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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

THE PEOPLE, Plaintiff and Respondent, v. JOSE TRINIDAD RAMIREZ, Defendant and Appellant.	B280623 (Los Angeles County Super. Ct. No. NA093863)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jesse I. Rodriguez, Judge. Affirmed.

Robert Sheahen for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Trinidad Ramirez (defendant) appeals from the judgment entered upon his conviction of murder. Defendant contends that the judgment should be reversed because his trial counsel failed to render constitutionally effective assistance; the "jailhouse informer 'system'" should not be countenanced; the gang expert relied on case-specific hearsay; a mistrial should have been granted due to an alleged comment regarding defendant's silence; the trial court should have excused a juror for bias; and the cumulative effect of all these errors was prejudicial. We reject many of defendant's contentions as unsupported by sufficiently developed arguments to be cognizable on appeal. We find the remaining contentions to be without merit, and thus affirm the judgment.

BACKGROUND

Defendant was charged with one count of murder in violation of Penal Code section 187, subdivision (a),[1] as well as a gang allegation pursuant to section 186.22, subdivision (b)(1)(C), and that a principal, John Silva Ramirez (John),[2] personally and intentionally discharged a firearm, causing death to the victim, pursuant to section 12022.53, subdivisions (d) and (e)(1), as well as subdivisions (b) and (c). A jury found defendant guilty of first degree murder, and found true both the gang and firearm allegations.

The trial court denied defendant's motion for new trial, and on December 15, 2016, sentenced defendant to a term of 50 years

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

[2] Although codefendants were tried together, they separately appealed. We affirmed the judgment against John Ramirez in a nonpublished opinion. (*People v. Ramirez* (Oct. 4, 2017, B267429).)

to life in prison, comprised of 25 years to life for murder, plus a consecutive firearm enhancement of 25 years to life. Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Shortly after midnight on April 20, 2012, Martin Contreras (Contreras), defendant, defendant's father Miguel Ramirez (Miguel), and others were drinking at a bar they all frequented.[3] While defendant and Contreras argued inside the bar, defendant mentioned the Westside Longo gang several times. Defendant repeatedly told Contreras and his companions that they were in his neighborhood and they should respect that.

As Contreras and three of his friends (Julio V., Orlando M., and Christian L.) were leaving the bar, defendant followed them out and began to fight with Contreras. Miguel came outside, saw defendant and Contreras struggling on the ground, and hit or kicked Contreras. Contreras then hit Miguel with a backhand over his shoulder, causing Miguel to fall to the ground and lose consciousness. A security guard for the bar came to the door and filled the air surrounding the combatants with pepper spray. Contreras and his friends ran away, while defendant ran to his white Ford pickup truck. Contreras's friends found him a short time later in front of his house, washing off pepper spray with a hose. As Contreras's three friends were getting out of Julio's car, defendant arrived in his white truck and parked behind them. Defendant got out of the truck holding a steel pipe about the size of a baseball bat, and told Julio not to move. Defendant asked whether the friends had been "hanging out" with Contreras, and said such things as, "You mother fuckers, you're going to pay; this is not going to end like this." Christian ran off just as a black

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[3] To avoid confusion, we refer to those who share a surname, either by party designation or first name after first mention. We mean no disrespect.

Dodge Ram pickup truck arrived on the scene and parked behind defendant's white truck. Orlando testified that he saw John, whom he identified as "Johnny," emerge from the black truck before he too ran off. He heard a gunshot when he was about 40 feet away. As Julio sat in the driver's seat of his car being threatened by defendant, he also heard a gunshot. Julio testified that it came from behind him and sounded close. Julio could no longer see Contreras as he drove away.

At the time of the shooting Contreras and Erika Silva (Erika) lived together with their four children, and her two cousins. Erika woke up that night at around 1:16 a.m. to the sounds of people arguing. Then she heard a gunshot and she went out to investigate just as Contreras came in, bleeding from his waist, near his right hip. Erika called 911, and at the operator's direction, asked Contreras who had shot him. Erika replied to the operator that he named "Johnny."

Erika later heard Contreras tell an officer that it was Johnny Ramirez who had shot him. Erika did not know John but knew defendant, as Contreras had worked for him. Long Beach Police Officer Harrison Moore testified that he was one of the first officers on the scene after the shooting, and had questioned Contreras in English as he lay wounded on the couch. Contreras replied, "Johnny Ramirez," to the question of who shot him and added that John had left in a two-door black Dodge Ram pickup truck.

Elizabeth C. testified that her friend John was visiting her at her apartment on the night of the shooting. After receiving a call just before 1:00 a.m., John told her he had to go handle something because his brother and father had gotten into a fight. He returned about 20 or 30 minutes later, appeared "jibbery" and paced nervously until a car arrived to pick him up a few minutes later, about 1:20 or 1:30 a.m.

