cal.3d at p. 27, and see cases cited therein.) And "[t]he evidence 'need not independently establish the identity of the victim's assailant.' [Citation.]" (*People v. Romero and Self, supra*, 62 Cal.4th at p. 32.) We therefore decline to strike the firearm enhancements. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

IV. Prosecutorial misconduct/mistrial

Defendant contends that the prosecutor committed misconduct by failing to redact a portion of the transcript of Rodriguez's conversation with the *Perkins* agent; that the misconduct resulted in a denial of due process; and that the trial court abused its discretion in denying his motion for mistrial.

A prosecutor's improper conduct does not violate the federal constitution unless it is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Misconduct violates state law only if the prosecutor has used deceptive or reprehensible methods to attempt to persuade either the court or the jury. (See *Hill*, *supra*, at p. 819.) It is defendant's burden to show that the prosecutor's conduct infected the trial with unfairness or that the prosecutor used deceptive or reprehensible methods. (*People v. Harrison* (2005) 35 Cal.4th 208, 256-257.) It is also defendant's burden to demonstrate "'a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*Id.* at p. 257.)

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial

is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 198-199.) A motion for mistrial "should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala* (2000) 23 Cal.4th 225, 283.) "'The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) In particular, it is defendant's burden to demonstrate that the trial court's decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 (*Alvarez*).)

Prior to playing the recording of the conversation, the prosecutor had agreed to redact passages from the CD and the transcript. One of the passages was not redacted in the original transcript given to the jury, although it had been redacted from the audio. That passage read:

> "Rodriguez: . . . One of the homies, he just got out, fool. The homie Kiki. That fool just got out, just got out.
>
> "Inmate [*Perkins* agent]: He just came out? (*Unintelligible*)
>
> "Rodriguez: Yeah. The fool, he's only been out probably like two months.
>
> "Inmate: You're kidding me.

"Rodriguez: Two or three months, fool.

"Inmate: After a gang of time?

"Rodriguez: After like 15 years. . . .

"Rodriguez: Ah, fool, they were -- he wasn't even supposed to come out. They was trying to get that fool for another case in there and shit."

Toward the end of the day on a Friday, the prosecutor played part of the recording during the testimony of Detective Gunner, starting and stopping it to ask questions about some of the statements recorded. When he realized that the subject passage had not been redacted from the transcript he stopped the recording altogether. Recess was taken, and in a discussion outside the presence of the jury the prosecutor explained to the court that the original plan to play the CD would have given him additional time to complete the redactions, but when the timetable was moved up, and defense counsel requested additional edits, he tried to complete all the redactions at lunchtime, and missed this passage in the transcript. Defense counsel indicated that the CD had stopped prior to the area of the recording corresponding to the written passage, and thus the unredacted page or pages were not reached. The jurors would have had to read the transcript a little ahead of the recording in order to have seen it.

Defense counsel's motion for mistrial was denied. The trial court offered to admonish the jury, but suggested that it might be better not to highlight it, to put on a different witness for the rest of the day, tell the jury that this was a scheduling issue and that the transcripts had been collected so they would not be lost and

passed out again on Monday. When the jury returned from recess, another witness was called. Before the jurors came in on Monday, defense counsel agreed with the court's suggestion to say nothing to the jury. Defense counsel acknowledged that the prosecutor stopped the recording before anyone reading along would get to the page with the challenged passage, and that it was unknown whether any juror read ahead.

Absent evidence suggesting that the prosecutor's omission was deceptive or the result of reprehensible methods, prosecutorial misconduct under state law has not been established. Further, defendant has shown no reasonable likelihood that the jury construed the passage in an objectionable fashion. Indeed, defendant has not shown a reasonable likelihood that any juror even read or understood the jargon-filled passage.

Defendant has also failed to demonstrate that the trial was infected with such unfairness as to violate due process. Unfairness must be assessed in the context of the trial as a whole, and a trial is not fundamentally unfair simply because it was imperfect. (*Darden v. Wainwright, supra,* 477 U.S. at pp. 180-183.) Not only is there no evidence that any juror saw the passage, defendant does not claim that it undermined his ability to present a defense or that it was used by the prosecutor in argument. Moreover, the jury learned from defense witness Delarosa that defendant had been incarcerated and paroled less than a year before the shootings.

