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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. HENRY ZARAZU et al., Defendants and Appellants.	B220661 (Los Angeles County Super. Ct. No. VA 093907)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Wesley Judge. Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Henry Zarazu.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Ernesto Perez, Jr.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellants Henry Zarazu and Ernesto Perez, Jr., of the first degree murder of Francisco Herrera, the attempted first degree murders of Carlos Nunez and Ricardo Murillo, and shooting at a motor vehicle. Between the two, appellants raise the following contentions:[1] (1) the trial court erred in denying their *Wheeler*/*Batson*[2] motion; (2) insufficient evidence supported the alleged gang enhancements; (3) the prosecution repeatedly violated its discovery obligations, requiring reversal; (4) the prosecutor committed misconduct consisting of discovery violations, *Doyle*[3] error, and improper closing argument comments; (5) the court erred in various evidentiary rulings; (6) the court committed instructional error; (7) insufficient evidence supported their convictions and the firearms allegations as to Perez; and (8) the cumulative error of the asserted errors requires reversal. We affirm.

STATEMENT OF FACTS

1. December 2004 Incident

Nunez was a member of the Wicked Town Bandits, or WTB, crew. He left Los Paranderos, or LPS, to be a member of WTB. Zarazu was a member of LPS with Nunez. On December 6, 2004, Nunez was walking down the street when a blue van pulled up next to him. He heard a male voice from the van say, "You're a bitch." When he looked up, he saw Zarazu in the front passenger seat of the blue van. Concerned for his safety, Nunez began to run away. When he reached the end of the block, the van pulled up again. Again he heard a male from the van say, "You're a bitch." He ran into a nearby school and hid for 10 to 15 minutes. He came out of the school and started walking again and the blue van appeared another time. Zarazu said, "You're a bitch," and got out of the

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[1] Each appellant joins in the arguments made by his codefendant that accrue to his benefit.

[2] See *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

[3] *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

van with a bat in his hands. Zarazu chased him with the bat and he ran away. Another 20 to 30 minutes later, as he was walking down a different street, Zarazu pulled up in a green Mustang. He had seen Zarazu in the Mustang three or four times before. Three people got out of the Mustang, including Zarazu. One of them, a male Nunez did not know, approached him and said, "Stop doing the homies wrong." The man started swinging at him. Mercedes Pantoja, Nunez's girlfriend, was with Nunez. She pulled him back from the man and Nunez realized the man had stabbed him on the left side of his body.

Several days later a detective from the South Gate Police Department showed Nunez a six-pack photographic lineup. He identified Zarazu from the lineup as the person that chased him with the bat.

2. February 12, 2006 Shooting

On February 12, 2006, Zarazu and his friend Martin Sanchez picked up Perez from his mother's house at approximately 10:40 p.m. Zarazu was driving a Mustang. Perez's lower body was paralyzed as a result of a shooting in 2002 and he used a wheelchair, but he had full use of both hands. Zarazu and Sanchez picked up and placed Perez in the front seat of the car, and the three left.

Nunez was at Murillo's house that evening when he received a call from his friend, 12-year-old Herrera. Herrera and Murillo were also members of WTB. The night of the shooting, Nunez told detectives that Murillo had received the call from Herrera, not him. In any event, Herrera sounded out of breath. He said he was being chased and he asked Nunez to pick him up on San Carlos Avenue in front of "Pepe's" house. Nunez and Murillo drove to San Carlos Avenue and parallel parked on the street. They went in Nunez's car, a Chrysler Cirrus. There was a car parked about two feet in front of Nunez and cars parked about 20 feet behind his car. Herrera ran out from behind a van that was parked across the street and got into the Chrysler.

Zarazu's green Mustang then pulled up. Its passenger side was about three feet from Nunez's driver's side. Nunez saw a gun pointing out from the passenger's side of the Mustang. He also saw Zarazu in the driver's seat leaning forward and looking to the

right at his car. Zarazu's right hand was on the steering wheel and had a white cast on it. He had seen Zarazu while he was driving the Chrysler four or five times before, and he had conversed with Zarazu while driving the Chrysler.

When he saw the gun, Nunez turned his car on and reversed, punching the accelerator. He heard two groups of shots being fired. As he was reversing, his car crashed into something three times. He reversed for approximately half a block and then tried to go forward but could move only five feet because the back of his car was smashed. He heard Herrera say he had been shot. The Chrysler came to a stop partially up on the curb. Murillo and Nunez went to the backseat to check on Herrera. Nunez was going to try to pick up Herrera, but before he could, the police arrived. They arrived approximately a minute to a minute and a half after the shooting. Herrera died of a gunshot wound to the chest.

Nunez told detectives that Zarazu was involved in the shooting. They showed him a six-pack photographic lineup, and he identified Zarazu from the lineup as the person who was driving the Mustang. A photograph taken of Zarazu just after the shooting at the police station showed him with a wrap on his right arm.

Nunez said that there was not a gun inside his car on the night of February 12, though he was not certain whether his passengers had a gun on them. At trial, he said his girlfriend, Pantoja, was not in the car or at the scene of the shooting. But the night of the shooting, he told detectives Pantoja was in his car.

Police took Nunez to the area of San Juan Avenue and Tweedy Boulevard where a crashed car was located. He identified the car as the Mustang involved in the shooting. Later that evening while being interviewed by the police, he told officers that Murillo was driving the Chrysler. He did not tell them that he was actually the driver because he did not have a license and did not want a ticket. He told the truth -- that he was driving -- when he testified at the preliminary hearing.

Juan Rios was driving in the area of the shooting on San Carlos Avenue on the night of February 12, 2006. As he was driving on San Carlos Avenue, a black Mustang was going in the opposite direction on the same street. Both cars slowed down as they

passed each other because of the narrowness of the street. Rios saw three people in the Mustang -- two people in the front of the car, and a person in the back. At the end of the block he made a right turn onto another street. He then heard gunshots.

C.F. lived on San Carlos Avenue on February 12, 2006. Around 11:30 or 11:40 that night he was awakened by the sounds of screeching tires and gunshots. He heard multiple groups of shots. He also heard a male voice yell out, "We're number one."

O.B. was at a house on San Carlos Avenue at approximately 11:30 p.m. on February 12. He heard two series of gunshots sounding as if they came from different guns. O.B. looked outside his window after he heard the gunshots and saw two people getting out of a crashed car. He saw one of those people walk up the driveway of his neighbor's property, and some time later the person came out of the driveway. A woman knocked on O.B.'s door after he heard the shots. She asked for water and used his telephone with his permission. He identified Pantoja from a photograph as the woman who used his telephone.

South Gate Police Officer Adam Cook responded to a call of shots being fired. He arrived at the scene of San Carlos Avenue at approximately 11:30 p.m. and saw a car crashed into a tree. Nunez and Murillo were outside the car and Herrera was in the backseat and had a gunshot wound. Murillo appeared to be walking out of a nearby driveway. Officers later found a .45-caliber Webley revolver in the driveway near where Officer Cook saw Murrillo.

Officer Edward Bolar heard a call that shots had been fired on San Carlos Avenue on the night of February 12. He was on his way to assist officers at the scene when he saw a green Mustang in front of him on San Juan Avenue. He was traveling at a high speed and had his lights and sirens on. When he was approximately one car length away from the Mustang, it accelerated from 25 or 30 miles per hour to 65 to 75 miles per hour. He notified dispatch that he had a green Mustang leaving him at a high rate of speed, and Officer Cook then mentioned over the radio that it was possibly a suspect vehicle. Officer Bolar continued to follow the Mustang, and when it came to the intersection of San Juan Avenue and Tweedy Boulevard, it hit some dips in the road and the driver lost

control. The Mustang crashed into some parked vehicles and came to a stop. Zarazu was in the driver's seat of the Mustang, Perez was in the front passenger's seat, and Sanchez was in the backseat. Perez was wearing a black Pittsburgh Pirates baseball cap with a gold "P" on it.

Officers found a pistol near the intersection of San Juan Avenue and Tweedy Boulevard. The only fingerprint lifted from the gun was of such poor quality it was not useful for comparison purposes. Firearms examiner Donna Reynolds recovered three fired .40-caliber cartridge cases from the scene of the shooting on San Carlos Avenue, and four more a little further down the street. The locations of the cartridge cases suggested groups of shots were fired from two different locations. She also recovered a fired bullet from a car parked on San Carlos Avenue, one from in front of a house on San Carlos Avenue, and one from under Nunez's Chrysler. She observed bullet impacts and bullet holes on the Chrysler and also recovered a fired bullet jacket from the engine compartment of the Chrysler. All of the bullets and cartridge cases Reynolds recovered, as well as the bullet recovered from Herrera's chest, were fired from the pistol found at San Juan Avenue and Tweedy Boulevard, near the Mustang.

Reynolds was also the one who recovered the revolver from the driveway near the location where Nunez's Chrysler had crashed. The revolver was loaded with two .45-caliber half-moon clips that were live, meaning they had not been fired. She recovered another .45-caliber half-moon clip on the floorboard of Nunez's Chrysler, and another from the gutter in front of a house on San Carlos Avenue.

Officers collected gunshot residue kits from the occupants of both Zarazu's Mustang and Nunez's Chrysler. One particle highly unique to gunshot residue and numerous particles consistent with gunshot residue were found on Zarazu's hands. Numerous particles unique to gunshot residue were found on Perez's hands. One particle consistent with gunshot residue was found on Sanchez's hands.

One highly specific particle of gunshot residue and several consistent particles were found on Nunez's left hand, and none were found on his right hand. Several

consistent particles were found on Murillo's hands. Herrera had no gunshot residue particles on either hand.

Irma Perez is appellant Perez's mother. She testified that Perez has always been a kind, respectful, and peaceful person. Esperanza Casique is Perez's aunt. She testified that he was always a family person, had never been in trouble with the law before, and was a respectful and peaceful person.

3. Gang Evidence

Detective Derek O'Malley with the South Gate Police Department was the prosecution's gang expert. Detective O'Malley testified that gang members typically earn tattoos by "putting in work." "Putting in work" consists of committing street crimes, attacking rival gang members, tagging in rivals' areas, or otherwise challenging them. The more violence a gang member commits, the more prominent his or her tattoos. Tattoos that denote membership in a Southern California gang include the letters "L.A.," signifying the Los Angeles area. A tattoo of three dots together represents "My crazy life," or "Mi vida loc[a]." Many gang members feel as if they have a "demon" or an "evilness" inside them, and they will tattoo demons or skulls or the like on their bodies to represent this feeling. The name of the gang is another common tattoo. Gangs also commonly affiliate themselves with a sports team. They will pick a prominent word in their name and find a sports team that begins with the same letter.

Detective O'Malley is familiar with LPS. WTB is the primary rival of LPS. When Nunez left LPS for WTB, this precipitated the rivalry between the two. It was the ultimate sign of disrespect to leave LPS for WTB because it suggested that WTB was better. It is uncommon for a gang member to leave one gang for another because when a person joins a gang, that person is pledging loyalty to the gang. The mentality is that the gang members will give their lives for one another. Respect is very important to gangs. Within the gang, one gains respect by putting in work and representing the gang at all times. The "crazier" one's "work" is, the more respect he or she earns.

Detective O'Malley had several contacts with Zarazu in the field. During one of those contacts, Zarazu told the detective that he belonged to LPS and his moniker was

"Spider." His last contact with Zarazu in the field was in December 2005. Detective O'Malley saw him on the street and asked how he had been doing. He said he had been getting straight "A's" in calculus, and the detective told him he was impressed and encouraged him to use school to stay out of gangs. Zarazu responded that his neighborhood was his "life." Officer Carlos Corella also had contacts with Zarazu in the field and heard him say he is a member of LPS and that his moniker is "Spider."

The primary activities of LPS are felony vandalism, assaults with a deadly weapon, battery, and firearms offenses in violation of Penal Code former sections 12021, 12025, and 12031. LPS's common sign or symbol was the letter "P," and the gang affiliated itself with the Pittsburgh Pirates sports team.

Detective O'Malley had contacts with Herrera during which he admitted that he was a WTB member with the moniker "Little Loco." He had contacts with Nunez in which he found out that he was a member of LPS and then left that gang to join WTB. His moniker was "Temper." The area of the shooting on San Carlos Avenue was in WTB's territory.

For gang members who are paraplegics, it would be hard for them to feel like they could carry their own weight in the gang. It would be important to them to get new tattoos to show they are still active members of the gang. Also, actually pulling the trigger in a shooting would give the shooter a higher status in the gang. Perez started getting tattoos after he was shot. He has tattoos on his left hand saying "L.A." and "LPS." He has a tattoo of three dots below his right eye. He has a tattoo of a joker pointing a gun that says, "The last laugh is mine, motherfuckers." He has a tattoo of a skull with a bullet hole and smoke coming out of the hole, and it says " R.I.P. LPS." Another of his tattoos is a demon with horns smoking a pipe, with a hand sign that forms the letter "P," representing LPS. The same tattoo also has script that says, "Smoke a bowl" and "Fuck a hoe." The latter statement was typical of an "I-don't-care attitude." Another of Perez's tattoos depicted a demon with skeletal hands forming the LPS sign, the letter "P." Detective O'Malley had seen Perez on the street with other known LPS members.

After the prosecution posed a hypothetical tracking the facts of this case, Detective O'Malley opined that the shooting was done for the benefit and furtherance of LPS. This was based on the rivalry between LPS and WTB, and that a member of WTB had gotten into a car with another WTB member who had already disrespected LPS by leaving the gang. The shooting would have established LPS's dominance and control.

PROCEDURAL HISTORY

Appellants were charged with the first degree murder of Herrera, the attempted first degree murders of Nunez, Pantoja, and Murillo, and shooting at a motor vehicle. The amended information also contained various special allegations, including gang allegations[4] against both appellants and allegations that Perez had personally and intentionally discharged a firearm. The trial court dismissed the count of attempted murder of Pantoja. Following a jury trial, the jury found appellants guilty of all remaining counts and found the special allegations connected to those counts to be true. In the aggregate, the court sentenced each appellant to life in prison without the possibility of parole plus another 105 years to life. Appellants filed timely notices of appeal.

STANDARD OF REVIEW

When reviewing a trial court's denial of a *Wheeler*/*Batson* motion, we examine only whether substantial evidence supports its conclusions. (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) We review a trial court's ruling on matters regarding discovery for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) We apply "the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense."

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[4] The amended information also charged Sanchez, the third occupant of Zarazu's car, with these crimes. Sanchez is not a party to this appeal. He pled guilty to voluntary manslaughter prior to appellants' trial.

(*People v. Waidla* (2000) 22 Cal.4th 690, 733.) Likewise, we review the legal adequacy of a jury instruction de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

When a defendant claims on appeal that a conviction or gang enhancement was based on insufficient evidence, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Augborne* (2002) 104 Cal.App.4th 362, 371 [applying substantial evidence test to gang findings].) "[I]t 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 on which that determination depends." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

DISCUSSION

1. Wheeler/Batson *Motion*

During voir dire, appellants made a motion pursuant to *Wheeler*, *supra*, 22 Cal.3d 258 and *Batson*, *supra*, 476 U.S. 79 regarding the prosecution's use of peremptory challenges to exclude two prospective African-American jurors. Appellants contend that the trial court committed reversible error in denying their motion and in denying them an opportunity to be heard during the *Wheeler*/*Batson* procedure. We disagree.

a. Denial of Motion

The federal and state Constitutions prohibit any party's use of peremptory challenges to exclude prospective jurors based on race. (*Wheeler*, *supra*, 22 Cal.3d at p. 276; *Batson*, *supra*, 476 U.S. at p. 84.) The United States Supreme Court in *Batson* established a three-step process to determine if a party has used peremptory challenges impermissibly. First, the defendant must establish a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Batson*, at p. 94.) Second, once the defendant has made out a prima facie case, the

"burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the peremptory strike. (*Ibid.*) Third, "'[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson v. California* (2005) 545 U.S. 162, 168.) This three-step procedure also applies to state constitutional claims brought under *Wheeler*. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

At the third step of the inquiry, the issue is whether the trial court finds the prosecutor's race-neutral explanations to be credible. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.) "'Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*Ibid.*) The trial court draws upon its contemporaneous observations of the voir dire. (*Ibid.*)

Because *Wheeler*/*Batson* motions call upon trial judges' personal observations, "we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

Here, appellants' *Wheeler*/*Batson* claim relates to prospective Juror No. 4132, an African-American.[5] Juror No. 4132 was a dean of students at a high school. His father was a social worker at a California women's correctional facility. His mother's cousin was on death row. He had visited the cousin four or five times over the years. He did not

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[5] At trial, appellants challenged the prosecution's dismissal of Juror No. 4132 and another juror (Juror No. 4887). On appeal, however, they argue that the court erred solely with respect to Juror No. 4132.

attend any of the court proceedings in the cousin's case. He said he did not think the situation would affect his ability to be fair and impartial in this case. The prosecutor asked him whether he had formed an opinion as to how the criminal justice system works based on his father's work in the prison system or his mother's cousin. He responded: "Well, yes, but I don't think -- Yeah, I mean I think it would be natural to form some kind of an opinion, but I don't really think it's biased one way or another. It's more interesting than anything else, I guess." The court asked whether there was any discussion in his family that the cousin was treated unfairly. He responded: "Yeah, a little bit because the co-conspirator in the case is now being brought back to L.A. to have a new penalty phase. There was some question as to, you know, whether or not the person who -- there was some question as to whether or not they got the right person." He also said that while his family all thought the cousin had something to do with the crime, "perhaps [the cousin] was treated unfairly in the penalty phase," but that he did not think this would affect his ability to be fair to both sides of the case.

The prosecution exercised a peremptory challenge to remove Juror No. 4132. When the prosecution exercised another peremptory challenge to remove Juror No. 4887, appellants made a *Wheeler*/*Batson* motion on the grounds that the prosecution had struck two African-American males. At that point, the prosecution had exercised nine total peremptory challenges. No African-American males had been impaneled yet. The court found a prima facie case under *Wheeler*/*Batson* and asked the prosecutor to state her reasons for excusing both jurors.

As to Juror No. 4887, her reasons were as follows: He had previously sat on a hung jury; when another prospective juror explained that he had been "jumped" by African-Americans, Juror No. 4887 laughed and shook his head, indicating to the prosecutor that he might not get along well with others; his son had been arrested for grand theft auto, and he felt his son was innocent; he had been arrested when he was 16; and the prosecutor overheard him in the hallway telling another juror that he was hoping to stay a little while longer, which she took as an indication that he was unmotivated, did not want to work, and essentially wanted a vacation when he came to jury duty.

As to Juror No. 4132, her reasons were as follows: His mother's cousin was on death row, where he had visited the cousin a few times; he felt that the penalty phase of the cousin's prosecution was unfair; he had formed some opinions regarding the courts; and because the cousin must have been convicted of murder, she did not want him approaching this case from what she perceived to be a defense perspective and relating too much to the family members of appellants. The prosecutor noted for the record that appellants were Hispanic, and she had excused two African-American males, four Caucasian people, one Asian female, and two Hispanic people. The court found that the prosecution's reasons for striking the two jurors were race neutral and denied the *Wheeler*/*Batson* motion.

Substantial evidence supported the trial court's conclusion that the prosecution offered a race-neutral explanation for striking Juror No. 4132. "[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." (*Wheeler*, *supra*, 22 Cal.3d at p. 275.) Here, the juror had a relative convicted of murder and on death row. He was close enough to this relative that he visited the person four or five times in prison. He seemed to have formed an opinion that at least the penalty phase of that relative's trial had been unfair. The suggestion of a specific bias against the prosecution and in favor of the defense was an appropriate, race-neutral reason for excusing Juror No. 4132. (*Id.* at pp. 274-275; see also *People v. Cornwell* (2005) 37 Cal.4th 50, 70 ["The juror's own remarks also clearly do not support an inference she was excused because of her race -- on the contrary, despite her obvious intelligence and good faith, her voir dire disclosed a large number of reasons other than racial bias for *any* prosecutor to challenge her, including but not limited to her personal experience with an allegedly unfair homicide prosecution of a close relative and her express distrust of the criminal justice system and its treatment of African-American defendants"].)

The prosecution excused another juror who was *not* African-American for what appeared to be a similar suggestion of bias against the prosecution. Juror No. 7563's son-

in-law had been charged with gross vehicular manslaughter and his case was then pending. The juror professed to previously having a heavy bias toward law enforcement because his father and many of his friends were police officers. Still, he acknowledged that he was seeing things from the defense perspective for the first time because of his son-in-law's case, and he felt his son-in-law was a hard-working family man who was merely in "the wrong place at the wrong time." He could not say how his son-in-law's case would affect his ability to sit as a juror until he saw how that case was resolved. The prosecutor used a peremptory challenge to dismiss Juror No. 7563 just before she dismissed Juror No. 4132. The prosecutor's race-neutral grounds for excusing Juror No. 4132 were both inherently plausible and supported by the record. We therefore find no error in the court's conclusion.

b. Denial of Opportunity to Respond to Prosecution's Explanation

Appellants also contend that the court violated their constitutional rights when it refused to let them respond to the prosecution's reasons for excluding Juror No. 4132. The prosecution offered its reasons and the court immediately thereafter denied the motion. Defense counsel requested to be heard, and the court denied the request, stating: "I made my ruling. That's the end of it. I'm not going to sit up there and discuss each of my rulings with you. [¶] . . . [¶] . . . I don't have to give you an opportunity to comment. You made your motion, I heard her response, I made my ruling. That's it."

Appellants argue that the law requires the court to hear from defendants at the third stage of the *Wheeler*/*Batson* inquiry, when the issue is whether the prosecution has offered a credible race-neutral explanation. They rely heavily on *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254 (*Thompson*). In *Thompson*, the trial court permitted the prosecution to state its reasons for excluding four African-American prospective jurors in an ex parte hearing. (*Id.* at p. 1257.) The court then ruled on the *Batson* challenge without divulging those reasons to the defense. (*Ibid.*) *Thompson* held that the trial court erred in refusing to allow defense counsel to hear the government's reasons and present argument thereon. (*Id.* at p. 1261.) The court based its decision on the right of a criminal defendant to an adversary proceeding, including the right to be personally present and

represented by counsel at critical stages. (*Id.* at p. 1258.) As the court saw it, defense counsel could perform "two crucial functions" at an adversary *Batson* proceeding. (*Id.* at p. 1260.) First, when the government's stated reasons seemed to indicate bad faith or seemed like pretext, the defense could point that out. (*Ibid.*) Second, the defense could preserve for the record crucial facts bearing on the court's decision. (*Id.* at p. 1261.) The court further held that the error could not be harmless, citing the United States Supreme Court's decision that racial discrimination in the selection of grand jurors was prejudicial error per se. (*Ibid.*, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 261-263.) It remanded for an adversarial hearing on the prosecution's motive in exercising its peremptory challenges. (*Thompson*, at p. 1262.)

In *People v. Ayala* (2000) 24 Cal.4th 243, 262 (*Ayala*), our Supreme Court approved of *Thompson* and held that, generally, it is error to exclude defendants from participating in hearings on their *Wheeler*/*Batson* motions. (*Ayala*, at p. 262.) The trial court in *Ayala* also held ex parte proceedings with the prosecution to hear its reasons for excluding prospective jurors, and then ruled without divulging those reasons to the defense. (*Id.* at p. 260.) The *Ayala* court nevertheless held that the error was harmless under state law, and assuming federal error occurred, it was also harmless beyond a reasonable doubt. (*Id.* at p. 264, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) & *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Based on the record, the court was confident that defense counsel could not have argued anything substantial that would have changed the court's ruling that the prosecutor offered proper, race-neutral reasons for excluding the individuals at issue. (*Ayala*, at p. 268.) The transcript of the court's ex parte hearing revealed various reasons for excluding the challenged jurors, including opposing the death penalty, appearing in a "dazed state," being a holdout on a previous jury, being rejected for a law enforcement position, being dishonest regarding a criminal past, investigating the case before reporting for jury duty, and struggling with English and not understanding the proceedings. (*Id.* at p. 266.) While the court recognized it was "theoretically possible" the lack of an opportunity to rebut the prosecution's reasons resulted in an incomplete record and was therefore

prejudicial, the prosecution furnished "reasons for the challenges that were, at a minimum, plausible" and supported by the record. (*Id.* at p. 267.)

Appellants' case differs from *Ayala*, *supra*, 24 Cal.4th 243 and *Thompson*, *supra*, 827 F.2d 1254 in that the court did not conduct an ex parte hearing on the prosecutor's reasons for excluding Juror No. 4132 -- it merely refused to let appellants comment on those reasons. Assuming arguendo that this was error, we would find the error was harmless under either *Watson*, *supra*, 46 Cal.2d at page 836, or *Chapman, supra*, 386 U.S. at page 24. Like the *Ayala* court, we do not see any substantial argument the defense could have made to change the trial court's ruling. Appellants argue that defense counsel would have been able to show the prosecutor's claim of bias was unsupported because Juror No. 4132's views about his relative's penalty phase were irrelevant, as this was not a capital case. They also would have pointed out that the relationship between the prospective juror and his relative was distant because it was his mother's cousin, not a sibling or child, and moreover, the juror did not think his experience with the case would affect his jury service. Additionally, they would have highlighted that the prosecutor asked the juror only four questions on the topic of the death penalty, indicating that she was actually disinterested in the issue and her claim of bias was pretextual. We are confident beyond a reasonable doubt that defense counsel's comments to this effect would not have changed the trial court's decision. We have reviewed the record of voir dire and have summarized the most pertinent parts above, and we do not find the prosecutor's reasons to be implausible. The prosecutor gave more than plausible race-neutral reasons for excluding Juror No. 4132, and these reasons were amply supported by the record. On this record, we believe any error was harmless.

2. Gang Enhancement

The gang enhancement, Penal Code section 186.22, subdivision (b)(1),[6] requires in part that defendants have committed a felony "for the benefit of, at the direction of, or

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6 All further statutory references are to the Penal Code unless stated otherwise.

in association with any criminal street gang." Subdivision (f) defines a criminal street gang in part as an ongoing organization, association, or group having as one of its "primary activities" certain offenses enumerated in subdivision (e). (§ 186.22, subd. (f).)

Appellants argue that the gang enhancement was not supported by substantial evidence. They contend the prosecution did not prove (1) that the "primary activities" of LPS consisted of enumerated offenses, and (2) that appellants knew the primary activities of the gang were such offenses. We are not persuaded.

First, appellants' contention that the prosecution did not prove their knowledge of LPS's primary activities is unavailing. In advancing this contention, appellants maintain that the prosecution "had to prove the essential element that appellant[s] knew LPS's members engage[] in or had engaged in a pattern of criminal gang activity." They cite to *People v. Robles* (2000) 23 Cal.4th 1106 and *People v. Green* (1991) 227 Cal.App.3d 692 for this proposition. But those cases involved the substantive gang offense defined in section 186.22, subdivision (a). (*People v. Robles*, *supra*, at p. 1115; *People v. Green*, *supra*, at pp. 699, 702.) That offense does, indeed, require the defendant to have participated in a criminal street gang "with knowledge that its members engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (a).) We deal here *not* with the substantive gang offense defined in subdivision (a), but the sentencing enhancement defined in subdivision (b). The express terms of the substantive offense and the enhancement are not the same. It is not an essential element of the enhancement that the defendant had "knowledge" of "a pattern of criminal gang activity."

Second, substantial evidence supported the finding that LPS's primary activities included enumerated offenses. Our Supreme Court has established that a gang expert's testimony may provide the basis for a finding that a group's primary activities consist of enumerated offenses. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*).) In *Gardeley*, the gang expert, a detective in the police department, expressed his expert opinion that the primary activity of the Family Crip gang was the sale of narcotics. The gang also engaged in witness intimidation. (*Ibid.*) These two offenses are enumerated in section 186.22, subdivision (e)(4) and (8). The detective based this opinion on

conversations with the defendants and with other Family Crip gang members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies. (*Gardeley*, *supra*, at p. 620.) The Supreme Court held that the detective's testimony provided a sufficient basis from which the jury could reasonably find that the Family Crip gang committed enumerated offenses as primary activities. (*Ibid.*)

People v. Martinez (2008) 158 Cal.App.4th 1324 (*Martinez*) is to the same effect. There, the gang expert testified that the King Kobras gang's primary activities included robbery, assaults with weapons, theft, and vandalism. (*Id.* at p. 1330.) The expert "had both training and experience as a gang expert. . . . His eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffice[d] to establish the foundation for his testimony." (*Ibid.*) The court held the testimony was sufficient evidence that the gang's primary activities fell within the enhancement statute. (*Ibid.*)

This case is similar to *Gardeley* and *Martinez*. Detective O'Malley testified that the primary activities of LPS are felony vandalism, assaults with a deadly weapon, and firearms offenses in violation of former sections 12021, 12025, and 12031. These are all offenses enumerated in subdivision (e) of section 186.22. (§ 186.22, subd. (e)(1), (20), (31)-(33).) The detective specialized in gangs within the department. Over the last six years, he had become familiar with the LPS gang. When he started with the South Gate Police Department in 2003, his field training officer was in the gang unit, and he began introducing him to the gangs of South Gate, including LPS, and educated him about them. He also talked to other veteran officers in the department who explained how LPS operated. He had spoken with LPS members and also rival gang members about how the gang operated. On a daily basis, he drove to areas where LPS members were known to frequent and contacted them or rival gang members. He also spoke with other officers on a daily basis who had contacted LPS. As in *Gardeley* and *Martinez*, Detective O'Malley's training and experience provided an adequate foundation for this expert testimony, which constituted sufficient evidence of LPS's primary activities.

3. Discovery

Appellants contend that numerous discovery violations by the prosecution violated their statutory and constitutional rights. After reviewing the relevant law, we discuss each seriatim. We disagree that discovery violations occurred in many instances. Even when violations did occur, the trial court did not abuse its discretion in fashioning remedies, and appellants entirely fail to demonstrate prejudice.

a. Relevant Law

The prosecution's statutory duty to disclose materials to a defendant is codified in section 1054.1. Under that section, the prosecution must disclose materials in the possession of the prosecuting attorney or materials the prosecuting attorney knows to be in the possession of investigating agencies. (§ 1054.1.) The disclosure obligation applies to all of the following materials: (a) the names and addresses of the prosecution's trial witnesses; (b) statements of all defendants; (c) all relevant real evidence seized or obtained as part of the investigation of the charged offenses; (d) the existence of a felony conviction of any material witness; (e) any exculpatory evidence; and (f) relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of expert witnesses. (§ 1054.1, subds. (a)-(f).) The disclosures must be made at least 30 days prior to trial unless good cause is shown. (§ 1054.7.) If the material becomes known or comes into the possession of the prosecution closer to trial, the disclosure must be made immediately unless good cause is shown. (*Ibid.*) A court may make any order necessary to enforce these discovery obligations, including immediate disclosure, contempt proceedings, delaying or prohibiting witness testimony or the presentation of real evidence, continuance of the matter, or instructing the jury of any failure to disclose or untimely disclosure. (§ 1054.5, subd. (b).)

A violation of section 1054.1 is subject to the harmless error standard of *Watson, supra,* 46 Cal.2d at page 836. (*People v. Gaines* (2009) 46 Cal.4th 172, 181; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, the error was prejudicial only if it was

reasonably probable that the jury would have reached a different verdict had the discovery been produced. (*Zambrano, supra,* at p. 1135, fn. 13; *People v. Shipp* (1963) 59 Cal.2d 845, 849 (*Shipp*).)

Pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the prosecution also has a duty under the Fourteenth Amendment's due process clause to disclose evidence that is *both* favorable to the defendant *and* material on either guilt or punishment. (*Brady, supra,* at p. 87; *Strickler v. Greene* (1999) 527 U.S. 263, 281-282; *In re Sassounian* (1995) 9 Cal.4th 535, 543.) "*Brady* exculpatory evidence is the only substantive discovery mandated by the United States Constitution." (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1314.) A *Brady* violation occurs if favorable and material evidence was actually suppressed by the prosecution, either willfully or inadvertently. (*Strickler v. Greene, supra,* at p. 282.) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citation.] [¶] Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.]" (*Sassounian, supra,* at p. 544.) "Reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. (*Ibid.*)

b. Gang Expert Discovery

Appellants contend that, with respect to the gang expert, Detective O'Malley, the prosecution failed to provide discovery regarding (1) his current curriculum vitae; (2) "75 percent" of the detective's testimony; (3) his opinion that the shooting occurred in WTB territory based on the fact that a WTB gang member, "Pepe," lived on the block where the shooting occurred; (4) his testimony regarding an LPS gang member named Alvaro Munez, who was confined to a wheelchair; and (5) conversations the detective had with Zarazu and the victim, Herrera.

None of these alleged violations constitute *Brady* errors. Appellants do not explain how any of this evidence was favorable to them. Additionally, with the exception of Detective O'Malley's most current curriculum vitae, which was not produced, the evidence was not suppressed for *Brady* purposes because it was all presented at trial.

(*People v. Morrison* (2004) 34 Cal.4th 698, 715 (*Morrison*) ["[E]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery"].)

Moreover, as we discuss below, much of this information does not fall into the categories of discovery required to be produced by section 1054.1, and even if some of it does, appellants have failed to show prejudice.

i. Detective O'Malley's Curriculum Vitae

Detective O'Malley had produced a "professional history" that he wrote in 2007, so that it was approximately two years old by the time of trial. There was no evidence that a more recent curriculum vitae actually existed. Still, appellants argue that the prosecution should have produced an up-to-date curriculum vitae. They do not identify which subdivision of the discovery statute requires production of such a document. In fact, assuming a more recent curriculum vitae existed, the statute did not require production of it. It would have contained the detective's name and address (§ 1054.1, subd. (a)), but this would have already been produced in the detective's earlier curriculum vitae. It was not "real evidence" seized or obtained as part of the investigation. (§ 1054.1, subd. (c).) Nor was it a relevant written or recorded witness statement or report of a witness statement "made in conjunction with the case." (§ 1054.1, subd. (f).) And it was not a statement by a defendant (§ 1054.1, subd. (b)), a felony conviction of a witness, or exculpatory evidence (§ 1054.1, subd. (e)). We are not permitted to broaden the scope of discovery beyond that provided by statute and the *Brady* rule. (§ 1054, subd. (e); *People v. Tillis* (1998) 18 Cal.4th 284, 294.) No violation occurred here.

ii. "75 Percent" of the Detective's Testimony

Appellants do not attempt to specifically identify which testimony composes this category. They refer us instead to a statement in the record by defense counsel that "about 75 percent" of the detective's testimony at the Evidence Code section 402 hearing had not been previously disclosed. This is wholly insufficient to support their claim of error. It is well established that appellants must support their factual assertions and

arguments with citations to evidence in the record. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368.) Statements of counsel are not evidence. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1166.) We are not required to search through the record and speculate about which 75 percent of the testimony appellants could mean. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) We have no basis for determining what evidence the prosecution purportedly withheld and whether the violation was prejudicial. We therefore find no violation here.

iii. The Detective's Opinion That the Shooting Occurred in WTB Territory and His Testimony Regarding "Pepe"

Detective O'Malley testified at trial that WTB claimed the area of San Carlos Avenue where the shooting occurred, and it was a known hangout for them. This was based on his observations that a known WTB member named "Pepe" lived on that block and through personally contacting gang members at Pepe's address. The detective testified on cross-examination that he documented a probation search on Pepe's house in 2007. The trial court ordered the detective to produce by the following evening any materials he had with respect to the alleged WTB member that lived on San Carlos Avenue. The detective was excused subject to recall, and the court had previously indicated that the defense could reopen cross-examination of the detective upon an offer of proof.

Again, appellants do not identify the specific subdivision of the discovery statute on which they are relying. To the extent they rely on subdivision (f), providing for discovery of "reports or statements of experts made in conjunction with the case" (§ 1054.1, subd. (f)), there was no indication that the detective prepared the probation search report of Pepe's residence in conjunction with appellants' case. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1232 [defense not entitled to examine all written records generated during expert's career in order to be able to cross-examine him concerning his opinion and professional experience].) Indeed, such a report would appear to have been generated for purposes of a case in which Pepe was the defendant. The court ordered the

report produced anyway. Appellants never sought to recall Detective O'Malley. They do not demonstrate why the court's remedy was an abuse of discretion or inadequate.

Appellants appear to be arguing that the detective made oral statements to the prosecutor regarding the area of San Carlos Avenue being WTB territory, and the prosecutor was then obligated by section 1054.1, subdivision (f) to reduce the statements to writing and produce them. (See *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 166-168 [reciprocal obligation of defense to disclose "reports of the statements of" witnesses (§ 1054.3, subd. (a)) means defense must disclose relevant oral statements witnesses made directly to counsel].) Assuming this was a discovery violation, appellants fail to demonstrate prejudice. They argue the failure to disclose any information earlier was prejudicial because "Zarazu's lawyer stated in opening statement that the shooting did not take place in a gang neighborhood." But they must show that the jury would have reached a more favorable verdict, absent the violation. (*Zambrano, supra*, 41 Cal.4th at p. 1135, fn. 13; *Shipp, supra*, 59 Cal.2d at p. 849.) This they cannot do. The evidence that this shooting was gang-related was strong, regardless of the evidence that it occurred in WTB territory. Nunez testified he was previously an LPS member who left the gang for WTB. It was the ultimate sign of disrespect to leave one gang for another. When Nunez left LPS for WTB, this precipitated the rivalry between the two gangs. Nunez testified that Zarazu was an LPS member, and Zarazu had previously assaulted him in December 2004 after he left the gang. Perez had several LPS tattoos on his body, and the detective had seen him on the street associating with LPS members. He was also wearing a Pittsburgh Pirates baseball cap, the sports team with which LPS associated itself. Even if the detective's statements were known to appellants earlier, it is not reasonably probable that the jury would have reached a different conclusion on the gang enhancement.

iv. The Detective's Testimony Regarding Munez

Detective O'Malley testified that he had numerous field contacts with an LPS member who was wheelchair bound, Alvaro Munez. He was an active member of LPS and had gang tattoos, including one on his head that said "5150." In police terms, "5150"

was a reference to Welfare and Institutions Code section 5150 and signified someone was "crazy."

There is no evidence that the detective prepared a report containing this information, which might have been subject to disclosure as a report of an expert made in conjunction with the case. (§ 1054.1, subd. (f).) Assuming this information comprised oral statements to the prosecutor that should have been disclosed, no prejudice is apparent. Appellants make no attempt to explain how defense counsel would have proceeded differently, had the information been disclosed sooner. They make only blanket and conclusory statements that all the prosecutor's alleged discovery violations were prejudicial because they interfered with counsels' ability to represent appellants. For example, Perez states: "[E]very single item of withheld or delayed discovery, whether inadvertent or intentional, was vital to defense counsel's ability to prepare for trial, to challenge the prosecution witnesses' credibility, and to cast doubt upon the reliability of the prosecutor's evidence." Such generic statements are not persuasive. Generalized statements without any specific discussion of prejudice are insufficient. (*People v. Verdugo* (2010) 50 Cal.4th 263, 282 (*Verdugo*) [generalized statements insufficient to establish prejudice, and no prejudice existed when defendant could not explain what counsel would have done differently, had discovery been disclosed sooner].) It is unclear, moreover, how the evidence relating to Munez was even material.

v. Zarazu's and Herrera's Statements to the Detective

Appellants heard Detective O'Malley's testimony about his contacts with Zarazu at the Evidence Code section 402 hearing. The detective had several conversations with Zarazu beginning in 2003, but he did not have the exact dates of each. In 2003, the first encounter, the detective was with his training officer, and they had stopped Zarazu and his companions for drinking alcohol in public. The training officer introduced Zarazu and his companions as members of LPS. The training officer asked Zarazu for identifying information and completed a field interview card. Zarazu admitted that he was an LPS member. Another encounter occurred in December 2005 at the apartments across the street from Zarazu's residence. This was just Detective O'Malley and Zarazu.

They talked for approximately 10 minutes. Zarazu talked about being in school and getting an "A" in calculus. The detective told Zarazu he was impressed and to focus on school, not gang life. Zarazu replied that the gang was his "life." The detective did not prepare a report of this conversation. He did not specifically recall details or conversations from the other encounters with Zarazu.

Detective O'Malley went on to testify before the jury to essentially the same facts -- that he had several contacts with Zarazu, and during one of those contacts, Zarazu said he belonged to LPS and his moniker was "Spider." He also testified about the December 2005 contact in which Zarazu said he was doing well in calculus, but the gang was his life.

Zarazu's statements to the detective were statements of a defendant that were discoverable under subdivision (b) of section 1054.1. However, appellants again fail to demonstrate prejudice. The prosecution provided during discovery field interview cards for Zarazu and other LPS members documenting contact between officers and these LPS members. They therefore knew before trial the prosecution had evidence that Zarazu admitted membership in LPS. Appellants have not explained what they might have done differently, had they known earlier of Zarazu's statements to the detective. (*Verdugo, supra*, 50 Cal.4th at p. 282.) Moreover, there was evidence other than the detective's statements that Zarazu admitted membership in the gang -- the field interview card, Officer Corella's testimony that he had heard Zarazu admit membership in LPS, and Nunez's testimony that Zarazu was an LPS member. The jury was not reasonably likely to reach a different outcome, had the specific statements been disclosed earlier.

As to Herrera, the detective testified he had several contacts with Herrera during which he admitted that he was a WTB member with the moniker "Little Loco." Assuming arguendo that Herrera's statements were discoverable under section 1054.1, subdivision (f), appellants have not demonstrated prejudice. They make no attempt to demonstrate, as they must, what would have been done differently, had they known of the statements sooner. (*Verdugo, supra*, 50 Cal.4th at p. 282.) Additionally, there was other

evidence that Herrera was a gang member -- Herrera's fellow gang member, Nunez, testified that Herrera was a WTB member.

c. Officer Corella's Testimony

Officer Corella testified about a contact he had with Zarazu on October 31, 2004, in which he admitted membership in LPS and said he used the moniker "Spider." The defense received discovery about this incident, and it is not at issue. Officer Corella then said he had approximately four additional contacts with Zarazu. He was not asked nor did he give any details about these other contacts. Outside the presence of the jury, the prosecutor stated that she had no further information about the contacts or the nature of the contacts. She indicated that all field interview cards had been produced already. The court ruled that it would order Officer Corella back, and appellants could reopen his cross-examination if they wanted. Appellants never questioned Officer Corella further.

No *Brady* error is apparent here. That Zarazu had additional contacts with the officer cannot be said to be favorable to the defense, nor was the information actually suppressed for *Brady* purposes. (*Morrison*, *supra*, 34 Cal.4th at p. 715.)

Regarding the statutory discovery obligations, there was no evidence that Officer Corella wrote a report documenting these other contacts, which arguably would have been discoverable under the statute. (§ 1054.1, subd. (f).) Even if we assume that the officer orally reported these contacts to the prosecutor, who should have reduced them to writing and disclosed them, appellants fail yet again on prejudice. First, they have not demonstrated why the court's remedy of allowing them to reopen cross-examination was inadequate. (*Verdugo*, *supra*, 50 Cal.4th at pp. 286, 289 [no prejudice in failing to disclose an expert's opinion when defendant made no attempt to demonstrate, "as he must," why remedy of deferring cross-examination was inadequate].) Nor have they explained what they would have done differently, had they known of the additional contacts sooner. (*Id.* at p. 282-283.)

d. Firearms Examiner's Materials

As Zarazu's counsel began cross-examining Reynolds, the firearms examiner, he noted that she appeared to be reviewing materials on the stand that had not been produced

in discovery. The court excused the jury and held a hearing regarding the materials. She had 26 pages of handwritten notes that were not produced but that she used to write the reports that were produced. She also had 15 photographs and a peer-review worksheet that were not produced. The prosecutor indicated that she had not seen these materials before and did not know about them. She nevertheless acknowledged that she had a duty to ensure such materials were produced to the defense. Reynolds testified that her materials were available to any court-appointed firearms expert that wanted to come look at them, and specifically, they were available to the expert that the court appointed on behalf of Perez.

The court then took a recess so that it and the parties could review the materials. After the recess, the court heard argument on appellants' motion for a mistrial, ultimately denying it. The court ruled there was "no conceivable theory for a *Brady* violation" because there was no exculpatory evidence among the materials. Further, the court did not believe there was a violation of the discovery statute because the prosecutor did not possess the materials or even know they existed until that day.

Notwithstanding, the court ruled that it would recess until the next day so that the defense could have time to review the materials more thoroughly. Because Perez's counsel had already cross-examined Reynolds, the court indicated that Perez could reopen cross-examination if he wanted to ask additional questions after reviewing the materials and conferring with his appointed firearms expert. (Zarazu had not requested a firearms expert and the court declined to appoint one at that late date.) Defense counsel chose not to recess but to proceed with cross-examination that day, and asked that Reynolds be subject to recall.

No *Brady* error occurred here. Appellants have not explained how Reynolds's additional materials were favorable to the defense, and because they were produced at trial, they were not suppressed.

The additional materials fell within the scope of the discovery statute. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 580 [notes relating to expert's testimony generally constitute relevant "'reports or statements of experts made in connection with the case'"

and are discoverable under § 1054.3].) The prosecution's disclosure obligation includes materials "in the possession of the prosecuting attorney or [known] to be in the possession of the investigating agencies." (§ 1054.1.) This means that materials not literally in the prosecution's hands but "'reasonably accessible'" through investigating agencies must be produced. (*In re Littlefield* (1993) 5 Cal.4th 122, 135.) The prosecution cannot necessarily plead ignorance of the materials to excuse a failure to produce. "Section 1054.1 concisely lists six specific items that the prosecution must disclose to the defendant or his or her attorney, and, consistent with the stated purposes of discovery provisions of [section 1054 et seq.], the prosecution has a duty to inquire in order to satisfy these requirements." (*People v. Little* (1997) 59 Cal.App.4th 426, 432; see also *id.* at p. 433 [prosecutor's "duty is not linked to his personal knowledge; his duty to inquire and disclose is created by section 1054.1 and his reasonable access" to the discovery materials].) The prosecutor thus had a duty to inquire of her witness whether she had notes or other materials relating to her testimony.

Even so, no prejudice is apparent. The court ordered a remedy for the violation -- namely, that the trial recess so the defense could thoroughly review the materials, and Perez could reopen cross-examination if needed. Appellants opt again for generalizations about the adverse effect on their preparation for trial without any specific argument -- they do not explain how the new information was material, how the new materials differed from the expert's testimony or disclosed reports (if at all), what they might have done differently had they known of the materials earlier, or why the court's remedy was inadequate. This is insufficient to compel reversal. (*Verdugo*, *supra*, 50 Cal.4th at pp. 282-285.)

e. Thirty-Eight Pages of Additional Notes from Investigators

Near the close of the prosecution's case-in-chief, the prosecutor produced 38 pages of notes consisting of notes of several officers and detectives regarding their investigation of the case, notes of investigators who were trying to locate Nunez and Pantoja, and "call details" for December 6, 2004, and December 12, 2006. Appellants

asserted this constituted misconduct and moved for a mistrial, or in the alternative, a jury instruction that the prosecution had not complied with discovery obligations.

The prosecutor explained that, after what happened the prior day with the firearms examiner, she requested to see the full file on the case from the South Gate Police Department. When she went through it, she noticed a number of pages that she did not have and she did not believe the defense had. She faxed these pages to counsel "at the earliest possible time." She also talked to the sheriff's department and discovered two notebooks in its file that had not been produced, and she had contacted two crime lab witnesses also but had not heard back from them. She recognized that the materials "should have been obtained before" and that "[t]here's no excuse." The court denied the motion for new trial and for a jury instruction but held that if appellants wanted to recall any witness based on the new discovery, they could do that and have additional time, and they would have the time they needed to review the notes.

The late discovery was not a *Brady* violation because the materials were not suppressed and instead were disclosed at trial. (*Morrison*, *supra*, 34 Cal.4th at p. 715.) Even though there was a violation of section 1054.1, subdivison (f), there was no apparent prejudice. As with the firearms examiner's notes, appellants do not attempt to explain the materiality of the new notes, how they differed from the previously disclosed notes or testimony of these witnesses, what they might have done differently had they possessed the notes earlier, or why the court's remedy of allowing them time to review the notes and recall witnesses was inadequate. (*Verdugo*, *supra*, 50 Cal.4th at pp. 282-285.)

f. Fingerprint Examiner's Notes

At approximately 10:30 p.m. on the day the prosecutor produced the 38 pages of additional notes, she faxed another eight pages of notes from the fingerprint examiner to Zarazu's counsel. Perez's counsel received a fax with two pages of notes from the prosecutor, though Zarazu's counsel sent him the entire eight pages after the two spoke. The prosecutor explained that these were notes from a crime lab witness she had referred to the day before, who she had contacted along with police investigators to ensure that

she had all the witnesses' materials. Appellants renewed their motions for a mistrial or jury instruction and their claims of misconduct. The court denied the motions but ruled that it would grant appellants additional time to have the defense expert review the notes.

No *Brady* error occurred, and appellants do not demonstrate prejudice from the violation of section 1054.1, subdivision (f). The notes were not suppressed within the meaning of *Brady*. Prejudice is lacking because appellants do not explain what was material in the new notes, how they differed from previously disclosed notes or testimony of the fingerprint examiner, what they might have done differently had they possessed the notes earlier, or why the court's remedy of allowing them time to review the notes was inadequate. (*Verdugo*, *supra*, 50 Cal.4th at pp. 282-285.)

g. Reports or Studies Reviewed by Criminalist

During the examination of the criminalist who analyzed the gunshot residue kits, appellants objected that she was "testifying about articles that she's read, studies that she's read that she's familiar with that we haven't received in advance." The court noted that "the prosecution is not expected to know everything that an expert has relied on in the course of their career for forming their opinions. And I don't think that is required in discovery."

We have examined the record of the criminalist's testimony up to appellants' objection, and she does not reference any particular articles or studies on which she relied, nor do appellants direct us to a place in the record where she purportedly does so. She provides detailed technical testimony regarding gunshot residue from which one might infer that she has read studies or academic articles, but there is no basis in *Brady* or section 1054.1 to compel discovery of every single item an expert has read in his or her career, as the trial court duly noted. There was no discovery violation here.

h. Midtrial Interviews with Nunez

During the prosecution's examination of Nunez, Zarazu's counsel informed the court that the prosecution had interviewed Nunez several times in the last week, and appellants had not received discovery of any of those interviews. Appellants requested that the prosecution provide Nunez's statements in the interviews, as well as the times

and dates of the interviews and the names of the people present. The prosecutor indicated she did not have any written notes of the interviews with Nunez. The court implicitly denied appellants' request to compel the prosecutor to provide the oral statements of Nunez.

On cross-examination, Zarazu questioned Nunez about his meetings with the prosecutor. Nunez testified that he spoke with the prosecutor that morning. She asked him questions about Pantoja. Detectives Kathleen Gallagher and Edward Camacho were also present. Nunez also spoke with the prosecutor the day before, after the trial had recessed for the day. The detectives were again present. They talked about Pepe. A third meeting between Nunez, the detectives, and the prosecutor took place two days prior. That was in the morning before court. They did not talk about matters related to the case. Nunez testified that he had refused defense counsel's request to meet with him. Nunez's response was that if the defense had anything to ask him, it could ask him in court.

Appellants have not shown a *Brady* violation. First, we note that the fact of the meetings with the prosecutor was not suppressed for *Brady* purposes, and indeed, appellants had the opportunity to cross-examine Nunez about the meetings. Any statements of Nunez were thus equally available to appellants. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1049 [no suppression and thus no *Brady* violation when evidence is available to the defendant through the exercise of due diligence, even if the prosecution is not the source of the evidence].) Second, appellants' argument consists solely of pointing out that notes of the midtrial interviews was one of the categories of discovery the prosecution did not produce. They make no attempt whatsoever to argue the evidence would have been favorable and material. We do not see how it would have been.

Regarding Pantoja, appellants had impeachment evidence at their disposal. Although Nunez testified at trial that she was not in the car during the shooting, he initially told detectives she was present, and O.B. identified her as the woman who came to his door just after the shooting. Nunez's credibility regarding Pantoja was already impeached, regardless of any statements he might have made in the meetings. Regarding

Pepe, the evidence from Detective O'Malley was that he was a WTB member who lived near the scene of the shooting and whose home was a WTB hangout, suggesting that the shooting occurred in WTB territory. Anything consistent with this evidence was not favorable to the defense. It would have shown that appellants were in rival gang territory and would have supported the gang enhancement finding and provided a motive for the shooting. Anything inconsistent with this evidence -- for example, that Pepe was not a WTB member or his home was not a WTB hangout -- was not material. Even if the shooting did not take place in WTB territory, there was ample evidence that appellants and the victims belonged to rival gangs, and the rivalry with Nunez was particularly significant because of his defection from LPS to WTB. Mere speculation that there might have been something favorable and material for the defense is not sufficient to demonstrate a *Brady* violation. (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214.)

Even assuming the prosecutor violated section 1054.1 because she should have reported relevant oral statements of Nunez, appellants fail to demonstrate prejudice for the same reasons. They knew about the meetings and had the opportunity to cross-examine Nunez, and they make no attempt to show the evidence would have affected the result of the trial.

i. Transcript of Police Interview with Nunez

During Zarazu's cross-examination of Nunez, he played several excerpts from a recording of Nunez's interview with police and gave the jury transcripts of those excerpts. During redirect, the prosecutor indicated that a law clerk had recently prepared a transcript of Nunez's entire interview. The law clerk prepared the transcript during trial, when Zarazu was conducting his cross-examination. The prosecutor had received the transcript two nights before but returned it to the law clerk to fix formatting issues. She received a hard copy the morning before she produced it to the parties and court.

The prosecutor wanted to play a larger portion of the interview to give context to the excerpts Zarazu played. Appellants objected because they had requested the prosecutor's version of the transcript three weeks earlier. The court ruled that it would take a 10-minute recess so that counsel could review the transcript, and then the parties

and the court would reconvene to discuss which parts were objectionable to the defense. When the proceedings resumed, appellants indicated that they had insufficient time to review the transcript and formulate their objections. The court agreed the defense needed more time and ruled that Nunez would be recalled later, after the court had heard and ruled on the defense's objections. This occurred on June 11, 2009. The court then held hearings on June 15 and 16 at which it went through the transcript with the parties, made corrections to it, heard objections, and ruled on which parts could be played.

Again, this was not a *Brady* violation because the prosecutor's transcript was produced at trial, not suppressed. Additionally, the prosecution did not violate section 1054.1 by failing to produce the transcript earlier. The statute requires the prosecution to disclose "relevant written or recorded statements" of witnesses. The parties do not dispute that the prosecution produced the audio recording of the interview in a timely manner. But the clear language of the statute does *not* require the prosecution to also *create* transcripts of recorded oral statements. (§ 1054.1, subd. (f).) Once the transcript had been created, however, the prosecution disclosed it in a timely manner. The prosecution satisfied its obligations.

j. Testimony Regarding Phone Number Called from O.B.'s Phone

Zarazu elicited testimony on cross-examination of Detective Camacho that O.B. had identified Pantoja as the woman who knocked on his door and used his phone just after the shooting. Detective Camacho testified to the exact number that she called from O.B.'s phone. Detective Gallagher from the sheriff's department later testified that she conducted a followup investigation of the number called from O.B.'s phone. She determined that the number belonged to the house of Pantoja's brother. Appellants objected to Detective Gallagher's statements on discovery grounds because they had not been disclosed in discovery. The court agreed and ordered the detective's testimony regarding the phone number stricken, and it admonished the jury to disregard it.

Detective Gallagher's statements were disclosed at trial and thus were not suppressed for *Brady* purposes. Moreover, to the extent the prosecutor violated the discovery statute, the court remedied the violation by striking the testimony and

admonishing the jury. Appellants have not argued that this was an abuse of discretion or shown that the remedy was inadequate. We see no error here.

We turn next to appellants' claims of prosecutorial misconduct.

4. Prosecutorial Misconduct

Appellants contend that the prosecutor committed misconduct by (1) violating *Doyle, supra,* 426 U.S. 610 in her examination of Detective Gallagher; (2) commenting during closing argument on appellants' failure to call Sanchez, the third occupant of their car and their codefendant; and (3) failing to provide discovery, as discussed in part 3, *ante*. We disagree on all counts.

a. Law of Prosecutorial Misconduct

"'A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Under state law, a prosecutor commits misconduct by using deceptive or reprehensible methods of persuasion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) The defendant need not show the prosecutor's bad faith. (*Ibid*.) When a claim of prosecutorial misconduct "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.) We note that while appellants objected to the prosecutor's actions discussed in this part (and in many cases also moved for a mistrial), they generally did not make a specific assignment of prosecutorial misconduct and request an admonition. The few exceptions were in some instances regarding asserted discovery violations. Nevertheless, we consider appellants' claims of prosecutorial misconduct. In light of the court's rulings on appellants'

objections and motions for mistrial, any claim of prosecutorial misconduct would have been futile, and their failures to raise it are excused. (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 237.)

b. Claim of *Doyle* Error

Detective Gallagher was a homicide detective for the sheriff's department and was called to the scene of the shooting. The following colloquy occurred during the prosecution's examination of Detective Gallagher:

"[Prosecutor:] Now, did you also have contact with the defendants in this case, Henry Zarazu and Ernesto Perez?

"[Detective:] Yes.

"[Prosecutor:] Did you also have contact with a person by the name of Martin Sanchez?

"[Detective:] Yes, ma'am.

"[Prosecutor:] And did -- did Martin Sanchez complain of any bullet wounds to his person?

"[Perez's counsel]: Objection, Your Honor. Calls for hearsay.

"The Court: Overruled.

"[Detective]: He did not.

"[Prosecutor]: Did Henry Zarazu complain of any bullet or gunshot wounds to his body?"

Before the detective could respond, Zarazu's counsel objected and asked to approach the bench. At side bar, counsel stated that Zarazu invoked his *Miranda*[7] rights immediately upon being questioned and argued that the prosecutor was impermissibly commenting on Zarazu's assertion of his right to remain silent. Both appellants moved for a mistrial. The court denied the motion but sustained the objection. The prosecutor resumed the detective's examination and asked whether the detective saw any indication

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

that Zarazu and Perez suffered any gunshot wounds when she saw them at the station that night. The detective responded in the negative.

Doyle holds that using a defendant's silence for impeachment purposes, after the defendant has been arrested and advised of his constitutional right to silence under *Miranda, supra,* 384 U.S. 436, violates the due process clause of the Fourteenth Amendment. (*Doyle, supra,* 426 U.S. at p. 619.) The rationale for the rule is the fundamental unfairness of trying to draw an adverse inference from the defendant's silence after assuring the defendant that silence is his constitutional right. (*Fletcher v. Weir* (1982) 455 U.S. 603, 606.) There is no *Doyle* error if the defendant is questioned about silence he maintained before being advised of his *Miranda* rights. (*People v. Earp* (1999) 20 Cal.4th 826, 856-857.)

A *Doyle* violation has two necessary components. (*People v. Evans* (1994) 25 Cal.App.4th 358, 368.) First, the prosecution must use the defendant's postarrest silence for impeachment purposes. (*Ibid.*) "Use of a defendant's postarrest silence can occur either by questioning or by reference in closing argument." (*Ibid.*) Second, the trial court must permit that use, which usually "take[s] the form of overruling a defense objection, thus conveying to the jury the unmistakable impression that what the prosecution is doing is legitimate." (*Ibid.*)

There was no violation of *Doyle* here. Preliminarily, to the extent appellants assert a *Doyle* violation because of the prosecutor's question about Sanchez, they do not have standing to assert such an argument. The *Doyle* rule derives from a defendant's invocation of his *Miranda* right to remain silent, which is in turn derived from the Fifth Amendment right against self-incrimination. (*Doyle*, *supra*, 426 U.S. at p. 617; *Miranda*, *supra,* 384 U.S. at p. 468.) It is well established that "[t]he privilege against self-incrimination is, of course, personal and may be asserted only by the holder." (*People v. Ford* (1988) 45 Cal.3d 431, 439 (*Ford*).) Appellants have no standing to assert a challenge to any improper use of Sanchez's silence.

Moreover, Perez cannot claim a *Doyle* violation because he has not established when (or indeed, if) he invoked his *Miranda* rights. Assuming the prosecutor was using

his silence against him, the use of pre-invocation silence does not violate *Doyle*. (*People v. Earp*, *supra*, 20 Cal.4th at pp. 856-857.)

In addition, Zarazu cannot show a *Doyle* violation because the second necessary component is lacking. He objected to the only question that even neared *Doyle* territory when the prosecutor asked the detective whether Zarazu had complained of any gunshot wounds. The court sustained that objection before the detective responded. The court thus did not sanction any impermissible use of Zarazu's silence. (*People v. Evans*, *supra*, 25 Cal.App.4th at p. 368.)

Finally, the prosecutor's questions about whether the detective observed any gunshot wounds on either appellant did not invade *Doyle* territory. One of the defense theories was that appellants acted in self-defense because one or more persons in Nunez's car had a gun and was threatening appellants with it. It is clear in the context of the record that the prosecutor's questions were designed to elicit information that appellants had not been attacked, which would tend to undermine their self-defense theory. The prosecutor did not ask whether appellants had invoked their right to remain silent or whether they had in fact been silent. She was not trying to impeach appellants' testimony or later statements to the police by reference to their earlier decision not to speak to police. The harm caused by impeachment when a defendant has chosen to remain silent is what *Doyle* seeks to prevent. The prosecutor merely asked a percipient witness for her observations of appellants' conditions on the night of the shooting. We do not think any juror would have understood the question about the detective's observations as a comment on appellants' assertion of their right to remain silent during police questioning. (*People v. Riggs* (2008) 44 Cal.4th 248, 299 [no *Doyle* error when prosecutor's question was not designed to impeach defendant's later statements with his earlier decision to remain silent].)

There was no *Doyle* error and because the prosecution did not violate *Doyle*, there was no prosecutorial misconduct.

c. Closing Argument Comments

Sanchez was charged along with appellants and had pled guilty to voluntary manslaughter at the time of their trial. He had yet to be sentenced. In closing argument, appellants argued that someone in Nunez's car had a gun and the shots from Zarazu's car could have been in self-defense. Zarazu's counsel argued specifically that the prosecution failed to disprove appellants had "an honest and reasonable belief in the need to defend themselves" and stated: "[A]nd remember, the only witness to all of what happened right out there on the streets is Carlos Nunez."

Before giving her rebuttal argument, the prosecutor requested that she be permitted to respond by saying that Sanchez was also a passenger in Zarazu's car and witnessed the events, that he was a logical witness for appellants' self-defense theory, and that their failure to call him indicated he would not support their theory. She referred the court to *Ford, supra,* 45 Cal.3d 431. The court heard argument from all parties and ruled that the prosecution could comment on the defense's failure to call Sanchez. The prosecutor thus stated as follows in her rebuttal argument:

"And one of the -- one of the things that the defense has argued is that the only witness available is Carlos Nunez . . . . [¶] [W]e also have Martin Sanchez. And you saw Martin Sanchez. . . . He -- we know exactly where he is. And he was in the defendant's car. He was on San Carlos. He was there from the get-go. He was there from moment one. And if there was any evidence that the victims ever pointed a gun, that the defendants were ever in fear, don't you think he would have been a logical witness? [¶] . . . [¶] . . . And if Martin Sanchez had anything to add, if he would have been able to say the victims pointed a gun, if he would have been able to testify to that truthfully, they would have called him as a witness."

In general, a prosecutor may comment on the failure of the defense to call logical witnesses. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1051.) "The failure of a defendant to call an available witness whom he could be expected to call if that witness testimony would be favorable is itself relevant evidence. The omission traditionally has been

considered an admission by conduct -- an admission that the witness's testimony would not be favorable." (*Ford, supra*, 45 Cal.3d at p. 448.)

As the prosecutor argued to the trial court, *Ford* is analogous and provides guidance in this case. In that case, Ford and three alleged accomplices were charged with burglary. (*Ford, supra*, 45 Cal.3d at p. 436.) Before Ford's trial, two of his codefendants pled guilty but had not yet been sentenced. The third codefendant's trial had been severed, and he had not yet been tried. Thus, each of the three codefendants could have invoked their privilege against self-incrimination if called as a witness at Ford's trial. (*Ibid.*) Ford offered an alibi defense at trial. (*Id.* at p. 438.) His testimony regarding his alibi placed two of his codefendants with him at the time. In closing argument, the prosecutor questioned why Ford did not call his codefendants as witnesses, if his alibi defense was true. (*Ibid.* ["There is just one other point that I would like to make, and that is that if the testimony is indeed true, why didn't he bring in [the codefendants]?"].)

The issue as framed by our Supreme Court was whether any statute, constitutional provision, or other rule precluded comment by the prosecutor on Ford's failure to call his codefendants as witnesses to support his defense. (*Ford, supra*, 45 Cal.3d at p. 435.) The trial court held that the prosecutor's comment constituted prejudicial misconduct, but the Supreme Court disagreed. (*Ibid.*) It held that comment by the prosecution was permissible, absent the codefendant's exercise of the privilege against self-incrimination, or a stipulation by the parties that the codefendant would validly assert the privilege if called. (*Ibid*.) The prosecution's ability to comment was limited only by Evidence Code section 913 -- which prohibits comment on the exercise of a privilege not to testify -- and *Griffin v. California* (1965) 380 U.S. 609, 615 -- which holds that the Fifth Amendment forbids comment by the prosecution on the *defendant's* failure to testify. (*Ford, supra*, 45 Cal.3d at p. 449.) Ford's position was that comment should be prohibited even when the witness has not asserted the privilege to remain silent. The court noted this "would create a judicial presumption that an entire class of potential witnesses is 'unavailable' and comment on their absence would be prohibited solely because the potential witnesses have been charged with the same offense as the defendant." It "decline[d] the

opportunity to engage in such judicial rulemaking." (*Ibid.*) Because Ford's codefendants had not asserted the privilege against self-incrimination, comment on their absence was permissible and did not constitute misconduct. (*Ibid.*)

In view of our Supreme Court's decision in *Ford*, we hold the prosecutor did not commit misconduct by commenting on the defense's failure to call Sanchez, who would have been a logical witness to corroborate appellants' self-defense theory. There is no evidence that Sanchez asserted his privilege against self-incrimination or that the parties stipulated he would assert it, if called. He was therefore an available witness, and the prosecutor could comment on this by pointing it out to the jury.

