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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CALIXTRO MORALES et al., Defendants and Appellants.	B229898 (Los Angeles County Super. Ct. No. PA064402)

APPEALS from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

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

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant Teodoro Elenes.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

In count 1, defendants Calixtro Morales and Teodoro Elenes were jointly charged with the murder of Javier Garcia. (Pen. Code, § 187.)[1] In counts 2-5, which involved a separate incident, Morales was individually charged with four counts of willful, deliberate, and premeditated attempted murder. (§§ 187, subd. (a), 664.) After a joint trial, the jury returned guilty verdicts on all counts and found that each crime was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) In addition, the jury found that Elenes intentionally discharged a firearm and caused Garcia's death and that Morales intentionally discharged a firearm and caused great bodily injury to the victims of the attempted murders. (§ 12022.53, subds. (b)-(d).)

In Morales's appeal from the judgment on counts 1-5, he contends that: (1) voir dire was improperly curtailed; (2) the prosecution's gang expert impermissibly testified in the form of a hypothetical that the crimes were committed for the benefit of a criminal street gang; and (3) the jury's findings on the gang enhancement allegations were not supported by substantial evidence.[2]

In Elenes's appeal from the judgment on count 1, he challenges the admission of extrajudicial statements made by Morales during recorded telephone calls from jail. Elenes contends that because the statements made by Morales, who did not testify, implicated him in the murder of Garcia: (4) the calls between Morales and his girlfriend were erroneously admitted in violation of Elenes's constitutional right to confrontation and cross-examination (*Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*)); and (5) a three-way call between Morales, his girlfriend, and Elenes was erroneously admitted on the theory that Elenes's failure to deny Morales's accusatory statements constituted an adoptive admission.

For the reasons that follow, we conclude the contentions lack merit and we affirm.

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1 All further undesignated statutory references are to the Penal Code.

2 Each defendant has joined in the other's contentions on appeal.

BACKGROUND

As neither defendant challenges the sufficiency of the evidence to support his conviction of murder in count 1 and, as to Morales, attempted murder in counts 2-5, our discussion of the evidence is intentionally brief. Additional facts pertaining to the issues regarding jury selection, the gang enhancement allegations, and Morales's recorded custodial telephone conversations are discussed later in this opinion.

I. Count 1 — the Murder of Javier Garcia

Count 1 involved the fatal shooting of Javier Garcia on January 21, 2009. The shooting occurred on Telfair Avenue near Telfair Elementary School shortly after the end of the school day.

Based on the prosecution's evidence, which included a pretrial photographic identification of Elenes as the shooter, the jury found that Elenes personally and intentionally discharged the murder weapon and that Morales was his accomplice. Elenes seeks to reverse his conviction on count 1 based on the allegedly erroneous denial of his motion to exclude or redact Morales's extrajudicial statements that allegedly implicated him in Garcia's murder. Elenes does not challenge the other evidence of his guilt, which included the following.

Garcia and several prosecution witnesses attended an alternative high school, Pacoima SEA Charter School (SEA School), which is located several blocks from Telfair Elementary where the shooting occurred. A surveillance video taken shortly before the shooting depicted Elenes and Morales at a bus stop in front of Bobo's restaurant on the corner of Telfair Avenue and Van Nuys Boulevard, across the street from SEA School.

Three SEA School students—Brenda Dedios, Isai Barrera, and Andres Torres—provided the following eyewitness testimony.

Dedios, a friend of Garcia's, was walking toward Bobo's when she saw Elenes and Morales at the bus stop. Because Dedios knew that Garcia belonged to the Brownstones gang and had been "jumped" by Elenes two months earlier, she warned

Garcia, who was on a bicycle, to "be careful." After she warned him, Garcia rode his bicycle "down Telfair" Avenue. Elenes pointed his finger at Garcia and said, "Let's go get that mother fucker."