The parties stipulated to the admission of defendants' cell phone records for the night of the shooting, including that defendant's cell phone called John's phone at 12:56 a.m., 12:57 a.m., 12:58 a.m., and 1:14 a.m.; that one call was made from John's phone to defendant's phone at 1:01 a.m.; that all calls were answered; and that the location of the cell tower used for the calls was consistent with both phones being at the scene of the shooting at the time of the shooting.

Juan Jose Barajas (Barajas) was Miguel's nephew and thus the cousin of defendant and John. Barajas lived with Maria Contreras (Maria), the victim's sister. Maria and Erika were thought of as sisters-in-law. Barajas testified that sometime between 1:00 a.m. and 3:00 a.m. the night of the shooting, John came to Barajas's house and told Barajas to tell Maria to remain silent, that John's name could not get around, because he had problems with the police. John showed Barajas his tattoos and said he was a soldier in his gang, adding that as a member, all he had to do was to give an order to have Barajas and his family killed if they said anything. John also explained he had done what he had done because of his father, and then left. Later that afternoon, Barajas told John that Contreras had been so gravely injured that he was going to die. John replied that the shot they had given him was not enough for him to die. Barajas also testified that he knew before the shooting that John was a soldier of the Westside gang.

Retired Deputy Medical Examiner Lisa Scheinin testified that she performed the autopsy, and determined that a large caliber bullet entered Contreras's body from behind, although not so directly behind as to rule out the possibility that Contreras could see the shooter. The location of the wound was consistent with an attempt to turn away upon seeing a gun. The bullet

damaged an artery and two veins, and despite surgery to repair them, Contreras died of his gunshot wound about 20 hours later.

Sometime after the night of the shooting, Julio, Christian, and another friend were parked at a liquor store, when defendant drove up, blocked their car, and said that what had happened to Contreras was nothing compared to what would happen to them if they said anything. Then John arrived in another car, said that this was his "hood," to remain quiet about what had happened, and all would be fine.

Defendant and John were arrested in November 2012. A black Dodge Ram truck registered to John and a white Ford F250 truck registered to defendant were seized. No gun was located.

Defendant was placed in a cell with an informant, their conversations were recorded, and over an hour of the recordings were played for the jury, with occasional explanations by the investigating officer, Detective Teryl Hubert. Among other things, defendant told the informant that his brother was a "rider," and that defendant telephoned his brother "to have this fool hit," and to tell him that "this fool needs to go down" and "be gone." Defendant did not directly say that his brother or John shot Contreras, but when the informant asked whether he "shot that fool," defendant replied "Nah"; and replied "yes" when the informant asked, "your brother?" Defendant then said that his brother was being blamed, but that it was "some other fool," a "homeboy" who was never arrested and was unknown to the police. Defendant said that the gun used was a revolver, which was disposed of by his brother.

The prosecution's gang expert, Long Beach Police Detective Chris Zamora, testified with regard to gang culture in general, and in particular, the culture, primary activities, membership, and common signs and symbols of the Westside Longo criminal street gang. Given a hypothetical question mirroring the facts in

evidence in this case, Detective Zamora expressed his opinion that the crime described was committed for the benefit of and in association with Westside Longo criminal street gang.

Detective Zamora testified to being familiar with John and defendant, and that in his opinion, they were both members of Westside Longo. He based his opinion on both men's prior law enforcement contact, their gang-related tattoos and the facts surrounding the investigation in this case. Detective Zamora explained the gang-related tattoos shown by photographs. On John's chest was "West" and then, "LB," which Detective Zamora said was indicative of Westside Longo. Above it were two lines with three dots on top, which was a Mayan numbering symbol, signifying that Westside Longo was a "Sureno" gang, subservient to the Mexican Mafia prison gang. One must earn the privilege of wearing such a symbol by putting in work for the gang, meaning the commission of violent assaults. Detective Zamora also explained that "rider" is a term in Sureno criminal street gangs that refers to an active member of the gang who puts in work for the gang.

Defense evidence

The defense presented the testimony of its own gang expert, Martin Flores, who opined that rather than showing a gang-related crime, the hypothetical facts described for Detective Zamora indicated a family dispute and a shooting to benefit the family name, not a gang. He agreed that John's tattoos were gang-related, but did not agree that the evidence demonstrated that he was an active member of the gang at the time of the shooting. He noted that gang members did not necessarily have tattoos removed upon leaving the gang. Flores noted that it was common for jail inmates to lie or exaggerate the reasons for their arrest and incarceration, but such bragging by defendant was absent in defendant's jailhouse conversations with the informant.

Flores also testified that "rider" can have many meanings, including the more benign meaning of "buddy."

DISCUSSION

I. Effective assistance of counsel

A. Defendant's contentions and standard of review

Defendant contends that trial counsel rendered ineffective assistance, resulting in a violation of defendant's right to counsel under the Sixth Amendment to the United States Constitution.