Defendant argues in essence that there was a *potential* for prejudice *if* any juror read and understood the passage, and he points out that evidence of a prior criminal conviction "'carries immense prejudicial weight.'" (*People v. Fritz* (2007) 153 Cal.App.4th 949, 961.) Defendant concludes that the evidence of prior incarceration infected the trial with unfairness because it suggested a history of serious criminality. Defendant's argument

goes to the egregious nature of the passage, but not to the question whether the trial was fundamentally unfair because of it, considering the trial as a whole.

We agree with respondent that defendant has failed to show prejudicial misconduct under either California law or federal law. Further, defendant has failed to show, or even argue that the trial court's decision to deny the motion for mistrial was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*Alvarez, supra*, 14 Cal.4th at p. 977.) We thus find no abuse of discretion.

V. Murder and attempted murder instructions

Defendant contends that while CALCRIM Nos. 520 and 600 correctly set forth the elements of murder and attempted murder respectively, the instructions are inconsistent and when read in combination, could confuse the jury as to the required mental state for attempted murder. As a result, defendant contends, the jurors could have mistakenly believed that implied malice satisfied the mental state required for attempted murder.

Defendant relies primarily on *People v. Lee* (1987) 43 Cal.3d 666, which held that it is error to give an instruction on implied malice in an attempted murder case, as the required mental state for attempted murder is express malice, i.e. intent to kill, and never implied malice. (*Id*. at pp. 669-670.) Defendant also relies on such authorities as *People v. Visciotti* (1992) 2 Cal.4th 1, 58, which held that the court must instruct that an intent to kill is an element of attempted murder, and *People v. Murtishaw* (1981) 29 Cal.3d 733, 764-765, which held that it was error to instruct on implied malice in conjunction with assault with intent to commit murder. There were no such errors in this case. Indeed, the trial court gave CALCRIM instructions, and

the word "malice" does not appear in CALCRIM No. 600, defining attempted murder.[9]

Here, defendants were charged both with murder and attempted murder. The instructions for each crime were clearly separate. The trial court did not instruct the jury on implied malice in connection with the attempted murder charges and instead correctly instructed that in order to find defendant guilty of those crimes the People had to prove that the defendant took a direct step towards killing a person, that the defendant "intended to kill a person." The court further instructed that "[a] direct step indicates a definite and unambiguous intent to kill." The instruction was clear, and required no clarification. Nor did the prosecutor's closing argument create or exacerbate any possible ambiguity, as defendant argues. The prosecutor made it very clear that he was speaking only of the murder of Hinojos.[10]

Moreover, defendant has failed to meet the burden imposed upon a defendant,"[w]hen [he] claims an instruction was subject to erroneous interpretation by the jury, [to] demonstrate a reasonable likelihood that the jury misconstrued or misapplied the instruction in the manner asserted. [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 926.) Defendant simply

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[9] The cases upon which defendant relies discussed the CALJIC instructions rather than CALCRIM.

[10] The prosecutor argued that "in doing something extremely deadly, obviously the natural result of that is a murder, not caring about the results. Shooting over, and over, and over again at people, that's murder, either express or implied, that's murder. When you have those two things, when you have a human being killed with malice aforethought you have murder. . . . You take the evidence, you apply the law to the evidence, and what you'll find, September 7th, 2014, Mr. Hinojos's murder."

concludes that respondent must demonstrate that a failure to clarify the allegedly confusing instructions was harmless under the constitutional standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) (beyond a reasonable doubt). As defendant has failed to show any reasonable likelihood that the jury misconstrued or misapplied the instruction, his conclusion is premature.

Moreover, if any ambiguity was created by the two instructions, it was harmless under any standard. First, we reject defendant's contention that the evidence of intent to kill was not strong. The "purposeful 'use of a lethal weapon with lethal force' against the victim[s], if otherwise legally unexcused, will itself give rise to an inference of intent to kill. [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 742.) "[W]here motive is shown, such evidence will usually be probative of proof of intent to kill." (*Ibid.*) A motive to kill may be reasonably inferred from the hatred of rival gang members. (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001-1002.) Thus, when defendant, a member of a criminal street gang, fired multiple shots at members of a tagging crew believed to be affiliated with a rival gang, the reasonable inference arose that he harbored an intent to kill. (See *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192.) The cell phone records, Rodriguez's statements and testimony, and the opinions of the gang expert all provided ample evidence to support all such inferences.

