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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. PABLO BLANCO et al., Defendants and Appellants.	B227650 (Los Angeles County Super. Ct. No. PA 056995)

APPEAL from judgments of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

H. Russell Halpern for Defendant and Appellant Pablo Blanco.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Gonzalez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Michael C Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Pablo Blanco and Daniel Gonzalez (hereinafter collectively referred to as appellants and individually by their last names) timely appealed from their convictions on two counts of attempted premeditated murder and two counts of assault with a firearm. The jury found true gang and firearm allegations. On one of the attempted premeditated murder charges, the court sentenced each of the appellants to life, with an additional 25 years to life for the firearm enhancement. On the second attempted premeditated murder charge, the court sentenced each of the appellants to a consecutive term of life, with an additional 20 years for the firearm enhancement. The court stayed the sentence on the remaining counts and enhancements. Among other issues, appellants contend there was insufficient evidence to support two attempted murder convictions, the court misinstructed the jury about a kill zone and about the natural and probable consequences doctrine, and the court did not adequately insure the panel was not tainted by the misconduct of a discharged juror. We affirm the judgments.

FACTUAL BACKGROUND

During the morning of January 8, 2008, Juan Alvarez drank some beer at his home on Lonerock Street with his brother-in-law Oscar Jimenez and a friend Ricardo Miranda. At some point, the three men moved to the front yard.

That afternoon, Jimenez noticed a black car that had stopped on Whites Canyon Boulevard. Although the car was only two houses away, there was a fence between Whites Canyon and the end of the cul-de-sac on Lonerock. At least twice, Jimenez heard someone inside the car yell, "'Where you from?'" In response, Jimenez replied, "'Come around and find out.'" The car then drove away.

Jimenez went into the house and grabbed an aluminum baseball bat. When Jimenez went back outside, he saw Miranda was holding a beer and Alvarez had nothing in his hands.

When Jimenez saw the same black car stop near the corner of Lonerock and Deeptree, he started walking toward the car with the bat in his hands. Alvarez followed Jimenez, and Miranda trailed both of them.

As he walked toward the black car, Jimenez noticed the car contained at least two people, a driver and a front passenger. Again, Jimenez heard someone inside the car ask where he was from in an attempt to find out his gang affiliation. Jimenez responded by shouting out "EYG's," the name of the tagging crew that he previously had associated with. Jimenez also stated he was from Panorama City, and referred to his area code by saying "818."

As Jimenez continued approaching the black car, with his aluminum bat pointed toward the ground, and Alvarez just one or two feet behind him, a gun was fired from the passenger side of the car. When Jimenez turned, he saw Alvarez lift up his shirt and expose an entry wound near his hip; Alvarez was hit in the lower abdomen. Alvarez, who was holding a can of pepper spray and a metal bar, fell to the ground as the black car drove away. Jimenez called for an ambulance and then hid the bat he had been carrying.

Deputy Sheriff Allen Hodge arrived on the scene at 1:50 p.m., approximately ten minutes after receiving a radio call about the shooting. Upon seeing Alvarez on a gurney being wheeled toward an ambulance, Hodge asked what had happened. In response, Alvarez said, "'Some fools rolled up and shot me.'" Alvarez further said that one of his assailants yelled, "'Brown Familia'" when the shot was fired. According to Hodge, Brown Familia was the name of a gang in the area.

During the search of the scene, deputies found a tire iron and a can of pepper spray in the street. Additionally, an aluminum bat was found inside Jimenez's car. The victims acknowledged they had those weapons in their hands at the time of the shooting.

Just prior to the shooting, Wesley Brewer was driving on Whites Canyon when he noticed a black Mustang with a broken license plate holder stop in front of him. The Mustang contained three Hispanic men. Two occupants sat in the front of the car, and one sat in the rear; the men appeared to be discussing something. Upon pulling up next to the Mustang, Brewer looked at both the driver and the front passenger and then drove away.

When Brewer heard sirens approximately five minutes later, he returned to the area where the Mustang had stopped. Brewer spoke with a responding police officer at the scene and met with Deputy Sheriff Patrick O'Neill the next day. Upon being shown a photograph of a black Mustang with a broken license plate holder that was registered to Gonzalez, Brewer identified the photograph as matching the car he had seen. When Brewer was shown photographic arrays, he identified Gonzalez as the driver and Blanco as the front passenger. Brewer confirmed his identifications at trial.

Deputy Sheriff Mark Noel spoke with Alvarez at the hospital following the shooting. While lying on a gurney screaming inside the emergency room, Alvarez told Noel that he was outside his house when three male Hispanics drove up in a black Mustang. Alvarez said one of the men fired a single shot and then the car drove away. At trial, Alvarez had no recollection of his conversation with Deputy Noel.

On January 17, 2008, O'Neill went to Alvarez's home and showed him a photograph of Gonzalez's black Mustang. After Alvarez told O'Neill that the photograph appeared to match the car he had seen, O'Neill showed Alvarez a photographic array containing Blanco. Alvarez stated he saw the front passenger holding a handgun. Alvarez identified Blanco's photograph as being that of the shooter. Alvarez was "70 per cent" certain of his identification. At trial, Alvarez claimed he made the identification only because he recognized Blanco from school. Jimenez told O'Neill that the front passenger fired the shot. O'Neill had considerable experience with local gangs and knew that the Brown Familia and Canones gangs were rivals.

