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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS NUMBERTO MORALES et al.,

Defendants and Appellants.

B253249

(Los Angeles County
Super. Ct. No. KA098830)

APPEALS from judgments of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed in part and reversed in part.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Numberto Morales.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Arthur John Quesada.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant Phillip Joseph Jojola.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant Robert Epifano Sanchez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Mark E. Weber and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Carlos Numberto Morales (Morales), Arthur John Quesada (Quesada), Phillip Joseph Jojola (Jojola), and Robert Epifano Sanchez (Sanchez), all members of the same criminal street gang, attempted to extort money from Andres Vargas (Vargas) by threatening to harm him if he did not pay them \$300. When Vargas did not pay, Morales shot Vargas multiple times, seriously injuring him.

A jury convicted defendants of the following crimes: (1) conspiracy to commit murder (Pen. Code,¹ § 182, subd. (a)(1); count 1); (2) attempted willful, deliberate, and premeditated murder (attempted premeditated murder) (§§ 187, subd. (a), 664, subd. (a); count 2); (3) attempted extortion (§ 524; count 3); and (4) false imprisonment (count 4). On count 4, Morales, Quesada, and Jojola were convicted of false imprisonment by violence, menace, fraud, or deceit, while Sanchez was convicted of the lesser included offense of false imprisonment (§§ 236, 237, subd. (a)). The jury also found true: the gang allegation (§ 186.22, subd. (b)) against all defendants on all counts; the firearm allegation (§ 12022.53) against all defendants on counts 1 and 2; and the great bodily injury allegation (§ 12022.7, subd. (b)) against Morales on counts 1 and 2.

The trial court sentenced each defendant to 25 years to life on count 1 (§ 182, subd. (a)), plus an additional 25 years to life for the firearm enhancement (§ 12022.53, subds. (d), (e)), for a total indeterminate term of 50 years to life on count 1. For Morales, the court also imposed the minimum 15-year parole eligibility term required by

¹ All further statutory references are to the Penal Code.

section 186.22, subdivision (b)(5). The court stayed the sentence on the remaining counts pursuant to section 654 for all defendants. For Quesada, the court also found true the prison prior allegation (§ 667.5, subd. (b)) but struck the additional punishment for that enhancement (§ 1385, subd. (c)(1)).

Four principal challenges are raised in this appeal: first, Morales contends that the trial court erred in denying his motion to continue the trial; second, all defendants claim that the trial court erred in instructing the jury on conspiracy to commit murder; third, all defendants challenge the sufficiency of the evidence on the conspiracy and attempted premeditated murder counts and on the gang allegation; and fourth, Morales contends that the trial court erred in denying his motion for a new trial. We affirm as to Morales. As to the remaining defendants, we affirm on all but the conspiracy to commit murder count.

FACTUAL BACKGROUND

A. THE PROSECUTION'S CASE

Defendants Morales (aka Popeye), Quesada (aka Baby), Sanchez (aka Big Boy), and Jojola (aka Giant) were members of the 18th Street gang. Vargas, the shooting victim, and his friend Bellanira Figueroa (Figueroa) knew the defendants but were not members of their gang. The events leading to the shooting of Vargas occurred over the course of three days in July 2012.

1. The Events Surrounding the Shooting

On July 6, 2012, Vargas and Figueroa went to Quesada's house in Baldwin Park to smoke methamphetamine with defendants. Quesada's mother owned the house, and Jojola lived there with Quesada and others. After smoking methamphetamine, Morales asked Vargas, who was driving a Jeep, to take him for a ride. Vargas, accompanied by Figueroa, drove Morales to El Monte. Morales brought with him a wig, a .357 Smith and Wesson revolver, and a pillowcase. Upon arriving in El Monte, Morales got out of the Jeep, robbed a pizza store, ran back to the Jeep, and directed Vargas to take off. Morales, Vargas, and Figueroa returned to Quesada's house and smoked more methamphetamine with Quesada, Jojola, and Sanchez.

Later that night, Vargas drove Morales and Figueroa to another pizza store in South El Monte—which Morales robbed. After the robbery, they drove to a house in Monterey Park, where Vargas’s friend Justin lived, as Morales wanted to sell methamphetamine to Justin. Vargas knew, but did not tell Morales, that the house was in a “hot” area—i.e., an area that the police frequently patrolled.

When they arrived at Justin’s house, Justin was not home. Morales and Vargas went inside the house to await Justin’s return, while Figueroa waited in the Jeep. As they were waiting, a police car drove by and flashed a light on Justin’s house. By text message, Figueroa alerted Vargas to the police’s presence. Minutes later, Morales left the house, got into the driver’s seat of the Jeep, and drove away with Figueroa, while Vargas remained in the house.

The police officer, who had continued to watch Justin’s house, followed the Jeep in his patrol car. The officer activated his lights to stop the Jeep for a traffic violation. Morales refused to comply, leading to a police chase. Morales successfully avoided the pursuit and returned to Justin’s house, parked the Jeep nearby, and ran away, leaving his cell phone in the Jeep. Figueroa did not accompany Morales, but instead ran to Justin’s house.

On July 7, 2012, the next evening, Vargas and Figueroa drove to Quesada’s house to return Morales’s cell phone to him. Vargas went inside and returned the phone, while Figueroa waited in the Jeep. All four defendants were in the house at the time. While in Jojola’s room, Morales and Quesada accused Vargas of “setting [Morales] up” with the police the previous night. The defendants then directed Vargas to the backyard to continue the discussion. Vargas sat down on the backyard stairs with each defendant in close proximity: Morales was in front of Vargas; Quesada was kneeling or leaning down directly behind Vargas; Sanchez sat at a patio table behind Vargas; and Jojola was standing nearby.

While outside, Morales and Quesada continued to confront Vargas about the prior evening’s events with the police. They told Vargas that the “set up” was a sign of “disrespect[,]” and that Vargas had disrespected not only Morales but “all of them.”

Morales and Quesada explained that Vargas would have to pay \$300 for his disrespect. Vargas did not have the money with him. Morales then left to get Figueroa from the Jeep, brought her to the backyard, and sat her next to Vargas. Vargas told her that defendants “were asking him for \$300 . . . [b]ecause [Morales] felt disrespected.”

Morales and Quesada repeated the demand for \$300, and threatened that Vargas needed to get the money “or else.” Vargas understood this to be a threat on his life. The threat was accompanied by violence. Quesada struck Vargas with a closed fist to the back of his head and hit Vargas twice more with blows to his forehead. Morales and Quesada told Vargas that he could not leave until they got the money, and that Figueroa would have to raise the money for him.

Morales told Figueroa that she had until 1:18 a.m. to get the money, and that it would be her “ass” too if she did not do so. Quesada then told Jojola to walk Figueroa out to the Jeep. As Jojola walked her out, he told her: “Everything will be okay. Just get the money.” After Figueroa left the house, she did not call the police because she believed defendants would kill Vargas if she did.