Appellants argue that the prosecutor committed misconduct because she argued facts not supported the evidence by telling the jury what Sanchez would have said had he been called. They rely on *People v. Gaines* (1997) 54 Cal.App.4th 821 (*Gaines*). The *Gaines* court recognized that a prosecutor may argue to the jury that a defendant has not produced evidence to corroborate an essential part of the defense. (*Id.* at p. 825.) Nevertheless, the prosecutor's comments in that case were not so limited. The prosecutor stated that the absent witness would have impeached the defendant's testimony, that the defense somehow got the witness "out of [t]here," and that the People were trying to find the witness once it became clear the defense would not call him. (*Id.* at pp. 824-825.) The court found that prosecutor committed misconduct because there was no evidence to support these three assertions. (*Id.* at p. 825.)

The case at bar differs. The prosecutor said that *if* Sanchez had anything to support appellants' self-defense theory, they would have called him. She invited the jury to draw an inference that Sanchez did not have anything favorable to say from the state of the evidence. That is precisely the inference that will arise in any case when counsel comments on the absence of a logical witness. But the prosecutor did not purport to know what Sanchez would say. She did not purport to state facts at all, such as the damaging "facts" in *Gaines* regarding how the defense hid the absent witness. The fact finder is permitted to draw reasonable inferences from the evidence. The prosecutor's behavior in *Gaines, supra,* 54 Cal.App.4th 821 is therefore distinguishable.

d. Discovery Violations

We discussed the prosecution's purported discovery violations in part 3, *ante*. The prosecution did not violate *Brady*, and even when it did not fulfill its statutory discovery obligations, the errors were not prejudicial. Therefore, under the federal standard, we cannot say that the prosecutor "'"infect[ed] the trial with such unfairness as to make the conviction[s] a denial of due process."'" (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1214.) Under state law, because we found the prosecutor's errors did not prejudice appellants, we cannot say that the errors were so serious as to constitute "deceptive or reprehensible methods of persuasion." (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1133.)

e. Cumulative Prejudice

Appellants contend that the cumulative effect of the prosecutor's misconduct resulted in prejudice, even if the acts individually did not result in prejudice. Because we have found no single act of misconduct, we need not consider any cumulative effect.

5. Evidentiary Rulings

Appellants argue that the trial court erred in excluding gang writings from a notebook belonging to Nunez and in admitting evidence of Perez's tattoos. They assert that these evidentiary rulings deprived them of their constitutional rights. We disagree. The trial court's rulings were not an abuse of discretion, and even if they were, they did not violate appellants' constitutional rights.

a. Perez's Tattoos

Both appellants objected to the admission of photographs depicting Perez's tattoo of the joker holding a gun, which also says, "The last laugh is mine, motherfuckers." Appellants objected that the tattoo was improper character evidence, more prejudicial than probative, and its admission would violate their constitutional rights to equal protection and due process. The court ruled that evidence of the tattoo was admissible because it was "highly probative" and contradicted Perez's mother's testimony that he was a peaceful person and her testimony that peaceful people do not have tattoos of guns. It moreover found that the effect of the evidence on Zarazu was not prejudicial because it was "a stretch of the imagination to think that a jury would attribute all of the

characteristics of a tattoo on one individual to another individual." The court indicated it would give a limiting instruction, however, if Zarazu prepared one. The court ultimately gave a limiting instruction approved by Zarazu's counsel.

Appellants renewed the objection when the prosecutor introduced the photograph during Detective O'Malley's gang testimony. If the court was going to allow the tattoo to be entered into evidence, Perez requested that the prosecutor use a photograph displaying the "full" tattoo, which contained another part reading "Maria Elena." The court ruled that the prosecutor could use whatever portion of the tattoo she wanted, and if the defense wanted to present other portions, it could. Perez also objected on relevance grounds to the admission of photographs showing the "Fuck a Hoe" tattoo with the demon and the LPS hand sign. The court overruled the objection. When Detective O'Malley's examination resumed, he opined that the joker tattoo was "a scary tattoo typical of gang members," and that it was "definitely not" a peaceful tattoo.

The trial court did not abuse its discretion in admitting Perez's tattoos. The tattoos were relevant and admissible. (Evid. Code, § 351 [all relevant evidence admissible].) The "hoe" script was part of a larger tattoo that depicted the hand sign for LPS. The tattoo tended to show Perez's membership in the LPS gang and was therefore relevant for proving the gang enhancement. (Evid. Code, § 210 [relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].) Perez's gang tattoos were highly probative on this issue. They were the strongest evidence of his gang membership, given that there was no evidence he had admitted membership to an officer, as Zarazu had. Even if the People had not alleged a gang enhancement, the gang tattoos were relevant to establish motive and intent. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [evidence of the defendant's gang affiliation relevant and admissible to "help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime"].) The prosecution argued that Nunez's defection from LPS and the resulting rivalry between LPS and WTB provided a

reason for the shooting and the intent to kill Nunez. Evidence that Perez was a member of LPS suggested a motive to avenge his gang by going after Nunez.

The tattoo featuring the joker, the gun, and the "last laugh is mine" script did not contain any express reference to the gang. Still, evidence of tattoos -- whether expressly referencing a gang or not -- may be properly admitted to show state of mind. (*People v. Leon* (2010) 181 Cal.App.4th 452, 462 [collecting cases in which courts have admitted tattoo evidence to show a gang member's state of mind].) *People v. Leon* is instructive. In that case, the defendant's gang moniker was "Chucky," which was the name of a "'homicidal doll'" in a movie who "'comes to life'" and "'goes about slashing people.'" (*Id.* at p. 461.) The court found that it was reasonable to infer the defendant wanted to emulate the Chucky doll's exploits and show his fellow gang members that his moniker was well-warranted. (*Ibid.*) Moreover, in the world of criminal street gangs, the moniker was a badge of honor because it connoted extreme violence. (*Ibid.*) The prosecution's gang expert testified that respect was "'almost everything'" for gang members and was based on a gang member's "'level of violence.'" The gang expert's testimony showed that the defendant was advertising his intent to model himself after a killer doll. (*Id.* at p. 462.) The court found the Chucky moniker was thus relevant to the defendant's motive and intent to commit the charged murder. (*Ibid.*)

Similarly, here, the joker tattoo was related to evidence about gang culture and tended to prove Perez's state of mind and motive. Detective O'Malley testified that respect was paramount to gang members, and they earned it by "putting in work." This consisted of committing street crimes and attacking rival gang members, among other things. A gang member who actually pulled the trigger in a shooting would be demonstrating his dedication to the gang and would be accorded a high status. It was reasonable to infer that, consistent with these precepts of gang culture, Perez tattooed himself with the joker image because he intended and was motivated to earn respect by emulating the homicidal character -- an act that he would have accomplished by shooting rivals.

Perez argues that the court should have excluded the joker and "hoe" tattoos because they were more prejudicial than probative. (Evid. Code, § 352.) We are not so persuaded. "'"Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. . . . "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. . . .['"] . . . ["'T]he statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]"'" (*People v. Doolin*, *supra*, 45 Cal.4th 390, 438-439, citations omitted.) The language and images in these tattoos were no more prejudicial than the evidence of the charged offense that Perez shot and killed a 12-year-old boy. (*People v. Leon*, *supra*, 181 Cal.App.4th at p. 462.) The trial court could have reasonably concluded that the tattoos would not "so inflame the emotions of the jurors that they would '"reward or punish one side because of the jurors' emotional reaction."' [Citation.]" (*Ibid*.)

Having found no abuse of discretion in the trial court's tattoo rulings, we cannot find the court violated appellants' constitutional rights. As a general matter, the "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Brown* (2003) 31 Cal.4th 518, 545; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 [the "'[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense'"].)

b. Nunez's Notebook

During cross-examination of Detective O'Malley, Zarazu's counsel indicated that he wanted to ask the detective about notebooks found near Nunez's car on the night of the shooting. The notebooks contained gang-related writings. When the prosecution objected, the court decided to hold an Evidence Code section 402 hearing regarding the two notebooks. Nunez admitted the notebooks were his, were inside the trunk of his car, and contained some of his writings. His friends in WTB also had access to the

notebooks. The court ruled that the entirety of one notebook was admissible. As to the other notebook, the defense wanted to use a poem that Nunez wrote, which read as follows: "Carlos came from Wicked Town Bandits. [¶] Fucking up the block and putting putos to sleep. We think bad kriminales in the crazy ass streets. Yes, [we] came up with this gangster ass beats so you bitches to hear." He wrote the poem approximately four years before, which would have been around June 2005. Appellants argued that the poem was evidence Nunez was a violent person who actually set the shooting in motion, that they could cross-examine the gang expert about the meaning of the poem, and it was thus relevant to their self-defense theory. The court ruled that the poem was inadmissible character evidence of the victim in the case. The court further ruled that the defense could ask the gang expert questions about other writings in the notebook, including a list of the WTB members by moniker and a writing that appeared to describe a clique within the gang called WTB "Locos."

We agree with the trial court that the poem was not admissible as character evidence. Evidence of a person's character generally is inadmissible when offered to prove that person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Evidence Code section 1103 provides an exception. "[E]vidence of the character or a trait of character (*in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct*) of the victim of the crime for which the defendant is being prosecuted" is admissible when "[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, § 1103, subd. (a)(1), italics added.) Appellants contend that the poem was evidence of Nunez's violent character and showed appellants would have been in fear of Nunez, which was relevant because they were claiming self-defense against Nunez. But the poem fell outside the scope of Evidence Code section 1103 -- it was not opinion evidence, reputation evidence, or a specific instance of conduct.

Appellants also contend that the poem was relevant to show Nunez's motive to attack them, just as Perez's tattoo was relevant to his state of mind and motive, and the court's uneven treatment of the tattoos and the notebook violated their constitutional

rights. Assuming the poem was admissible on this basis, any error in failing to admit it was not prejudicial. There was ample evidence admitted that supported appellants' self-defense theory. Detective O'Malley testified about gangs violently attacking their rivals generally and about the particular rivalry between Nunez and LPS. Nunez himself testified to the rivalry between himself and LPS members when he told of how he defected from the gang and Zarazu subsequently attacked him in 2004. The evidence was susceptible to an inference that Murillo had hidden a gun in a nearby driveway when he and Nunez fled Nunez's crashed car. And at least one witness heard two groups of shots. Evidence that Nunez wrote a violent poem and thus might have been motivated to attack his rivals was along the same lines and would have been cumulative. We do not believe it was reasonably probable that the poem was the missing key that would have convinced the jury of the self-defense theory. Further, the exclusion of such evidence does not rise to a constitutional violation. (*People v. Smithey* (1999) 20 Cal.4th 936, 996 ["if the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law"]; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1103 ["excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense"].)

6. Jury Instructions

Appellants contend that the trial court erred and deprived them of their constitutional rights by failing to instruct the jury on (1) voluntary manslaughter based on heat of passion, sudden quarrel, or provocation; (2) self-defense against assault; and (3) the prosecutor's purported discovery violations. We are not so persuaded.

a. Relevant Law

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) In accordance with this right, "[a] court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Lopez* (1998) 19 Cal.4th 282, 287.) Moreover, "a trial court must instruct on lesser

included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Lewis, supra,* at p. 645.) "Conversely, even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such instruction." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense . . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Evidence is substantial for this purpose if it could cause a jury composed of reasonable persons to conclude that the defendant committed the lesser but not the greater offense. (*Ibid.*)

We review error in failing to instruct on a lesser included offense under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) When analyzing whether a defendant was prejudiced by a trial court's erroneous decision not to instruct on a lesser included offense, we must decide if it is reasonably probable that the jury would have found the defendant guilty of only the lesser offense. (*People v. Leal* (2009) 180 Cal.App.4th 782, 792.) But "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis*, *supra*, 25 Cal.4th at p. 646.)

b. Instructions on Heat of Passion, Sudden Quarrel, or Provocation Theory of Voluntary Manslaughter

Voluntary manslaughter is a lesser included offense of intentional murder. Either heat of passion or imperfect self-defense will reduce an intentional killing from murder to voluntary manslaughter by negating the element of malice. (§ 192, subd. (a); *People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) Heat of passion manslaughter has both an objective and subjective element. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326, disapproved on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) "The subjective element requires that the actor be under the actual influence of a strong passion at the time of the homicide." (*Wickersham*, at p. 327.) The objective element requires that "the accused's heat of passion must be due to 'sufficient provocation.'" (*Id.*

at p. 326.) The question is whether an "'"ordinarily reasonable person under the given facts and circumstances"'" would be "'"so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection."'" (*Ibid.*)

"[W]hen a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of 'imperfect self-defense' applies to reduce the killing from murder to voluntary manslaughter." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086.)

Here, the court instructed the jury on, among other things, self-defense (CALJIC Nos. 5.12, 5.13), imperfect self-defense (CALJIC No. 5.17), voluntary manslaughter (CALJIC No. 8.40), the distinction between murder and manslaughter (CALJIC No. 8.50), provocation that may be considered in determining the degree of murder (CALJIC No. 8.73), first degree murder (CALJIC No. 8.20), and second degree murder (CALJIC No. 8.30). Appellants requested that the court also give CALJIC Nos. 8.42[8]

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[8] CALJIC No. 8.42 states:

"To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

"The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.

"The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

("Sudden Quarrel or Heat of Passion and Provocation Explained") and 8.44[9] ("No Specific Emotion Alone Constitutes Heat of Passion"). The court refused their request because it did not believe there was sufficient evidence of sudden quarrel or heat of passion.

First, the court did not err because there was not substantial evidence supporting heat of passion instructions. Appellants contend that the evidence showed provocation that occurred over a period of years and stemmed from a deep-seated, emotional gang rivalry between Nunez and appellants. The evidence consisted of the 2004 incident between Nunez and Zarazu, the gunshot residue on Nunez's and Murillo's hands, the gun found in the driveway near Nunez's crashed car, and evidence from the gang expert about "sudden quarrel[s]" between gang rivals. While the evidence of a rivalry and that the victims had a gun may have supported a self-defense or imperfect self-defense theory, there was absolutely no evidence that appellants acted under the "actual influence of a strong passion" or intense emotion at the time of the shooting. (Compare *People v. Wickersham*, *supra*, 32 Cal.3d at p. 327 [substantial evidence of strong passion when two police officers who observed the defendant shortly after shooting her estranged husband

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"If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter."

9 CALJIC No. 8.44 states:

"Neither fear, revenge, nor the emotion induced by and accompanying or following an intent to commit a felony, nor any or all of these emotional states, in and of themselves, constitute the heat of passion referred to in the law of manslaughter. Any or all of these emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness. Also, any one or more of them may exist in the mind of a person who acts deliberately and from choice, whether the choice is reasonable or unreasonable."

described her as "hysterical," many of her statements were unintelligible, and several witnesses testified she was very distraught over victim's involvement with another woman].) Appellants' argument that the killing occurred during the course of a conflict without any evidence as to how precisely they were provoked is insufficient to warrant the requested instructions. (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1086.)

Second, assuming arguendo that the trial court erred in failing to give the heat of passion instructions, the failure to so instruct was harmless. The evidence that appellants point to -- the long-standing gang rivalry, the evidence that the victims had a gun -- was rejected by the jury. This was the same evidence supporting their self-defense theory. The court instructed the jury on self-defense and imperfect self-defense. Nevertheless, the jury found appellants guilty of the first degree murder of Herrera and the attempted first degree murders of the other victims, implicitly rejecting the theory that appellants had either reasonably or unreasonably believed in a threat of death or great bodily injury by the victims. (See CALJIC Nos. 5.12, 5.17.) Furthermore, the court instructed the jury that it could consider evidence of provocation "for the bearing it may have [had] on whether the defendant[s] killed with or without deliberation and premeditation" (CALJIC No. 8.73), and it instructed them on second degree murder. Still, the jury implicitly rejected any mitigating effect of provocation by finding appellants guilty of murdering or attempting to murder the victims willfully, deliberately, and with premeditation. It was not reasonably probable the jury would have found appellants guilty of only manslaughter, had it been instructed on a heat of passion and provocation.

c. Instruction on Self-defense Against Assault

Appellants requested that the court give CALJIC No. 5.30, the self-defense against assault instruction, based on the rationale that the victims committed an assault by pointing a gun at appellants.[10] The court refused because it did not believe CALJIC No. 5.30 was "meant to be given in a homicide case."

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[10] CALJIC No. 5.30 states:

Assuming arguendo the court should have instructed with CALJIC No. 5.30, any error was harmless. As discussed, *ante*, the court instructed the jury on the concepts of self-defense and imperfect self-defense. Appellants argued their theory to the jury that the victims had a gun in their car and that appellants were merely reacting to a threat by the victims. The jury necessarily decided appellants were not acting in self-defense by finding appellants guilty of first degree and attempted first degree murder. Because the jury was already instructed on concepts of self-defense, it is not reasonably probable the result would have been different, had the court given the additional instruction on self-defense against assault.

d. Instruction on Discovery Violations

As we discussed, *ante*, in part 3, a trial court may, in the exercise of its discretion, consider a wide range of sanctions in response to the prosecution's violation of discovery obligations. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 299.) A jury instruction regarding the prosecution's failure to disclose or untimely disclosure of evidence is but one option. The others include, but are not limited to, ordering immediate disclosure, contempt proceedings, delaying or prohibiting witness testimony or the presentation of real evidence, or continuance of the matter. (§ 1054.5, subd. (b).) The court abuses its discretion when it acts in an arbitrary or capricious manner or "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

The court addressed the late disclosure of discovery here by allowing appellants additional time to review materials, offering to recess for the day, and/or allowing them

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"It is lawful for a person who is being assaulted to defend [himself] [herself] from attack if, as a reasonable person, [he] [she] has grounds for believing and does believe that bodily injury is about to be inflicted upon [him] [her]. In doing so, that person may use all force and means which [he] [she] believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

to recall witnesses to whom the discovery related. Appellants argue that the failure to give an instruction was an abuse of discretion because the court erroneously believed the prosecutor's good faith insulated the People from sanction. Regardless of whether the court believed that, the fact remains that the court fashioned remedies for the prosecutor's late disclosures. We repeatedly discuss in part 3 how appellants fail to marshal any argument that the trial court's chosen remedies were inadequate or an abuse of discretion, nor can we see how they were so. We thus cannot say that the court's remedies were arbitrary, capricious, or beyond the bounds of reason, and that only a jury instruction would have sufficed.

7. Substantial Evidence Claims

Appellants next contend that the evidence was insufficient on all counts, and Perez contends that the evidence was insufficient to support the personal use allegations against him. We disagree.

Appellants essentially argue that the prosecution's case rose and fell on Nunez, who was shown to be a pathological liar and whose testimony was thus too incredible to believe. They catalogue the inconsistencies in his testimony. For example, he told officers on the night of the shooting that Pantoja was there, and then he later said she was not; he told officers that Murillo spoke to Herrera on the phone, then said he was the one who spoke to Herrera; he first said Murillo was driving, then admitted that he lied about that because he did not have his license and did not want to get in trouble; he said that he did not have a gun in his car, though he did not know whether anyone else in the car had one, and yet a gun was found in a driveway near his crashed car, and Murillo was seen going into that driveway just after the crash. Nunez was subject to rigorous cross-examination and was impeached with his recorded interview with officers and statements from the preliminary hearing.

It was the exclusive province of the jury to judge Nunez's credibility and resolve evidentiary conflicts, and we will not disturb the verdict on this basis. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The jury was free to reject parts of Nunez's testimony while believing other parts of it. (*People v. Langley* (1974) 41 Cal.App.3d 339, 348.)

Appellant's claim that we should reverse because Nunez's testimony was inherently incredible is misplaced. While there is authority for reversal based on the evidence being "inherently improbable," the "inherently improbable standard addresses the basic content of the testimony itself -- i.e., could that have happened? -- *rather than the apparent credibility of the person testifying*. Hence, the requirement that the improbability must be 'inherent,' and the falsity apparent 'without resorting to inferences or deductions.' [Citation.] In other words, the challenged evidence must be improbable '"on its face."'" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729, italics added.) This is not a situation in which the events to which Nunez testified were inherently improbable.

Additionally, the evidence was sufficient to support a finding that Perez personally and intentionally discharged a firearm (§ 12022.53, subds. (b)-(d)). Perez contends that there was no "hard evidence" he was the shooter or "did anything more than go for a ride with friends." Not so. Nunez testified that the shots came from the passenger's side of Zarazu's Mustang. Nunez saw Zarazu look at him from the driver's seat of the Mustang just before the shots, and the arm that would have been closest to the passenger's side, Zarazu's right arm, had a cast on it. This was corroborated by a photo taken just after the shooting showing Zarazu's right arm in a wrap. Also, Perez's mother saw Zarazu and Sanchez put Perez in the front passenger's seat of the Mustang, and he had able use of both hands. He was still there after the car crashed and paramedics had to remove him from the car. He had numerous particles unique to gunshot residue on his hands. Sanchez, who was in the backseat of the car and had access to the passenger window, had only one particle consistent with gunshot residue on his hands. This evidence was sufficient to support a finding that Perez was the shooter.

8. Cumulative Error

Appellants lastly contend that the cumulative effect of all the asserted errors denied them a fair trial and requires reversal. We are not so persuaded.

Having considered the various elements of their cumulative error argument, we conclude the cumulative error doctrine does not apply. As Witkin notes, this doctrine applies in close cases (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible

Error, § 46, p. 508), and this was not such a case. As it is, we have determined that no *Wheeler*/*Batson* error occurred, no *Doyle* error occurred, no prosecutorial misconduct occurred, no abuse of discretion occurred in the court's fashioning of remedies for any discovery violations, and the evidence was sufficient to support the convictions and various special allegations. We also determined that any asserted errors with respect to evidentiary rulings or jury instructions were of no consequence. Whether considered independently or together, any errors or assumed errors were not prejudicial and did not undermine appellants' convictions. Appellants received a fair trial.

DISPOSITION

The judgments of conviction are affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.