Second, "[i]t is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th at 894, 940.) Further, "[t]he record reflects no confusion on the part of the jury, or requests for further guidance on these points." (*Ibid.*) We thus conclude beyond a reasonable doubt that there was no likelihood of confusion caused by instructing as to both

murder and attempted murder with CALCRIM Nos. 520 and 600, where defendant was charged with both crimes, the evidence of intent to kill was strong, and neither the concept of implied malice nor the word "malice" was mentioned in connection with attempted murder.

VI. Consciousness/awareness of guilt

Defendant challenges CALCRIM Nos. 362, 371, and 372, which permit an inference of consciousness of guilt from false statements, fabrication of evidence, or flight. He contends that the instructions embody irrational permissive inferences in violation of due process.

As defendant acknowledges, the California Supreme Court has repeatedly approved consciousness-of-guilt instructions. (See, e.g., *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021, 1024-1025; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101-102; *People v. Mendoza* (2000) 24 Cal.4th 130, 181; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1245; *People v. Crandell* (1988) 46 Cal.3d 833, 871.) Defendant points out, however, that unlike the CALJIC instructions in those cases, the CALCRIM counterparts no longer use the term, "consciousness of guilt," but have substituted the term, "awareness of guilt." He contends that the term, "aware of his guilt" has a different meaning than "consciousness of guilt" in that the former term *equates* the described behavior with guilt.

As defendant also acknowledges, the identical argument was rejected by in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1159, in relation to CALCRIM No. 372, which found no difference in the meaning of the two terms. We find the reasoning of *Hernandez Rios* persuasive and equally applicable to CALCRIM Nos. 362 and 371. We thus adopt it here, and conclude that the use of the everyday word "aware" rather

than its more formal synonym "conscious" or "consciousness" does not render the instruction constitutionally defective.

VII. Prosecutor's explanation of premeditated and deliberate

Defendant contends that the prosecutor committed misconduct in closing argument by comparing premeditation and deliberation to the everyday acts of driving and strolling. He argues that the comparison mischaracterized premeditation and deliberation, was designed to diminish the prosecution's burden on the issue, and resulted in a denial of due process.

Defendant challenges the following portion of the prosecutor's argument: "'Deliberate' and 'premeditated.' It's something which you do every day. When you think about coming to stop signs or crosswalks. You are coming to a stop sign, you pause. Do you look left? Do you look right? Do you think about it? Is it safe to enter? Do you move on? You deliberate. You premeditate before doing something. You look to the left. You look to the right. Is it safe? And how long does that take? It doesn't take long."

We agree with respondent that defendant forfeited this challenge by failing to "'make a timely and specific objection to the alleged misconduct and request the jury be admonished to disregard it.' [Citation.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 797.) Defendant asks that we reach the issue to avoid a claim of ineffective assistance of counsel. Upon doing so, we find the issue to be without merit.

"'"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.' [Citation.] 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement

for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.' [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 58.) There is nothing in the prosecutor's argument at odds with these principles.

"Counsel trying to clarify the jury's task by relating it to a more common experience must not imply that the task is less rigorous than the law requires." (*People v. Centeno* (2014) 60 Cal.4th 659, 671.) A comparison with looking both ways before proceeding through an intersection does not violate this rule. As respondent observes, the comparison is similar to the following argument approved by the Supreme Court in *People v. Avila* (2009) 46 Cal.4th 680, 715: "[A]ssessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, [is] an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated.'"

Defendant argues that crossing an intersection requires only "sensory perception and [a] factual determination," whereas "deliberation and premeditation involved in deciding whether to kill requires moral, ethical and tactical considerations." On the contrary, while deciding *not* to kill likely involves a consideration of moral and ethical considerations, defendant has cited no authority or evidence that the decision to kill must involve such a thought process. Our Supreme Court considered a similar claim of prosecutorial misconduct in *People v. Osband* (1996) 13 Cal.4th 622, where the court found no misconduct in the prosecutor's argument that the defendant's reasoning process need not be evaluated "by a standard befitting Albert Einstein" and that the

jury need not find that he "weighed the consequences as much or as long as might 'regular, civilized people, who aren't criminals, who would never think of [doing] such a thing.'" (*Id.* at p. 697.)