On July 8, 2012, in the early morning hours, Figueroa continued her search to raise the money. During that time, Morales dragged Vargas to another area in the back of the house. Morales and Quesada then assaulted Vargas, punching and kicking him while he was on the ground. Quesada also struck Vargas with a heavy object that was placed in a sock.

Throughout the early morning, Morales and Jojola continued to follow up with Figueroa about the money. Jojola sent a series of increasingly ominous text messages, warning Figueroa that time was running out. He wrote: “Two can play games, you’ve got until 3:18 and game over”; “3:10 now, hurry up, time is running”; and “look hurry the fu[c]k up.” Figueroa did not meet the 3:18 a.m. deadline and was never able to raise the \$300.

For the rest of the day, Vargas’s movements were closely monitored and controlled. Quesada gave him permission to take a shower. After he showered, Vargas went into the living room, where Sanchez was sitting on a couch. Morales then took

Vargas on four trips out of the house that day using Jojola's car. Each time Morales carried a gun in his waistband; and each time he followed the same ritual, requiring Vargas to walk in front of him as Morales followed from behind while holding his gun.

The first trip occurred before daylight. Morales and Quesada tied Vargas's hands with rope and placed him in the back of Jojola's car. Morales drove Vargas around the area without any apparent destination and then returned to the house, where Quesada, Jojola, and Sanchez remained. Later that day, Morales took Vargas to a motel, knocked on a motel room door, and left when he received no response. Morales drove back to Quesada's house, went inside with Vargas, and left a couple of minutes later. Morales next drove Vargas to the apartment of Monica Freire (Morales's friend), where they all smoked methamphetamine for about an hour. Morales and Vargas again returned to Quesada's house. Jojola and Sanchez were still in the house. Morales and Vargas remained there for more than an hour before they left for their fourth and final trip together.

On their final trip, Morales told Vargas that he would drive him to Vargas's house. But Morales did not drive in the direction of Vargas's home and instead took him to a more secluded area in the mountains. Morales stopped the car and ordered Vargas to get out. Vargas pleaded with Morales that "he didn't have to do this." Morales insisted that Vargas leave the car. As Vargas took his first step out, Morales shot him twice, striking him in the buttocks. Morales then left the car and continued to shoot Vargas four more times, striking him in the hip, groin, and chest.

Vargas survived the shooting, but sustained life-long, debilitating injuries. He is paralyzed from the chest down, with only limited use of his hands, and requires around-the-clock care.

2. The Investigation and Arrest of Defendants

On July 10, 2012, Covina Police Officer Oswaldo Preciado received a dispatch that a suspicious person was knocking on doors and asking for help at a West Covina apartment complex. Officer Preciado went to the complex and found Morales hiding behind a dryer in the laundry room. Morales was sweating profusely and appeared

nervous, disoriented, and confused. He said he was being chased and had been stabbed, though there was no evidence of a stabbing. The officer did find a .357 Smith and Wesson revolver covered by a bloodstained tee shirt in the laundry room and a wallet belonging to someone in the apartment complex. Officer Preciado believed that Morales was under the influence of methamphetamine. Based on his paranoia and suicidal statements, Morales was hospitalized on a 72-hour psychiatric hold. In the hospital, Morales admitted that he had been using methamphetamine.

As part of the investigation into the shooting of Vargas, the investigating officer spoke with Vargas and Figueroa. Vargas identified defendants as being involved in the events surrounding the shooting. Figueroa described defendants as follows: (1) Morales was “the main person running the show,” who “was basically taxing [Vargas] the \$300”; (2) Quesada was the man who “hit [Vargas] in the face”; (3) Sanchez was the man who “didn’t allow [Vargas] to leave”; and (4) Jojola “was the one who was texting and calling” her.

On July 26, 2012, the investigating officer executed a search warrant at Quesada’s house. The house had been vacated, but Quesada was found and arrested later that day at Freire’s apartment. Jojola was found and arrested a few days later, and Sanchez was found and arrested in December 2012.

3. *The Gang Evidence*

Los Angeles Police Officer Daniel Garcia testified as the prosecution’s expert on criminal street gangs. He testified that all four defendants were members of the 18th Street gang with monikers and tattoos identifying them as gang members. He further described the gang’s criminal activities.

In Officer Garcia’s opinion, the crimes in this case were committed for the benefit of, at the direction of, or in association with the 18th Street criminal street gang. He described the importance of “respect” in the gang culture, stating that “respect means everything.” A sign of disrespect to one gang member, he added, is construed as a sign of disrespect to the whole gang. Officer Garcia further testified that a gang does not make threats lightly: If the gang issued “an ultimatum such as ‘pay us \$300 or else,’”

the gang would follow through with the threat to avoid appearing “weak.” Officer Garcia also explained the use of the “1:18” and “3:18” deadlines for paying the money was “to demonstrate that they’re from 18th Street.”

When Vargas testified at the preliminary hearing in this case, Morales used his hands and the 1 and 8 tattoos on his arms to make 18th Street gang signs at Vargas.

B. THE DEFENSE CASE

Morales and Quesada each called witnesses for the defense.

1. Witnesses for Morales

Morales called two expert witnesses—one on the effects of methamphetamine (Dr. Rody Predescu), and the other on criminal street gangs (Dr. Bill Sanders).

Dr. Predescu, a medical doctor, testified that methamphetamine is a strong stimulant whose short-term effects can last 10 to 12 hours. Heavy users can experience insomnia, confusion, suspicion, paranoia, and hallucinations and can become violent, homicidal, or suicidal. “They have a very false sense . . . that they can do whatever they please and they’re not going to be caught, they will not pay the consequences for their acts.” The effects of long-term use can mimic paranoid schizophrenic behavior, including suffering from hallucinations, paranoia, nervousness, and violent behavior. Based on her review of the police and medical records, Dr. Predescu opined that Morales was under the influence of methamphetamine at the time of the shooting, having used the drug hours earlier, and at the time of his arrest.

Dr. Bill Sanders, a criminal justice professor, testified that respect is important in gang culture, and that gang members earn respect by committing violent crimes against rival gang members, not against someone who had done nothing to the gang. According to Dr. Sanders, Vargas was not a rival gang member and did nothing to disrespect the 18th Street gang. Dr. Sanders opined that the shooting was not committed for the benefit of the 18th Street gang, because no one from the 18th Street gang directed Morales to shoot Vargas, no other gang member was present at the time of the shooting, and Morales did not yell out “18th Street” as he shot Vargas. Dr. Sanders also testified that a gang member’s use of methamphetamine carried a stigma that would bring that gang member

less respect, and that a “hyped up” member would not gain respect for shooting an addict who had done nothing to the gang.

2. *Witnesses for Quesada*

Quesada called three percipient witnesses—Freire, the woman with whom Morales and Vargas smoked methamphetamine on the date of the shooting; Avelina Urdiales, Quesada’s mother and owner of the Baldwin Park house; and Manuel Alderete, a tenant in that house.

Freire testified that Morales called her around the July 6, 2012 weekend, and asked if he could come to her apartment to smoke methamphetamine. Morales and Vargas then arrived at the apartment between 10:00 a.m. and noon, and she smoked methamphetamine with Morales, Vargas, and a friend of hers. Morales and Vargas stayed at the apartment for about two hours. During that time, everyone was in a good mood, and nothing seemed unusual. At one point, Vargas left the apartment by himself to get a lighter from Freire’s car and then returned with the lighter. Freire did not see Morales with a gun, and she saw no signs that Vargas had been injured in any way.

Urdiales testified next. She testified that she believed Morales, Jojola, and her son were 18th Street gang members. She stated that her son and Jojola lived in her house in July 2012, along with Alderete and his girlfriend, who lived in a room off the back patio. On July 7, 2012, Urdiales returned to her house around 7:30 p.m. and saw her son, Morales and Jojola there. At 10:00 p.m., Vargas and Figueroa arrived at the house and went to the backyard. A few minutes later, Figueroa came inside, looking angry or upset. Urdiales did not go into the backyard. While inside the house, she did not hear any yelling or fighting in the backyard.

Urdiales went to sleep in her son’s room at about 1:00 a.m. on July 8th and woke up at 6:00 a.m. At about 8:00 a.m., Vargas entered the house from the backyard, greeted her, and got food from the kitchen. At about 8:30 a.m., Morales arrived at the house, and he, Quesada, Jojola, and Vargas went into the backyard. At 9:00 a.m., Morales and Vargas left the house, drove away in Jojola’s car, and returned three hours later. At about 4:00 p.m., Morales and Vargas left the house again and drove away in Jojola’s car, while

Quesada and Jojola sat on the front porch. Urdiales left the house at 6:00 p.m. and did not see Morales or Vargas again that day. Urdiales never saw Morales with a gun or Vargas with his hands tied. Nor did she see any cuts, bruises, or swelling on Vargas or hear him complain of pain or injuries.

Alderete, an ill and elderly man, testified that he spent most of his time in his room at Quesada's house. On July 7, 2012, Alderete left his room in the afternoon and saw a few men on the side of the house. He returned to his room, watched television until about 10:00 p.m., and then went to sleep. He did not hear any yelling or the sound of anyone being beaten. On July 8, Alderete woke up at 7:00 a.m. and saw only Urdiales, Quesada, and Jojola in the house. Later that afternoon, Alderete saw a man wearing a wig. Alderete left the house and returned at about 3:00 p.m. and saw only Urdiales and Jojola at that time.²

DISCUSSION

A. MORALES'S MOTION FOR A CONTINUANCE

Morales contends the trial court violated his right to due process by denying his trial counsel's request for a continuance to explore psychiatric issues that might support a potential defense. We disagree.

1. Relevant Procedural Background

On June 26, 2013, the court set trial for October 21, 2013. Up to that point, Morales had been represented by the Alternate Public Defender (APD) for at least nine months. On June 26, Morales told the court that he wished to exercise his rights, under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562], to represent himself. The court continued the proceedings to July 2 to address the *Faretta* request.

At the July 2 hearing, the trial court fully advised Morales of his constitutional rights and the potential consequences of self-representation, as Morales acknowledged by signing a "*Faretta* Waiver" form. Morales was advised that he would be obligated to

² Alderete acknowledged that Quesada's brother had called or texted him several times before trial and threatened him.

prepare for and conduct trial, that the trial would not be continued without good cause, and that any continuance request “made just before trial will most likely be denied.” Morales was further advised that “if at some point, appointed counsel is permitted or required to take over [his] case, that attorney may be at a disadvantage and that this disadvantage cannot be considered on appeal.” The trial court granted Morales’s *Faretta* request and relieved the APD as his counsel. The case remained set for trial on October 21.

The trial court granted Morales *propria persona* funds and appointed a private investigator to assist him. On August 19, the court provided additional funds and appointed Dr. Sanders as an expert witness for Morales. On October 17, at the trial readiness conference, the court continued the trial until October 28. On October 28, the court revoked Morales’s *propria persona* status, because he had assaulted an officer in county jail. The court appointed Charles J. Uhalley, who previously had been serving as standby counsel, to represent Morales. An attorney standing in for Uhalley then announced that Morales was ready to proceed with trial the following day.

On October 29, the day set for trial, Uhalley orally requested a continuance. He stated that he did not have an opportunity to interview Morales prior to that day, and that based on his interview and the arrest report reflecting a psychiatric hold placed on him on the day of the arrest, he needed time to explore the “substantial psychiatric issues” in the case. Uhalley stated that he believed that Morales was competent, but that he wanted to pursue potential psychiatric defenses. The prosecutor objected to a continuance, noting that Morales had been representing himself, had filed motions and discovery requests, and had not mentioned anything about any psychiatric issues. Quesada also objected to any continuance.

The trial court denied the motion. Addressing Uhalley, the court stated: “The Court notes that you’re going to have Thursday and Friday of this week and Monday of next week to explore whatever issues you wish to explore. You were appointed as standby counsel And I know you were keeping track of what was going on in the case.” Uhalley did not raise the issue again during the three-week trial, and he did not provide

any additional information to the court about this issue in the new trial motion he filed two months later.

2. *Legal Analysis*

A motion for a continuance in a criminal trial may only be granted for good cause, and the denial of a continuance may not be so arbitrary that it violates due process. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1181.) A trial court's denial of a continuance is reviewed for abuse of discretion. (*Ibid.*) This standard affords wide deference to the trial court's determination, which will be upheld so long as the trial court has not strayed from the "bounds of reason." (*Ibid.* [noting that "an order denying a continuance is seldom successfully attacked"]; see also *People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) Whether the denial constitutes an abuse of discretion depends on the circumstances of the case, rather than on any mechanical formula. (*Hajek and Vo, supra*, at p. 1181.) The party challenging the ruling bears the burden of establishing an abuse of discretion. (*Ibid.*) Morales has not carried his burden here for three reasons.

First, Morales has not shown that he exercised reasonable diligence in preparing for trial. "A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Morales made this request on the eve of trial. By that point, the case had been pending for at least a year. During that time, Morales did in fact explore "psychiatric issues"—i.e., the effect of methamphetamine on his mental state—and he retained an expert in that field to testify at trial.

This drug-induced psychiatric issue was apparent from the outset of the case. The arresting officer noted in his report that Morales appeared to be under the influence of methamphetamine and paranoid at the time of the arrest. The officer therefore transported Morales to a hospital for psychiatric evaluation. The APD, Morales, and Uhalley would have known this from the outset of their involvement in the case. Had Morales wished to explore any psychiatric defense other than the obvious one caused by his extensive drug use, he had more than a year to do so. The case did not commence

anew when Uhalley was appointed, as Morales knew when he was advised of the dangers of self-representation.

Second, Morales did not show that the requested continuance, if granted, would be useful. “[T]o demonstrate the usefulness of a continuance a party must show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time.” (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) This showing must be done with reasonable specificity. Section 1050, subdivision (b), requires that the motion be supported by “affidavits or declarations detailing specific facts showing that a continuance is necessary.”

The facts presented here fall far short of the required showing. Uhalley relied principally on the facts surrounding the arrest, which already had been explored and led to the retention of an expert, Dr. Predescu. Uhalley added only that Morales recently had attacked a guard and that his recent interview of Morales suggested “substantial psychiatric issues.” Uhalley did not provide any facts, under seal or otherwise, to support or explain these “substantial psychiatric issues.” He did not explain what, in one interview, he was able to learn that the APD and Morales, during the prior year of representation, could not discern. Nor did he provide any information about the amount of time he would need to explore these unspecified issues. In these circumstances, it was not unreasonable for the trial court to expect more before delaying the trial, particularly when all the other parties in this multi-defendant case were prepared to proceed.

The meager showing here stands in stark contrast to the facts in the case upon which Morales relies. In *Ake v. Oklahoma* (1985) 470 U.S. 68, 71, 86 [105 S.Ct. 1087, 84 L.Ed.2d 53], the defendant’s behavior was “so bizarre” that the trial court, on its own, ordered a psychiatric evaluation. The examining psychiatrist concluded that the defendant likely was schizophrenic and questioned his competency to stand trial. The trial court later found that the defendant was not competent and committed him to a state hospital, where he remained until his sanity was restored three months later. At the murder trial, the defendant’s sole defense was insanity, and the trial court denied the indigent defendant’s request for funds to retain a psychiatrist. The Supreme Court found

that the denial deprived the defendant of his right to due process, stating: “We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist’s assistance on this issue if the defendant cannot otherwise afford one.” (*Id.* at p. 74.)

To the extent that Morales seeks to extract from *Ake* the principle that a trial court must grant a continuance to allow preparation when a defendant has made a preliminary showing of insanity or other mental defense, Morales has failed to satisfy the requisite showing. A trial court is not required to accept vague and unsupported assertions on the day of trial of the need to explore “substantial psychiatric issues.”

Third, Morales has not shown any prejudice from the denial of his motion. (*People v. Leavel* (2012) 203 Cal.App.4th 823, 830 [reversal requires showing of prejudice].) He argues on appeal that more time was required to explore the “[c]oncrete signs of psychiatric problems.” In advancing this argument, he relies on the psychiatric problems that resulted from drug use: “Trial counsel had observed a bizarre set of facts which spoke to a distorted reality under methamphetamine, plus bizarre behavior shortly after the event. [Morales] had suffered a severe psychotic episode as a result of chronic use of methamphetamine.”

But Morales called a psychiatrist to testify about these issues at trial. Dr. Predescu testified about the impact of methamphetamine on users such as Morales. She described the effects in a way that explained Morales’s behavior, including the perspiration, dilated pupils, confusion, hallucinations, paranoia, hostility, and violence. She explained that users can become “like a walking zombie, somebody that walks, but is not conscious.” Dr. Predescu opined that Morales was under the influence of methamphetamine at the time of the arrest, and that his behavior at the time was consistent with the effects of that drug. She also opined that the drug would have had similar effects on Morales had he used it around the time he committed the crimes. Morales’s counsel relied on this evidence in closing argument to claim that Morales did not have the specific intent to

commit the conspiracy, attempted murder, and attempted extortion crimes because of his methamphetamine use.

In sum, the trial court did not abuse its discretion in denying a last-minute, non-specific, and unsupported request for continuance. Moreover, Morales has not shown any prejudice resulting from the denial.

B. THE INSTRUCTION ON THE CONSPIRACY TO COMMIT MURDER COUNT

Defendants contend that their convictions of conspiracy to commit murder must be reversed because the trial court's instruction on this charge erroneously failed to include the requirement that each defendant must have intended to kill Vargas. We agree there was instructional error and conclude that such error requires the reversal of the convictions on this count as to Quesada, Jojola, and Sanchez, but not Morales.

To prove that a defendant committed the crime of conspiracy to commit murder, the prosecution must prove that the defendant intended to enter into the conspiracy and further intended to commit the offense that is the object of the conspiracy. (*People v. Swain* (1996) 12 Cal.4th 593, 600; accord, *People v. Smith* (2014) 60 Cal.4th 603, 616.) In charging conspiracy to commit murder, the prosecution must therefore prove not only that the defendant intended to conspire, but also that the defendant intended to kill the victim. (*Swain, supra*, at p. 607; accord, *People v. Petznick* (2003) 114 Cal.App.4th 663, 680-681 (*Petznick*).)

The trial court instructed the jury using CALJIC. (See fn. 5, *post* [discussing the differences between CALCRIM and CALJIC].) The elements necessary to prove conspiracy to commit murder are set forth in those instructions in CALJIC No. 8.69. This instruction defines the crime by stating: "A conspiracy to commit murder is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of murder and with the further specific intent to commit that murder, followed by an overt act committed in this state by one [or more] of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime." The instruction further states that the "crime of conspiracy to commit murder requires proof that the conspirators harbored express malice aforethought, namely, the specific intent to

kill unlawfully another human being.” The instruction then goes on to define an “overt act” and explains that such an act must be taken by “one [or more] of the conspirators.” (*Ibid.*)

The form instruction then lists all the elements that must be proved:

- “1. Two or more persons entered into an agreement to kill unlawfully another human being;
- “2. [Each] [At least two] of the persons specifically intended to enter into an agreement with one or more other persons for that purpose;
- “3. [Each] [At least two] of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and
- “4. An overt act was committed in this state by one or more of the persons [who agreed and intended to commit murder].” (CALJIC No. 8.69.)

The Use Note to CALJIC No. 8.69 explains that the alternative bracketed wording is provided to address the situation that arose in *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131, in which one of the participants in the conspiracy was a “false coconspirator.” In *Liu*, three men plotted to kill the victims. One of the men was reluctant to participate in the plan and decided to become a confidential informer (CI) for the Federal Bureau of Investigation (FBI). Working with the FBI, the CI obtained a recording of incriminating statements from the two other coconspirators, which exposed the two coconspirators’ intent to kill the victims after having taken substantial steps towards that objective. (*Id.* at pp. 1125-1126.) A jury convicted the defendant of conspiracy to commit murder, among other charges. (*Id.* at p. 1127.)

On appeal, the court stated as an undisputed principle that “where only two persons are involved and one is a government agent or informer, the other cannot be convicted of conspiracy,” because “the crime of conspiracy requires at least two people to have the requisite criminal specific intent, and a government agent by definition cannot be a coconspirator.” (*People v. Liu, supra*, 46 Cal.4th at p. 1128.) The defendant in *Liu* attempted to extend this principle farther, asserting that the crime of conspiracy cannot be

committed when one of the members never intends to perform the acts constituting the planned offense, even if two or more of the members had such an intent. (*Id.* at pp. 1128-1129.) The court rejected this argument, holding: “We conclude that the feigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other coconspirators who actually agree to the commission of the subject crime, specifically intend that the crime be committed, and themselves commit at least one overt act for the purpose of accomplishing the object of the conspiracy.” (*Id.* at p. 1131.)³

Unlike in *Liu*, there was no issue in this case of “feigned participation of a false coconspirator” and thus no reason to give the bracketed alternative that requires the prosecution to prove that “[a]t least two of the persons” specifically intended to conspire and kill Vargas. Yet, without objection, the trial court read that formulation to the jury, stating that the prosecution was required to prove:

1. “[T]wo or more persons entered into an agreement to kill unlawfully another human being;
2. “[A]t least two of the persons specifically intended to enter into an agreement with one or more other persons for that purpose;
3. “[A]t least two of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and

³ The Use Note to CALJIC No. 8.69 cautions that “[t]he alternative bracketed wording has been provided in elements 2, 3 and 4 to accommodate the situation where there is a feigned accomplice. ‘The “feigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other co-conspirators who actually agree to the commission of the subject crime, specifically intend that the crime be committed, and themselves commit at least one overt act”’ (*People v. Liu*[, *supra*,] 46 Cal.App.4th [at p.] 1130)”

4. “[A]n overt act was committed in this state by one or more of the persons who agreed and intended to commit the murder.”⁴

This rendition of the instructions for conspiracy to commit murder was erroneous. (*Petznick, supra*, 114 Cal.App.4th at pp. 680-681.) In *Petznick*, the trial court initially instructed the jury using the “each” version of CALJIC No. 8.69, but then revised the instruction after an unreported sidebar conference by replacing “each” with the “at least two” version. (*Petznick, supra*, at pp. 678-679.) During deliberations, the jury inquired whether element three required that “all 4 conspirators harbored express malice aforethought?” The jury explained the reason for its question: “We are asking this question because [CALJIC No.] 6.11 (Joint Responsibility) indicates that members of a conspiracy are liable for the natural and probable consequences of the act without all 4 participants having expressed malice aforethought.” (*Id.* at p. 679, italics omitted.) In response, the trial court stated that it “[d]oes not require all four” and withdrew the “each” version from the jury instruction packet and replaced it with the “at least two” version. (*Id.* at pp. 679-680.)

On appeal, the court considered whether there was a reasonable likelihood that the jury would have understood from the instruction that it was not required to find that the

⁴ The trial court also submitted the instructions in writing to the jury. In the written version, the trial court combined the alternative wording, stating in elements two and three that the prosecution had to prove: “2. Each At least two of the persons specifically intended to enter into an agreement with one or more other persons for that purpose”; and “3. Each At least two of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being” When there is a conflict between oral and written instructions, the latter generally govern. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) No prejudicial error will occur if the trial court provides accurate written instructions, and the mistakes in the oral version otherwise appear harmless. (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113.) Here, the written instructions did nothing to inform the jury that the “each” language—and not the “at least two” language—applied. We therefore cannot say that “no reasonable juror would have understood the instruction to relieve the jury of the necessity” to prove an element of the crime. (*People v. Crittenden* (1994) 9 Cal.4th 83, 138.)

defendant harbored malice aforethought. The court noted that the final version of CALJIC No. 8.69, adopting the “at least two” version, was erroneous. The magnitude of the error was compounded by the inclusion of the concept in CALJIC No. 6.11 that holds a conspirator liable for the natural and probable consequences of a coconspirator, “*even though that crime or act was not intended as a part of the agreed upon objective . . .*” (*Petznick, supra*, 114 Cal.App.4th at p. 679, quoting CALJIC No. 6.11.)

In finding instructional error, the court reasoned: “[F]or defendant to be guilty of the crime of conspiring to commit murder, he had to have been one of the participants who harbored the specific intent to kill. [Citation.] The revised instruction does not say that. It says only that ‘at least two’ of the participants must have intended to kill and does not specify that defendant must have been one of them. Since the jury was aware that there were four participants, the instruction erroneously permitted the jury to find [the] defendant guilty of conspiracy to commit murder without regard to whether or not he personally intended to kill so long as they found that at least two of the other participants harbored that intent.” (*Petznick, supra*, 114 Cal.App.4th at pp. 680-681.)

The court then turned to the question whether the erroneous instruction was prejudicial. An erroneous instruction does not automatically require reversal. Rather, the harmless error standard, as stated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], applies to this type of error. The test is whether it appears “‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” [Citations.]” (*Petznick, supra*, 114 Cal.App.4th at p. 681.) Applying this standard, *Petznick* concluded that the error required reversal of the conspiracy conviction because the lack of the requisite intent was an essential part of the defense, and the court could not find beyond a reasonable doubt that the jury’s question related to doubts about whether the other three uncharged participants had the specific intent to kill. (*Ibid.*)

The People urge this court to affirm the convictions on the conspiracy to commit murder count despite the instructional error. They first contend that defendants forfeited any claim of error on appeal by failing to object to the instructions as given. As a general

rule, the failure to object to an instruction forfeits any claim of error on appeal. (*People v. Lucas* (2014) 60 Cal.4th 153, 291, fn. 51, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) However, “no forfeiture will be found where . . . the court’s instruction was an incorrect statement of the law [citation], or the instructional error affected the defendant’s substantial rights. [Citations.]” (*People v. Mason* (2013) 218 Cal.App.4th 818, 823; see also § 1259.) Here, the instruction was an incorrect statement of law that calls into question whether the jury found that all essential elements of the crime had been proved. We therefore address the merits of defendants’ claim of error. (*Mason, supra*, at p. 824.)

In arguing the merits, the People attempt to distinguish *Petznick*. They argue that the error in this case did not come in response to a jury question that reflected confusion about whether the prosecution had to prove that each defendant who entered into the conspiracy had the intent to kill. The People, however, fail to demonstrate that this factual distinction warrants a different outcome here. As was true in *Petznick*, the instructions in this case included CALJIC No. 6.11 and “erroneously permitted the jury to find [a] defendant guilty of conspiracy to commit murder without regard to whether or not he personally intended to kill so long as they found that at least two of the other participants harbored that intent.” (*Petznick, supra*, 114 Cal.App.4th at p. 681.) While the jury did not expressly seize on the problem as was done in *Petznick*, we cannot say that it is reasonably likely that the jury here would have been able to correctly navigate this complex area of the law despite the instructional error.⁵

⁵ Our conclusion is reinforced by CALJIC No. 8.69’s formulation of the crime. In describing the elements of the crime, the instruction states the first element as follows: “Two or more persons entered into an agreement to kill” The next two elements require that “[e]ach of the persons” has—or, in a feigned accomplice case, “[a]t least two of the persons” have—the specific intent to enter into the agreement and the specific intent to kill. Even the phrase “[e]ach of the persons” is potentially ambiguous in light of the reference in the first element to “[t]wo or more persons.” A jury might think that the phrase “[e]ach of the persons” refers back to the “[t]wo or more persons” in the first element. If so, this would have the effect of interpreting elements two and three as requiring only that “[a]t least two” of the persons have the intent to conspire and kill.

Viewing the instructions as a whole does not alter this conclusion. The jury was advised in CALJIC No. 6.22 that “[e]ach defendant in this case is individually entitled to, and must receive, your determination whether he was a member of the alleged conspiracy.” But this instruction did not cure the error in CALJIC No. 8.69, as it merely told the jury that it had to consider individually whether “[e]ach defendant . . . was a conspirator by deciding whether he willfully, intentionally and knowingly joined with any other or others in the alleged conspiracy.” This instruction did not address, much less clarify, the requirement that each defendant harbor malice aforethought. Rather, the instruction informed the jury that to return a guilty verdict as to any defendant, it had to find “(1) there was a conspiracy to commit the crimes [in counts 1 and 2], and (2) a defendant willfully, intentionally and knowingly joined with any other or others in the alleged conspiracy.” The jury reasonably would have referred to CALJIC No. 8.69 to determine if there was such a conspiracy—and that instruction incorrectly requires a finding that only two defendants had the intent to conspire and the intent to kill.

We cannot conclude that the erroneous instruction was harmless beyond a reasonable doubt in the case of Quesada, Jojola, and Sanchez. In deciding this question, we consider not only all the instructions when viewed together, but also the record as a whole, including the closing arguments. (*People v. Mason, supra*, 218 Cal.App.4th at p. 825.) The People have cited nothing in the record that would suggest that the lawyers

CALCRIM No. 563 avoids any such confusion by focusing on “the defendant” as the subject in each stated element without any prior reference to the need for at least two true participants to form a conspiracy. It states that the prosecution must prove: “1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/[or] [other coparticipant(s)] to intentionally and unlawfully kill; [¶] 2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would intentionally and unlawfully kill; [¶] 3. (The/One of the) defendant[s] [or coparticipant(s)] . . . committed [at least one of] the following over act[s] alleged to accomplish the killing . . . ; [¶] And [¶] 4. [At least one of these/This] overt act[s] was committed in California.” The instruction then adds in a multi-defendant case: “[The jury] must make a separate decision as to whether each defendant was a member of the alleged conspiracy.”

made clear to the jury that CALJIC No. 8.69 required that each defendant convicted on the charge have the intent to kill. On the contrary, the prosecution and Morales's counsel repeated the "at least two" language in closing argument. None of the other counsel clarified the error. At best, the lawyers for Sanchez and Jojola argued that their respective clients did not have the required intent.⁶

Nor can we say that the evidence against Jojola and Sanchez on this charge was so overwhelming that the jury verdict would have been the same had it been properly instructed. (*People v. Mil* (2012) 53 Cal.4th 400, 417 [reviewing the record to determine if "the record supports a reasonable doubt as to [the omitted] element of the offense"].) The evidence of an agreement to kill Vargas was circumstantial, based on defendants' actions and gang affiliation. In closing argument, the prosecutor acknowledged that Morales and Quesada played a "more active" role than Jojola and Sanchez. And counsel for Jojola and Sanchez specifically argued that there was no evidence that their respective clients intended to kill Vargas. While there was substantial evidence to support a conviction on the conspiracy charge, we cannot find beyond a reasonable doubt that the jury so concluded as to Jojola and Sanchez. Thus, the convictions of conspiracy to commit murder must be reversed as to them.

Whether reversal on this charge is required in the case of Quesada presents a closer question. The jury concluded that "at least two" of the defendants committed this crime. If the jury concluded that *only* two of the four were guilty (which we must assume for this analysis), it is likely that Quesada would have been one of them. Next to Morales, he played the most active role. Along with Morales, Quesada confronted Vargas about being disrespected, demanded that Vargas pay \$300 "or else," assaulted Vargas, refused to let Vargas leave the house, and tied Vargas's hands with rope. Though the evidence against Quesada was stronger than it was against Jojola and Sanchez, we cannot find beyond a reasonable doubt that Quesada was one of the two

⁶ Quesada's counsel did not address the elements of the charged crimes and instead focused on the credibility of the witnesses.

defendants who intended to enter into an agreement to kill Vargas. Thus, Quesada's conviction on this charge must be reversed.

As for Morales, there can be no reasonable doubt that the jury concluded that he was one of the two (or more) defendants who conspired and intended to kill Vargas. (See *People v. Aranda* (2012) 55 Cal.4th 342, 373-374; *People v. Mil*, *supra*, 53 Cal.4th at p. 417.) He was central to the events: he accused Vargas of showing disrespect; he attempted to extort Vargas; he threatened and beat Vargas; and he shot Vargas at close range with multiple rounds. Therefore, Morales is not entitled to reversal of his conviction of conspiracy to commit murder based on the erroneous instruction.

C. THE SUFFICIENCY OF THE EVIDENCE

Defendants contend that the evidence was insufficient to support: (1) their convictions of conspiracy to commit murder (as to all defendants); (2) their convictions of attempted premeditated murder (as to all defendants other than Morales); and (3) the gang enhancement (as to all defendants).

In considering a challenge to the sufficiency of the evidence, we review the entire record to determine if any rational jury could have found the elements of the crime or special allegation were proven beyond a reasonable doubt. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) In performing this analysis, we evaluate the evidence in the light most favorable to the prosecution. So long as there is substantial evidence to support the verdict, we must affirm. (*Ibid.*) This same standard of review applies when a defendant challenges a finding that a crime was gang related. (See *People v. Albillar* (2010) 51 Cal.4th 47, 60.) Based on this standard, we reject the sufficiency challenges.

1. Morales's Conviction of Conspiracy To Commit Murder

All four defendants contend that the evidence was insufficient to support their convictions of conspiracy to commit murder. In light of our reversal of these convictions as to Quesada, Jojola, and Sanchez, we address only Morales's sufficiency challenge.

Morales asserts that there was "no evidence that his independent act of shooting Vargas was something he conspired to do with the other three [defendants]." He argues that there is no evidence of any agreement to murder Vargas, and no evidence that the

threat made to Vargas (pay \$300 “or else”) was intended as a deadly threat. He adds that the subsequent facts belie any such intent, since he did not kill Vargas immediately after Vargas failed to pay the money, but instead took him on a few trips before shooting him.

These arguments overlook key evidence and the standard of review. Viewed in the light most favorable to the prosecution, the evidence supported a reasonable inference that defendants had agreed to extort \$300 from Vargas for showing disrespect to a fellow gang member, and that Morales and at least one other codefendant intended the deadly consequences if Vargas failed to pay. When Vargas entered the Quesada house, the defendants appeared to operate in a coordinated fashion. All four defendants directed Vargas to go to the backyard and positioned themselves around him in an intimidating way. Morales and Quesada demanded \$300 and told Vargas that he better pay “or else.” It is reasonable to conclude that defendants had spoken about the “disrespect” that Vargas had shown to Morales and hatched a plan to demand payment accompanied by a deadly threat.

The fact that the phrase “or else” was not completed with the words “we will kill you” is of little significance here. The jury reasonably could have concluded that those words were implicit in the threat. Indeed, after making the threat, defendants demonstrated their seriousness by falsely imprisoning Vargas, repeatedly beating him, and imposing menacing deadlines (i.e., “1:18” and “3:18”) that suggested gang-style consequences for failure to comply. And the consequences were swift and lethal, as Morales shot Vargas the same day after the extended deadline had expired.

In short, the circumstantial evidence is sufficient to support the jury’s findings that Morales and at least one other defendant agreed to kill Vargas if he failed to pay the money, and that Morales and at least one other defendant entered into the agreement with malice aforethought. (See *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399 [stating that “conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy”].) While the jury was free to accept Morales’s argument that he was operating independent of his fellow gang members when he shot Vargas, it

was not compelled to do so given the evidence of concerted action, violence, threats, and swift consequences in a gang context.

2. *Quesada's, Sanchez's, and Jojola's Convictions of Attempted Premeditated Murder*

Quesada, Sanchez, and Jojola were convicted of attempted premeditated murder on the theory that they aided and abetted the attempted extortion and false imprisonment of Vargas (the target offenses), and that the attempted murder (the nontarget offense) was the natural and probable consequence of the target offenses. Defendants contend that the evidence was insufficient to sustain their convictions under the natural and probable consequences doctrine. We disagree.

The trial court instructed the jury that in order to find these three defendants guilty of the crime of attempted murder, the People had to prove beyond a reasonable doubt that: (1) “the . . . crimes . . . of attempted extortion and . . . false imprisonment were committed”; (2) the defendant “aided and abetted in those crimes”; (3) “a co-principal in [those crimes] committed the crime of attempted murder”; and (4) “the crime of attempted murder was a natural and probable consequence of the commission of the crimes [of attempted extortion and false imprisonment].” The court then read the standard definition of a “natural and probable” consequence.

In challenging the sufficiency of the evidence on this charge, defendants claim that Morales acted alone, and that they could not have foreseen that he would have driven Vargas to a secluded area and shot him. According to defendants, while the evidence may show that they attempted to extort money from Vargas and falsely imprisoned him, they ceased any further criminal behavior when Vargas failed to come up with the money. At that point, they argue, Morales went off on a methamphetamine-fueled frolic of his own and shot Vargas—a consequence they could not possibly have foreseen.

Liability under the natural and probable consequences doctrine is determined by an objective standard—i.e., “whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.” [Citation.]” (*People v. Medina* (2009) 46

Cal.4th 913, 920.) To be foreseeable under this standard, “a possible consequence” that reasonably might have been contemplated is sufficient. (*Ibid.*) Reasonable foreseeability is a fact issue to be decided by the jury based on all the relevant facts, including gang membership. (*Id.* at pp. 922-923.)

Applying this standard, we reject defendants’ contention. As previously discussed, the jury reasonably could have interpreted the attempted extortion to contain a death threat (or at least a threat that included the real prospect of death for failure to comply). This was not an idle threat made by a notorious loudmouth. This was a threat from gang members who felt so “disrespected” that they beat and imprisoned a man while they sought to collect their “tax.” According to the prosecution’s gang expert, if the gang issued an ultimatum to “pay us \$300 or else,” the gang would follow through with the threat to avoid appearing “weak.” As gang members, Quesada, Jojola, and Sanchez could be expected to have known this much about gang culture. They also could be expected to have known, based on the evidence in the record, that Morales had a gun ready to use if necessary.

Because of the close nexus between the target crimes (attempted extortion and false imprisonment) and the nontarget crime (attempted murder), the jury had sufficient evidence before it to find these defendants guilty of attempted murder. (See *People v. Medina, supra*, 46 Cal.4th at pp. 922-923 [concluding that “the jury could reasonably have found that . . . a gang member[] would have or should have known that retaliation was likely to occur”].) This close connection distinguishes the cases upon which defendants rely in bringing this challenge. (See *People v. Leon* (2008) 161 Cal.App.4th 149, 161 [concluding that there was no “close connection” between the crime of vehicle burglary and witness intimidation when one of the two burglars fired a shot in the area after a witness threatened to call the police]; *U.S. v. Andrews* (9th Cir. 1996) 75 F.3d 552, 556 [concluding that when brother and sister agreed to retaliate against a specific victim who had punched the sister, the brother reasonably could not have foreseen that sister would “impulsively and on her own” shoot others who had not previously assaulted or antagonized her].)

The jury also properly could find that the attempted murder was willful, deliberate, and premeditated. Contrary to Sanchez’s assertion, this finding must not be stricken on the authority of *People v. Chiu* (2014) 59 Cal.4th 155 and *People v. Favor* (2012) 54 Cal.4th 868. Sanchez suggests that those cases require a jury finding that he reasonably could have foreseen an attempted *premeditated* murder, and the evidence does not support such a finding. *Favor*, however, stands for the opposite proposition: “Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation.” (*Favor, supra*, at p. 880.) *Chiu* expressly addressed a separate issue, one “not previously considered,” about “how to instruct the jury on aider and abettor liability for first degree premeditated murder under the natural and probable consequences doctrine.” (*Chiu, supra*, at p. 162.) In addressing that issue, *Chiu* approved of the holding in *Favor* but found it distinguishable in the context of first degree premeditated murder. (*Chiu, supra*, at p. 163 [Unlike with attempted premeditated murder, “the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the . . . public policy concern of deterrence.”].) We are therefore bound by, and follow, the holding in *Favor*. (*People v. Johnson* (2012) 53 Cal.4th 519, 527-528 [“The trial court and Court of Appeal are, indeed, bound by decisions of this court.”].)

3. *The Gang Enhancements*

The jury found the gang allegations to be true for each of the crimes committed. Defendants do not appear to seriously dispute that they were fellow gang members at the time of the crimes. They contend, however, that the evidence was insufficient to show that the crimes were gang related. We reject this contention, as we find support in the record for the jury’s determination that the crimes were committed “for the benefit of, at

the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

Section 186.22, subdivision (b)(1), provides for enhanced criminal penalties for gang-related crimes. To sustain the imposition of the enhancement, “the record must provide some evidentiary support, other than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, italics omitted.) A jury may rely on expert testimony about gang culture and habits (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930), but an expert’s opinion, without more, is not sufficient (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657). The expert testimony must be accompanied by “some substantive factual evidentiary basis” (*id.* at p. 661) “from which the jury could reasonably infer the crime was gang related” (*Ferraez, supra*, at p. 931).

Defendants argue that the prosecution’s gang expert, Officer Garcia, offered nothing more than unsubstantiated opinion that the crimes were committed for the benefit of the 18th Street gang. Morales emphasizes that he and Vargas were on a “methamphetamine binge,” and that he “spontaneous[ly]” shot Vargas during “a psychotic break” because he felt “personally” disrespected. His motive was therefore purely personal, as supported by his gang expert, Dr. Sanders.

This argument might carry more weight had Morales been acting alone. But there was substantial evidence that Morales was acting in association with three fellow gang members. The evidence supports a reasonable conclusion that defendants perceived the disrespect shown to Morales to be a sign of disrespect to the entire gang. Indeed, Quesada told Vargas that he had “[d]isrespected all of them” by placing Morales in harm’s way. Defendants then directed Vargas to the backyard, where he was beaten by two gang members, threatened, and ordered to pay what could be interpreted as a “tax” imposed by gang members.

Defendants then continued to issue threats, and did so using a vital tool of the gang trade—gang intimidation. Morales told Figueroa that she had until “1:18” to get the money; and, when she missed that deadline, Jojola demanded that she return with the money by “3:18.” The repeated use of the number “18” was a thinly veiled reference to the 18th Street gang, signaling that defendants were operating in their capacity as gang members and that the failure to comply would come with gang-style consequences. For the evidence to be sufficient to support the gang enhancements, defendants did not have to express directly that which was so plainly implicit. Nor did the prosecution have to show that another 18th Street gang member ordered the shooting. It is sufficient that defendants acted together, in association with a criminal street gang, to exact payment for disrespecting the gang or a gang member. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

The evidence showed that the crimes were not only committed “in association with” the 18th Street gang, but that they were done so with “the specific intent to promote, further, or assist in” criminal conduct by its gang members. As the California Supreme Court has stated, “if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*People v. Albillar, supra*, 51 Cal.4th at p. 68.) It was not necessary, as defendants contend, to show that “the crimes were intended to enhance the reputation of 18th Street” or were “broadcast[ed] to the community or to other gang members.”

In re Daniel C. (2011) 195 Cal.App.4th 1350, cited by defendants, does not support their position. There, three young gang members or affiliates entered a store, and one of them, the defendant, attempted to steal a bottle of liquor. When confronted by a store employee, the defendant raised the bottle as if to hit or throw it at the employee. The bottle broke on a nearby machine and hit the employee, and the defendant ran out of the store. (*Id.* at p. 1353.) The juvenile court found that the gang enhancement applied to the robbery charge. (*Id.* at p. 1357.) On appeal, the court held that the evidence was

insufficient to support a conclusion that the defendant committed the crime with the specific intent to promote, further, or assist any criminal conduct by gang members. In so holding, the court distinguished *Albillar*, stating: “[T]here is no evidence that [the defendant] acted in concert with his companions. [The defendant’s] companions left the store before he picked up the liquor bottle, and they did not assist him in assaulting [the employee].” (*In re Daniel C.*, *supra*, at p. 1361.) In contrast, the facts here clearly show that defendants engaged in concerted action.

Applying the *Albillar* analysis, we find substantial evidence that defendants acted in association with a criminal street gang with the specific intent to promote, further, or assist gang members in that criminal conduct.

D. THE DENIAL OF MORALES’S MOTION FOR NEW TRIAL

After the jury verdict, the trial court denied Morales’s motion for a new trial, rejecting his claim that the verdict was contrary to the evidence. Morales contends that the trial court applied the wrong legal standard in evaluating his claim. We find that Morales has failed to preserve this issue on appeal.

When a defendant brings a new trial motion on the ground that the verdict is contrary to the evidence, a trial court “independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge . . .*” (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) In doing so, “the trial court accords no evidentiary deference to the verdict.” (*People v. Carter* (2014) 227 Cal.App.4th 322, 327.)

In bringing his new trial motion, Morales never set forth the applicable standard. Morales filed a four-page motion that included a two-page notice. In arguing that the verdict was contrary to the evidence (§ 1181, subd. (6)), Morales did not cite any legal standard or provide any substantial argument. His entire discussion of legal authority consisted of a single (incomplete) sentence, noting that “[s]ection 1181[, subdivision] (6) states: [¶] ‘When the verdict or finding is contrary to law or evidence.’” His entire argument on this point consisted of three sentences: “The People’s case rested on the testimony of Andres Vargas and Bellanira Figueroa. [¶] The court instructed the jury on

reasonable doubt, [CALJIC No.] 290. As to Carlos Numberto Morales, we submit that Andres Vargas and Bellanira Figueroa were not credible to satisfy the requirements of [CALJIC] No. 290 in order to sustain conviction beyond a reasonable doubt.”

(Capitalization omitted.)

At the hearing on the motion, Morales’s counsel did little more than repeat his written argument, stating: “As to the issue of the jury not following CALJIC [No.] 290, I would argue to the Court that . . . based on the quality and the character of the testimony of the two main witnesses in this case, that there was insufficient believability on their part to have found the defendant guilty beyond a reasonable doubt. And I would argue that.” In response, the trial court commented: “[W]e may have questions about any witness’[s] character, the quality of the testimony, [or the] opportunity to see or hear or become aware of the matters [he or she] testify about. But that is a unique question that’s reserved purely for the jury. They’re the ones that make the determinations as to who to believe and how much” After making this comment, the court invited Morales’s counsel to respond. Morales’s counsel declined.

On this record, we find that Morales has forfeited his argument about the trial court’s use of an erroneous legal standard. The general rule is that a criminal defendant must challenge an erroneous ruling in the trial court to preserve the issue on appeal. (*People v. McCullough* (2013) 56 Cal.4th 589, 593.) This rule serves a valuable purpose: it encourages the parties to alert the trial court to errors that may be corrected below, thus avoiding the unfairness and inefficiency that results from raising the issues for the first time on appeal. (*Ibid.*) Here, Morales deprived the trial court of the ability to correct its misstatement of the legal standard.

Morales’s reliance on *Carter* is of no assistance. In *Carter*, the court rejected the forfeiture claim, stating: “[The defendant] properly filed a new trial motion and argued the correct legal standard to determine the motion. For appellate purposes, he preserved his claim.” (*People v. Carter, supra*, 227 Cal.App.4th at p. 327, fn. 2.) Morales did not argue the correct legal standard in his new trial motion, despite his contrary assertion on appeal. *Carter* is also distinguishable because the trial court there clearly would have

granted a new trial had it applied the correct standard. (*Id.* at p. 328 [“[t]he trial judge’s statements reflect his belief that the prosecution did not bear its burden of proving that [the defendant] was present and committed the burglary”].) In contrast, the trial court here did not suggest that it disbelieved the core testimony of Vargas or Figueroa. In fact, upon denying Jojola’s new trial motion (a ruling not challenged on appeal), the trial court expressed confidence in the jury’s verdict, stating: “[I]t does appear that there’s ample evidence to support the jury’s verdict. And I’m quite confident that the verdict will be substantiated on appeal.”

Thus, we find that Morales has forfeited his argument that the trial court applied the wrong legal standard in denying his new trial motion.

DISPOSITION

The judgment is affirmed as to Morales. As to Quesada, Sanchez, and Jojola, we reverse the convictions on count 1 for conspiracy to commit murder and the related enhancement on that count and otherwise affirm. If the district attorney’s office fails to give written notice in the trial court of its intent to retry count 1 and the related gang enhancement within 30 days of the issuance of the remittitur, the trial court shall resentence them on the remaining counts and enhancements.

BLUMENFELD, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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