Isai Barrera, a friend of Elenes's brother, considers Elenes to be his "homeboy." Shortly before the shooting, Barrera was walking on Telfair Avenue when he was approached by Elenes and Morales in a "copper color" car. Morales asked Barrera where he was from. Barrera replied, "Astoria" (Astoria Gardens gang). Morales identified himself as "Jokey" "from the Flats" and made a derogatory reference to the Brownstones. Barrera had just seen Garcia, who was "from Brownstones," riding by on his bicycle. Barrera also saw a gun in Elenes's hand. About 10 minutes after defendants drove toward Telfair Elementary, Barrera heard a gunshot.

Andres Torres, a friend of Garcia's, stated during a police interview that he had witnessed the shooting. Although during the interview Torres had selected Elenes's picture from a photographic lineup and identified him as the shooter, he testified that he did not witness the shooting and had lied to police. Torres further testified that he belongs to the Pacoima South Side Locos gang and that gangs kill snitches.

In addition to the eyewitness testimony, the prosecution introduced a recording and transcript of Elenes's telephone call from jail to Priscilla DeAlba, Morales's girlfriend. (Elenes does not challenge the admissibility of this call on appeal.) During the call, Elenes stated that "the detectives are saying, they know I did it, you know? Like, they — they know — they know that for a fact. But they're like, why you did it? And I — I keep telling them, I don't know. I don't know why I did it." When DeAlba suggested that Elenes plead insanity, Elenes said, "[t]hat's what I was thinking the same thing that — cause I — I'm not admitting to shit right here, but to my lawyer. The lawyer could cut you deals, you know?" Elenes said that he would talk to his lawyer and would "take the blame." "I'll be like, look, Cali [Morales] didn't have nothing to do with it. All he did was just drop me off home. And from there I did my own thing. I walked it over there, you know? And I'm — that's what I'm going to do, Priscilla. I gave my word. I'm going to take the blame for it, Priscilla."

II. Counts 2-5 — the Attempted Murders of Four Victims

In a separate incident on February 15, 2009, four victims (Jonathan Sanchez, Luis Castro, Everardo Castro, and Carlos Perez) were shot outside a liquor store in Sun Valley. A surveillance video showed that the shooter was a passenger in a black Honda, which was registered to Morales's girlfriend, Priscilla DeAlba. The police recovered a .45 caliber Llama pistol from Morales's bedroom. The seven .45 caliber casings found at the scene were tested and determined to have been fired from the weapon recovered from Morales's bedroom. When questioned about the February 15 shootings, Morales admitted firing the gun seven times at the four victims.

Elsa Castro, the victims' relative who lives near the liquor store, told police that she heard a shot and saw a "black Honda or a Nissan Maxima, black, driving away and . . . heard someone yell out, 'Pacoima.'"

III. The Sentences

On count 1, Elenes received a sentence of 25 years to life for first degree murder (§ 187), with a consecutive term of 25 years to life for personally and intentionally discharging a firearm that resulted in Garcia's death (§ 12022.53, subd. (d)). Additional terms were imposed and stayed under sections 12022.53, subdivisions (b), (c), (d), (e), and (f). Restitution, parole revocation, and other fines were also imposed.

On count 1, Morales received a sentence of 25 years to life for first degree murder. (§ 187.) On each of counts 2-5, Morales received a consecutive term of life imprisonment for willful, deliberate, and premeditated attempted murder (§§ 664, 187), with a consecutive term of 25 years to life for personally and intentionally discharging a firearm (§ 12022.53, subd. (d)). Additional terms were imposed and stayed under sections 12022.53, subdivisions (b), (c), (d), (e), and (f). Restitution, parole revocation, and other fines were also imposed.

DISCUSSION

In the following sections, we address the defendants' respective contentions with the understanding that each defendant has adopted the arguments of the other.

I. Voir Dire Was Not Improperly Curtailed

Before calling the panel of prospective jurors to the courtroom, the trial court explained that it would be using the "'six pack' method" of jury selection,[3] in which each attorney would have a maximum of 15 minutes to question the initial 18 prospective jurors, and a maximum of five minutes to question each successive group of six prospective jurors. Elenes's trial counsel, Michael Schensul, objected to these time limitations and requested additional time for voir dire. He stated that he did not "believe we can establish possible biases in that time for that number of people with less than a minute per person." The trial court denied the request and cited several California Supreme Court decisions that had upheld reasonable time limitations on voir dire. (Citing *People v. Avila* (2006) 38 Cal.4th 491, 534-535; *People v. Robinson* (2005) 37 Cal.4th 592, 618-619; *People v. Carter* (2005) 36 Cal.4th 1215, 1249-1252.)

After the initial 18 prospective jurors received a questionnaire concerning their ability to be fair and impartial jurors, the trial court collectively inquired whether anyone had answered "yes" to any of the questions. After no affirmative answers were revealed, the trial court posed a series of general background questions (name, residence, marital status, children, occupation, spouse's occupation, and prior jury service) before inquiring whether the prospective jurors or their family or friends had been charged with a crime, been a victim of a crime, or been employed by or associated with the justice system. Each attorney was then allowed to question the initial 18 prospective jurors for a

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[3] As explained in Morales's opening brief, the six-pack method utilizes an initial group of 18 prospective jurors, from which 12 are seated in the jury box and six are seated temporarily. As the prospective jurors in the box are excused, their seats are filled by those in the temporary seats. When no prospective jurors remain in the temporary seats, an additional six prospective jurors are called to sit in the temporary seats.

maximum of 15 minutes. The court repeated this process for each additional group of prospective jurors, but limited voir dire to five minutes per attorney.

Morales contends that it was improper to restrict "voir dire to 15 minutes for the first 18 prospective jurors, and five minutes for each additional six prospective jurors. . . . The limited voir dire amounted to just under 50 seconds to question each . . . prospective juror." In support of his contention, Morales argues that because the questionnaire was obviously designed to elicit negative responses, the lack of affirmative responses was not helpful in ascertaining the presence or absence of bias, prejudice, or misunderstanding of the law. He asserts that the questionnaire, the trial court's questions, and the attorneys' "50 seconds of questioning per juror" were insufficient to reveal juror biases and flaws. He claims that it was only through "sheer serendipity (as opposed to adequate time for examination)" that the attorneys could identify any biases and flaws among the prospective jurors.

To the extent Morales's contention is based on a perceived problem with the questionnaire, we conclude that the issue was forfeited by the failure to raise it below. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 617.) As for the contention that the trial court unduly restricted voir dire, our Supreme Court has recognized "that the adequacy of *voir dire* is a matter '"'not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and responses to questions.'"' (*People v. Holt* (1997) 15 Cal.4th 619, 661, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424; see also *People v. Cardenas* (1997) 53 Cal.App.4th 240, 247 ['"The exercise of discretion by trial judges under the new system of court-conducted voir dire is accorded considerable deference by appellate courts."']; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313 [same].) The applicable standard is a demanding one: 'Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. [Citation.] A fortiori, the same standard of reversible error applies when both the court and counsel participate in the voir

dire.' (*People v. Holt, supra*, 15 Cal.4th at p. 661; see also *People v. Bolden* (2002) 29 Cal.4th 515, 538 [same].)" (*People v. Carter, supra*, 36 Cal.4th at pp. 1250-1251.)

Trial courts clearly possess discretion to impose reasonable time limitations on voir dire. (Code Civ. Proc., § 223 [courts may specify maximum time that each attorney may question an individual juror].) And as was correctly pointed out below, the Supreme Court approved reasonable time limitations on voir dire in *People v. Avila*, *supra*, 38 Cal.4th 491 at pages 534-535, *People v. Robinson*, *supra*, 37 Cal.4th at pages 618-619, and *People v. Carter*, *supra*, 36 Cal.4th at pages 1249-1252. In short, there is no constitutional right to unlimited voir dire. On the contrary, "'[t]he right to voir dire, like the right to peremptorily challenge [citation], is not a constitutional right but a means to achieve the end of an impartial jury. [Citation.] . . . [I]t is the duty of the trial judge to restrict the examination of the prospective jurors within reasonable bounds so as to expedite the trial. [Citations.]' (*People v. Wright* (1990) 52 Cal.3d 367, 419; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086.)" (*People v. Carter*, *supra*, 36 Cal.4th at p. 1251.)

Based on our review of the record, the trial court properly exercised its discretion to impose reasonable time limitations on voir dire. The fact that numerous jurors were excused indicates that the two days spent on jury selection were reasonably sufficient to inquire into the fitness of the prospective jurors. The record does not support a finding that the selection process was improperly curtailed.

Moreover, even if we were to assume that the trial court abused its discretion in limiting the time for voir dire, Morales has failed to establish prejudice. (Code Civ. Proc., § 223 ["The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution."].) Although Morales asserts that the time limitations precluded the attorneys from exploring issues

such as voluntary intoxication, the record reflects that on several occasions when the allotted time had not expired, there were no further questions.

II. The Prosecution's Gang Expert Testimony Was Not Improper

Los Angeles Police Department Officer Rodolfo Rodriguez, the prosecution's gang expert, testified that Elenes is a known member of the Pacoima Project Boys gang and Morales is a known member of the Pacas (slang for Pacoima) Flats gang. The two gangs share an informal alliance and commit crimes together. The primary activities of the Pacoima Project Boys gang are "robbery, attempt[ed] robbery, carjacking, vehicle theft, possession of handguns or weapons, narcotics sales, witness intimidation, vandalism," and the primary activities of the Pacoima Flats gang are "possession of handguns, narcotic sales, ADW [assault with a deadly weapon], witness intimidation," "graffiti, felony . . . vandalism, and carjacking and vehicle theft."

Garcia, the victim in count 1, belonged to the Brownstones, which is a rival of the Pacoima Project Boys and Pacoima Flats. Rodriguez explained that gangs enhance their status by committing crimes against rival gangs. Because gangs value respect, which they equate with fear and intimidation, they "work" to commit more violent crimes in order to create "an atmosphere of fear and intimidation within the community."

Over a defense objection that the questions called for speculation, Rodriguez was presented with two hypothetical scenarios that tracked the prosecution's evidence for the crimes alleged in count 1 and counts 2-5. Rodriguez testified that in his expert opinion, the crimes in both hypothetical situations were committed for the benefit of a criminal street gang.

Morales contends on appeal that the hypothetical scenarios were improperly used to obtain Rodriquez's inadmissible expert opinion concerning defendants' subjective knowledge or intent in violation of *People v. Killebrew* (2002) 103 Cal.App.4th 644. While this appeal was pending, however, the California Supreme Court rejected a similar contention in *People v. Vang* (2011) 52 Cal.4th 1038. *Vang* held that hypothetical questions rooted in the evidence of a case are permissible to elicit an expert's opinion that

a crime committed in the manner described was committed for the benefit of a criminal street gang. (*Id.* at p. 1049.) Accordingly, we conclude that Rodriguez's expert opinion was admissible under *Vang*.

III. The Gang Enhancement Allegations Were Supported by Substantial Evidence

Morales contends that without Rodriguez's expert opinion that the crimes described in the hypothetical questions were committed for the benefit of a criminal street gang, the jury could not have found the gang allegations to be true. He argues that Rodriguez's opinion was not entitled to any weight because it was "inconsistent with the evidence and purely speculative." The assertion is unsupported by the record.

As to the gang enhancement allegation in count 1, Rodriguez's expert opinion was consistent with the evidence. For example, shortly before the shooting, Elenes was seen pointing his finger at Garcia, a rival gang member, while saying to Morales, "Let's go get that mother fucker." This was followed by the encounter with Barrera, also a rival gang member, during which Elenes displayed a gun, Morales announced that he was "Jokey" "from the Flats," and Morales made a derogatory reference to Garcia's gang, the Brownstones.

As to the gang enhancement allegations in counts 2-5, Rodriguez's opinion was also consistent with the evidence. Immediately after shots were fired in front of a liquor store, someone in the assailant's vehicle yelled "Pacoima." Rodriguez explained that this was a gang reference. Rodriguez explained that defendants belong to related Pacoima gangs that share an informal alliance and commit crimes together.

The manner in which the crimes were committed, when coupled with Rodriguez's expert opinion concerning gang activities, provided ample support for the jury's findings that each crime was committed for the benefit of a criminal street gang. "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1).

(See, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354 [relying on expert opinion that the murder of a nongang member benefited the gang because 'violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents who are, as a result, "fearful to come forward, assist law enforcement, testify in court, or even report crimes that they're victims of for fear that they may be the gang's next victim or at least retaliated on by that gang"']; *People v. Romero* (2006) 140 Cal.App.4th 15, 19 [relying on expert opinion that 'a shooting of any African-American men would elevate the status of the shooters and their entire [Latino] gang'].)" (*People v. Albillar* (2010) 51 Cal.4th 47, 63.)

IV. There Was No *Aranda-Bruton* Error

Elenes contends that his constitutional rights to confrontation and cross-examination were violated by the admission of codefendant Morales's extrajudicial statements that allegedly implicated him in the shooting of Garcia. (*Bruton*, *supra*, 391 U.S. 123; *Aranda*, *supra*, 63 Cal.2d 518.) We disagree. Even assuming error, the admission of Morales's statements was harmless beyond a reasonable doubt in light of the strong evidence of Elenes's guilt.

A. Factual Background

The prosecution sought to introduce against Morales a compact disc (CD) recording and transcript of several telephone calls that Morales had made from jail to his girlfriend, Priscilla DeAlba. (We will separately discuss the three-way telephone call between Morales, DeAlba, and Elenes, which was admitted against Elenes on the theory that it contained possible adoptive admissions.) Outside the jury's presence, Elenes moved to redact Morales's statements that if he (Morales) agreed to testify, he would be released from jail. Elenes argued that admitting these statements without confrontation and cross-examination would violate *Bruton* because they "obviously" implied that Morales "would . . . be able to offer information" concerning Elenes's guilt.

In opposition, the prosecutor argued that Morales's statements should not be redacted because they did not implicate Elenes: "There is never anything about what he's going to testify to, what he's going to say, what kind of information; and I differ with counsel with him saying 'I'm specifically going to testify against one person or another person.'" The prosecutor continued, "there is no specifics, only that 'I gotta testify. If I testify I can get out.' He's under some impression if he testifies they were going to give him a get out of jail free card."

The trial court denied the motion, stating: "This is not the type of statement that is within the meaning of *Bruton versus United States*, 391 U.S. 123, and I would not order redaction." The trial court advised the jury that the "C.D. and the transcript are going to be used against defendant Morales and not against defendant Elenes."

B. Analysis

"*Aranda* and *Bruton* stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120-1121.)" (*People v. Jennings* (2010) 50 Cal.4th 616, 652.) In determining whether the trial court's admission of a nontestifying codefendant's statement violated the right of confrontation, we apply the de novo standard of review. (*Lilly v. Virginia* (1999) 527 U.S. 116, 136-137.)

Aranda and *Bruton* apply only to a nontestifying codefendant's extrajudicial statements that inculpate the defendant. In *People Olguin* (1994) 31 Cal.App.4th 1355, for example, the court held that *Aranda* and *Bruton* were inapplicable because the statements "do not mention the crime for which Mora and Olguin were on trial [fn. omitted], and provide absolutely no information about the crime which could be imputed to Olguin. [Fn. omitted.] They do reflect gang morals and values, but no case has ever extended *Bruton-Aranda* so far as to hold that it applies to circumstantial evidence of gang activities, and we decline to do so here." (*Id.* at pp. 1374-1375.)

Here, the only statement by Morales that arguably inculpated Elenes in the shooting of Garcia was Morales's admission that he (Morales) was an accomplice in that crime. However, this statement was not facially incriminating of Elenes, but became so only when linked with other evidence, such as Elenes's (uncontested) self-incriminating statement to DeAlba that "I don't know why I did it." Because Morales's statements were not facially incriminating of Elenes, it is less likely that the jury ignored the limiting instruction that the statements should be considered only with regard to Morales. According to *Richardson v. Marsh* (1987) 481 U.S. 200, 208, "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget."

In light of the above, we conclude that because Morales's statements were not facially incriminating of Elenes, *Aranda* and *Bruton* do not apply. In light of our conclusion, we need not reach Elenes's contention that the trial court was required to instruct sua sponte that Morales's statements should be viewed with caution.

In any event, even assuming that the challenged statements were facially incriminating of Elenes, not all extrajudicial statements by a nontestifying codefendant that inculpate the other defendant are subject to redaction. As we stated in *People v. Greenberger* (1997) 58 Cal.App.4th 298, 332: "*Bruton* does not stand for the proposition that all statements of one defendant that implicate another may not be introduced against all defendants in a joint trial. The *Bruton* opinion itself stated that the offending hearsay statement in that case was clearly inadmissible against the nondeclarant under traditional rules of evidence, and that there was no recognized exception to the hearsay rule for its admission." We further noted that, "Since declarations against interest may be admitted

in evidence without doing violence to the confrontation clause, we see no reason why such declarations, when made by a codefendant, should not also be admissible. This is not to say that all statements which incriminate the declarant and implicate the codefendant are admissible. Any such statement must satisfy the statutory definition of a declaration against interest and likewise satisfy the constitutional requirement of trustworthiness. This necessarily requires a 'fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved; . . .' (*Williamson v. United States* [(1994)] 512 U.S. [594,] 604.) There is nothing in *Bruton* which prohibits introduction of such evidence." (*Greenberger, supra*, 58 Cal.App.4th at p. 332.)

In this case, Morales's statements met all of the constitutional requirements for their admission. Morales clearly incriminated himself by admitting, for example, that he was at Bobo's restaurant, that the police had found his gun, and that he was an accomplice to the murder on Telfair. No reasonable person in Morales's position would have made such statements unless he believed them to be true. (Evid. Code, § 1230.) His statements were also trustworthy in that they reflected his personal knowledge of the circumstances discussed and were made voluntarily to DeAlba, who was his confidant, companion, and the mother of his child. Although Elenes argues that Morales had a motive to lie about his involvement in order to comfort DeAlba, who was distraught over his incarceration, the record reflects that DeAlba was not comforted by Morales's statement that "[t]hey probably give them [accomplices] less years." DeAlba replied, "Years? That's what hurts. Years."

Because we find that Morales's statements qualified as declarations against interest and satisfied the constitutional standard of trustworthiness, we find no error in their admission. Finally, even if the statements should have been redacted, their admission was harmless beyond a reasonable doubt. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 652 [otherwise valid conviction should not be set aside for confrontation clause violation if the error was harmless beyond a reasonable doubt].) As we previously mentioned, the other evidence of Elenes's guilt included Elenes's self-incriminating

statements to DeAlba ("I don't know why I did it"), the videotape and eyewitness testimony that placed Elenes in the vicinity of the shooting, Dedios's testimony that Elenes had pointed at Garcia and said, "Let's go get that mother fucker," Barrera's testimony that Elenes was holding a gun shortly before the shooting, and Torres's pretrial photographic identification of Elenes as the shooter. In light of the strong and convincing evidence of Elenes's guilt, we are satisfied beyond a reasonable doubt that even without the disputed statements the jury would have reached the same result.

V. Morales's Statements Constituted Adoptive Admissions

We now address statements made by Morales during a three-way telephone call between Morales, DeAlba, and Elenes. Elenes contends the three-way call was erroneously admitted on the theory that it contained possible adoptive admissions.

A. Additional Facts

Morales, who was in jail, called DeAlba, who then called Elenes on a separate phone and placed the two phones next to each other in order for Elenes to hear Morales over the speaker phone. According to the transcript and CD of the three-way call, DeAlba at times served as a conduit in relaying statements from one defendant to the other. There were also "a couple of occasions" where Elenes's voice could be heard on the CD.

Elenes moved to exclude the three-way call under *Bruton.* The trial court denied the motion on the ground that a defendant's Sixth Amendment confrontation rights are not violated through the receipt of his own adoptive admissions. (Citing *People v. Jennings*, *supra*, 50 Cal.4th at pp. 661-662.)

Elenes renewed the objection and argued for the three-way call's exclusion or, alternatively, redaction of all but the actual adoptive admissions. Elenes expressed a desire to question DeAlba about the three-way call procedure and what she heard and communicated from one defendant to the other. The trial court indicated that Elenes

would be allowed to question DeAlba on what she heard and related between the defendants, but that the transcript "was self explanatory."

The prosecutor argued that the recording and transcript provided a sufficient foundation to infer that Elenes could hear what was being said and that the jury should decide whether the statements constituted adoptive admissions. Referring to DeAlba's role in the conversation, the prosecutor noted that "[s]he responds to what he said, and she also tells him exactly what Calixtro Morales is saying on her end that we can totally hear; and so I think the foundational establishment of the call being recorded in the jail cell and these two being the individuals talking and the identification of their []voices [serve] as foundation for the case, and the rest of it is circumstantial evidence."

At this point, the trial court stated: "I understand. Let me read this in a closer light; and, counsel, it's incumbent upon you, Mr. Schensul [Elenes's attorney], to remind me when the People proffer this evidence."

When the prosecution later proffered the evidence at trial, Elenes reminded the trial court of the "foundational issue" concerning "the People's ability to establish [Elenes's] ability to hear what Mr. Morales was saying." Elenes, however, did not renew his request to question DeAlba, who was now married to Morales, concerning the three-way call.

The trial court overruled the foundational objection based on its determination that a jury could reasonably ascertain from the recording and the transcript whether or not Elenes had heard and understood, either directly or through DeAlba, what Morales was saying. In light of this preliminary determination, the court admitted the three-way call and allowed the jury to decide whether or not Elenes's failure to deny Morales's accusatory statements constituted adoptive admissions.

The trial court instructed the jury with CALCRIM No. 357, which states: "If you conclude that someone made a statement outside of court that (accused the defendant of the crime/or tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The

defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

B. Adoptive Admissions Generally

The Supreme Court explained the law regarding adoptive admissions in *Jennings*, *supra*, 50 Cal.4th at page 661, which we quote at length:

"The law pertaining to adoptive admissions is well settled. 'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' (Evid. Code, § 1221.) As this court has explained, '[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' (*People v. Preston* (1973) 9 Cal.3d 308, 313-314 (*Preston*).)

"'"[A] typical example of an adoptive admission is the accusatory statement to a criminal defendant made by a person *other* than a police officer, and defendant's conduct of silence, or his words or equivocal and evasive replies in response. With knowledge of the accusation, the defendant's conduct of silence or his words in the nature of evasive or equivocal replies lead reasonably to the inference that he believes the accusatory statement to be true." [Citation.]' (*People v. Silva* (1988) 45 Cal.3d 604, 623-624 (*Silva*).) 'For the adoptive admission exception to apply, however, a direct accusation in so many words is not essential.' (*People v. Fauber* (1992) 2 Cal.4th 792, 852 (*Fauber*).)

‘“When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party’s reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.” [Citation.]’ ([*People v.*] *Riel* [(2000)] 22 Cal.4th [1153,] 1189.)

“‘Moreover, it is well settled that an adoptive admission can be admitted into evidence without violating the Sixth Amendment right to confrontation “on the ground that ‘once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule.’” [Citation.]’ (*People v. Cruz* (2008) 44 Cal.4th 636, 672.) ‘Being deemed the defendant’s own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant.’ (*Silva*, *supra*, 45 Cal.3d at p. 624.) Stated another way, when a defendant has adopted a statement as his own, ‘the defendant himself is, in effect, the declarant. The “witness” against the defendant is the defendant himself, not the actual declarant; there is no violation of the defendant’s right to confront the declarant because the defendant only has the right to confront “the witnesses against him.” [Citations.]’ (*U.S. v. Allen* (7th Cir. 1993) 10 F.3d 405, 413.)

“It follows that the admission of an out-of-court statement as the predicate for an adoptive admission does not violate the principles enunciated in *Crawford* [*v. Washington* (2004) 541 U.S. 36] or in *Aranda* and *Bruton.* (*People v. Roldan* (2005) 35 Cal.4th 646, 711, fn. 25 [‘admission of defendant’s adoptive admissions did not violate the confrontation clause as interpreted in *Crawford*’], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Combs* (2004) 34 Cal.4th 821, 841-843 . . . [no *Crawford* violation when incriminating statements made during joint interrogation were admitted as adoptive admissions]; *Preston*, *supra*, 9 Cal.3d at p. 315

[admission of evidence under the adoptive-admission exception to the hearsay rule does not violate the *Aranda* rule]; *People v. Osuna* (1969) 70 Cal.2d 759, 765 [there is no *Aranda-Bruton* error when conversation among codefendants was admitted under adoptive-admission rule].)"

C. Analysis

"To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. (*People v. Richards* (1976) 17 Cal.3d 614, 618.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

According to "*People v. Preston*[, *supra*,] 9 Cal.3d [at pages] 313-314: 'If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' (See also, *People v. Simmons* (1946) 28 Cal.2d 699, 712-713.)" (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1011.) "'For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential.' ([*Fauber*, *supra*,] 2 Cal.4th [at p.] 852.) 'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' (*Estate of Neilson* (1962) 57 Cal.2d 733, 746.)" (*People v. Riel*, *supra*, 22 Cal.4th at p. 1189.)

In this case, in addition to listening to the CD, the trial court carefully reviewed the transcript several times and determined that DeAlba's role in the three-way call was

self-explanatory and that the jury was capable of ascertaining from the transcript and CD whether Elenes had heard any accusatory statements and responded (or failed to respond) in a manner that constituted a tacit admission of such statements. We conclude that Elenes has failed to establish that the trial court abused its discretion in making this preliminary assessment of the evidence and allowing the jury to determine whether Morales's statements were accurately repeated by DeAlba and heard and understood by Elenes.

To the extent Elenes's contention is that he was denied the opportunity to question DeAlba about the mechanics of her role as a conduit during the three-way call, the record reflects that it was his obligation "to remind [the court of his request] when the People proffer this evidence." Given that Elenes did not renew his request to question DeAlba before the evidence was proffered at trial, the contention is forfeited.

Finally, we conclude that even if the statements should have been excluded because the evidence does not reasonably suggest that accusatory statements were made under circumstances affording a fair opportunity to deny the accusations, their admission was harmless beyond a reasonable doubt. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 652 [otherwise valid conviction should not be set aside for confrontation clause violation if the error was harmless beyond a reasonable doubt].) We previously set forth the compelling evidence of Elenes's guilt and we are satisfied beyond a reasonable doubt that even without the disputed statements the jury would have reached the same result.[4]

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[4] As a result of our conclusion that the challenged evidence was properly admitted, we reject Elenes's suggestion that the court erred by denying his severance motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.