Contrary to defendant's contention, the prosecutor's scenario included tactical considerations: whether it was safe to cross an intersection and whether to do so. While we do not entirely disagree with defendant's suggestion that tactical considerations should play some part in premeditation and deliberation, considerations such as planning and the manner of killing are categories of evidence from which preexisting reflection and weighing of considerations may be inferred. They are however, not required elements. (*People v. Brooks*, *supra*, 3 Cal.5th at pp. 58-59, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 [other categories include motive and manner of killing].)

We conclude the prosecutor did not commit misconduct or diminish the People's burden of proof by the use of comparison to common experiences not involving moral or ethical considerations. As defendant did not object in the trial court or complain that his constitutional rights were violated, our "'rejection of [the] claim on the merits necessarily leads to rejection of [the] constitutional theory'" that the argument resulted in a denial of due process. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 364.)

Moreover, we discern no reasonable probability that the outcome would have been different absent the prosecutor's comments, or that there was any unfairness amounting to denial of due process. The trial court twice instructed the jury with the definitions of premeditation and deliberation, including the following:

> "The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated.

> The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of reflection, not the length of time." (CALCRIM Nos. 521 & 601.)

The jury was also told: "You must follow the law as I explain it to you even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions you must follow my instructions."

Further, the categories of evidence suggesting premeditation and deliberation were present in abundance in this case. (See *People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27 [include motive, planning, and manner of killing].) Carrying a loaded firearm to confront rival gang members and getting out of a car in order to shoot in their direction, shows planning and motive; and shooting at rivals multiple times is a manner of killing that suggests premeditation and deliberation. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224-1225.) Here, defendant saw a man wearing a Compton cap, directed Rodriguez to the block on which Swindles had been seen, emerged from the car, approached the victims, and fired seven to nine times toward them with a semiautomatic handgun which he had brought with him.

Given the court's instructions coupled with the evidence on premeditation and deliberation, defendant suffered no prejudice under any standard, as we conclude beyond a reasonable doubt that the result would not have been different absent the claimed misconduct. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

VIII. No cumulative error

Defendant contends that the cumulative effect of all the errors heretofore discussed was to deny him a fair trial. Because "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must reject defendant's claim of prejudicial cumulative effect. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

IX. Restitution fine

Citing *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), which require a jury determination of any facts which might increase criminal punishment beyond the prescribed statutory maximum, defendant contends that because a restitution fine is punitive, it may not be imposed absent a jury determination. Defendant also relies on *Southern Union Co. v. United States* (2012) 567 U.S. 343, which held that the *Apprendi* rule also applies to the imposition of criminal fines.

The former and current section 1202.4, requires the imposition of a restitution fine up to a maximum of $10,000, with a minimum of $300. (See section 1202.4, subd. (b)(1); Stats. 2012, ch. 873, § 1.5.) The amount of the fine is set at the discretion of the court, commensurate with the seriousness of the offense, but may not exceed the maximum. (§ 1204.4, subd. (b)(1).) Here, the trial court imposed a fine of $10,000, the maximum within the statutory range.

In *Apprendi*, the United States Supreme Court held: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Apprendi, supra*, 530 U.S. at p. 525.) "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

reflected in the jury verdict or admitted by the defendant. [Citation.]" (*Blakely, supra*, 542 U.S. at p. 303.)

Defendant acknowledges *People v. Kramis* (2012) 209 Cal.App.4th 346, 350-351, which held that the *Apprendi* rule does not apply to the imposition of a restitution fine within the statutory range. Under that holding, the maximum $10,000 fine imposed here did not violate the *Apprendi* rule. Nevertheless, defendant reasons that the minimum fine is in reality the maximum permitted by section 1202.4, because subdivision (c) permits consideration of defendant's ability to pay "in increasing the amount of the restitution fine in excess of the minimum fine"; and because subdivision (d) of the statute requires consideration of multiple factors prior to imposing an amount above the minimum, "including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime." (§ 1204.4, subd. (d).)

The plain language of subdivisions (c) and (d) refers to a "minimum" fine. Further, although they permit or require a *consideration* of factors, they contain no language which requires the court to find any fact as a prerequisite to the imposition of an amount more than the statutory minimum. In *Apprendi*, the Supreme Court reviewed the relevant common law and constitutional history and noted that "nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute. . . . [J]udges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. [Citation.]" (*Apprendi,*

supra, at p. 481; see also *People v. Kramis, supra*, 209 Cal.App.4th at p. 351.) As subdivisions (c) and (d) of section 1202.4 merely describe factors the court may or should take into consideration in exercising its discretion within the statutory range, it comports with the requirements of *Apprendi*.

Moreover, the trial court in this case did not engage in judicial fact-finding. As defendant has not shown that any factor was used to enhance the fine beyond the statutory maximum, *Apprendi* does not apply to this case.

X. Effective assistance of counsel

Defendant advances a blanket challenge, on the ground of ineffective assistance of counsel, to any failure by trial counsel to raise an issue where such failure resulted in forfeiture.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686; see also Cal. Const., art. I, § 15.) It is defendant's burden to demonstrate that trial counsel was inadequate and that prejudice resulted. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.) As defendant has failed to identify any specific error or to provide an analysis of any claimed error to demonstrate the inadequacy of counsel or resulting prejudice, we find no ineffective assistance of counsel. (See *Strickland*, at p. 687; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

XI. Firearm enhancement as amended

In supplemental briefing, defendant has requested remand for resentencing under the recent amendment of section 12022.53, subdivision (h), which grants the trial court the discretion to strike that section's firearm enhancement in the interests of justice. (See Stats. 2017, ch. 682, § 2.) Defendant was sentenced in all three counts to a consecutive term of 25 years to life in prison pursuant to section 12022.53, subdivision

(d). The amended subdivision (h) reads: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Respondent acknowledges the amendment applies retroactively to judgments which are not final on January 1, 2018, under the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, because the amendment gave trial courts new sentencing discretion to lessen punishment. (See *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

In general, when new statutory discretion is applied retroactively or the trial court was otherwise unaware of its discretion, a defendant is entitled to resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) "'Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record. [Citation.]" (*Ibid*.) The general rule is not without exception. Remand for resentencing may be "denied if the record shows that the sentencing court . . . clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. [Citation.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 (*Romero*).)

Respondent contends that remand should also be denied when the appellate court concludes that "no reasonable court would exercise its new discretion to strike [defendant's] firearm enhancements." Respondent points to the eight factors in

aggravation listed in the probation report, noting that just one factor in mitigation was listed (satisfactory performance on parole). Respondent also summarizes the violent circumstances and tragic consequences of defendant's crimes, and concludes "that under the circumstances of this case, it would likely constitute an abuse of discretion to strike any of the firearm-use enhancements for sentencing purposes." In support of his conclusion, respondent relies on our opinion in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*). However, *Gutierrez* is inapposite.

In *Gutierrez*, after the defendant's sentencing and during the pendency of his appeal, the California Supreme Court published its opinion in *Romero*, *supra*, 13 Cal.4th 497, holding that trial courts had discretion under section 1385 to strike prior convictions alleged under the Three Strikes law. (*Gutierrez*, *supra*, at p. 1896.) The *Gutierrez* court considered *Romero* but declined to remand for resentencing, reasoning that no purpose would be served by a remand, as the following comment by the sentencing court showed that the court would not have exercised its discretion in the defendant's favor: "'[T]his is a situation where I do agree with [the prosecutor], there really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.'" (*Ibid*.)

As the *Gutierrez* court recognized, resentencing is required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion" in the defendant's favor. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896, citing *Romero*, *supra*, 13 Cal.4th at p. 530, fn. 13.) Only where "'the record shows that the trial court would not have exercised its discretion even if it believed it could

do so,'" would remand be denied as an "'idle act.'" (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)
Respondent fails to point out any comment or action by this trial court indicating how it might act on remand.

As the trial court made no comments at sentencing, or gave any other indication how it would have exercised its discretion if it had such authority at that time, no exception to the general rule requiring resentencing can be discerned from the record. We must thus vacate the sentence and remand for the limited purpose of allowing the trial court to exercise its newly granted discretion.

DISPOSITION

The sentence is vacated, and the case is remanded to give the trial court the opportunity to exercise its discretion under section 12202.53, subdivision (h). The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT