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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.

EDWARD F. OSORIO,

Defendant and Appellant.

B280893

(Los Angeles County
Super. Ct. No. KA109521)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed as modified and remanded with directions.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Edward F. Osorio of the first degree murder of Matthew Martin and possession of a firearm by a felon. The jury also found true gang allegations as to both counts and firearm use allegations as to the murder count. After Osorio admitted prior convictions including a serious or violent felony conviction, the trial court sentenced him to state prison for a term of 80 years to life.

Osorio appeals, claiming: (1) the trial court erred in admitting his codefendant's hearsay statements to a confidential informant under the statements against penal interest exception (Pen. Code, § 1230)¹; (2) the recorded statements were inaudible and did not meet corroboration requirements of section 1111.5; (3) the trial court should not have admitted evidence of two murders charged against Osorio's codefendant only; (4) the court should have granted his motion for a mistrial; (5) Mexican Mafia evidence should have been excluded as highly prejudicial and irrelevant; (6) a detective's testimony should have been excluded as speculative; (7) neither count is supported by substantial evidence; (8) instead of striking the firearm enhancements under subdivisions (b) and (c) of section 12022.53, the trial court should have imposed and stayed sentence based on these enhancements in sentencing Osorio under subdivision (d); and (9) the abstract of judgment should be corrected to reflect a parole revocation fine.

In supplemental briefing, Osorio contends and the People agree Osorio should be given a new sentencing hearing for the trial court to exercise its discretion whether to strike the firearm

¹ All undesignated statutory references are to the Penal Code unless otherwise indicated.

enhancement pursuant to the recent amendment of section 12022.53, subdivision (h).

We affirm the judgment of conviction but remand for the trial court's exercise of discretion under section 12022.53, subdivision (h). We also order that Osorio's abstract of judgment be amended to reflect imposition of a parole revocation fine under section 1202.45.

FACTUAL AND PROCEDURAL SUMMARY

1. Prosecution Evidence

On October 23, 2013, Covan Brady was killed at a donut shop on Holt Avenue in Pomona. Pomona Police Department detectives obtained security camera video, which had recorded a man in shorts shooting Brady. The hood of a sweatshirt covered the shooter's face.

Matthew Martin worked as an informant for Pomona Detective Greg Freeman.² Martin associated with the Pomona 12th Street gang (12th Street) and provided Freeman with information about 12th Street's activities.³ Martin told Freeman that 12th Street gang member Israel Magana had committed the donut shop murder.

On November 2, 2013, at 2:43 a.m., a 9-1-1 caller reported gunshots in the carport area behind the apartment complex on Kingsley Avenue in Pomona where Selena G. lived. She knew

² According to telephone records, Martin and Freeman communicated 113 times through text messages and telephone calls.

³ In 2013, there was a spike in gang-related violence in Pomona, including an unusually high number of murders (29) attributed to shootings between Black and Hispanic gangs.

Martin by his nickname, which was “Yellow.” He frequently visited the apartment next to hers and often parked in the carport behind the complex.

The responding police officer found Martin in the front passenger seat of his car, with multiple gunshot wounds to his face and head and his cell phone in his lap. Martin had no pulse. The driver’s side window and all the car doors were closed. The front passenger side window was rolled down three or four inches, and the rear passenger side window was shattered. There was no damage to the driver’s side door, but there were three bullet holes on the inside of the rear passenger side door. A crime scene investigator determined the trajectory of the bullets that struck Martin. Because the bullets traveled from the front to the rear of the car, he concluded the driver’s side door had been open, with the shooter inside or just outside the driver’s door. The investigator photographed and made castings of shoe impressions left in the wet soil near the car.

An autopsy confirmed a total of 10 gunshot wounds to Martin’s head. One gunshot wound to his left cheek showed stippling from gunpowder burns, indicating that the gun barrel had been held against or close to Martin’s face when the shot was fired. The absence of stippling with the other wounds suggested the gun barrel was held more than 24 to 36 inches away. Seven of the wounds were fatal.

The morning after Martin’s murder, police executed a search warrant at Magana’s residence and recovered shorts matching those worn by the donut shop shooter. The shorts tested positive for gunshot residue.

On January 10, 2014, about two months after Martin’s shooting, Detective Freeman was conducting surveillance to

locate Magana when he saw Magana, Osorio, and Natividad Gonzales (known as “Junior” or “JR”) get into a car, with Gonzales driving. Osorio’s son was also in the car. The detective stopped the car and arrested Magana for the donut shop murder.

Two days later (on January 12, 2014), Magana was placed in a cell with Brandon Cerda. Cerda worked as an informant for law enforcement agencies and worked with Los Angeles County Sheriff’s Department deputies while in jail. Cerda had been convicted of various theft-related crimes in the past and had been in state prison before. After serving his sentence on a prior case, he started working with the Los Angeles Sheriff’s Department on cases against the Mexican Mafia. Cerda was paid more than \$50,000 for his assistance, and he also received \$40,000 from a federal agent for relocation expenses after working on this case involving Osorio and Magana.

Cerda was back in custody in 2014 following convictions for receiving stolen property and taking a vehicle without the owner’s consent. He continued to work as an informant while incarcerated by recording conversations with inmates placed in his cell. There was no agreement for Cerda to be paid while incarcerated. He did not believe it mattered whether he obtained confessions—only that he was helpful in a number of operations. He hoped law enforcement would speak on his behalf and that he would receive leniency.

At first, when a new inmate was placed with Cerda, he would play cards and eat with the inmate and “just sit and bullshit about why we’re in jail” to make the inmate feel comfortable. Then detectives would remove the inmate to question him. Cerda would be given a recording device during this time. When the inmate returned, Cerda would record their

conversation.⁴ Cerda would build a rapport with a new inmate before receiving the recording device because it would be dangerous if the inmate learned he was recording their conversation. Out of 11 inmates placed with Cerda while he wore a recording device, nine were forthcoming with information.

Before Magana was placed with Cerda, Cerda was told only that Magana was being investigated for murder; Cerda did not know anything else about the case. The deputy (Noah Kirk) who placed Cerda and Magana together knew only that Magana was being investigated for murder and did not tell Cerda what questions he should ask.⁵

For Cerda's safety, he was not given a recording device when Magana was placed with him, but he developed a rapport with Magana right away. Magana told Cerda he was a 12th Street gang member known as "Cheetah." Cerda knew two 12th Street gang members and talked with Magana about them. Magana said his two closest friends within 12th Street were "Junior" (or "J.R.") and "Speezo." As they played cards and ate together, Magana told Cerda about several murders he had committed, describing at least three in detail.

Magana identified one of the victims as "Yellow." Magana told Cerda that Yellow was a friend of theirs, but they killed him

⁴ Later Cerda would be removed from the cell to turn over the recording device and tell detectives what the inmate had told him.

⁵ On December 5, 2013, another inmate named Salcedo and known as "Risky" had been placed with Cerda. On his return to the cell after speaking with detectives, Salcedo talked about "Yellow's" murder, telling Cerda it "wasn't him." Salcedo said it was his "homeboy Cheetah."

because he was an informant. Magana said he had gotten a text message sent from Yellow's phone that said something like, "They know you're coming. Don't go. They got rid of it already." Magana interpreted it as a message meant for a detective. Magana said he and Osorio arranged to meet Martin in his car in the alley. Magana said he and Osorio walked up to Martin's car together. Magana knocked on the car window and opened the door. Osorio shot Martin.

Cerda asked Magana about evidence they might have left at the scene. Regarding fingerprints and DNA, Magana said he had pulled his sleeve over his hand when he opened the car door and used his knuckle to knock on the window, but told Cerda they were worried about the possibility of a shoe print or a sack of "dope" they might have dropped. Other than that, they were the only three people who knew what happened.

Magana also told Cerda that he (Magana) had committed another murder with Junior at a donut shop. Magana shot the victim, but he ran so Magana chased him and shot him a "couple more times." Magana was wearing a hoodie but worried that the security camera may have recorded his tattoos. Magana said that earlier that same night, when they were a few blocks away from the donut shop, they saw two African Americans and shot them too. Magana discussed all three of these murders with Cerda that night, before Cerda received a recording device.

The next morning (January 13, 2014), Cerda received the recording device while Magana spoke with detectives, and when Magana returned, he and Cerda continued to discuss these crimes.

Osorio was arrested on February 7, 2014. On February 9, 2014, Osorio was placed in a cell with Cerda, and their initial

interaction was friendly. Cerda testified he did not know of Osorio's connection to Magana until Osorio told him he was "Speezo" and said where he was from. When Osorio was returned to the cell after talking to detectives, he told Cerda he did not know what detectives were talking about; they must have been talking about someone else. Thinking he had nothing to lose, Cerda told Osorio he knew Osorio was lying to him. "Your homeboy Cheetah already told me that you were there and that you guys did this." He asked Osorio, "Why you lying to me[? A]re you a cop?" Osorio turned pale and was saying, "Well, I don't know. I don't know." Cerda was removed from Osorio's cell.

During this time, both Magana and Osorio made a number of telephone calls from jail. A recording at the start of every call warns that calls are recorded. As a result, inmates often speak in code to communicate. For example, Osorio sometimes referred to Magana as either his son, "Coctus," "Stutterbox," or "Sally's sister's boyfriend." He referred to a high-ranking 12th Street gang member named Pedro Gonzalez with the moniker "Jecko" or "Jeckel" or "Oowie Oowie Oowie."

On February 8, 2014, before being placed with Cerda, Osorio called his wife Esther at 7:59 p.m. He told her to contact Junior and to have him get a message to "Coctus" (referring to Magana) to "make sure the fool's alright" and "to see what's going on with him." He told Esther he had "keep-away" status in the jail and believed they were keeping him away from Magana.

At 10:26 p.m. Magana called his girlfriend Patricia Mascarenas who told him Junior had called and asked her to set up a three-way call with him.

At 10:43 p.m., Osorio called his wife again and asked, “Did you do what I asked? Did you talk to Junior?” She said she had and told him Magana was in the Men’s Central Jail.

At 10:57 p.m., Magana called his girlfriend again. Mascarenas told Magana that Osorio was in jail. Magana got upset and asked, “Well, which one did they get him for, the first one or the second?” She said she did not know and told him, “They haven’t forgot about you in here. You’ll be okay. They haven’t forgot about you.” Magana said he wanted to contact Junior.

On February 9, 2014, at 1:32 p.m., Osorio called Junior, stressing that he wanted Junior to call Magana and tell him that Osorio was not “tripping” and no one “forgot” about him.

Later that day, detectives accused Osorio of murdering Martin.

At 7:32 p.m., Osorio called Junior again and asked him several times to contact Magana. Osorio told Junior to ask Magana, “What the fuck you been up to[,] man?” and “tell that mother fucker what’s up.”

Osorio and Junior spoke again (at 8:28 p.m.) after Cerda was moved from Osorio’s cell. Osorio told Junior that Cerda knew Osorio’s name and “a lot of shit.”

Osorio was released from custody on February 11, 2014.

That day, Cerda was taken to court where he “pled open” in his pending case. The judge told him he was “looking at 17 years, 4 months if you plead guilty.” A few months later, Cerda was placed on probation for five years, with a six-year suspended state prison sentence. For his work in this case, law enforcement officers wrote letters on his behalf. He did not know they had done so until after he made the jailhouse recordings. He received

nothing more for this testimony. He knew that participating in such operations was dangerous. Because he had worked against the Mexican Mafia, he knew it would be a death sentence if he had to go back to prison.

On February 12, 2014, Magana called Junior, who put Osorio on the phone. Osorio told Magana, "These niggas can't hold me back." Magana said he was "spooked." Osorio told Magana, "They're making up stories," and "they telling so much shit they had me convinced." Osorio told Magana he (Osorio) and "Bandit" (Cerde) had been placed in a cell together. Magana responded, "Oh shit." Osorio told Magana that Cerde had told Osorio that Magana had made statements about Osorio. Magana said he was trying to have Cerde "help me out." Osorio then repeatedly told Magana he was "tripping," and Magana said, "Yeah never again."

Osorio then told Magana that Cerde had been lying to him and that he believed Cerde was a "cop." He warned Magana he had "better watch your characters." He told Magana that Detective Freeman "was talking about that . . . we would get hit with the death penalty and that you [Magana] were going to fucking flip and watch, he was telling me watch." Osorio said he told the detective that he knew Magana "didn't fucking do no stupid shit like you're saying."

Osorio told Magana he did not know what he had been arrested for until he met with the detective in jail and said the detective talked about "adding more charges." Magana responded, "Oh man you should of like nigga hit me with everything nigga, whatever you want to hit me with, man." Osorio told Magana to keep his head up and "don't trip."

In another call, Magana told Junior, “Hey, I’ll take it. I’ll take it.” Detective Freeman testified this meant Magana was willing to “take the fall” for Osorio because he was upset about what happened.

On February 25, 2014, a search warrant was served at Osorio’s Fontana residence. Police seized clothing and 44 pairs of Nike sneakers. Osorio said, “Those could be anybody’s prints in the mu--” before stopping himself. The two detectives present had not discussed shoeprints or the condition of the ground at the scene of Martin’s murder with Osorio. When Detective Freeman accused Osorio of killing Yellow, Osorio did not respond. Osorio approached Detective Iwig and told him the police had taken two pairs of his son’s shoes. He said he wanted them returned. The detective said he would process them as soon as possible and return them, but as a “favor,” he asked Osorio not to come back to Pomona and kill anyone else. Osorio said, “I won’t.”

Forensic results identified Magana as a possible contributor of DNA on the interior door handle of Martin’s car; Osorio was excluded.

A Los Angeles Sheriff’s Department criminalist (Kristina Fritz) testified that some of Osorio’s shoes shared a “class characteristic” with impressions left in the wet soil, which meant his shoes could not be excluded, although other similar shoes could also be included as possible sources. Osorio’s computer reflected multiple searches on February 4 through February 6, 2014, regarding shootings in Pomona and Air Jordan shoes.

The Pomona police had distributed a press release but did not provide details of Martin’s murder, other than stating that a man had been shot in the torso.

At Osorio's preliminary hearing, Detective Iwig acknowledged he had mistakenly identified the telephone number that had called Osorio's phone at 4:00 a.m. after Martin's murder as Magana's. Magana's cell phone number was (909) 568-3088, but the number placing the call to Osorio that night was (909) 568-8088. The number was traced to a "burner" phone bought by "JoJo" using a fake address. Magana's cousin's moniker was JoJo. He was in custody at the time of the murder.

Detective Iwig sent the recording of Cerda's conversation with Magana to the FBI, and the FBI was able to buffer some of the background noise, but unlike television, not all of the extraneous noise disappeared. A portion of the recording of Magana's conversation with Cerda was played for the jury, with a 92-page transcript provided. The trial court instructed the jury that the transcript was merely an effort to report what is heard and that the jury was to be governed by the actual recording itself.

The jury also watched the video recording of the donut shop shooting. The trial court instructed the jury that the video was being offered for the limited purpose of deciding whether it corroborated statements attributed to Magana.

In December 2015, two deputies assigned to investigate gang activity within the jail (Anthony Miller and Devon Self) searched Osorio's cell, where they found two pages of "roll calls" on a shelf behind Osorio's bed. A roll call list includes each Hispanic inmate's booking number, last name, moniker, gang name, court location, next court date, and position within the Mexican Mafia hierarchy.

Miller explained that the bottom level of the hierarchy is a "resident," meaning a Hispanic male not affiliated within a gang

or living in a gang area. A subsection of this category is a “Pisa,” and “illegal alien,” usually Mexican, who speaks only Spanish and has no gang ties. The next level is “Southsiders” (“SS” on the roll call list). Southsiders are criminal street gang members who have never been to state prison. They actively work for the Mexican Mafia by transporting “kites” (notes), drugs, weapons, and other contraband. Next are “Surenos,” comprised of Southsiders who have been in prison, assaulted another inmate, and studied Aztec and Mayan culture. At the top level are the actual members of the Mexican Mafia.

The roll call list found in Osorio’s cell was a secondary list prepared by or at the direction of the “shot caller,” who would collect the information from other inmates two or three times a week. Shot callers are trusted inmates within the jail hierarchy. They are active street gang members with strong reputations for “putting in work,” meaning committing crimes on behalf of the gang. Shot callers are usually denominated as Surenos. A Southsider would only be a shot caller if no shot caller were present. Osorio’s younger cellmate (Jacob Harrison, known as “Sniper”) was identified as a Southsider on the list. Osorio’s moniker was listed as “Speezo,” his gang was listed as Pomona 12th Street Sharkies and his status within the Mexican Mafia hierarchy was listed as Sureno. It is important that inmates accurately report their information. The roll call list is passed between shot callers within the jail until it is sent to the inmate “running the jail” as designated by the Mexican Mafia.

Another Pomona police detective (Andrew Bebon) testified as a gang expert. He identified the primary Hispanic gangs in Pomona as 12th Street, Cherryville Pomona, Happytown Pomona, and Westside Pomona and explained that there are also

many Black Blood- and Crip-affiliated gangs. Many gangs no longer claim a specific territory.

Bebon had known Osorio since 2008. Osorio had gang tattoos and was seen in a photograph with Magana, Junior, and Pedro Gonzalez in which Magana and Gonzalez made 12th Street gang signs. According to field identification (“F.I.”) cards from 2008 to 2010, Osorio denied he was a 12th Street gang member, but he associated with gang members. Bebon opined Osorio was a 12th Street gang member based on his personal knowledge of Osorio, Osorio’s gang tattoos, gang-related and social relationships, and statements to other gang members in jailhouse phone calls, as well as statements on the roll call sheet and to his cellmate. He explained that a “snitch” is someone who gives information to law enforcement, with being killed or severely beaten a likely consequence if gang members find that someone is a snitch. Presented with a hypothetical based on the facts of this case, Bebon testified that Martin’s murder was a gang-related crime committed for the benefit of, at the direction of, or in association with the 12th Street gang.

2. Defense Evidence

Osorio testified on his own behalf. He denied shooting Martin and said his recorded telephone calls related to his concern that Magana might commit suicide. His coded speech was “just the way I talk.” He denied he had started to say “mud” during the search of his home, and was instead calling one of the detectives a “motherfucker.”

Osorio said he introduced himself to “Bandit” (Cerde) as “Speezo” “because you can’t lie when you’re in the County jail. You will get assaulted if you try to make up a name that is not familiar to what you go about—what gang you’re from.” He

testified he had been jumped into 12th Street 15 or 20 years earlier. Magana’s “whole family” belonged to the gang, and Junior was also a member.

Osorio testified that Sureno is “somebody that has been to prison and has done some type of—anything for the Mexican Mafia or a prison gang or anything of prison.” Writing as he did on the roll call that he was from “Sur” “means that that’s what you, like, basically, have been around and that’s what you support.” He “put it to stand for Sureno.”

Osorio also testified that he could be killed or assaulted if the transcript got out with him talking about gang members and their activities. In gang culture, if someone “snitches” and tells what other gang members are doing, that will get them killed or assaulted.

DISCUSSION

1. *Magana’s Statements to the Confidential Informant*

“Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.” (Evid. Code, § 1230.) We review a trial court’s decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion.⁶ (*People v. Grimes* (2016) 1 Cal.5th 698, 711–712 (*Grimes*).)

⁶ Citing *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174–175 (*Cervantes*), Osorio asserts the correct standard is de novo review, but his reliance is misplaced. (*People v. Cortez*

Magana was unavailable as a witness at trial. At a pretrial hearing, Magana confirmed he was charged with the same crime charged against Osorio and then “pled the 5th” to all other questions he was asked. The trial court found Magana had invoked his privilege against self-incrimination to all questions relating to the subject matter of the proceeding.

To demonstrate that an out-of-court declaration is admissible as a declaration against interest, “[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant’s penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.”⁷ (*Grimes, supra*, 1 Cal.5th at p. 711.) “In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.” (*Ibid.*)

Before trial, defense counsel moved to exclude Magana’s statements to the confidential informant on January 13, 2014 as unreliable hearsay because Cerda received payment from law enforcement and most of the recording was inaudible.

After listening to the recording of Magana’s conversation with Cerda, the trial court found that Magana was in a cell with

(2016) 63 Cal.4th 101, 125, fn. 5 [rejecting reliance on *Cervantes, supra*, 118 Cal.App.4th 162, 174–175, as requiring de novo review because authorities cited in *Cervantes* involve separate question whether admission violates confrontation clause; abuse of discretion standard applies].)

an individual he felt at ease to speak with. Further, the statements attributed to Magana in Cerda's preliminary hearing testimony and in the transcription of the recording were declarations against Magana's penal interest in that they implicated him in Martin's murder as well as at least two other murders he described in detail. Magana also admitted committing five other murders for a total of eight in a six-month period. Although Magana indicated he had not fired the weapon resulting in Martin's death, he clearly indicated that he was involved in the prearranged meeting with Martin, and that he opened the door to the car where Martin was seated to allow Osorio to shoot and kill Martin. Not only were Magana's statements recorded, but Cerda testified to his recollection of the conversation at the preliminary hearing. Based on this evidence, the trial court found sufficient indicia of trustworthiness to admit the testimony.

Osorio contends Magana's statements to the confidential informant were untrustworthy because the recording of the conversation between Magana and Cerda was "largely" inaudible, and the indicia of trustworthiness present in *Cervantes, supra*, 118 Cal.App.4th 162 are absent in this case.⁸ We disagree.

First, as Osorio concedes, a partially unintelligible recording is admissible unless the audible portions are so incomplete that the recording's relevance is destroyed.⁹ (*People v.*

⁸ Osorio concedes Magana's statements to Cerda are declarations against penal interest because he implicated himself as an accomplice in Martin's murder.

⁹ The trial court instructed the jury that the recording was the evidence while the transcript was only an aid to assist jurors in following along as they listened.

Polk (1996) 47 Cal.App.4th 944, 952.) We have listened to the recordings played for the jury at trial. While Magana is sometimes difficult to hear over the considerable background noise in the jail, based on the audible portions of the recording, Magana appears to be very comfortable with Cerda and speaks freely with him as they play cards, eat, discuss Magana's crimes, consider what evidence the police might have, and assess how Magana should proceed.

The recorded conversation begins with Cerda asking, "What's up fool?" Magana answers, "They're trying to get me for another one, dog." He tells Cerda, "It's some fool I know, dog. It's stupid." "It was fucking Yellow." When Cerda asked what kind of gun was used, Magana tells Cerda he does not know. "I didn't do it." He tells Cerda the shooting occurred about "two weeks" earlier, and the "homie that did it" is "out there." When Cerda mentions Yellow again, Magana says, "He had it coming. He's a snitch." Magana clearly identifies the shooter as "Speezo." Cerda twice repeats back "Speigel" until Magana raises his voice to correct him. When Cerda asks, "How many was there[?]" Magana tells him "Three" and refers to "Junior" several times.

Magana told Cerda, "I knew he'd be there [in the alley] before we parked." "We asked him to meet us." They parked and then "walked up" on Martin.

Cerda asks Magana, "Hey fool, if that fool snitched on you, why'd your homeboy pop him?" Magana answers, "He was mad." Cerda tells Magana, "You have to lay out like . . . what you know and what you think they might know." They went on to discuss the particular details of Martin's murder as well as the donut shop murder and another shooting that same day.

At one point, Magana complains: “I think they just go off what the fuck it’s me, you know what I’m saying? Every time something happens my name pops up. Every time if it’s me or not me. You know what I’m saying? Fucking every time dog. It just never fails.” Cerda responded, “You say you had eight last year so, they’d probably be after you, you know what I mean? That’s a lot of murders, dude.” Magana agrees, “Yeah,” telling Cerda, “I was young and in business.” “Putting in work,” Cerda agrees. Cerda’s trial testimony was consistent with the audible portions of the recording.

The circumstances are similar to the facts presented in *People v. Arauz* (2012) 210 Cal.App.4th 1394 (*Arauz*). In *Arauz* the defendants’ accomplice believed he was speaking with a fellow inmate who was “running court” for the Mexican Mafia, but the arrangement was a ruse. The accomplice was speaking with a paid confidential informant who recorded their conversation. The accomplice told the informant that he had driven the defendants to the location where the defendants then shot two victims. He was candid about his role in the shooting and bragged it was a “legit shooting.” (*Id.* at p. 1401.) The *Arauz* court found the statement ““so far contrary to [the accomplice’s] interests ‘that a reasonable man in his position would not have [said it] unless he believed it to be true.’” [Citations.]’ [Citation.]” (*Ibid.*, quoting *People v. Brown* (2003) 31 Cal.4th 518, 536.)

The accomplice’s “facially incriminating comments [implicating himself and identifying [the defendants] by their gang monikers] were in no way exculpatory’ [Citation.]” (*Arauz, supra*, 210 Cal.App.4th at p. 1401, quoting *People v. Samuels* (2005) 36 Cal.4th 96, 120 (*Samuels*).) “Although the

conversation was a question and answer session, [the accomplice's] statements were 'inextricably tied to and part of a specific statement against penal interest. [Citation.]' [Citation.]" (*Arauz, supra*, 210 Cal.App.4th at p. 1401, quoting *Samuels, supra*, 36 Cal.4th at p. 121.) "Such specificity, including naming both [defendants] as the actual shooters, show 'trustworthiness.'" (*Arauz, supra*, 210 Cal.App.4th at p. 1401.)

Similarly, while Magana identified Osorio ("Speezo") as the one who had actually fired the gun, Magana implicated himself in Martin's murder as well by specifying his own role in arranging to meet with Martin, walking up together with his fellow gang members, and then knocking on the window and opening the car door so that Osorio could shoot and kill Martin for being a "snitch." (See *People v. Samuels, supra*, 36 Cal.4th at p. 121 [statement volunteered to acquaintance that defendant had paid declarant to kill victim was specifically dis-serving to declarant's interest in that it intimated he had participated in contract killing and conspiracy to commit murder].) The context in which Magana made his statements to Cerda does not suggest he was trying to improve his situation with police. As Magana confirmed when he later spoke with Osorio in a recorded call from jail, he spoke freely with Cerda because he believed Cerda was helping him plan his defense and was therefore motivated to tell the truth. (*Grimes, supra*, 1 Cal.5th at p. 717 ["context matters"].) On this record, the trial court did not abuse its discretion in admitting evidence of Magana's statements to Cerda as declarations against penal interest under Evidence Code section 1230.

Osorio asserts that a portion of the recorded statement was misleading to jurors because they were told Osorio was arrested

on February 7, 2014 and then released, but the recorded conversation between Magana and Cerda took place on January 13, 2014, and Cerda asks Magana, “Oh they already let him go?” The ambiguity Osorio alleges does not automatically render Magana’s statement inadmissible. (See *People v. Cortez, supra*, 63 Cal.4th at p. 125 [ambiguity defendant alleges regarding declarant’s meaning does not automatically render exception for statements against penal interest inapplicable or establish abuse of discretion in admitting statement].) Moreover, consistent with the date of the earlier statement, the jury heard testimony that Osorio was with Magana when Detective Freeman stopped the car, but only Magana was arrested that day (January 10, 2014), so “they . . . let [Osorio] go” at that time.

Osorio asserts that Magana obviously had a motive to transfer blame for Martin’s murder to avoid facing the death penalty, but the Supreme Court in *Grimes* rejected “a rigid or hypertechnical application of [a] rule that would in all cases require exclusion of even those portions of a confession that are inextricably intertwined with the declarant’s admission of criminal liability” (*Grimes, supra*, 1 Cal.5th at p. 716; see also *Samuels, supra*, 36 Cal.5th at pp. 120–121 “[t]he cases . . . make it clear that the fact a hearsay statement portrays the declarant as a more minimal participant in a crime by itself does not require exclusion or end our analysis”; “[o]nly where there is both blame shifting by the declarant and *other* circumstances suggest some improper motive for the blame shifting have courts found admission of a hearsay statement error”).

Osorio contends the only corroboration for the claim that Magana did not shoot Martin was Cerda’s own testimony—not the recording—because Cerda testified that Magana was not loud

enough to hear and Cerda therefore kept repeating what he thought Magana had said. Again, the audible portions of the recording confirm that Magana repeatedly agreed that Cerda had understood correctly when he repeated Magana's own words back to him. Several of his statements are also audible on the recording.

Osorio says Cerda's reliability was undermined by his claim that Magana and Osorio worried about footprints left at the scene. Even if that reference is not found in the recording, however, one of the detectives testified that Osorio expressed such a concern to him, thus corroborating this testimony.

Osorio also contends Cerda was undercut by his testimony that Magana was concerned about a bag of coke he might have dropped at the scene because there is no mention of it in the transcript or recording. He is mistaken. When Cerda prompted Magana to consider whether he could have dropped anything at the scene of Martin's murder, Magana told Cerda that he had "like a whole sandwich bag of coke" but did not know where it ended up by the end of the night. Magana said that it could have been there, but he doubted it.

2. *Corroboration of the In-Custody Informant's Testimony*

Subdivision (a) of section 1111.5 states: "A jury . . . may not convict a defendant . . . based on the uncorroborated testimony of an in-custody informant. The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense . . . to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense . . ."

The trial court instructed the jury with CALCRIM No. 336 as follows: "View the testimony of an in-custody informant

against the defendant with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

“You may use the testimony of an in-custody informant only if:

“1. The testimony is supported by other evidence that you believe;

“2. That supporting evidence is independent of the testimony;

“AND

“3. That supporting evidence connects the defendant to the commission of the crimes. The supporting evidence is not sufficient if it merely shows that the charged crime was committed.

“Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact mentioned by the accomplice in the statement or about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

“A percipient witness is someone who personally perceived the matter that he or she testified about.

“Brandon Cerda is an in-custody informant.

“The Los Angeles County Jail is a correctional institution.”

As summarized above, the recording of Magana’s actual conversation with Cerda constitutes independent evidence corroborating Cerda’s testimony about the conversation.¹⁰ In addition, Osorio’s telephone calls and attempts to have others communicate with Magana and Osorio’s statement about footprints in the “mu—” constitute corroboration. We find no error.

3. *The Two Murders Charged Against Magana Only*

We review the trial court’s rulings on the admissibility of evidence, including those turning on the relevance or probative value of evidence, for abuse of discretion. (*People v. Lee* (2011) 51 Cal.4th 620, 643.)

Before trial, defense counsel objected to any reference to murders charged against Magana that were not charged against Osorio.¹¹ The prosecutor said he had no evidence Osorio was involved in either of the two offenses and did not believe Osorio was involved in them, but he argued that evidence of the other

¹⁰ Osorio’s reliance on Detective Iwig’s testimony that it was “fair” to describe much of the recording as inaudible is misplaced because Osorio cites testimony about the recording before the FBI enhanced it to minimize background noise.

¹¹ According to the record, the victim in the donut shop murder was Covan Bradley. In the information, the two crimes charged against Magana but not Osorio involved two victims other than Bradley. Magana was charged with the murder of Charles Cooper (§ 187, subd. (a)) and the attempted murder of Robert Montgomery (§§ 187, subd. (a) & 664) on October 22, 2013. Magana told Cerda he had shot two African American men earlier on the day of the donut shop murder. The donut shot murder occurred after midnight on October 23, 2013.

murders was relevant to Magana's credibility. The trial court concluded that the two other murders described in the jailhouse recordings and any supplemental testimony in this regard were relevant to the corroboration of what Magana had said about Martin's murder as well as Cerda's testimony to what Magana had said during the recorded conversation. The court offered to give a limiting instruction on the use of such evidence.

Osorio contends the trial court erred because the details of Magana's other murders were irrelevant to establishing the identity of Martin's killer, and even if relevant, such evidence was inadmissible to show Osorio's propensity to commit crimes (Evid. Code, § 1101, subd. (a)), and its probative value was substantially outweighed by the probability admission would create a substantial danger of undue prejudice (*id.*, § 352). Osorio failed to raise Evidence Code sections 352 and 1101 as grounds for objection to Magana's statements.¹² Absent a timely and specific objection to the admission of evidence, an appellant forfeits the issue on appeal. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 21; *People v. Abel* (2012) 53 Cal.4th 891, 928–929 [defendant forfeited claim that admission of evidence violated Evid. Code, § 1101, subd. (a) by failing to raise it at trial].)

Leaving to one side the issue of forfeiture, Magana's statements to Cerda regarding his involvement in these crimes were admissible declarations against penal interest under Evidence Code section 1230, and the details of the crimes other than Martin's murder were relevant to demonstrate the

¹² At defense counsel's request, the trial court instructed the jury that the video recording of the donut shop murder was offered for the limited purpose of deciding whether it corroborated the statements attributed to Magana.

trustworthiness of Magana's statements and to provide corroboration for Cerda's testimony. The trial court did not abuse its discretion.

4. *Motion for Mistrial*

We review the denial of a motion for mistrial under the abuse of discretion standard. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.)

“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.” (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1428.) “Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured. [Citations.]’ [Citation.]” (*Id.* at p. 1429.)

Before trial, in the context of discussing the scope of expert testimony on the gang allegations, defense counsel said that in his experience, Detective Freeman had a tendency to volunteer information in an attempt to prejudice defendants in giving his opinion as to the gang enhancement. As we have discussed, the prosecutor told the court he had no evidence that Osorio had been involved in the murders charged against Magana only, and he believed Osorio was not involved in those crimes.

In rebuttal, the prosecutor questioned Detective Freeman about Osorio's jailhouse phone calls and elicited testimony that no one with whom Osorio had spoken asked him why he had been arrested, supporting the inference that everyone already knew the reason. Freeman confirmed that in Osorio's first call to his wife from the Los Angeles County Jail, she never asked why he

was in custody, and in all the calls he reviewed, no one had ever asked this question. He said the only reference to the reason Osorio was in custody occurred during a conversation between Magana and his girlfriend. When she told Magana that Osorio was in jail, he became upset and said, "Well, which one do they have him for, the first or the second?"

On cross-examination, defense counsel asked, "And the statement that you just made, that Mr. Magana said 'Is it the first or second one . . . ,' Mr. Osorio is not a suspect in the donut shop murder, is he?"

Defense counsel continued: "Well, let me rephrase that. I've got to be careful what I ask you. He is not being charged with the crime for the donut shot murder, correct?" The detective answered, "Not yet."

Defense counsel: "Move to strike, Your Honor."

The court: "That's no?"

Detective Freeman: "Yes, sir. No."

The court: "Jury's admonished to disregard the previous answer to that question."

Defense counsel: "He's not on that video, is he?"

Detective Freeman: "He's not on the video."

Defense counsel: "And you have not produced any document saying that he was there or assisted in that killing; is that right?"

Detective Freeman: "Not yet."

Defense counsel: "Move to strike, Your Honor. Does that mean 'no'?"

The court: "Disregard the last question and answer. Ask your question again."

Detective Freeman: "That is correct."

Defense counsel then asked to approach the bench.

Returning to the record outside the jury's presence, defense counsel moved for a mistrial, arguing the detective's testimony was an inappropriate attempt to prejudice the jury as was his "habit and custom." In response to the trial court's questioning, the detective explained that he believed Osorio may have been the driver in the donut shop murder so he was a suspect in that crime and in several other crimes. The trial court determined the detective had not acted in bad faith and denied the motion for mistrial.¹³

Osorio contends the trial court could not have admitted the uncharged crimes evidence against him under Evidence Code section 1101. While the trial court struck the testimony and admonished the jury, Osorio contends the statements were too prejudicial to cure. We disagree.

Earlier in the prosecution's presentation of evidence, without objection, the recorded telephone calls to and from the jail were played for the jury. In other words, the jury already knew that when Magana's girlfriend told him Osorio had been incarcerated, Magana responded by asking, "Well, which one did they get him for, the first or the second?" Aware of these circumstances, defense counsel continued to pursue this line of questioning after the trial court struck Detective Freeman's response and directed the jury to disregard the first time he answered, "Not yet." (See *People v. Reyes* (1976) 62 Cal.App.3d 53, 65 [because counsel elicited predictable testimony in response

¹³ The court noted that it had sealed and returned information the detective had provided after initialing each page and directing him to retain the documents until the court authorized him to destroy them.

to his own question, any error was invited, forfeiting the issue on appeal].)

In any event, the trial court repeated its admonition the second time, and no more was said on the subject. Nothing in the record suggests this is an exceptional case in which the trial court's response was insufficient. Moreover, the court instructed the jury at the start and again at the end of trial that it must disregard any testimony that was stricken and not consider it for any purpose. (CALCRIM Nos. 104, 222.) We presume that "jurors comprehend and accept the court's directions." (*People v. Homick* (2012) 55 Cal.4th 816, 867.)

5. *The Mexican Mafia Roll Call Sheet*

Osorio contends the trial court abused its discretion in allowing Mexican Mafia evidence. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 228 [evidence of threats to kill police officers, descriptions of criminal activities of other gang members, and reference to Mexican Mafia had little or no bearing on any other material issue relating to defendant's guilt and "approached being classified as overkill"].)

In the trial court, Osorio argued any reference to the Mexican Mafia should be excluded under Evidence Code section 352. The trial court overruled the objection.

The testimony was relevant and did not warrant exclusion under Evidence Code section 352. A court in its discretion may exclude evidence, even though it is relevant, "if its probative value is *substantially outweighed* by the probability its admission will . . . create substantial danger of undue prejudice" (Italics added.) Prejudice in this context means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a

defendant's guilt. (*People v. Crew* (2003) 31 Cal.4th 822, 842.) Here the prosecution sought to admit the evidence of the roll call sheet to support the conclusion Osorio was a current 12th Street gang member, and it was relevant for this purpose.

We also note that, before Osorio made the objection raised here, Cerda testified the police used him in cases he knew—like Mexican Mafia—without objection, and it was defense counsel who elicited the evidence Cerda had testified in the “Saucedo case” and would be at great risk if he returned to prison because he had worked against the Mexican Mafia.

In any event, when the deputy testified about the roll call sheet, he specifically stated he was not saying Osorio was a member of the Mexican Mafia; he was explaining the hierarchy within the jail as to all Hispanics. Although he referred to Osorio as a “soldier” under these circumstances, it was defense counsel who pressed for his opinion on Osorio's involvement. On this record, we see no error.

6. *The Phone Call to Osorio on the Night of Martin's Murder*

Osorio contends the trial court erred by admitting speculative evidence from Detective Iwig suggesting Osorio received a 4:00 a.m. phone call from Magana on the night of Martin's murder. We disagree.

Before trial, the defense moved to exclude evidence of cell phone calls between Magana and Osorio. The prosecutor responded that he did not intend to introduce such evidence. The next day, defense counsel withdrew his objection based on an April 5, 2016 police report produced in discovery. In that report, Detective Iwig indicated he had been mistaken when he testified the call had come from Magana.

Again, the prosecutor did not intend to present this evidence; it was defense counsel who pursued and elicited the evidence of which he now complains. In any event, in the context of this record, Osorio could not have been prejudiced by the admission of this evidence.

7. *Sufficiency of the Evidence*

In considering a challenge to the sufficiency of the evidence, we must review the record in the light most favorable to the judgment and decide whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

The key evidence in this case was the recorded conversation between Magana and Cerda and Cerda's testimony. Osorio reiterates his contentions that the recording is inaudible and Cerda's testimony was not corroborated. As we have explained, this evidence was properly admitted. This evidence, along with the recorded jailhouse telephone conversations, constituted substantial evidence upon which a reasonable jury could find Osorio guilty as charged. Osorio's remaining claims ignore the fact that we do not reweigh a jury's credibility determinations.

8. *Remand for Consideration Under Section 12022.53, Subdivision (h)*

Osorio's sentence includes a consecutive term of 25 years to life under section 12022.53, subdivision (d) on the first degree murder count because Osorio personally used and discharged a firearm causing Martin's death. The trial court struck the enhancements under subdivisions (b) and (c) of section 12022.53 "in light of the fact that the court has imposed the penalty under

[subdivision] (d).” As Osorio argues in his opening brief and the People agree, the trial court erred in doing so. In 2017, when Osorio was sentenced, former section 12022.53, subdivisions (f) and (h) required the court to impose the 25-year-to-life enhancement under section 12022.53, subdivision (d), and prohibited the court from striking any of the section 12022.53 firearm enhancements. (See *People v. Woods* (2018) 22 Cal.App.5th 1076, 1082.) Instead the court was required to impose and stay execution of, rather than strike, the subdivision (b) and (c) enhancements under section 12022.53. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129–1130).

In his supplemental appellate brief, Osorio contends that a remand is appropriate for the trial court to consider whether to strike any or all of the section 12022.53 enhancements. As amended (effective January 1, 2018), subdivision (h) now provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” This amendment applies retroactively to Osorio’s appeal. (*People v. Woods, supra*, 19 Cal.App.5th at pp. 1090–1091.) The People also filed a supplemental brief and agree that remand for the trial court’s exercise of discretion is appropriate.

The discretion granted by section 12022.53, subdivision (h) does not require the trial court to choose between imposing 25 years to life under section 12022.53, subdivision (d), or nothing at all. Here, in addition to the true finding under section 12022.53, subdivision (d), the jury found true allegations under section 12022.53, subdivisions (b) and (c). Subdivision (b) (use of a

firearm) carries a consecutive term of 10 years. Subdivision (c) (discharge of a firearm) carries a consecutive term of 20 years. In exercising its discretion under section 12022.53, subdivision (h), the trial court could strike the section 12022.53, subdivision (d) enhancement of 25 years to life (the “enhancement otherwise required to be imposed by this section” (§ 12022.53, subd. (h))), but still impose a determinate enhancement of 20 years under subdivision (c) or (if the court wished to also strike the subdivision (c) enhancement) 10 years under subdivision (b). The trial court gave no indication what it might do if it had such discretion. Accordingly, the matter must be remanded for the court to exercise its discretion under section 12022.53, subdivision (h).

9. *The Abstract of Judgment Should Be Corrected To Reflect the Trial Court’s Imposition of a Parole Revocation Fine.*

Osorio contends and the People agree that the abstract of judgment should be amended to reflect the trial court’s oral pronouncement of a \$300 parole revocation fine imposed under section 1202.45. The abstract of judgment must be amended to reflect the assessments actually imposed. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The matter is remanded for the trial court to exercise its discretion under section 12022.53. The clerk is directed to amend the abstract of judgment to reflect imposition of the \$300 parole revocation fine under section 1202.45.

MICON, J.*

We concur:

MANELLA, P.J.

WILLHITE, J.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.