Appellants' residences were searched. Inside Blanco's bedroom closet, deputies found a newspaper that contained an article about the drive-by shooting of Alvarez. At Gonzalez's residence, deputies found some gang writings and other items that tended to connect him with the Brown Familia gang.

Deputy O'Neill interviewed Gonzalez. The court admonished the jury that anything Gonzalez said was limited to him and not to Blanco. When he was arrested, Gonzalez admitted he had been involved in the shooting. Gonzalez, who admitted he and

his two passengers were members of the Brown Familia gang, told O'Neill that he was driving past the cul-de-sac with two fellow gang members when he saw some rival gang members standing in front of a house. Gonzalez made a U-turn and stopped. At that point, people inside his car loudly asked, "'Where are you from?'" The rivals replied, "'Come around here and we will tell you.'" Intending to fight to settle the differences between the gangs, Gonzalez parked his Mustang and watched a few of the rival gang members walk toward his car. One of the rivals held a baseball bat, and another placed his hand in his pocket. At that point, the front passenger pulled a handgun out of his waistband and fired one shot at the rivals who were between 45 and 60 feet away. Upon seeing one of the rival gang members fall to the ground, Gonzalez drove away from the scene. Gonzalez claimed he did not know that one of his passengers was armed before the gun was used.

Although Alvarez claimed to have quit before the shooting occurred, he admitted that he had been a member of the Canones gang and acknowledged that a rivalry had existed between Canones and Brown Familia.

Detective Mark Barretto testified as an expert on local gangs. Canones and Brown Familia were rivals. Given a hypothetical based on the prosecution evidence, Barretto opined that the shooting had been committed for the benefit of the Brown Familia gang. Barretto explained the shooting helped the gang by creating fear in the community and the shooting was also likely to elevate the status of appellants within the gang.

DISCUSSION

I. Attempted Murder Convictions

Appellants contend there was insufficient evidence to support two convictions for attempted murder because there was a single shot and the two victims were not in the line of fire. In addition, appellants contend the kill zone instruction was improper.

A. Substantial Evidence

"On appeal, '"we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is

reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."' In conducting such a review, we '"presume[ ] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.'" (Citations omitted.) (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

Generally an intent to kill "must be inferred from the circumstances of the shooting." (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.) "[A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*People v. Stone* (2009) 46 Cal.4th 131, 140.) However, "'guilt of attempted murder must be judged separately as to each alleged victim.'" (*Id*. at p. 141.)

Appellants argue this case is similar to *People v. Perez* (2010) 50 Cal.4th 222. In *Perez*, the defendant was convicted of eight counts of attempted premeditated murder based on firing a single shot at a group of seven officers and one civilian; the court reversed seven of those counts. (*Id*. at pp. 224, 233-234.) Although *Perez* was decided after the trial, appellants raised it at the hearing on their new trial motions, and the court found it was not controlling.

The *Perez* court noted: "The facts of this case do not establish that defendant created a 'kill zone' by firing a single shot from a moving car at a distance of 60 feet at the group of eight individuals, notwithstanding that they were all standing in relatively close proximity to one another. [The] kill zone theory of multiple attempted murder is necessarily defined by the nature and scope of the attack. The firing of a single bullet under these circumstances is not the equivalent of using an explosive device with intent to kill everyone in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill everyone fired upon. The indiscriminate firing of a

single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group." (*People v. Perez*, *supra*, 50 Cal.4th at p. 232.)

The *Perez* court distinguished *People v. Smith* (2005) 37 Cal.4th 733: "[T]he defendant [Smith] was standing a few feet behind a car that was pulling away from the curb when he fired a single bullet through the rear windshield, hitting the driver's headrest and barely missing both the driver (the defendant's former girlfriend) and her three-month-old son, who was 'secured in a rear-facing infant car seat in the backseat' directly behind her. Applying the deferential sufficiency of evidence standard, we affirmed the jury's verdicts convicting the defendant of two counts of attempted murder. We focused first on the fact that the infant was seated directly behind the mother, with both victims (the mother and the infant) plainly 'in [the defendant's] direct line of fire.' We concluded the presence of both victims in the shooter's direct line of fire, one behind the other, gave him the apparent ability to kill them both with one shot." (See also [*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 685, 690] [single bullet fired at two police officers who were crouched, one behind the other, directly in shooter's line of fire and visible to him, supported two counts of attempted murder].)" (Citations & italics omitted.) (*People v. Perez*, *supra*, 50 Cal.4th at pp. 232-233.)

The Supreme Court continued: "We went on in *Smith* to explain why the evidence supported the jury's conclusion that the defendant had acted with specific intent to kill both the mother and the infant. We observed that 'evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both.' We explained, 'The defense below offered nothing to undercut the force of the inference, drawn by the jury on the People's evidence, that defendant acted with intent to kill both victims when he fired off a single round at them from close range, each of whom he knew was directly in his line of fire. . . . His defense at trial thus furnishes no support for his claim on appeal that the People's evidence was insufficient to establish his intent to kill the baby.' Last, we observed that 'even if

defendant's act of shooting at the baby was done "without advance consideration and only to eliminate a momentary obstacle or annoyance," the jury could still infer, from the totality of the circumstances, that he acted with express malice toward that victim.'" (Citations omitted.) (*People v. Perez, supra*, 50 Cal.4th at p. 233.)

In rejecting the application of *Perez*, the trial court below found "the two victims that were alleged in this [case] were one behind the other and one slightly to the side of the other, and it was reasonable to infer, and the jury did so find, that the defendant or defendants intended to kill both victims."

Appellants assert the victims were standing in proximity not directly in the line of fire, i.e., the shot could have hit one or the other, but not both. Unlike *Perez*, Blanco did not fire into a crowd of scattered people, but rather at two rival gang members standing near each other. Even though the evidence was not crystal clear as to exactly where the victims were standing, there was evidence to support an inference Blanco intended to kill both victims.

Alvarez testified he was following Jimenez when he was shot; he was not sure how close he was to Jimenez. Jimenez testified Alvarez followed him and was behind him one or two feet away on his left side and the gun was pointing at them; Jimenez stopped when he saw the gun. Miranda testified he followed Alvarez and Jimenez, but he did not testify as to how close Alvarez was to Jimenez. O'Neill testified appellants told him Alvarez was two feet to the left of Jimenez. Exhibit 12, a photograph taken by O'Neill, shows two people standing approximately where Jimenez and Alvarez were standing when Alvarez was shot, but the line of fire was not established as the location of the car was not indicated in the photograph. Blanco's counsel noted the locations of the people in the photo were just a guess. The prosecutor argued the victims were in the line of fire. Neither defense counsel cross-examined the victims about where they were standing nor argued the victims were not in the line of fire. Thus, under the deferential standard of review, we interpret the evidence as supporting a finding the victims were in the line of fire.

B. Kill Zone Instruction

The court instructed the jury with CALCRIM No. 401 on aiding and abetting and No. 600 on attempted murder, which included a paragraph about a kill zone. Gonzalez argues that even if there was sufficient evidence of intent, the kill zone instruction was improper because the evidence was legally insufficient to support it. Blanco also asserts there was no substantial evidence to support the kill zone instruction. As explained above, there was evidentiary support both victims were in the line of fire so that the giving of the instruction was proper.

II. Natural and Probable Consequences

A. The Instructions

In relevant part, CALCRIM No. 403 (natural and probable consequences) provided that in order to find an aider and abettor guilty of a non-target offense, it must find:

> 1. The defendant is guilty of a planned physical attack; [¶] 2. During the commission of the planned physical attack a coparticipant in that planned physical attack committed the crime of assault with a firearm and/or attempted murder; [¶] AND [¶] 3. Under all the circumstances, a reasonable person in the defendant's position would have known that the commission of the assault with a firearm and/or attempted murder was a natural and probable consequence of the commission of the planned physical attack.

The jury was not instructed to find attempted premeditated murder was a natural and probable consequence of a planned physical attack.

In relevant part, CALCRIM No. 601 instructed: "If you find the defendant guilty of attempted murder . . . you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] . . . . The attempted murder was done willfully and with deliberation and premeditation if either defendant or both of them acted with that state of mind."

On both counts of attempted murder, the jury found true the allegation the offense was committed "willfully, deliberately and with premeditation." The jury did not find attempted premeditated murder was a natural and probable consequence of the planned physical attack.

B. The Law

Gonzalez contends his right to jury trial was violated when the court only instructed that attempted murder was a natural and probable consequence of the target crime instead of instructing that attempted premeditated murder was a natural and probable consequence of the target crime.

"A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133; see also *People v. Prettyman* (1996) 14 Cal.4th 248, 260 [The natural and probable consequences doctrine "is based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion."'].)

"The factual determination whether a crime committed by the perpetrator was a reasonably foreseeable consequence of the crime or crimes originally contemplated is not founded on the aider and abettor's subjective view of what might occur. Rather, liability is based on an 'objective analysis of causation'; i.e., whether a reasonable person under like circumstances would recognize that the crime was a reasonably foreseeable consequence of the act aided and abetted. The finding will depend on the circumstances surrounding the conduct of both the perpetrator and the aider and abettor." (Citation omitted.) (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1587.) Citing *Woods*, the Supreme Court adopted its reasoning that an accomplice under the natural and probable consequences doctrine did not stand in the same position as the perpetrator and might have a different degree of guilt based on the same conduct depending on which of the

perpetrator's criminal acts were reasonably foreseeable and which were not. (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 275-276.)

"The fact the perpetrator cannot be found guilty of both a greater and a necessarily included offense should not preclude an aider and abettor from being found guilty of an uncharged, necessarily included offense when the lesser, but not the greater, offense is a reasonably foreseeable consequence of the crime originally aided and abetted. [¶] Therefore, in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence." (Citation omitted.) (*People v. Woods*, *supra*, 8 Cal.App.4th at pp. 1587-1588.)

Gonzalez argues it was theoretically possible for the jury to find that Blanco premeditated the attempted murder, but that such premeditation was not a natural and probable consequence of the planned physical attack. Gonzalez notes that even though the facts in the record were sufficient to support a finding of attempted premeditated murder, those facts did not lead ineluctably to that conclusion.

Gonzalez relies on *People v. Hart* (2009) 176 Cal.App.4th 662, 672. In *People v. Hart*, *supra*, 176 Cal.App.4th at pages 673-674, the court reversed defendant Rayford's conviction as an aider and abettor for premeditated attempted murder because: "The instructions did not fully inform the jury that, in order to find Rayford guilty of attempted premeditated murder as a natural and probable consequence of attempted robbery, it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." "Error in instructing the jury concerning lesser forms of culpability is reversible unless it can be shown that the jury properly resolved the question under the instructions, as given." (*Id*. at p. 673; see also *People v. Prettyman*, *supra*, 14 Cal.4th at p. 272 [The court held that in reviewing a natural and probable consequences instruction which failed to identify and describe the

target crime, the inquiry was whether there was a reasonable likelihood the jury applied the challenged instruction in a way that violated the Constitution.].)

In the case at bar, the prosecutor argued (and the jury was instructed on) both theories of murder, aider and abettor and natural and probable consequences; the prosecutor argued only that the jury had to find attempted murder, not attempted premeditated murder, was the natural and probable consequence of the physical assault. Nothing indicates which theory the jury used to find Gonzalez guilty of attempted murder.

In *Hart*, the court compared the error there to the error in *Woods*, concluding: "The jury was left to its own devices without proper guidance concerning the law. Under the instructions given, the jury may have found Rayford guilty of attempted murder using the natural and probable consequences doctrine, an objective test, and then found the premeditation and deliberation element true using the only instruction given as to that element, which described a subjective test. Thus, the instructions on the natural and probable consequence doctrine and attempted murder were prejudicially deficient." (*People v. Hart*, *supra*, 176 Cal.App.4th at p. 674.)

Citing *People v. Lee* (2003) 31 Cal.4th 613, the People assert it was not an error to fail to instruct the jury to determine the personal willfulness of the aider and abettor as it was sufficient that the attempted murder itself was premeditated. In *Lee* the court addressed the question of whether the provision of Penal Code section 664,[1] subdivision (a) for increased punishment for willful, deliberate and premeditated attempted murder applied to aiders and abettors and concluded that it did. (*Id*. at p. 624.) The court held that the law required only that the murder attempted was willful, deliberate and premeditated such that a person might be convicted of attempted premeditated murder as an aider and abettor even if he or she did not personally act with willfulness, deliberation and premeditation. (*Id*. at pp. 616, 624, 627.) The court noted that where the natural and

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1 Unless otherwise indicated, all statutory references are to the Penal Code.

probable consequences doctrine did not apply, an attempted murderer who was guilty as an aider and abettor might be less blameworthy and punishing such an attempted murderer with life imprisonment would not run counter to Penal Code section 664's purpose of making the punishment proportionate to the crime. (*Id*. at pp. 624-625.) Thus, the court left open the question of whether the same rule applied where the defendant was found guilty of attempted murder on a theory of natural and probable consequences.

Some cases have applied *Lee* in situations involving the natural and probable consequences doctrine where the jury was instructed the nontarget crime was attempted murder, not attempted premeditated murder. (See e.g. *People v Cummins* (2005) 127 Cal.App.4th 667; *People v. Curry* (2007) 158 Cal.App.4th 766.)[2] In *Cummins*, the court reasoned: "Kelly was a willing and active participant in all the steps that led to the attempt on Taglieri's life. Although the evidence did not conclusively determine which defendant had physical contact with the victim when he was pushed [off a cliff], certainly Kelly's conduct makes him no less blameworthy than Cummins. The jury here was properly instructed on the elements of attempted premeditated murder and, based on the evidence, found the attempt on Taglieri's life was willful, deliberate, and premeditated. Nothing more was required." (*People v. Cummins*, *supra*, 127 Cal.App.4th at pp. 680-681.)

We vacated submission of this case pending a decision by the Supreme Court in *People v. Favor,* review granted March 16, 2011, S189317. On July 16, 2012, the Supreme Court filed its opinion in *People v. Favor* (2012) 54 Cal.4th 868 [2012 WL 2874241].) The court concluded that "the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*Id.* at p. ___.) The court relied on *Lee* and *Cummins,* and reasoned that "[b]ecause section 664(a) 'requires only that the attempted murder itself was willful

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2 *Hart* does not address these cases.

deliberate, and premeditated' (*Lee, supra*, 31 Cal.4th at p. 626), it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' *(Cummins, supra*, 127 Cal.App 4th at p. 680.) Moreover, the jury does not decide the truth of the penalty premeditation allegation until it first has reached a verdict on the substantive offense of premeditated murder. [*People v. Bright* (1996) 12 Cal.4th 652, 661.] Thus, with respect to the natural and probable consequences doctrine as applied to the premeditation allegation under section 664(a), attempted murder—not attempted premeditated murder—qualifies as the nontarget offense to which the jury must find foreseeability. Accordingly, once the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated." *(Favor, supra*, at p. ____[2012 WL 2874241*7].) It is not required that the aider and abettor have "reasonably foresee[n] an attempted premeditated murder as the natural and probable consequence of the target offense." (*Ibid.*)

According to the decision in *Favor*, we find the jury was properly instructed in this case.

III. Gang Expert

Gonzalez contends the gang expert (Detective Barretto) went beyond the permissible scope of expert opinion and violated his right to due process and a fair trial in that Barretto told the jury that because Gonzalez belonged to the same gang as Blanco and was in the vehicle, Gonzalez must have known Blanco possessed the firearm and endorsed Blanco's use of it, which amounted to telling the jury how to decide the case and replicated the error committed in *People v. Killebrew* (2002) 103 Cal.App.4th 644.[3] Gonzalez also complains Barretto gave an opinion on the ultimate fact of whether he (Gonzalez) knew Blanco had a firearm and intended to use it. "'Testimony in the form of

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[3] In his discussion of the natural and probable consequences instruction, Gonzalez concedes "it is reasonable to infer that [he] knew that Blanco had a gun and intended to use it if necessary."

an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the jury.'" (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

In response to the prosecutor's hypothetical question, Barretto testified in part: "Furthermore, it's common for gang members to know that other gang members are carrying weapons. It's very unlikely that the passenger of this vehicle didn't know that [another] gang member was carrying a weapon. [¶] Gang members who travel together are aware of weapons that are stashed. They use stash houses. They use other gang members to carry weapons. Everybody knows who carries what. It's kind of a rule that gang members have. They know if they are strapping or carrying a weapon." Later, Barretto stated Gonzalez knew Blanco had a handgun in the car.

Shortly thereafter, at a pause in the proceedings, the court asked to see counsel at sidebar where it raised the issue of whether an expert could opine that when one gang member in a car possessed a gun, his fellow gang members inside the car would know. Citing *Killebrew* and another case, the court noted that an expert could offer a general opinion about a gang member being aware of what will happen and that there could be no error because there had been no objection. Neither defense counsel disagreed or objected.

The People argue Gonzalez forfeited this claim by failing to object; however, Gonzalez asserts failing to object was ineffective assistance of counsel. Accordingly, we will address the merits of the claim Barretto exceeded the permissible scope of expert opinion. (*People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151.)

In *People v. Killebrew*, *supra*, 103 Cal.App.4th at page 658, the court held the expert exceeded the permissible scope of expert opinion by testifying about the subjective knowledge and intent of each occupant in a vehicle, but noted an expert might opine regarding a typical or hypothetical gang member's likely knowledge, intent or expectation in a given situation. (See also *People v Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3 [recognizing the difference in having an expert testify about specific persons rather

than hypothetical persons]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1179 [The court held the trial court erred by excluding expert opinion "as to whether in gang culture and operation every time a gang member rides with other gang members he or she is aware of what will happen."]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 [The court permitted expert testimony "focused on what gangs and gang members typically expect and not on [defendant's] subjective expectation."].)

Gonzalez posits this case is similar to *People v. Sifuentes* (2011) 195 Cal.App.4th 1410. *Sifuentes* involved a "gang gun," which was found under a mattress in a motel room occupied by two defendants and two females. The court reversed one defendant's conviction for possession of a firearm by a felon (and the attendant gang enhancement), concluding there was no substantial evidence the defendant had control of the gun as the expert did not testify that any gun possessed by a gang member was a gang gun, that the subject gun was a gang gun or that all gang members always had the right to control a gang gun; the expert just testified that a gang gun was accessible to gang members at most times. (*Id*. at pp. 1417-1420.) In contrast, ,here, Barretto testified gang members in general know if fellow gang members in the same vehicle are armed.

Accordingly, we conclude Barretto's opinion, based on the hypothetical, was proper. (See *People v. Vang*, *supra*, 52 Cal.4th at p. 1049 [To the extent the testimony responds to hypothetical questions, it does not inform the jury of the expert's belief of the suspect's knowledge and intent.].) Even though at one point Barretto did offer an improper opinion about Gonzalez's knowledge, under the circumstances, it was not reasonably probable the jury would have reached a more favorable result if that statement had not been made. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As Gonzalez concedes, it was reasonable to infer he knew Blanco had a gun. Moreover, the one statement was brief and made after a detailed explanation of gang members' knowledge such that even if that one statement exceeded the permissible scope of expert opinion, its admission was not so egregious as to render the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

IV. Gonzalez's Confession

Blanco contends the admission of Gonzalez's redacted confession violated his right to due process because the redaction was not adequate and its admission violated his right to cross-examine as it was a testimonial statement under *Crawford v. Washington* (2004) 541 U.S. 36.

A. Redaction

Prior to trial, the court denied Blanco's motion to sever. Gonzalez's extrajudicial statement was introduced by the testimony of Deputy O'Neill, who stated that Gonzalez told him (O'Neill) that he (Gonzalez) was the driver and that the front passenger fired the weapon. Blanco asserts that was not an effective redaction as Brewer subsequently identified Blanco as the front passenger.

An extrajudicial statement by a defendant which implicates a codefendant may be introduced in a joint trial if all parts implicating the codefendant are effectively deleted without prejudice to the declarant. (*People v. Aranda* (1965) 63 Cal.2d 518, 528-530.) California courts follow the practice suggested in *Aranda* of editing the confession "so that all statements that identify or implicate the nondeclarant defendant are deleted and replaced with neutral language." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1045-1046.) The extrajudicial statement may be admitted if all references, direct or indirect, are deleted. (*Id*. at p. 1046.)

In *People v. Sapp* (2003) 31 Cal.4th 240, 277, the California Supreme Court cited to a case in which the United States Supreme Court determined that "the use of a blank space or the word 'deleted' in the confessing defendant's statement" was an insufficient deletion. The court reasoned: "The deletion, in context, was plainly a name of a person involved with the confessing defendant in the charged crime; jurors in all likelihood would have filled in the blank space with the name of the nonconfessing codefendant present in court. Here, the blank portions of the transcript were far more lengthy, extending for several sentences or half a page. The content of the deleted material was not readily discernable." (*Id*. at pp. 277-278.) The People assert that the identity of the

front passenger was not readily discernable noting the number of codefendants (one) did not match the number of other people in the car (two). However, because Brewer and Alvarez identified Blanco as the front passenger, the jury would have had no trouble knowing whom Gonzalez identified as the killer. The reference to the shooter was also brief. Accordingly, we agree the "redaction" was inadequate.

B. Cross-examination

"The principle is well established: '[A] nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.'" (Italics deleted.) (*People v. Hill* (1992) 3 Cal.4th 959, 994, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) The holding that admission of a nontestifying defendant's extrajudicial statement implicating a codefendant violates the codefendant's rights under the confrontation clause, "extends only to [extrajudicial statements] that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant." (*People v Fletcher* (1996) 13 Cal.4th 451, 455 & fn. 1.) Gonzalez's statement was facially and powerfully incriminating as he impliedly identified Blanco as the shooter.

"Under the *Chapman* test, *Aranda–Bruton* error is harmless where the properly admitted evidence against defendant is overwhelming and the improperly admitted evidence is merely cumulative. To find the error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question. We employ the same analysis for *Crawford* error since the *Chapman* test also applies." (Citations omitted.) (*People v. Song* (2004) 124 Cal.App.4th 973, 984-985; accord *People v. Burney* (2009) 47 Cal.4th 203, 232.)

Gonzalez's statement was cumulative. Alvarez identified the front passenger as the shooter. Alvarez and Brewer identified Blanco as the front passenger. Both Alvarez

and Brewer identified Gonzalez's black Mustang. Police found an article about the shooting in Blanco's room. Blanco complains the statement was used to satisfy the gang allegation. i.e., that the crime was perpetrated in concert with other gang members against rivals. Jimenez, Alvarez, Miranda, Barretto and Gonzalez all established that fact. Accordingly, any error in admitting the statement was harmless beyond a reasonable doubt.

V. Standing Mute

A. Background

Deputy O'Neill testified that he interviewed Blanco after Blanco's arrest. O'Neill advised Blanco of his constitutional rights, and Blanco said he understood his rights. Upon being asked whether he wanted to speak without an attorney being present, Blanco stated he wanted to speak with O'Neill. At the outset of the interview, Blanco revealed his tattoos. When O'Neill asked Blanco what the tattoos meant, Blanco said they stood for Brown Familia, his "barrio" (gang). O'Neill asked Blanco whether he still went by the moniker "Shorty," and Blanco said he still used that name.

O'Neill told Blanco that Gonzalez had been arrested. When O'Neill said he had already spoken with Gonzalez, Blanco asked what Gonzalez had said; O'Neill refused to answer. The prosecutor then asked, "After that, Detective O'Neill, did Pablo Blanco tell you anything about what had happened in the afternoon of January 8th, 2008?" Without objection from the defense, O'Neill replied, "No."

B. Forfeiture

Blanco contends the prosecutor's solicitation from O'Neill that Blanco stood mute violated his constitutional rights and constituted prosecutorial misconduct. (See *Griffin v. California* (1965) 380 U.S. 609, 614-615 [it is impermissible to penalize an individual for exercising his Fifth Amendment privilege]; see also *People v. Hardy* (1992) 2 Cal.4th 86, 154 [the prosecutor may not directly or indirectly urge the jury to infer guilt from a defendant's failure to testify].)

Blanco "forfeited this claim [of violation of a constitutional right] because he failed to object." (*People v. Valdez* (2004) 32 Cal.4th 73, 127.) In addition, a failure to object and request an admonition forfeits a claim of prosecutorial misconduct on appeal unless an objection would have been futile or an admonition ineffective. (*People v. Arias* (1996) 13 Cal.4th 92, 159.) We disagree with Blanco that an objection would have been futile because the "cat was out of the bag."

In addition, "A defendant has no right to remain silent selectively. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights. (*People v. Hurd* (1998) 62 Cal.App.4th 1084, 1093.) The prosecutor did not comment on Blanco's exercise of a constitutionally protected right or suggest the failure to respond evidenced guilt; he simply established, that after answering other questions by O'Neill, upon learning O'Neill had spoken to Gonzalez, Blanco did not tell O'Neill what had happened on the 8th.

VI. Cumulative Error

Blanco contends the cumulative effect of Gonzalez's statement that the right front passenger fired the shot and O'Neill's comment that Blanco remained mute was prejudicial. In addition, Blanco lists five other alleged errors. It appears Blanco only objected to two of these errors -- to Alvarez's telling Deputy Hodge that "some fools rolled up and shot me" and one of the shooters yelled out "Brown Familia" and to Barretto's opinion that witnesses tended to be less honest when testifying in cases involving gang members. Even assuming arguendo overruling those objections was erroneous, Blanco presents no argument as to how he was prejudiced by those minor statements. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) There was no cumulative error as any error was inconsequential. (See *People v Hines* (1997) 15 Cal.4th 997, 1075.)

VII. Juror Misconduct/Juror Information

Appellants contend they were denied their right to an impartial jury when the trial court failed to insure the panel was not tainted by the misconduct of a discharged juror.

A. Background

During deliberations, the jury foreperson sent a note to the court indicating that one of the jurors, Juror No. 3, had expressed concern for the safety of herself and her family and had prior knowledge of gangs in the area. The court conducted an inquiry in chambers with counsel.

Juror No. 3 explained that when Deputy O'Neill testified, she realized she knew him in connection with an experience she had years earlier; Juror No. 3 stated she had not known him by name when the list of witnesses was called. Juror No. 3 explained that 10 years earlier she had been at a party with her brother and a friend of her brother when they were approached by some Canones gang members and that she had not realized the same gang was involved until after she was selected as a juror. After the friend was stabbed, Juror No. 3's brother testified. Two days after the perpetrator got out of jail, a "cocktail bomb" was thrown into her brother's car while it was parked in her driveway. Deputy O'Neill asked Juror No. 3 and her brother questions and wanted to know if her brother was associated with any gang.

The court asked Juror No. 3 why she failed to disclose during voir dire that a relative had been the victim of a crime. Juror No. 3 stated she did not want to bring up or discuss her past experiences. Juror No. 3 explained that when other jurors noticed she was not feeling well and said something to her, she told them, "'I'm scared because of that that happened with my brother.'" Juror No. 3 stated she could still decide the case fairly and impartially.

The court then met with counsel in open court outside the presence of Juror No. 3. The court repeatedly stated Juror No. 3 intentionally concealed something in voir dire. With the agreement of all counsel, the court decided Juror No. 3 should be removed.

After Blanco's counsel expressed some concern the information Juror No. 3 shared with the other jurors might have tainted the whole jury, the court noted it had discretion to hold such a hearing, but a hearing should be held only if the defense came forward with evidence demonstrating a strong possibility that prejudicial misconduct had occurred and the evidence presented a material conflict which could only be resolved by such a hearing. Neither defense counsel asserted any such conflict existed. The court found there was insufficient evidence to conduct an evidentiary hearing as it did not see any taint of the jury because Juror No. 3 "just told them why she was upset." The court said it would admonish the jury to disregard anything it was told and instructed the jury to disregard prior deliberations.

B. Misconduct

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors." (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) Juror misconduct may establish juror bias. (*Ibid*.)

"'As a general rule, juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted."' In determining whether misconduct occurred, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination.'" (Citations omitted.) (*People v. Majors* (1998) 18 Cal.4th 385, 417.)

"A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 111.) The court reasoned that "false answers or concealment on voir dire also eviscerate a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial." (*Ibid*.) In *Hitchings* and some of the other cases cited by appellants, the issue was whether a particular juror could be impartial or should be removed. Juror No. 3

committed misconduct because she concealed the incident involving her brother during voir dire. The failure to reveal her brother's experience during voir dire questioning constituted misconduct, but appellants do not explain how withholding information in voir dire tainted the jury. In addition, Juror No. 3 was removed and deliberations begun anew, which rebutted any presumption of prejudice from the concealment. (See *People v. Tafoya* (2007) 42 Cal.4th 147, 193.)

The question is whether anything Juror No. 3 said tainted the other jurors. "'"When a trial court is aware of possible juror misconduct, the court 'must "make whatever inquiry is reasonably necessary"' to resolve the matter." Although courts should promptly investigate allegations of juror misconduct "to nip the problem in the bud," they have considerable discretion in determining how to conduct the investigation.'" (Citations omitted.) (*People v. Virgil* (2011) 51 Cal.4th 1210, 1284.)

"The trial court has the discretion to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is 'necessary to resolve material, disputed issues of fact.' 'The hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.'" (Citations omitted.) (*People v. Avila* (2006) 38 Cal.4th 491, 604.) The court here chose to hold an in-chambers hearing with Juror No. 3 followed by discussion in open court; both out of the presence of the other jurors.

Blanco claims the court abused its discretion by not holding a hearing with each individual juror to determine if the juror was frightened by Juror No. 3's experience. Gonzalez asserts that Juror No. 3 committed misconduct by introducing extraneous

information into the deliberations. Gonzalez posits that by claiming personal knowledge of the gangs in the area, Juror No. 3 was claiming personal knowledge of a fact at issue, i.e., that Brown Familia was a gang in the area and a rival of Canones. That is speculation; there was no indication Juror No. 3 said anything about Brown Familia. Moreover, that fact was established by Barretto and Alvarez. Gonzalez speculates that because of what Juror No. 3 told them, there was a possibility the jurors either might fear retaliation if they convicted appellants. (See *People v. Wilson* (1996) 43 Cal.App.4th 839, 852 [speculation about how jurors might have arrived at their verdict does not show good cause].) Gonzalez concludes the court should have held a full hearing because there was a factual dispute if the rest of the jury was aware of the misconduct, and if it was, if the misconduct influenced deliberations.

In ruling on the new trial motions, the court stated it had found the juror had not committed misconduct. We interpret that comment to mean it found there was no misconduct in what Juror No. 3 said to the other jurors. Thus, we disagree with Gonzalez's claim the court implicitly found Juror No. 3 had interjected an inflammatory personal account. In *People v. Danks* (2004) 32 Cal.4th 269, 302-303, the Supreme Court, which extensively discussed the analysis of a claim of juror misconduct, noted:

"However, '[t]he introduction of much of what might strictly be labeled "extraneous law" cannot be deemed misconduct. The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." Moreover, under that "standard" few verdicts would be proof against challenge.' 'The safeguards of juror impartiality . . . are not infallible; it is

virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" (Citations omitted.)

Moreover, "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) Juror No. 3 informed the court that she told the other jurors that she was scared because of what happened to her brother. Despite the juror's reassurances that she could be fair, all agreed she should be removed. As noted by the court, all Juror No. 3 did was tell the others that she was scared; the court did not inquire as to exactly what Juror No. 3 said to the other jurors. Even if Juror No. 3 related the facts of the prior incident, it is common knowledge that gangs commit crimes. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 162 [no misconduct when several jurors recounted personal experiences involving drugs].) We conclude that the court did not abuse its discretion by declining to inquire further of the other jurors as to what Juror No. 3 said and its effect on them as that would involve an invasion of the jurors' thought processes. (See Evid. Code, § 1150.) Given the gang evidence properly adduced in this case, the likelihood of juror bias was not substantial. (See *People v. Danks*, *supra*, 32 Cal.4th at pp. 303-304.)

To the extent appellants claim the court erred in denying their new trial motions based on a claim of juror misconduct, the motions were supported by the unsworn report of a defense investigator who spoke to one juror. The court did not abuse its discretion by denying the new trial motions. (*People v. Dykes* (2009) 46 Cal.4th 731, 810 ["[O]rdinarily a trial court does not abuse its discretion in declining to conduct an evidentiary hearing on the issue of juror misconduct when the evidence proffered in support constitutes hearsay. Moreover, a trial court does not abuse its discretion in denying a motion for new trial based upon juror misconduct when the evidence in support constitutes unsworn hearsay." (Citation omitted.)].)

C. Release of Juror Information

Pursuant to Code of Civil Procedure section 206, subdivision (g), a defendant may petition the court for access to juror identifying information "for the purpose of developing a motion for new trial." Code of Civil Procedure section 237, subdivision (b) provides, "The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information."

At the hearing on their new trial motions, appellants sought release of juror information. The motion was also based upon the investigator's report. The court found appellants had failed to show good cause for the disclosure and denied the motion. Blanco contends the court abused its discretion in denying the motion because two jurors expressed fear of gang retaliation.[4] Blanco makes no argument as to why that constituted good cause for the release of juror information.

Decisional and statutory law protect jurors from unwanted postverdict intrusions. (*People v. Barton* (1995) 37 Cal.App.4th 709, 716.) Although a defendant may request personal juror information, he has no absolute right to such information; absent a sufficient showing of good cause or need for the request, a trial court may properly deny the request. (*Ibid*.)

First, the motion did not include a declaration, only an unsworn report from the defense investigator. In denying the motion, the court impliedly found it was based on hearsay. The investigator's report contained hearsay as to what the one juror the investigator interviewed told the investigator. Second, even considering the report, nothing the questioned juror said indicated the other jurors were fearful of retaliation. The court was aware Juror Nos. 3 and 9 had expressed fear of retaliation. Contacting the other jurors to determine if they feared retaliation or were influenced by the alleged

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[4] At a sidebar prior to opening statements, Juror No. 9 informed the court that she had learned she would not be getting paid and stated she was afraid for her family because the defendants were gang members. The court advised the juror that the names of the jurors would all be sealed after the trial.

introduction of extrinsic material would invade the jurors' thought processes. The court did not abuse its discretion by denying the request. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

DISPOSITION

The judgments are affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**