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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICARDO GARCIA, Defendant and Appellant.	B236196 (Los Angeles County Super. Ct. No. BA357126)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed as modified.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

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The People charged defendant Ricardo Garcia with murder (count 1) and attempted murder (count 2), with enhancements alleged as to both counts that the offenses were committed for the benefit of a criminal street gang and that a principal personally and intentionally discharged a firearm causing death. (Pen. Code, §§ 187, subd. (a), 664/187, subd. (a), 186.22, subd. (b), 12022.53, subds. (d), (e)(1).)[1] The charged offenses arose from a walk-up shooting. The prosecution theory was that Garcia aided and abetted the crimes by acting as a dropoff and getaway driver for the actual shooter.[2] A jury acquitted Garcia of first degree murder, convicted him of second degree murder, and acquitted him of attempted murder. As to the second degree murder guilty verdict, the jury found that the offense was committed to benefit a criminal street gang and that a principal personally and intentionally discharged a firearm causing death.

The trial court sentenced Garcia to a total term of 40 years to life in state prison comprised of a term of 15 years to life on the murder count and 25 years for the firearm enhancement. The court ordered Garcia to pay $7,280 in direct victim restitution through the Victim Compensation Board, and to pay a $5,000 restitution fine and corresponding $5,000 parole revocation fine (stayed). (§§ 1202.4, subds. (b), (f), 1202.45.)

Garcia appeals. We modify the terms of the restitution fines, and affirm.

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[1] All further section references are to the Penal Code, unless otherwise indicated.

[2] The People charged Francisco Ruiz with the same offenses. The prosecution theory was that Ruiz was the actual shooter. Garcia and Ruiz were tried together. The jury found Ruiz not guilty on the attempted murder count, and could not reach a verdict on the murder count. At a second trial, a jury convicted Ruiz of first degree murder, with findings the murder was committed for the benefit of a criminal street gang and that a principal personally and intentionally discharged a firearm causing death. By separate opinion we address Ruiz's appeal from his murder conviction.

FACTS[3]

1. The Murder

On March 19, 2009, around 5:45 p.m., Jose O. (the murder victim) arrived home from work to his apartment building on 24th Street, near San Pedro Street.[4] Jose's girlfriend, Perla C., was on the front porch of the building with their baby, her mother, sister, uncle, and her cousin, Juan C. Jose joined his family on the porch. About 10 minutes later, a man wearing a ski mask approached from the intersection of 24th Street and San Pedro Street. The man said, "What's up, man" or "What's up, homey," then pulled out a handgun and started shooting. As family members ran to get inside the apartment building, the assailant continued shooting. Jose tried to help Perla inside with their baby, but he was shot multiple times, fell to the ground, and died. The fatal wound was from a bullet that entered around Jose's right buttock, and traveled through his body, exiting near the collarbone. A bullet hit Juan C. in the arm. After the attack, the shooter walked away on 24th Street toward Stanford Avenue.

The apartment building was in "territory" claimed by the Primera Flats gang. There was Primera Flats graffiti on 24th Street. Gang members were sometimes present near the apartment building. Jose was not a member of the Primera Flats; he did not have any gang tattoos. Perla C. and Juan C. were not gang members.

Jose O.'s brother, Jesus O., lived in the same apartment building. Just before the shooting, Jesus was at a market on the corner of 24th Street and San Pedro Street. His wife, E.P., and daughter were outside in his car when Jesus heard six or seven gunshots. Jesus got into his vehicle and drove on 23rd Street toward Stanford Avenue. He turned right onto Stanford Avenue and drove toward 24th Street. As he approached 24th Street, Jesus saw a black Chevrolet Silverado pickup truck stopped at

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3 The facts are summarized from the evidence presented at the first trial at which Garcia was convicted.

4 For sake of clarity, we have used first names in this opinion to differentiate between individuals with the same or similar surnames. No disrespect or affinity should be inferred.

the intersection of 24th Street and Stanford Avenue. A man with a gun in his hand got into the bed of the truck and the truck drove toward Jesus on Stanford Avenue. As the truck passed, Jesus noticed that the truck's taillights were "tinted" black. E.P. saw the driver of the truck as he drove toward and past Jesus and E.P.

Maria H. lived on 24th Street between San Pedro Street and Stanford Avenue. She heard gunshots, and looked out her window. She saw a man wearing a mask and holding a handgun in front of her house. The man walked toward Stanford Avenue. She then saw a black pickup truck turn off 24th Street onto Stanford Avenue. The man with a gun got into the pickup truck.

E.B. also lived on 24th Street. At the time of the shooting, he was in front of his house talking to a friend. He heard gunshots and turned to see a man running toward them. The man was wearing a mask and had a gun. The man stopped, pointed a gun at them, asked them where they were from, then continued on.

2. The Investigation

Los Angeles Police Department (LAPD) Detective Tommy Thompson responded to the scene of the crime around 8:00 p.m. Prior to his arrival, LAPD officers had secured the area around the apartment building. Detective Thompson saw Primera Flats graffiti at the intersection of 24th Street and San Pedro Street and also in front of the apartment building. During the investigation at the scene, officers recovered multiple .40-caliber bullet casings from in front of the apartment building, and bullets and a bullet fragment from the building. The casings at the scene were consistent with a semiautomatic firearm being used.

In canvassing the area, Detective Thomson learned there was a video surveillance camera outside a store on the corner of 24th Street and San Pedro Street. Video footage was obtained from the camera and played for the jury at trial. The video showed a black Chevrolet Silverado pickup truck pulling up to the east corner of San Pedro Street just north of 24th Street at 5:46 p.m. and then stopping. A person walked from the area of the truck south on San Pedro Street toward 24th Street and

then walked east on 24th Street. The truck then pulled away and turned onto 23rd Street. The truck had distinctive markings and a distinctive chrome front bumper.

On a date uncertain from this testimony, Detective Thomson observed a black Chevrolet Silverado "SS" truck parked in a driveway at 1232 East 20th Street. The truck appeared similar to the truck in the video obtained at the time of the shooting on March 19, 2009. Detective Thompson ran the license plate and received information that Garcia was the registered owner of the truck. On May 27, 2009, about two months after the shooting, Detective Thompson saw Garcia driving the truck. When the brakes were applied, the brake lights appeared to be tinted as described by Jesus O. Garcia's truck was impounded and photographed; it had distinctive markings and a front chrome bumper similar to the truck in the video taken at the time of shooting.

On May 27, 2009, Detective Thompson received a telephone call from detectives at the Hollywood police station, who told him that they had a man in custody who might have information about a shooting. Detective Thompson went to the station and interviewed Luis Rosas. Rosas told Detective Thompson that the information he (Rosas) had about the shooting came from the "guy himself." After talking to Rosas to determine whether he had useful information, Detective Thompson and his partner, Detective Gersna, taped an interview with Rosas. The taped interview and a transcript of the interview were used at trial.

Parts of the interview were not audible on the tape. At trial, Detective Thompson testified to clarify the contents of Rosas's interview. Detective Thompson testified that Rosas stated that he had a conversation with Francisco Ruiz (see fn. 2, *ante*) and that Ruiz had said he was involved in a shooting. Ruiz told Rosas that he (Ruiz) walked up to a two-story apartment building wearing a ski mask and shot a man in a group in the front of the building. Ruiz said he thought the guys were "Flats." At two or three points during the interview, Rosas said that Ruiz said "Rica" dropped him off. Rosas never expressly mentioned Garcia by name during the interview, but he (Rosas) testified during trial that he knew Garcia as Rica.

On May 28, 2009, Detective Thompson showed a six-pack photographic lineup to Jesus O. and E.P. Detective Thompson prepared the six-pack; he used "a prior booking photo" of Garcia in the six-pack. Jesus was unable to identify anyone. E.P. identified Garcia. Police officers arrested Garcia and Ruiz at their residences on May 28, 2009.

3. The Criminal Case

In December 2009, the People filed an information jointly charging Garcia and Ruiz with the murder of Jose O. (count 1; § 187, subd. (a)) and the attempted murder of Juan C. (count 2; §§ 664/187, subd. (a)). As to both counts, the information alleged the crime was committed to benefit a criminal street gang, and that a principal personally and intentionally discharged a firearm causing death.

In February and March 2011, the charges were tried to a single jury. The testimony of the percipient witnesses established the facts of the murder summarized above. E.P. identified Garcia as the driver of the getaway truck. Detective Thompson testified regarding his investigation, including E.P.'s pretrial identification of Garcia from the six-pack photograph lineup, and his interview with Rosas, including Rosas's statements during that interview that Ruiz had stated he was the shooter and that "Rica" was the driver.

The prosecution also called Rosas. Rosas grew up in the area of the 1200 block of 22nd Street. He knew Ruiz as "Francisco" or "Cisko." When they saw each other in the neighborhood they sometimes had short conversations. Rosas also knew Garcia from the area and had talked to him a few times.

Rosas denied he ever had a conversation with Ruiz about a shooting that occurred in March 2009 near San Pedro Street and 24th Street. He admitted he spoke to detectives on May 27, 2009, at the Hollywood station after he had been arrested for possession of methamphetamine and a firearm, but testified he did not recall telling detectives he had a conversation with Ruiz or that he was friends with several 22nd Street gang members. Rosas testified he did not recall telling detectives that Ruiz had said he went up to an apartment building and shot some guys he thought were Primera

Flats gang members. Rosas also did not recall telling detectives that Ruiz had said that "Rica" dropped Ruiz off at the corner of 24th Street and San Pedro Street before the shooting. Rosas also did not recall telling detectives that he was at a recycling center with Ruiz when Ruiz became nervous because he thought a man there was a witness to the shooting and had recognized him. Rosas admitted he did not want to testify, but denied being afraid for his or his family's safety. A recording of Rosas's interview was played for the jury. Rosas denied it was his voice on the recording.

LAPD Officer Ronald Berdin testified as a gang expert for the prosecution. Officer Berdin testified it was his opinion that Garcia "definitely associates with members of the 22nd Street gang." Officer Berdin based his opinion on statements from Garcia about two weeks before his arrest.[5] Ruiz was a documented self-admitted member of the 22nd Street gang. In answer to a hypothetical question that tracked the facts of the shooting on March 19, 2009, Officer Berdin offered his opinion that the shooting was committed with the intention to, and for the benefit of, the 22nd Street gang.

Garcia presented a mistaken identity defense. He testified in his own defense, denying he participated in the shooting on March 19, 2009. He testified that he lived next door to Ruiz, and that he knew Ruiz because their children attended school together. He admitted owning a black Silverado truck, but denied it was his truck on the store video recovered in the case. Garcia denied he was a member of the 22nd Street gang, denied he associated with gang members, and denied he ever told police he was a gang member. He did not have any gang tattoos. Garcia also presented an expert on the subject of eyewitness identification, Robert Shomer, Ph.D. Broadly

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[5] During cross-examination, Officer Berdin conceded that, in his time as a gang officer, he had not seen Garcia associating with 22nd Street gang members. Officer Berdin acknowledged that he was not aware of any field identification cards noting Garcia as a member of the 22nd Street gang. Officer Berdin also acknowledged that Garcia had no gang tattoos, and no known gang moniker. No firearms were found inside Garcia's residence at the time of his arrest. Garcia was not listed as a gang member in any police department resources or documents.

summarized, Dr. Shomer's testimony was that stranger identification is "about fifty/fifty under the very best of circumstances."

On March 8, 2011, the jury returned verdicts finding Garcia not guilty of first degree murder, guilty of second degree murder, and not guilty of attempted murder.

On August 26, 2011, the trial court sentenced Garcia to a total aggregate term of 40 years to life, and ordered him to pay $7,280 for direct victim restitution to the Victims' Compensation Board, a $5,000 restitution fine, and a $5,000 parole revocation fine (stayed). (§§ 1202.4, subds. (b), (f), 1202.45.)

DISCUSSION

1. Ruiz's Out-of-Court Statement Implicating Garcia

Garcia contends his murder conviction must be reversed because the trial court erred in admitting evidence of an out-of-court statement made by Ruiz that implicated Garcia in the crimes on March 19, 2009. We disagree.

A. Background

As noted above, the prosecution's case included evidence showing that Detective Thompson interviewed Rosas during the murder investigation, and that Rosas said Ruiz said he (Ruiz) was the shooter. Also during the interview, Rosas said Ruiz said that "Rica" drove Ruiz to the area of the shooting. Rosas did not refer to Garcia by name during the interview, but testified at trial that he knew Garcia as Rica. The Rosas interview was recorded; the recording and a transcript of the interview were used at the first trial involving Garcia and Ruiz. The jury at the first trial convicted Garcia of second degree murder.

Prior to the first trial, Garcia's counsel filed a motion for separate trials, or, in the alternative, for an order excluding evidence of Ruiz's out-of-court statements to Rosas insofar as Ruiz's statements implicated Garcia. The trial court conducted a hearing under Evidence Code section 402. The main issue addressed at the hearing was whether Rosas had actually obtained the murder information directly from Ruiz, or from someone else, that is, on the street grapevine so-to-speak. The court found the evidence was sufficient to show that Rosas obtained the murder information directly

from Ruiz. The court ruled that the evidence of Ruiz's out-of-court hearsay statements to Rosas, which were to be introduced by way of evidence of Rosas's interview with Detective Thompson, could be admitted at trial as statements against penal interest.