Defendant's opening brief sets forth three categories of alleged counsel error. The first discussion concerns an accused's right to continuity of representation throughout the proceedings. The second topic concerns whether the right to counsel requires an attorney to be in good standing with the state bar. The third category of counsel error claims is that defendant did not receive effective assistance of counsel. We discuss below.[4]

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674 (*Strickland*); see also Cal. Const., art. I, § 15.) "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted.

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[4] Defendant's briefs fall short of the requirements of California Rules of Court, rules 8.204(a) and 8.360(a), that appellant's opening brief must "[p]rovide a summary of the significant facts *limited to matters in the record*"; and that each brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each [summarized] point by argument . . . ." (Italics added.)

[Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) "Moreover, '"a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." [Citation.]' [Citation.]" (*Id*. at p. 1126; see also *Strickland v. Washington*, *supra*, at pp. 688, 694.) Appellants must affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: '"Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "If the record on appeal '"sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,"' and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 876, overruled on another point in *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

B. Defendant's contention that he was deprived of competent counsel

Defendant contends that he was deprived of his right to competent assistance of counsel because his trial attorney disappeared without interviewing jurors or bringing a motion for new trial, and prior to sentencing.

Trial counsel represented defendant through the jury's verdict, which was rendered July 1, 2015. Sentencing was initially scheduled for September 29, 2015. On that morning, the trial court was notified that another attorney would be standing in for trial counsel, but could not be there until after 11:00 a.m. During the afternoon session, the court spoke to a State Bar prosecutor, and determined that trial counsel's 60-day disciplinary suspension was scheduled to begin October 11, 2015. Stand-in counsel requested a sentencing date of October 5 or 6. After speaking to defendant, stand-in counsel requested a sentencing date of December 15, 2015, and defendant waived time for sentencing until that date.

The trial court calendared defendant's sentencing for December 15, and issued an order for trial counsel's appearance on October 1, 2015. Though trial counsel did not appear, the prosecutor informed the court of a telephone conversation between the two in which trial counsel said that he had received his suspension order from the California Supreme Court, effective September 21. The prosecutor then confirmed with the State Bar prosecutor that the effective date would in fact be October 11. Based on that information the trial court found that trial counsel had abandoned defendant. Defendant requested that the court appoint new counsel. Defendant told the court that trial counsel had not contacted him since the verdict, but had told family members that he could no longer represent defendant due to his suspension.

The office of the public defender was appointed and a status conference scheduled for November 3. At the status conference the trial court granted defendant's request to continue sentencing and motions to January 20, 2016. On that date defendant informed the court that he had retained private counsel (Robert Sheahen), who requested to be substituted for the public defender for all purposes, and asked for a continuance. After additional continuances, defendant's motion for new trial was ultimately heard and denied on November 17, 2016, and defendant was sentenced on December 15, 2016.

Quoting *People v. Smith* (1993) 6 Cal.4th 684, 696, defendant points out that "[a] defendant is entitled to competent representation at all times, including presentation of a new trial motion or motion to withdraw a plea." He contends that he was denied the right to be represented by counsel at all critical stages of the proceedings, including sentencing and a motion for new trial. However, defendant was in fact represented by counsel during the motion for new trial, which was prepared and argued by his current counsel, who also represented him during sentencing. Defendant does not contend that present counsel rendered ineffective assistance in the course of his representation.

Instead, defendant contends that he was denied assistance of counsel during three months following the verdict and before the public defender was appointed on November 3, 2015, because trial counsel did not communicate with him or the court during that time. Defendant claims that this was a denial of his right to *continuity* of representation. To demonstrate his contention, defendant compares the facts of his trial counsel's disappearance with those in *People v. Manson* (1976) 61 Cal.App.3d 102, where counsel for one of the defendants disappeared prior to closing arguments, some five months into trial. (*Id*. at pp. 197-198.) The

California Supreme Court held that the defendant was denied effective representation due to "the extraordinary disruption of the trial process resulting from the disappearance of her trial counsel at the moment he *would have argued* her contentions within the framework of the trial and the plan of defense which he had developed." (*Id*. at pp. 200-201, italics added.) The court concluded that the circumstances qualified as legal necessity, which required the trial court to grant the defendant's motion for mistrial, in the same manner as would the absence of the judge or a juror. (*Id*. at pp. 201-202.)

Certainly, the circumstances in *Manson* were extreme. As the court explained in *People v. Clark* (2011) 52 Cal.4th 856, 991 "substitute counsel's summation was constitutionally inadequate [in *Manson*] because, having had no opportunity to observe the demeanor of the many witnesses at trial, he could not effectively argue the significant issue of credibility during closing remarks. [Citation.]" Thus, *Manson* turned on its extreme and unusual circumstances. (*Clark*, at p. 991.) As we explained in *Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1525-1526, the key point in *Manson* is that ineffective assistance of counsel constitutes legal necessity for a mistrial *only* in extreme circumstances. *Manson* has no application where, as here, defense counsel did not absent himself *during* trial or before closing remarks, where defendant did not request a mistrial, and counsel's absence has not been shown to have prejudicially affected the defendant's right to effective counsel. (See *Carrillo*, at pp. 1526-1528.)

Indeed, rather than demonstrate prejudice, defendant merely concludes that the"[d]isappearance of an attorney is

prejudicial per se."[5] However, prejudice is presumed only "where assistance of counsel has been denied entirely or during a critical stage of the proceeding." (*Mickens v. Taylor* (2002) 535 U.S. 162, 166, citing *United States v. Cronic* (1984) 466 U.S. 648, 658-659; see also *People v. Hernandez* (2012) 53 Cal.4th 1095, 1106.) A critical stage is "a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." (*Bell v. Cone* (2002) 535 U.S. 685, 695-696, footnote omitted.) Prejudice may also be presumed "'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing'" and "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." (*Ibid*.)

Here, successor counsel was retained and given considerable time to prepare motions and for sentencing. As successor counsel had the opportunity to do these things, defendant was not denied counsel. Defendant argues that the three-month period after verdict was a critical stage of the proceedings because trial counsel did not communicate with him or his family, interview jurors, or write and argue motions during that time. In essence, defendant's complaint is that the delay in filing of a motion for new trial and preparing for sentencing by new counsel was a denial of effective assistance of counsel only during that part of the delay caused by trial counsel. However, the fact that some tasks were not accomplished by counsel at a

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[5] Defendant's reliance on *Javor v. United States* (9th Cir. 1984) 724 F.2d 831, is misplaced. There, the federal appeals court held "that when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary. [Citations.]" (*Id*. at p. 833.) No such facts were shown here.

specific time does not make that time a critical stage. (See *Bell v. Cone*, *supra*, 535 U.S. at pp. 696-697.)

We conclude that defendant is not relieved of the burden to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) As successor counsel had the opportunity to adequately prepare for motions and sentencing, which defendant does not claim were performed deficiently, or that the delays requested by successor counsel caused him harm, he has failed to meet his burden to show prejudice.

C. Defendant's contention that counsel must be in good standing with the state bar association

Defendant contends that the California and federal constitutional right to counsel requires representation by an attorney who is in good standing with the state bar.

The only authority on which defendant relies to support his contention is *People v. Vigil* (2008) 169 Cal.App.4th 8 (*Vigil*), which held that the "defendant's state constitutional right to counsel was violated by his attorney's mid-trial resignation from the State Bar with charges pending, and that such a violation requires reversal without inquiry into attorney competence." (*Id.* at p. 11.) As trial counsel here did not resign, there is no apt comparison to be made with the attorney in *Vigil*. On the other hand, discussion in *Vigil* made clear that an attorney who has resigned is no longer a member of the State Bar, a suspended attorney remains licensed. (*Id.* at pp. 14-15.)

In California there are two classes of members of the State Bar: active and inactive. (Bus. & Prof. Code, § 6003.) The State Bar prosecutor informed the trial court that trial counsel's 60-day disciplinary suspension would begin no earlier than October 11,

2015, more than three months after verdict.[6] On October 1, 2015, the trial court appointed new counsel at defendant's request. Thus, at all times throughout trial, trial counsel was a licensed, active member of the State Bar. (See *People v. Barillas* (1996) 45 Cal.App.4th 1233, 1238-1240 & fn. 6.) Inadequate representation of counsel is not presumed from the fact that disciplinary proceedings were pending during counsel's representation of a criminal defendant. (*People v. Frye* (1998) 18 Cal.4th 894, 997, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Ngo* (1996) 14 Cal.4th 30, 38; *People v. Sanchez* (1995) 12 Cal.4th 1, 43-45.)

Furthermore, as respondent notes, the fact that an attorney has been disciplined by the State Bar in other cases, "cannot be used to subject counsel to open-ended inquiries about counsel's entire career. [Citation.] To find that an attorney has rendered services below the standard of care, each case must be examined according to its own facts. [Citation.] Any evidence of prior neglect must have a bearing on the new accusations. [Citation.]" (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1134.) We agree with respondent that while trial counsel's conduct in other cases were found to constitute misconduct, defendant has not shown that the conduct in those cases has any bearing on trial counsel's conduct in defendant's trial.

Defendant also argues that the disciplinary cases brought by the State Bar precluded trial counsel from providing "conflict-free" assistance. "In the context of a conflict of interest claim, deficient performance [must be] demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performanc*e -- as opposed to a mere theoretical

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6 Defendant acknowledges that trial counsel was not disbarred until July 23, 2017, more than two years after verdict.

division of loyalties.' [Citations.]" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 417, quoting *Mickens v. Taylor*, *supra*, 535 U.S. at p. 171.) Defendant has failed to demonstrate deficient representation by his trial counsel.

D. Defendant's contention of ineffective assistance of counsel

In a single paragraph, defendant contends that counsel's performance was deficient in the following respects:

> "[Trial counsel] failed to investigate the case. He did not interview witnesses. He thought he was ineligible to practice law. He did not prepare for trial. He could have had a plea to second-degree murder but he failed to resolve the case properly. He made no opening statement before the prosecution's case. He made no opening statement before the defense case. He called no witnesses. He put on no defense. He knew nothing about the Evidence Code. He failed to object to juror misconduct or case-specific hearsay evidence. He entered into a horrific and gamechanging stipulation about cell tower evidence. He had a new admittee argue a motion. He came late to court. He missed court. He angered the court. He lied to the Bar. He disappeared at a critical stage of the proceedings. He abandoned appellant."

Defendant's briefs do not set out any of these points under separate headings or subheadings, and with the exception of the stipulation regarding cell towers, he does not provide record citations for any of the enumerated alleged errors, as required by rules 8.204 and 8.360(a) of the California Rules of Court. The statement of facts in defendant's opening brief is of little help, as it consists mostly of argument and commentary based upon defendant's interpretation of the clerk's minutes, rather than "a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(C).) We agree with

respondent that defendant has not preserved his paragraph-long list of alleged counsel errors for review. "We discuss only those arguments that are sufficiently developed to be cognizable. To the extent defendant perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis. [Citations.]" (*People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.)

We decline to guess at the factual underpinnings of the undeveloped claims of counsel errors and omissions, despite respondent's impressive efforts to do so. It is the appellant's burden to demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564-565.) As defendant has neither made an argument in support the undeveloped claims nor shown prejudice, we decline to construct an argument for him. Instead, we presume as to those alleged errors "'that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas*, *supra*, 12 Cal.4th at p. 437.)

An appreciable argument was made regarding the cell tower stipulation, which we discuss only to the extent that the facts material to this issue appear in the record. Defendant contends that trial counsel failed to consult an expert to review or refute the prosecution's cell tower evidence. Defendant fails to cite evidence in the record for this contention, and our review has turned up no such evidence. Since there may have been a satisfactory reason to enter into the cell tower stipulation, we must reject defendant's claim "'unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.)

Though not mentioned specifically in this argument, defendant apparently relies on an expert's report attached to defendant's motion for new trial. Although the report is not

expressly mentioned in defendant's briefs, he refers to pages in the clerk's transcript where it is reproduced. In the report, a cell tower expert retained by current counsel, opined that the cell tower stipulation was incomplete and misleading, because "[i]t is inaccurate to say the cellphones of both brothers were at the [crime] scene when each cellphone could have been at other locations or in transit within the area covered by Sector 5 of Tower 466," such as the family home or the subject bar. The expert's premise was faulty. The stipulation did not say that defendants' cell phones were present *at* the scene of the crime, but rather that the data in the records were *consistent* with the phones' presence there. The stipulation read in relevant part: "These cell phone records show that at the time of the shooting, both of these phones communicated with the nearest cell tower to the scene of the shooting [No. 466] and communicated with an antenna from that tower pointing toward the crime scene. . . . The cell tower information is *consistent* with both phones being at the scene of the shooting at the time of the shooting. Moreover, call detail records show several calls between the defendants' phones shortly before the shooting." (Italics added.)

The cell tower records (exhibit 1) were admitted into evidence pursuant to the stipulation. Respondent represents that the records showed a cell tower location which was closer to defendant's home and the subject bar than the crime scene. It is the appellant's burden to present an adequate record for review on appeal and to affirmatively demonstrate error. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at pp. 564-565.) As the exhibit has not been delivered to this court, we assume the cell tower records would support rather than undermine the judgment. (See *People v. Onesra Enterprises, Inc.* (2016) 7 Cal.App.5th Supp. 7, 14.)

Attorneys for both defendants entered into the cell tower stipulation. A conceivable reason that both counsel agreed to the stipulation was to avoid tedious expert testimony. Defendant has failed to show counsel error on this record.

Moreover, defendant has shown no reasonable probability that the result would have been different if counsel had not entered into the stipulation. (See *Strickland*, *supra*, 466 U.S. at p. 694.) Multiple eyewitnesses placed defendant and John at the crime scene at the time of the shooting. Julio testified that a white truck arrived on the scene that was at least similar to defendant's truck. He saw defendant get out of the truck and approach him. Defendant threatened Julio while holding a metal pipe or bat, at the time John arrived at the scene. Defendant was still present when Julio heard a gunshot. Orlando also saw the white truck arrive. He testified that defendant got out of the driver's side of the truck, pulled out a long pipe, and told Julio not to move. He also saw John get out of a black Dodge Ram pickup truck parked behind the white truck. As Orlando ran away, he heard a gunshot. Shortly thereafter the mortally wounded Contreras identified John as his shooter and that John left in a black Dodge Ram pickup truck.