Immediately upon the court's ruling on the evidence issue, Garcia's defense counsel renewed his argument for separate trials of Garcia and Ruiz, arguing that any part of Ruiz's statements to Rosas implicating Garcia could not be used against Garcia. The trial court denied severance, once again noting that the evidence of Ruiz's out-of-court statements was admissible because Ruiz's statements were against Ruiz's penal interests, and, as such, were sufficiently trustworthy to be admitted.

In summary, the trial court ruled it was for the jury to decide the ultimate fact whether Ruiz had, in fact, admitted to Rosas that he (Ruiz) was the shooter. As to the parts of Ruiz's statements mentioning that he was dropped off by "Rica," the court ruled that separate trials were not necessary because Ruiz had not been "blame-shifting" when he said he was dropped off near the scene of the murder.

At trial, Rosas denied having a conversation with Ruiz about the shooting. Rosas testified he spoke to detectives on May 27, 2009, at the Hollywood station, but denied telling the detectives about a conversation with Ruiz. Rosas denied he told the detectives that Ruiz said he went up to an apartment building and shot a man who he thought was a Primera Flats gang member. Rosas also denied he told the detectives that Ruiz said "Rica" dropped him off at 24th Street and San Pedro Street. When the prosecution played several parts of the recording of Rosas's interview, and asked Rosas about his statements heard on the recording, Rosas denied it was his voice on the tape. The recorded interview in its entirety was played for the jury. Although much of the recording was unintelligible, in what could be heard Rosas said that "Cisco" (Ruiz) had said he walked up to a two-story apartment building and shot a man who he thought was a Primera Flats gang member. Rosas said Ruiz said he (Ruiz) was wearing a ski mask. Rosas also said Ruiz said "Rica" was driving a truck and dropped him off.

Detective Thompson also testified at trial about the taped interview with Rosas. Detective Thompson verified that Rosas was the person on the recording who was being interviewed by the detectives. Detective Thompson testified that he and his partner interviewed Rosas for about 40 minutes, but only recorded the last part of the interview. Detective Thompson listened to the tape as it was played in court, and filled in some of the unintelligible gaps in the recording. Detective Thompson testified that Rosas said he had two separate conversations with Ruiz. In the first conversation, Ruiz said he shot someone and "Rica" was the driver. The second conversation occurred when Rosas and Ruiz were at a recycling center. Ruiz told Rosas that he (Ruiz) thought he saw a witness to the shooting and was afraid the witness recognized him.

B. Analysis — The Confrontation Clause Issue

Garcia contends his murder conviction must be reversed because the trial court's ruling to admit evidence of Ruiz's out-of-court statements to Rosas — specifically, the parts of Ruiz's statements that implicated Garcia (i.e., "Rica") in the murder — violated his right of confrontation under the Sixth Amendment to the United States Constitution (hereafter the confrontation clause) for the reasons articulated in *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*), and, by extension, his right to due process under the Fourteenth Amendment to the United States Constitution. We find no confrontation clause violation.

The confrontation clause reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The main and essential purpose of the confrontation clause is to secure for a defendant an opportunity to cross-examine any witness who gives testimony against the defendant. (See *Davis v. Alaska* (1974) 415 U.S. 308, 315.) "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.)

In *Bruton, supra*, 391 U.S. 123, the United States Supreme Court addressed the issue of using one defendant's out-of-court statements, there a confession, at a joint trial charging two defendants with armed postal robbery. Part of one defendant's out-of-court statements implicated the second defendant in the crime. The Supreme Court ruled that when a defendant makes an out-of-court statement implicating a codefendant, and the former does not testify at trial, admitting evidence of the first defendant's out-of-court statement implicating the codefendant at a joint trial violates the codefendant's Sixth Amendment right of confrontation, and it is not enough for a trial court to give a cautionary instruction to the jurors that they are not to consider the first defendant's out-of-court statement in determining the second defendant's guilt. (*Id*. at pp. 135-137.) As the Supreme Court summarized: "Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." (*Id*. at p. 137.) Accordingly, since *Bruton*, the rule for joint trials ordinarily followed has been to exclude evidence of one defendant's out-of-court statement implicating a codefendant unless the trial court redacts the part implicating the codefendant. (See, e.g., *People v. Fletcher* (1996) 13 Cal.4th 451, 455.)

When evidence of one defendant's out-of-court statement is erroneously admitted against a codefendant under *Bruton*, the error is examined for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24, because the error involves the constitutional right of confrontation. (*People v. Burney* (2009) 47 Cal.4th 203, 232.) In short, *Bruton* error is "not reversible per se." (*Ibid*.) Instead, a reviewing court must determine whether the improperly admitted *Bruton* evidence prejudiced the objecting defendant; the error may be found harmless when the remaining, properly admitted evidence against the defendant is overwhelming and the evidence of the incriminating out-of-court statement is largely cumulative of other direct evidence. (*Ibid*.) Stated in other words: "To find [*Bruton*] error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in

relation to everything else the jury considered on the issue in question." (*People v. Song* (2004) 124 Cal.App.4th 973, 984, citing *Yates v. Evatt* (1991) 500 U.S. 391, 403.)

Nearly 40 years after *Bruton*, the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) clarified that a defendant's right of confrontation only applies to an out-of-court statement that is "testimonial" in nature. (*Id*. at pp. 56-68.) "Where nontestimonial hearsay is at issue," the Sixth Amendment affords the states "flexibility in their development of hearsay law," and "exempt[s] such statements from confrontation clause scrutiny altogether." (*Id*. at p. 68.) The Supreme Court expressly declined to define when an out-of-court statement should be considered "testimonial" for purposes of confrontation clause analysis: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id*. at p. 69, fn. omitted.)[6]

In two subsequent companion cases, *Davis v. Washington* (2006) 547 U.S. 813, (*Davis*) and *Hammon v. Indiana* (2006) 547 U.S. 813 (*Hammon*), the United States Supreme Court began trying to clarify when an out-of-court statement will be considered "testimonial" for purposes of the confrontation clause. In *Davis*, the court reiterated that only a statement that is testimonial in nature "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. . . . It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Id*. at p. 821.) In that vein, the Court explained that "statements are nontestimonial when made in the course of police interrogation under circumstances

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6 In an opinion concurring in the judgment, Chief Justice Rehnquist, joined by Justice O'Connor, expressed concern that the failure to define "testimonial" would leave "thousands of federal prosecutors and . . . tens of thousands of state prosecutors" in need of answers as to what kinds of testimony is covered by *Crawford*. (*Crawford, supra*, 541 U.S. at p. 75.) Garcia's case is just such a case in need of an answer.

objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id*. at pp. 814-815.)

In *Hammon*, police responded to a domestic disturbance radio call and found the defendant's wife alone on the front porch. She seemed "'somewhat frightened'" but said nothing was the matter. There were signs of recent violence at the residence. Defendant, who was in the kitchen, said that he and his wife had had an argument but "'"everything was fine now."'" In responses to questions by an officer, the wife related that defendant had assaulted her, breaking household objects and throwing her on the floor. (*Hammon, supra,* 547 U.S. at pp. 819-820.) At that time, there was neither an ongoing emergency nor an immediate threat to the wife's person. The officer was not seeking to find out what *was* happening, but what *had* happened. While the interrogation was not as formal as the one in *Crawford*, it was formal enough: It was carried on in a separate room from the room defendant was in, and the officer was asking the wife questions for use in an "investigation." (*Hammon, supra*, at pp. 829-830.)

Since *Davis* and *Hammon*, several California cases have expressly held, or, at a minimum, have intimated, that out-of-court statements made to friends, family members, or others whom the declarant did not believe to be law enforcement officials, and which the declarant did not expect would be used to prosecute him or her, were not testimonial, even if the out-of-court hearsay statements were used as proof of a disputed fact at trial. (See 3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 26, p. 72 [and cases cited therein].) Our court has followed this rule. (*People v. Arceo* (2011) 195 Cal.App.4th 556 (*Arceo*) [confrontation clause did not apply to a defendants' statements to relatives that included information implicating an objecting codefendant].) We are not convinced by Garcia's arguments here that we should reconsider our examination of when and in what circumstances the

confrontation clause applies to out-of-court statements. As we stated in *Arceo*, the United States Supreme Court's cases "mean what they say" — examination of the admissibility of an out-of-court statement under the confrontation clause applies only when the out-of-court statement is "testimonial." (*Arceo, supra*, at p. 575.) We read nothing in the more recent cases to support the proposition that a different rule applies when the out-of-court statement in question is a nontestimonial statement by a codefendant.

C. Analysis — The Reliability/Hearsay Issue

Garcia next argues that, apart from the confrontation clause, the trial court erred in admitting evidence of the part of Ruiz's out-of-court statements that implicated Garcia because Ruiz's information about Garcia was not shown to be reliable. We disagree.

Ruiz's arguments on appeal require us to examine two layers for trustworthiness. The first inquiry is whether there is trustworthy evidence showing that Ruiz actually made the statements to Rosas that implicated Garcia. If so, the second inquiry is whether there is evidence showing the trustworthiness of Ruiz's statements implicating Garcia. In other words, are Ruiz's "accusations" against Garcia, if made, sufficiently trustworthy to have been submitted to and considered by the jury, without Ruiz having been subject to cross-examination by Garcia? With this framework in place, we turn to the trustworthiness examination.

As to the first layer examination, the record shows that Rosas had been arrested. After being taken to the Hollywood police station, he said he had knowledge of a crime. Someone (not identified) contacted Detective Thompson. Detective Thompson, with his partner, Detective Gersna, interviewed Rosas at the Hollywood police station. The interview lasted about 40 minutes. The detectives only recorded the end part of the interview. During the Evidence Code section 402 hearing (402 hearing), Rosas testified he did not remember anything he told the detectives. He testified he was under the influence of alcohol, marijuana and methamphetamines when he talked to the detectives. Rosas testified he told a defense investigator that he

(Rosas) had heard about the shooting from "some guy" in a conversation, but not from Ruiz himself. Rosas acknowledged he knew Ruiz as "Cisko," and knew Ruiz and Garcia from the streets.

Detective Thompson testified at the 402 hearing that Rosas said he had a direct "conversation" with Ruiz, and that Ruiz had said he was involved in a shooting on 24th Street near San Pedro Street. Rosas also said that, on another occasion, he and Ruiz were at a recycling center when Ruiz saw somebody he thought might have been from the shooting. Detective Thompson testified that, from what he heard from Rosas, Garcia had not admitted to Rosas he was involved in the shooting.

After the testimony at the 402 hearing, Garcia's counsel argued that there was ambiguity as to whether Ruiz spoke to Rosas or whether Rosas picked up information on the streets from a third party. There was nothing in the interview recording showing that Rosas got his information directly from Ruiz. If Ruiz did not testify, then Garcia's counsel would not be able to cross-examine him about what he allegedly said to Rosas. Admission of Ruiz's statement, untested by cross-examination, through the path of Rosas's interview would be unduly prejudicial.

In evaluating the Evidence Code section 402 evidence, the trial court described Rosas as "cagey," and acknowledged there was "evidence pointing both ways. That's the problem." In the end, the court found the detective's version, that is, what Rosas said to Detective Thompson about what Ruiz had allegedly said to Rosas about the shooting, was adequate to establish a "foundation" for the evidence to go to the jury. After more exchanges, the court ruled the challenged out-of-court statement by Ruiz (through Rosas) would be admitted against both defendants without redacting because the statement was both sufficiently trustworthy and against Ruiz's penal interests.

We agree with the trial court that the evidence was sufficiently trustworthy to show that Ruiz talked to Rosas. The evidence was sufficient to allow the jury to make an overall assessment of the credibility of Ruiz's statement as presented through Rosas. We agree with the trial court that Rosas was a "cagey" witness, but his interview and his testimony consistently showed he knew Ruiz and was on

conversational terms with Ruiz. The evidence was trustworthy to the extent it supported a finding that Ruiz would have shared information with Rosas. And, with regard to the shooting, Rosas knew information about the shooting that corresponded with the facts of the shooting as described by the disinterested witnesses. To the extent Garcia argues that Rosas could have gotten the information from someone on the street other than Ruiz, we find no error in the trial court's ruling that there was sufficient trustworthy evidence to allow the jury to decide whether or not Ruiz, in fact, provided the information to Rosas. We are satisfied that, as a foundational matter, the evidence supports a conclusion that Ruiz spoke with Rosas, and that Ruiz admitted his involvement in the shooting to Rosas.

This brings us to the evidence of the actual words from Ruiz's mouth. First, as far as Ruiz's admission to Rosas that he (Ruiz) was the shooter, Ruiz's statement plainly was a declaration against interest and, as such, admissible under Evidence Code section 1230. It is too well-settled to question here that a declarant's out-of-court statement specifically inculpating the declarant embodies an inherent, particularized element of trustworthiness, which supports the admissibility of the statement at trial, for use against the declarant. (See *Arceo, supra*, 195 Cal.App.4th at p. 576, citing *People v. Greenberger* (1997) 58 Cal.App.4th 298, 329.) Ruiz's statement inculpating himself was sufficiently trustworthy to be admitted at trial against Ruiz.

This leaves Ruiz's words inculpating Garcia. When the trustworthiness of a declarant's statement is "'"so clear from the surrounding circumstances"'" that testing the declarant by cross-examination "'"would be of marginal utility,"'" the Sixth Amendment does not bar the admission of the declarant's statement, even when part of the statement implicates a codefendant. (*Arceo, supra*, 195 Cal.App.4th at pp. 567-577, quoting *Lilly v. Virginia* (1999) 527 U.S. 116, 136, 139.) The number of statements that will be admissible by this path are limited, and the admissibility determination "'requires a "fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity

involved . . . .”’” (*Arcelo, supra,* 195 Cal.App.4th at p. 577, quoting *People v. Greenberger, supra*, 58 Cal.App.4th at p. 332.)

We assume without deciding that the trial court erred when it declined to redact Ruiz's statement to remove the passages implicating Garcia (i.e., "Rica") as the driver. At a minimum, a trier of fact who is tasked with determining credibility and criminal liability may benefit when one defendant (e.g., Garcia) is given an opportunity to cross-examine a second defendant (e.g., Ruiz) about a statement implicating the former. (See *Bruton, supra*, 391 U.S. 123.) We assume without deciding that this is not one of those limited cases in which a codefendant's accusation is admissible.

Having assumed error, we must decide what to make of the error. Regardless of whether we examine the issue as a constitutional error potentially affecting the right to a fair trial or confrontation, or examine the issue as an ordinary evidentiary error, we find the error harmless even under the heightened beyond a reasonable doubt standard applied to errors of constitutional magnitude. (Compare *People v. Davis* (2009) 46 Cal.4th 539, 620 [*Crawford* error in admitting testimonial evidence is subject to harmless error review under reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. at p. 24]; *People v. Duarte* (2000) 24 Cal.4th 603, 618-619 [erroneous admission of hearsay evidence subject to harmless error review under reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

First, there is no true dispute that someone in a truck drove Ruiz to the area, and picked him up after the shooting. To the extent Ruiz said he was driven to the area in a truck, his out-of-court statement did not truly add improper evidence strongly adverse to Garcia. And, in any event, the information about a driver and truck was admissible as it did not expressly implicate Garcia as the driver. The only possible prejudice here is in Ruiz's identification of "Rica" as the driver. Does this warrant reversal? We find it does not.

E.P. identified Garcia as the driver of the truck at trial. She also identified Garcia in a six-pack photographic lineup before trial. At trial, she testified she had been "certain" about her identification from the six-pack. When interviewed at the

time of the crimes by detectives, E.P. and Jesus O. described the truck that they saw pick up the shooter. Garcia was the registered owner of a black Chevrolet Silverado truck that matched the witnesses' descriptions, including unique characteristics such as having tinted brake lights. At trial, E.P. identified Garcia's Chevrolet Silverado truck as the one she saw on the day of the shooting. Garcia's truck looked like the truck captured on video from cameras at the liquor store where he dropped off Ruiz. Garcia lived next door to Ruiz. In our view, using Ruiz's out-of court statement about "Rica" did not contribute to the jury's decision to convict Garcia. The jury could not reach a verdict as to Ruiz at the first trial based on his out-of-court statement implicating himself, but did convict Garcia, indicating that Ruiz's out-of-court statement was not heavily weighed by the jury. As to Garcia, the jury must have found guilt beyond a reasonable doubt elsewhere. We contend that, even had the part of Ruiz's out-of-court statement implicating Garcia been excluded, the result of Garcia's trial would have been the same, even applying the heightened beyond a reasonable doubt standard of review.

2. The Severance Issue

Garcia contends his murder conviction must be reversed because the trial court erred in denying his renewed motion to sever his case from Ruiz's case after the court ruled that Ruiz's out-of-court statements to Rosas could be admitted. We disagree.

Section 1098 prescribes a statutory preference for a joint trial of jointly charged defendants, meaning joinder is the first rule, and severance is the exception. (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.) A defendant seeking a separate trial of joint charges bears the burden to establish a substantial danger of prejudice requiring separate trials. (*People v. Catlin* (2001) 26 Cal.4th 81, 110.) A trial court's denial of a severance motion is reviewed under the abuse of discretion standard, based on the record when the motion was heard. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41.) Refusal to sever may be an abuse of discretion when (1) evidence of the crimes to be jointly tried would not be cross-admissible in separate trials, (2) charges against one defendant are likely to inflame the jury against the defendant seeking severance,

and (3) a weak case has been joined with a strong case so that the "'spillover'" effect of aggregate evidence on several charges might alter the outcome of some or all of the charges. (*People v. Catlin, supra,* at p. 110.) If a trial court abuses its discretion in failing to grant severance, reversal is required "only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (*People v. Coffman and Marlow, supra*, at p. 41.)

We find no abuse of discretion. First, Garcia and Ruiz were charged with the same crimes and we see no possibility that the charges against Ruiz could have inflamed the jury against Garcia. Second, there is nothing in the record to suggest that a problem with the "spillover effect" of evidence adversely affected Garcia. The evidence against Ruiz was not so overwhelming as to taint Garcia by association.

Finally, as we discussed above, assuming there was error in declining to redact Ruiz's statement to the extent it implicated Garcia, we find the error to have been harmless. We decline to find the error compels reversal in the context of examining severance. Assuming Garcia should have been separately tried, we decline to reverse Garcia's conviction because we are not persuaded to a reasonable probability, that Garcia would have received a more favorable result in a separate trial. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 41.) The use of Ruiz's statement that he was driven to and from the scene of the shooting by "Rica" did not, in our view, contribute to the jury's decision to convict Garcia. It was the remaining evidence that tipped the jury to return its guilty verdict.

3. The Identification Issue

Garcia contends his murder conviction must be reversed because the trial court erred in denying his objection to the pretrial, six-pack identification by witness E.P., and also erred in allowing E.P. to identify Garcia at trial. We disagree.

A pretrial photographic lineup violates due process when it is so impermissibly suggestive that it creates a "very substantial likelihood of irreparable misidentification." (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.) The defendant bears the burden of proving suggestiveness "as a 'demonstrable reality,' not

just speculation." (*Ibid*.) The threshold test is whether the pretrial identification procedure was unduly suggestive and unnecessary. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) If the test is met, the question becomes whether a subsequent identification at trial was nevertheless reliable under the totality of the circumstances, taking into account such factors as the witness's opportunity to view the offender at the time of the crime, the witness's attentiveness, the accuracy of the witness's prior description, the level of certainty displayed at the identification, and the time elapsed between the crime and the identification. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. Wash* (1993) 6 Cal.4th 215, 244.)

There is no requirement that a defendant in a lineup be surrounded by others "'nearly identical'" in appearance. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) Distinguishing clothing do not necessarily cause a photographic lineup to cross into the realm of unconstitutional suggestiveness. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Lineups have been upheld when the defendant was the only person in jail clothing (*People v. Johnson* (1992) 3 Cal.4th 1183, 1215-1218) and when the defendant was the only person in a red shirt (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1222). And minor differences in facial hair also do not necessarily render a lineup unconstitutionally suggestive. (See *People v. Holt* (1972) 28 Cal.App.3d 343, 350, disapproved on other grounds in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6.) Likewise, differences in background color and image size among the various photographs also do not necessarily render a lineup unconstitutionally suggestive. (*Id*. at pp. 349-350.) The test basically comes down to this: whether the lineup as a whole would cause a witness to focus on a particular photograph, namely, the defendant's photograph. (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.)

On appeal, a de novo standard applies to both prongs of the identification analysis. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459.)

We have reviewed the photograph lineup from which E.P. identified Garcia, and are not persuaded that it is unconstitutionally suggestive. The lineup depicts six

males who are sufficiently similar to support the reliability of E.P.'s identification. All six of the individuals appear to be Hispanic, all appear to be about the same age, all have closely coiffed hair. There are no distinctive markings in the background, or foreground or on their clothing to make one stand out in particular. Garcia's photograph does not particularly stand out.

Moreover, assuming the initial threshold showing of suggestiveness had been established, Garcia's claim fails because the record, in our view, shows that E.P.'s in-court identification at trial was clothed with ample indications of reliability to allow her to make the identification; it was for the jury to determine whether her in-court identification was accurate or tainted by the pretrial lineup. E.P. saw the face of the driver of the truck as it was driving directly toward her. She provided a description to the police at that time, describing the driver as dark-skinned and bald. When she was shown the lineup, she did not express any uncertainty about her identification. Her identification in court was not tentative or equivocal.

4. The Expert Testimony Issue

Garcia contends his murder conviction must be reversed because the trial court erred by "severely restricting" the testimony of a defense expert on the subject of eyewitness identifications. We disagree.

A. The Setting

Before the first trial, the prosecution filed a motion pursuant to Evidence Code section 352 to exclude or limit the testimony of the defense eyewitness identification expert, Dr. Shomer. The court denied the motion to exclude the testimony in its entirety, but did order the following limitation: "Obviously, it's not the place of an eyewitness identification expert to comment on the validity or invalidity or weight of any particular witness' identification in this case. [¶] So [defense counsel is] ordered . . . not to elicit that or ask questions that would tend to elicit it without first asking to approach sidebar and convincing me that that restriction is wrong in the particular facts of this case."

During the direct examination of Dr. Shomer, Garcia's counsel requested to show the six-pack to the witness and ask if, in his opinion, there was anything suggestive about it. The court ruled that counsel could ask general questions on how a six-pack should be compiled, but could not ask specific questions about the six-pack used in this case. In essence, the court ruled that it was for the jury to decide, based on factors described by Dr. Shomer, whether the six-pack was problematic.

B. Analysis

A defendant has a right to present testimony of witnesses in his defense, subject to the condition that "a state court's application of ordinary rules of evidence -- including the rule stated in Evidence Code section 352 -- generally does not infringe upon this right." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Due process does not require that a court allow an accused to present evidence in the exact form, manner and quantum the defense desires, and may properly preclude its use pursuant to Evidence Code section 352. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

When a defendant on appeal challenges a trial court's evidentiary rulings in the context presented by Garcia here, a reviewing court applies well-settled standards of review: "[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion." (*People v. McDonald* (1984) 37 Cal.3d 351, 377 (*McDonald*), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Accordingly, a trial court may allow expert testimony that "informs the jury of certain factors that may affect such an identification in a typical case," while at the same time limiting such "to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness." (*McDonald*, *supra*, at pp. 370-371.) In other words, a trial court may properly exclude expert testimony that potentially takes over the jury's task of judging credibility by telling the "jury that any particular witness is or is not truthful or accurate in his identification of the defendant." (*Id*. at p. 370.)

We see no more in Garcia's current case than a proper application of *McDonald*-like parameters on an expert's testimony. The court did not "severely restrict" Garcia's expert witness. The court did no more than preclude Garcia's expert from directly telling the jurors how they were supposed to view the six-pack. There was no error. (*McDonald*, *supra*, 37 Cal.3d at pp. 370-371.)

5. The Failure to Disclose Evidence Issue

Garcia contends his murder conviction must be reversed for a *Brady* violation. (See *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).) More specifically, Garcia argues his conviction must be reversed because the prosecution failed to disclose the existence of hours of jailhouse recordings until the end of its case-in-chief. We disagree.

A. The Setting

Toward the end of the prosecution's case-in-chief, the prosecutor alerted the trial court and defense counsel that the prosecution just became aware of two tape recordings in the possession of Detective Thompson. One was a recording of a 48-hour period when Garcia and Ruiz were in the same jail cell after their arrest. The other was a telephone conversation between Garcia and his wife. The prosecutor stated that he did not have the tapes in his possession and that he did not plan on using them at trial. He also indicated that he did not know the substance of the conversations on the tapes.

The trial court ordered the prosecutor to call Detective Thompson and have him make copies of the recordings for the defense immediately. A short time thereafter, the prosecutor informed the court that he had spoken with Detective Thompson and that the detective had provided the following information: During the telephone call between Garcia and his wife, Garcia told her "to get rid of the rims."

Later, during the cross-examination of Garcia, the prosecutor requested permission to question him about the telephone conversation he had with his wife. The court stated that defense counsel had not had the opportunity to listen to the tape of the conversation, and disallowed the prosecutor's line of questioning.

B. Analysis

Under *Brady*, *supra*, 373 U.S. 83, the prosecution violates a defendant's right to due process when it suppresses evidence that is favorable to the defendant, and the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. (*Id.* at p. 87; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 279-280; *In re Sassounian* (1995) 9 Cal.4th 535, 543.) Evidence is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the defendant's criminal proceeding would have been different. A reasonable probability means a probability sufficient to undermine confidence in the outcome. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) *Brady* applies whether the evidence being examined is exculpatory or for impeachment purposes. (*Giglio v. United States* (1972) 405 U.S. 150, 154.) The constitutionally based duty to provide defendants with evidence before trial as articulated in *Brady* does not apply to inculpatory evidence; *Brady* only applies to exculpatory evidence. (*Brady*, *supra*, at pp. 86-87; *People v. Burgener* (2003) 29 Cal.4th 833, 875.)[7]

Based on the record before us on appeal, we will not reverse Garcia's murder conviction for *Brady* error because we do not see anything in the record to show that the prosecution suppressed *exculpatory* evidence. The prosecutor's explanation as to his understanding of the content of the tapes did not show they contained any exculpatory evidence. The evidence was ordered to be provided to the defense during the trial, and the court gave the defense the opportunity to listen to the tapes to determine if there was anything on them helpful to the defense. When Garcia filed his motion for new trial, he did not raise a *Brady* claim related to the recordings or as to any other evidence. We see nothing in the record to indicate that the tapes contained any exculpatory evidence. Even on appeal, Garcia does not specifically identify what

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[7] Garcia does not argue a statutory-based discovery violation.

part of the tapes could have been used by him as exculpatory evidence. Accordingly, we see no *Brady* issue.

C. Analysis — Statutory Disclosure

Alternatively, Garcia contends the prosecution's failure to disclose the jailhouse tapes to the defense until midtrial violated discovery under section 1054.1, justifying reversal of his murder conviction. We disagree.

Assuming the prosecution should have disclosed the existence of the jailhouse tapes before trial pursuant to section 1054.1, we disagree with Garcia that reversal is the justified remedy. Reversal of a conviction is not an available valid remedy for a violation of statutory discovery rights, except in extraordinary circumstances. Where a party fails to comply with its statutory discovery obligations, a court "may make any order" needed to enforce discovery, "including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).) But, the court "shall not dismiss a charge . . . unless required to do so by the Constitution of the United States." (§ 1054.5, subd. (c).)

We find the trial court properly addressed the situation by offering the defense either a continuance to investigate the recordings, or exclusion of the evidence. The court did not abuse its discretion in remedying the situation as it did. The trial court believed the prosecutor's representation about when and how he discovered the recordings and found no intentional discovery violation. To the extent Garcia claims the trial court imposed no sanction for the prosecution's late disclosure, in effect declining to enforce discovery obligations, we disagree. When the prosecutor tried to use the incriminating evidence on the recordings, the trial court excluded the evidence. The prosecutor was not allowed to cross-examine Garcia with the statement that he made to his wife about getting rid of his truck's rims.

In the end, Garcia has not persuaded us that late disclosure of the nonexculpatory jailhouse recordings of conversations resulted in a fundamentally unfair trial violating his right to due process. Absent such a showing, we decline to reverse his conviction for the alleged discovery violation. (*People v. Ochoa* (1998) 19 Cal.4th 353, 473-474.)

6. The Instructional Issue

Garcia contends his murder conviction must be reversed because the trial court erred in allowing the prosecutor "to change his theory of the case" after the jury informed the court that it could not reach a verdict. Although Garcia's arguments raise concerns with the practice of instructing jurors on a new and different theory of criminal liability after deliberations have already started, we find reversal of his murder conviction is not warranted in light of the over-all circumstances of his trial.

A. The Setting

As noted above, the prosecution's theory against Garcia was that he aided and abetted the murder by acting as the dropoff and getaway driver for Ruiz. As the prosecutor put it: "The driver is as guilty as the shooter. [¶] . . . [¶] The driver aids, promotes or encourages him. Without him this crime is not committed. He drives there. He drops the shooter off. He pulls around the corner. He picks the shooter up. Without him this will never happen." The trial court instructed the jury on aiding and abetting as follows: "To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. *The defendant knew that the perpetrator intended to commit the crime*; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." (Italics added.)

On its third day of deliberations, the jury sent a note to trial court that read:

> "We are unable to reach a decision on the aiding and abetting charge against Ricardo Garcia. The issue is instruction 401, *element 2*, as well

> as the distinction between 1st & 2nd degree murder as applies to Garcia (does the charge need to be the same as what the jury finds for Ruiz e.g. 1st degree/1st degree or 2nd degree/2nd degree). *If during the commission of the crime a more serious crime is committed, how does that [a]ffect element 2 of aiding & abetting*?" (Italics added.)

Fairly construed, the jury's note is comprised of three parts. The first part advised the trial court that the jurors were unable to reach a decision on whether Garcia *knew that Ruiz intended to commit the charged murder*. In other words, they were unable to decide whether Garcia had been an aider and abettor of the charged murder. The second part of jury's note asked: Do we have to convict Garcia and Ruiz of the same degree of murder? Third, the jury asked: How is the element of aiding and abetting affected if, during the commission of a crime, a more serious crime is committed?

At a hearing to address the jury's note, the prosecutor asked the court to instruct the jury on the natural and probable consequences theory of aider and abettor liability, which was what the jury was "asking for." The target offense would be identified as assault with a firearm. Garcia's counsel objected, arguing the People did not include the natural and probable consequences instruction in their proposed instructions and did not rely on the theory in closing argument. Garcia's counsel argued the law of natural and probable consequences "did not fit into my theory or strategy for a defense." Counsel asked that, if the court intended to give the additional instruction, the defense be permitted to consult with its gang expert to see if the prosecution's gang expert should be recalled and asked additional questions in light of the new theory. Garcia's counsel also requested additional argument on the new theory.

In an ensuing exchange, the trial court noted that Garcia's theory at trial was that he did not participate in the shooting, that the case against him was a case of mistaken identity. The court commented that it did not see how the defense would have proceeded differently during the trial had the prosecution requested instructions on the natural and probable consequences theory from the outset. The court directed Garcia's counsel to have the defense gang expert ready the next morning if the defense

wished to present additional testimony; the court also told the prosecutor to have his gang expert available. At the end of the exchange, the court ruled that it would permit both sides to give additional argument limited to the natural and probable consequences instruction.

The next morning, Garcia's counsel informed the court that he did not wish to call any additional witnesses and did not need to further question the People's gang expert. Instead, counsel moved for a mistrial based on the jury's note that it was unable to reach a decision as to Garcia based on the instructions given. He argued the prosecution's theory at trial was that Garcia aided and abetted a murder, not an assault with a firearm.

The court denied the motion for mistrial. In making its ruling, the court noted that the jury raised the issue with their question, and that the court had to provide a response. The court found giving the natural and probable consequences instruction was an appropriate response to the jury's question. The court found that the instruction was supported by the evidence at trial.

The court then instructed the jury on the natural and probable consequences theory of aiding and abetting. The parties then gave additional argument on the instruction. The jury retired to resume deliberations at 9:36 a.m. At 10:00 a.m., the jury sent out a note advising the court that they had reached a verdict as to Garcia.

B. Analysis

In a criminal case, the trial court generally must decide upon and inform counsel what jury instructions it will give before closing argument; however, the trial court may depart from the usual order of trial, and may instruct the jury on the applicable law at any time during the trial, particularly when the court learns the jury is confused by the original instructions. (See §§ 1093, subd. (f), 1093.5; and see *People v. Ardoin* (2011) 196 Cal.App.4th 102, 127 (*Ardoin*).) In *Ardoin*, the Court of Appeal held that a trial court did not err by giving modified felony-murder instructions after the jury had already started deliberations; the modified instructions clarified that the theory of felony murder applied to both defendants, instead of just one. The Court of

Appeal found no error for a variety of reasons. First, when a trial court receives a jury question, the trial court has a statutory duty to help the jury understand the legal principles that are involved in the jury's question. (*Id.* at pp. 126-128.) Second, the circumstances that the prosecution pursued only one theory supported by the evidence, and the court instructed only on that theory, does not preclude the court from giving further instructions on a second theory supported by the evidence. The issue is whether the court abuses its discretion in giving the supplemental instructions, taking into consideration all relevant factors, including the defendant's due process rights to notice and a fair trial. (*Ibid*.) In deciding to expand on the original instructions, the court must reopen the case to allow the parties to argue the theory put to the jury by the supplemental instructions. (*Id*. at p. 129.)

We come to the same no error conclusion in Garcia's current case. First, the trial court's instructions on the natural and probable consequence theory responded to a jury question about a greater crime being committed during a lesser crime. Second, the trial court found, and we agree, that the evidence supported instructions on the natural and probable consequences theory of aider and abettor liability. It could have been given at the outset. The prosecutor's added argument after the natural and probable consequences instructions was that Garcia could be found guilty of murder and attempted murder if he knew that Ruiz was going to commit an assault with a firearm when he dropped him off, but Ruiz instead committed the charged murder and attempted murder. The factual issue was whether the charged murder and attempted murder were a natural and probable consequences of the intended assault with a firearm. The added instructions and argument correctly relayed the law regarding the natural and probable consequences theory, and were supported by the evidence.

Assuming the trial court erred in giving the natural and probable consequences instructions, we are not persuaded that reversing Garcia's murder conviction is required. Garcia's defense was that he was not the driver. Garcia's defense was not undermined by the added instructions on the natural and probable consequences theory. The "failure" to give Garcia earlier notice of the theory of natural and

probable consequences did not impair the presentation of Garcia's chosen defense. Garcia's mistaken identity defense applied equally whether an aided and abetted murder was employed or an aided and abetted target offense (assault with a firearm) resulting in murder was employed. We note the statement by Garcia's counsel during the argument over the added instructions that he would have prepared and presented a different defense case, but find this issue is not readily reviewable in the context of an appeal. The record before us on appeal shows that Garcia testified he was not the driver. Given the defense that was presented at his trial, we find no prejudice.

7. Substantial Evidence

Garcia contends his murder conviction must be reversed because it is not supported by substantial evidence. More specifically, Garcia argues the evidence is not sufficient to sustain the jury's finding that he was the driver of the truck. We disagree.

In reviewing a defendant's claim that the evidence is insufficient to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200; *People v. Jurado* (2006) 38 Cal.4th 72, 118; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The test on appeal is not whether the evidence proves guilt to the reviewing court beyond a reasonable doubt, but whether any rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt. (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Rich* (1988) 45 Cal.3d 1036, 1081.) Moreover, it is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) Therefore, the appellate court must accept any and all logical inferences that the jury might have drawn from.

The identification of a single eyewitness is sufficient to support a jury's verdict. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) For the reasons explained above, we reject Garcia's argument that E.P.'s identification was tainted by a suggestive pretrial photograph lineup. Apart from this, the evidence showed the getaway truck possessed unique characteristics, and that Garcia's truck had those same characteristics. Substantial evidence should not be evaluated as a linked chain from a starting point to an end point, with a single broken link defeating a conviction; substantial evidence should be evaluated as a woven rope, and, to the extent a strand is frayed, it will not defeat a conviction unless the overall woven rope is thereby weakened to the point of undermining confidence in the conviction. We find the evidence sufficient to sustain the jury's verdict, i.e., its factual finding that Garcia was a willing participant in a planned murder, or in a planned assault with a firearm that resulted in a murder.

8. Cumulative Prejudice

Garcia contends his murder conviction must be reversed for multiple errors cumulatively causing prejudice. We disagree.

For the reasons explained above, we find no cumulative prejudicial errors at trial. To the extent there were any trial errors herein, none of them individually or collectively rendered appellant Garcia's trial unfair in light of the evidence of guilt and the insignificant nature of the alleged errors. Thus, Garcia is not entitled to relief as a result of the cumulative effect of the alleged errors. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 360; *People v. Carter* (2005) 36 Cal.4th 1215, 1281.)

9. Restitution Fines

Garcia contends the $5,000 restitution fine imposed on him under section 1202.4, subdivision (b), along with the corresponding $5,000 parole revocation fine imposed on him under section 1202.45, must be reversed because they are impermissibly "disparate" from the $200 restitution fine and corresponding $200 parole revocation fine imposed on Ruiz. Garcia acknowledges that the trial court had discretion to fix the amount to impose for restitution, but contends the disparate restitution fines that were actually imposed as to him and Ruiz resulted in a violation

of the Fourteenth Amendment in that they "treat two equally situated defendants differently." (Capitalization and boldface omitted.) Garcia "asks that the [$5,000] section 1202.4, subdivision (b), fine be reduced to $200, the sum imposed on codefendant Ruiz."[8]

The Attorney General argues the trial court justifiably imposed the $5,000 restitution fine on Garcia because he committed murder, and the restitution fine, though large, has an acceptable, rehabilitative purpose. (See *People v. Moser* (1996) 50 Cal.App.4th 130, 135; *People v. Griffin* (1987) 193 Cal.App.3d 739, 741.) Garcia plainly recognizes as much, but that is not his point. Garcia argues it was unconstitutional to fine him, the second degree getaway driver, murderer, in the amount of $5,000, while only fining Ruiz, the first degree actual shooter, murderer, in the amount of $200.

We agree with Garcia that equal protection is not limited to requiring enactment of legislation that does not create distinguishing classifications between two or more groups of people who are similarly situated, but extends to discriminatory application of the law as well. However, establishing an equal protection violation based upon a claim that the law was applied in a discriminatory manner, requires proof of the same. On the record before us on Garcia's current appeal, we find no such showing has been established. There were no objections or other meaningful discussions of the factors considered in fixing restitution (e.g., ability to pay) at either Garcia or Ruiz's sentencing hearings, and, thus, we see no factual basis to support a finding that there was an unconstitutional, i.e., discriminatory, application of the restitution fine statutes as to Garcia.

10. More Concerning Restitution Fines

Garcia contends, the People concede, and we agree that the abstract of judgment should be amended to reflect joint and several liability for the $7,280 in

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[8] We see that the probation officer's report prepared for Garcia's sentencing included a recommendation for a $200 restitution fine under section 1202.4.

direct victim restitution payable to the victim's family for burial expenses. The trial court orally pronounced that the payments were to be joint and several.

DISPOSITION

The judgment is affirmed as modified. The trial court is directed to make the clerical corrections of the abstracts of judgment to show the $7,280 payable for direct victim restitution is joint and several.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.