Under these circumstances defendant would have had no reasonable probability of successfully arguing that defendant "could just as easily have been home watching TV with his dad[,][7] at the Barracuda Bar or in his car a half mile away." As defendant has not met his burden of demonstrating either counsel error or prejudice, we reject his claim.

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[7] Defendant was most certainly not with his father at the time, as Miguel had been taken to the hospital after the fight.

II. The jailhouse informer "system"

Under the heading, "The Judgment Should Be Reversed to Protect the Integrity of the Courts from the Jailhouse Informer 'System,'" defendant contends that the trial court erred in denying defendants' motion for disclosure of the identity of any confidential informants who were placed in defendant's cell with a recording device, and that the ruling resulted in a denial of due process.

John filed a written motion for disclosure of the undercover informants whose conversations with each defendant were separately recorded. Defendant joined in the motion. The motion was brought on the ground that the identity of the informants was necessary to counter statements made in the jailhouse conversations about John's gang membership. It was supported by exhibit A, the declaration of defense gang expert Flores, who stated that although one informant was identified in police reports as Lalo Martinez, Flores was familiar with the voices on the jailhouse recordings, believed that this was not the informant's true name, and believed that both informants were high-ranking Mexican Mafia gang members, whose voices he recognized. Flores opined: "If the informants in this case are indeed high-ranking gang members . . . , their status may have influenced and/or intimidated both John and [defendant] to lie about their gang status," a practice known in gang jargon as "stepping up."

The prosecutor opposed the motion and represented to the court that none of the recorded conversations between informants and John would be played for the jury. That only the conversations between informants and defendant would be presented, and the informants would not be called as witnesses. The trial court denied the motion, stating: "The main threshold of the motion would appear to have been addressed to the issue of

the statements made by Mr. John Ramirez. The way that the court analyzes this is that . . . Mr. Flores would need that information to . . . formulate opinions that this informant is a high asset . . . of the Sureno gang. And, therefore, Mr. John Ramirez felt pressured to agree or wanted to sort of assimilate into the jail easier and sort of pretend to be part of the gang life so that would render protection for him. . . . [Based on] the moving documents, . . . the court [concludes] that this so-called informant is not a material witness. And, therefore, since the threshold of materiality has not been met and has not been crossed, therefore, the court believes from the moving documents, the case law, the statutory law, that the identity of this informant should not be revealed, period."

Defendant no longer contends that the identities of the informants was necessary to prove that he was not a gang member or that his brother was not a gang member. Instead, he now argues that disclosure of the informants' identities was necessary to discover evidence of coercion and evidence that might show whether the informants expected compensation or other benefit from their cooperation. Defendant argues that "[t]here is a pervasive practice in Southern California law enforcement whereby jailhouse informers are used to circumvent and make end runs around the Fifth and Sixth Amendments."

Defendant argues that disclosure of the informants' identities would show that the police engaged in outrageous government conduct in using coercive tactics by a paid informer, and that "[t]he paid gang informer system is an ugly one, unbefitting a civilized society, [which] should no longer be countenanced."[8] We observe, as did respondent, that defendant

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[8] Defendant relies on *People v. Dekraai* (2016) 5 Cal.App.5th 1110, in which the appellate court affirmed an order recusing the

did not need to know the informants' identities in order to discover whether they were paid or acted with the expectation of some other benefit, as he could simply have asked the prosecutor to turn over such information. If the discovery revealed the informants were paid government agents, defendant could then have followed up with the appropriate motion alleging violations of the Fifth and Sixth Amendments.

Regardless, we agree with respondent that the admission of conversations with unidentified informants was harmless, as there was overwhelming evidence of defendant's guilt. Defendant's behavior before and after the shooting pointed to his complicity in the shooting. Shortly before arriving at Contreras's home wielding a metal pipe or bat, defendant had fought with Contreras and had observed Contreras hit Miguel, who fell and lost consciousness. John received a phone call which prompted him to tell his friend he had to go handle something because his brother and father had been in a fight. When John arrived at Contreras's residence a short while later, defendant was threatening Contreras's friends. Gunfire was soon heard, and Contreras identified John as his shooter. John later went to the home of his cousin, Barajas, and implied that he had shot Contreras. He also threatened Barajas and his family if they did not remain silent. Sometime after the night of the shooting, defendant and John both threatened Julio and Christian. Defendant told them that if they said anything, what had happened to Contreras was nothing compared to what would

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Orange County District Attorney's office, due to a conflict of interest which interfered with its constitutional and statutory obligations to ensure a fair trial. While that case involved the use of a confidential jailhouse informant, it did not involve a motion to reveal the informant's identity, and is thus inapposite.

happen to them. John said that this was his hood and to remain quiet about what had happened.

Although the original focus of the motion was to counter evidence of John's gang membership, the prosecution did not use John's recorded conversation. Still there was overwhelming evidence of John's gang membership. Barajas testified that he knew his cousin John was a member and soldier of the Westside gang. When John came to his home after the shooting to threaten Barajas, John displayed his gang tattoos and reminded Barajas that John was a soldier in his gang. When John later threatened Julio and Christian, he did so while claiming his hood. It was the opinion of gang expert Zamora that John was a member of the Westside Longo gang, based in part on John's gang-related tattoos. Finally the defense expert testified about his familiarity with John's tattoos, including the one on his head, and opined that the tattoos were gang-related and indicated that John was at one time a member of the Westside Longo gang.

We conclude beyond a reasonable doubt that the result would have been no different if the discovery of the informant's identities had led to the suppression of the recorded conversation or had lent support to an argument that defendant had lied to his cellmates out of fear or bravado.

III. Gang expert's reliance on hearsay

Defendant contends that because Detective Zamora based his opinion that defendant was a gang member on hearsay, the judgment must be reversed under the reasoning of *People v. Sanchez* (2016) 63 Cal.4th 665. In *Sanchez*, the California Supreme Court noted that some of its own precedents had blurred the distinction between *case-specific* hearsay the hearsay sources from which experts frequently derived their knowledge. (*Id*. at p. 678.) The court stressed the traditional hearsay rule that precludes expert witnesses "from relating *case-specific* facts

about which the expert has no independent knowledge." (*Id*. at p. 676; see also pp. 679, 684, 686.)

Defendant contends that it is not possible to conclude that the error was harmless, as we did in John's appeal, because the evidence against defendant was not as strong as the evidence against John. Defendant does not specify whether he is challenging the gang enhancement finding or the verdict. The gang enhancement does not require proof that defendant was a gang member when as here, the evidence showed that he committed the crime with a known gang member. (See *People v. Albillar* (2010) 51 Cal.4th 47, 67-68; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1369-1370.) As discussed in the last section, the evidence of John's membership in the Westside Longo gang was overwhelming. Indeed it was overwhelming even if Detective Zamora's opinion had been excluded. John's cousin knew that John was a member of the Westside gang; John reminded Barajas the night of the shooting that he was a soldier in his gang and could have Barajas and his family killed if they said anything. John's own expert agreed that John's tattoos indicated gang membership, although he did not think that the evidence demonstrated *active* membership at the time of the shooting.

Moreover, we do not agree that evidence of defendant's guilt was weak. As we have discussed the overwhelming evidence of defendant's guilt in the last section, it is unnecessary to repeat it here. We conclude beyond a reasonable doubt that introduction of Detective Zamora's opinion that both defendants were gang members, although based in part on hearsay, was harmless.

IV. Denial of motion for mistrial

Defendant contends that the trial court should have granted his motion for mistrial due to *Griffin*[9] error. In *Griffin*, the United States Supreme Court held that "the Fourteenth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (*Griffin*, at p. 615, fn. omitted.) Defendant also cites *Doyle v. Ohio* (1976) 426 U.S. 610, which held that a defendant's post-arrest silence after *Miranda* warnings is not admissible as impeachment.

Defendant claims error occurred "when an experienced homicide detective blurted out a comment about appellant exercising his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966)." Defendant directs us to the testimony of Detective Hubert: "I suppose when talking to [defendant] he could have offered that information as well."

A witness's volunteered statement will provide the basis for a mistrial where the statement was "'so incurably prejudicial that a new trial was required.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 40, disapproved on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 198.) "[W]e review a ruling on a motion for mistrial for an abuse of discretion, and such a motion should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v.*

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[9] *Griffin v. California* (1965) 380 U.S. 609.

Ayala (2000) 23 Cal.4th 225, 283.) "Unless the trial court's ruling is "'arbitrary, capricious or patently absurd,'" we are powerless to disturb it. [Citations.]" (*People v. Garcia* (2014) 229 Cal.App.4th 302, 311.)

It is defendant's burden to show that the prosecution made inappropriate use of his postarrest, post-*Miranda* silence. (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448.) "An assessment of whether the prosecutor made inappropriate use of defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument. [Citation.]" (*Ibid.*, citing *Greer v. Miller* (1987) 483 U.S. 756, 765-766.) Defendant has made no effort to show either.

Respondent, on the other hand, has provided some context. During cross-examination by John's counsel, Detective Hubert commented on some of defendant's statements to the jailhouse informant. Defendant made reference to two unnamed people at the scene of the shooting, a "homie" or "homeboy" and a "fool." Asked whether she had attempted to learn who the homie or the fool was, Detective Hubert said she had not. Because defendant also told the informant that the homeboy pointed a gun at him, counsel asked, "Did you do anything to follow up to see who, if anybody, would have pointed a gun at [defendant]?" Detective Hubert answered, "No, but I suppose when talking to [defendant], he could have offered that information as well."

The trial court found no *Griffin* error, as Detective Hubert's answer did not make clear whether she was referring to defendant or to someone else. Nevertheless, the court struck the answer from the record and instructed the jury to disregard it. Defendant makes no attempt to argue that the jury understood Detective Hubert's answer any better than the trial court did, or that the jury failed to follow the trial court's instruction to disregard the answer. As Detective Hubert's answer was

ambiguous, isolated, part of a lengthy trial, and the jury was instructed to disregard it, any prejudice was attenuated. (See *Greer v. Miller*, *supra*, 483 U.S. at p. 759-760.) Defendant has failed to show that Detective Hubert's answer was incurably prejudicial or that the denial of the motion for mistrial was arbitrary, capricious, or patently absurd.

V. Juror bias

Defendant contends that the judgment must be reversed because the trial court banned defendant's father (Miguel) from the courthouse after two incidents of behavior that made several jurors feel intimidated. Defendant argues that because the court's order suggested that the Ramirez family was dangerous, the appropriate remedy would have been to summarily excuse the reporting juror without further inquiry. Defendant also contends that defense counsel rendered ineffective assistance by failing to object to the court's order.

To support his contentions defendant has cited just one case: *People v. Nesler* (1997) 16 Cal.4th 561, 583 (*Nesler*). Defendant cites *Nesler* as support for the proposition that "[t]his is the kind of issue which should be subject to review." *Nesler* involved allegations of juror misconduct, not the exclusion of a spectator from the courtroom, and the issue in that case was whether a juror's use of the outside information during deliberations caused her to render a verdict that was not based solely upon the evidence presented in court. (*Ibid.*) Although defendant fails to provide any substantive argument, he appears to be advocating for a *presumption* of juror bias whenever a defendant's family member is barred from the courtroom after engaging in intimidating behavior.[10]

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10 Defendant does not raise any issue regarding the constitutional right to a public trial. (See generally, *People v.*

"Bias in a juror may not be presumed [citation] . . . . Before a trial court may excuse a juror for inability to perform the juror's functions, '"that inability must appear in the record as a demonstrable reality."' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 153, 232.) A trial court must conduct an inquiry whenever it is put on notice that good cause to discharge a juror may exist; and its determination calls for an exercise of discretion which will be upheld if supported by any substantial evidence. (*Id*. at pp. 231-232.) We thus must reject defendant's suggestion that the appropriate remedy was to excuse the juror without further inquiry.

Nevertheless, the trial court conducted the required inquiry here. After receiving a note from Juror No. 6, which reported that a few days earlier, Miguel had stood between the courtroom and the escalator during afternoon recess, staring at jurors as they walked by; and a few days after that, Miguel stood outside a courthouse exit with his feet apart, hands on his hips, staring ahead but positioned so that jurors had to go around him in order to leave the building. Juror No. 6 felt uncomfortable, believed that Miguel was trying to intimidate the jury, and had spoken to several other jurors who also felt intimidated. The trial court questioned Juror No. 6, who verified the information in the note. The court then separately questioned, at length, each of the other jurors and alternates without suggesting the facts of Juror No. 6's report. The court assured the jurors who knew the facts that Miguel would be ordered to stay several blocks away from the

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Scott (2017) 10 Cal.App.5th 524, 529-533, and cases cited therein.) Such a claim would likely lack merit, as the court's action was taken near the end of the seven-day trial, and thus did not deprive defendant of an essentially public trial. (Cf. *People v. Pena* (2012) 207 Cal.App.4th 944, 950-951.)

courthouse; that Miguel would not know which juror raised the issue; and that all jurors' identifying information would be sealed. The seven jurors who had either noticed Miguel's behavior or had heard about it expressed their comfort with the plan, and all the jurors told the court he or she could be fair to all parties and would remain impartial.

We conclude that the trial court's inquiry was adequate and that its determination was supported by substantial evidence. As defendant does not contend otherwise, and makes no particularized substantial evidence argument, we treat that point as waived. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Moreover, at the end of the jury interrogation, the court asked all counsel if there were other questions to be asked, any objections, or any motions. Each attorney answered in the negative, and submitted the issue. Defendant has not preserved the issue of juror bias for review as he failed to request the removal of the affected jurors, suggest additional examination (*People v. Holloway* (2004) 33 Cal.4th 96, 124, 126-127), or move for a mistrial after the court's examination of the jurors. (*People v. McIntyre* (1981) 115 Cal.App.3d 899, 906.)

Furthermore, defendant's claim of ineffective counsel is not sufficiently developed to permit review of the issue in that context. We do not reach undeveloped claims. (See *People v. Freeman*, *supra*, 8 Cal.4th at p. 482, fn. 2.) In particular, we not reach any claim of ineffective assistance of counsel where, as here, the defendant has failed to demonstrate prejudice. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

VI. No Cumulative error

Defendant contends that the cumulative impact of multiple errors requires reversal. Defendant has failed to preserve some issues for appeal, has failed to provide a cognizable argument for

other issues, and "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial"; we thus reject defendant's claim of prejudicial cumulative effect of any alleged errors. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT