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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOEL CASTANEDA, Defendant and Appellant.	B239471 (Los Angeles County Super. Ct. No. LA047078)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael K. Kellogg, Judge. Affirmed in part, reversed in part, and remanded with directions.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Joel Castaneda appeals from the judgment entered after a jury convicted him of first degree murder and attempted murder. We affirm the trial court's decision to not give certain jury instructions, along with its decision not to exclude evidence of two eyewitness identifications. However, because Castaneda was deprived of his right to counsel and was also not properly advised about the risks of self-representation in connection with hearings regarding a new trial motion and sentencing, we reverse in order to: (1) appoint new counsel if requested and if Castaneda is eligible; (2) provide a new hearing on the new trial motion if Castaneda has new counsel appointed; and (3) if there is a new hearing on the new trial motion and that motion is denied, provide for a new sentencing hearing.

FACTS AND PROCEDURAL HISTORY

Southside Reseda gang member Jose Espinosa was shot and wounded and his companion Carlos Guevara was shot and killed in the early evening of August 11, 2004, after "mad-dogging" and taunting by members of rival gang Canoga Park Alabama (CPA), triggered a car chase that ended in gunfire.

The incident began when Espinosa, Guevara, and Margarita Ferman were hanging out at Reseda Park, which sits within Southside Reseda's territory. A Honda Civic driven by CPA member Johnny Santillan drove past the park twice while some of the car's four passengers mad-dogged the Guevara group. Rival gang signs were flashed and as Santillan drove off, Guevara – joined by Espinosa in the front passenger seat and Ferman in the rear – got in Guevara's Volvo and pursued them.

After catching up with the CPA group, Guevara pulled along the right side of the Honda and swerved toward it several times. The person in the Honda's right rear passenger seat pointed a gun out the window and fired several shots toward the Volvo. One struck driver Guevara in the head; the other struck Espinosa in the arm.

Three witnesses identified CPA gang member Castaneda as either the shooter or at least as someone who was in the Honda. The first was Diane H., who was Santillan's girlfriend. The Honda Santillan was driving belonged to Diane H.'s mother, which the

16-year-old girl had taken without permission. She was seated in the front passenger seat of the Honda during the incident and testified that Santillan told everyone in the car to duck just before Castaneda started shooting. The other two were independent eyewitnesses. Jacqueline S. was in her car about 40 feet away at the time of the shooting. She was shown a photo six-pack lineup and identified Castaneda as someone seated in the back of the car, although she believed he was behind the driver, not the front seat passenger. David L. was in his car about 60 feet away when the shots were fired. He too was shown a photo six-pack lineup. He initially thought Castaneda looked like the person in the right rear passenger seat. Over time, his certainty about that fact grew.[1]

A jury found Castaneda guilty of both counts in 2006. We reversed the judgment because of the manner in which an inquiry into possible judicial misconduct was handled. (*People v. Castaneda* (Nov. 1, 2007, B190453) [nonpub. opn.] (*Castaneda I*).) A second jury failed to reach a verdict in 2009 and a mistrial was declared. This appeal arises from the third trial, held in June and July 2011, where Castaneda was again found guilty of both counts.

Castaneda was represented by appointed counsel in the second trial, but was represented by private counsel Colleen O' Hara for the third. O'Hara represented Castaneda throughout the entire trial until after she filed a new trial motion following the guilty verdicts. The hearing on that motion, along with a sentencing hearing, was set for November 28, 2011. At the start of the hearing, O'Hara said that Castaneda wanted to fire her and ask for the appointment of new counsel. The trial court did not interfere with Castaneda's right to fire privately retained counsel but refused to appoint new counsel. The hearing was continued for two weeks to give Castaneda time to either hire another lawyer or represent himself.

When the hearing resumed, Castaneda represented himself. The new trial motion was denied and he was given a combined state prison term of 50 years to life as follows:

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[1] We discuss the facts surrounding the witnesses' pre- and post-trial identifications of Castaneda in more detail in section 5. of our DISCUSSION.

On the murder count, 25 years to life plus a consecutive 25 years for a firearm use enhancement; and on the attempted murder count, 15 years to life, plus a consecutive 25 years for a firearm use enhancement, both of which were to run concurrently with the count 1 sentence.

On appeal, Castaneda challenges the following trial court rulings: (1) denying his request to instruct the jury on theories of perfect and imperfect self-defense; (2) denying his request to instruct the jury on the proper treatment of accomplice testimony in regard to Diane H.; (3) denying his motion to exclude the eyewitness identifications of David L. and Jacqueline S. because the pre-trial photo lineup process was unduly suggestive; (4) denying his new trial motion on the ground of newly discovered evidence based on the defense's ability to finally contact victim Espinosa, who claimed Castaneda had not been the shooter; (5) denying the request in his new trial motion for juror contact information in regard to a claim of juror misconduct; and (6) violating his constitutional rights by refusing to appoint new counsel and by failing to advise him of the dangers of self-representation.

The eyewitness identification issue was not part of the new trial motion. Although the refusal to instruct on perfect and imperfect self-defense and accomplice testimony were included in the new trial motion, they were independently appealable because the trial court refused to give those instructions when requested during the trial. (Pen. Code, § 1259.) In the interests of judicial economy we choose to reach these issues now. In conjunction with the new trial motion, Castaneda's lawyer filed a separate motion (denominated as a petition) seeking release of the juror contact information. Because the denial of right to counsel issues affected that separate motion as well, we will treat it as part of the new trial motion as to which a new hearing is required.

DISCUSSION

1. *Facts Concerning Castaneda's Request to Appoint New Counsel*

Soon after the hearing on the new trial motion began, O'Hara told the court that Castaneda wanted to bring a *Marsden*[2] motion, which is applicable when a defendant seeks to dismiss appointed counsel for ineffective representation. The trial court correctly reminded O'Hara that *Marsden* did not apply because she had been privately retained. When O'Hara said that Castaneda wanted to "terminate [her] services," the court said Castaneda was free to do so without making a motion.

The defense investigator then began to testify about the efforts made to track down victim Espinosa in Mexico. O'Hara asked if she could question the witness as a friend of the court, drawing an objection from the prosecutor because she had just been fired. The trial court appeared unclear on whether that had in fact happened and asked for confirmation from O'Hara. O'Hara said Castaneda had discharged her, adding "He needs an attorney."

The court told Castaneda that "at this point in time you're representing yourself on the motion as well as for the sentencing aspect. Are you sure that's what you want to do?" O'Hara said she thought Castaneda was asking to have a lawyer appointed from the bar panel. The prosecutor complained that it "doesn't work that way." The trial court said, " . . . just so long as Mr. Castaneda understand, if he terminates at this late point in time that he himself will be making the argument for a new trial. That he himself will be making an argument for sentencing. I'm not going to appoint counsel today because it's another, in the court's opinion, it's such a late point. I've got the family of the victim in court. I have the investigator who is going to do a statement in lieu of a formal written declaration in support of the motion." The trial court said O'Hara had no standing to argue for Castaneda if she had been fired. O'Hara replied that she was not asking to do so. She added that Castaneda "indicated that that [terminating her services] was predicated on the court's appointing another attorney."

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2 *People v. Marsden* (1970) 2 Cal.3d 118.

The court responded that "[w]e don't play that game in this courtroom and neither does the Court of Appeals." The trial court reminded O'Hara that she was not appointed counsel but instead had been privately retained "by the Castaneda Family or friends of the Castaneda Family." If Castaneda wanted to represent himself, he could do so, but "I'm not going to inconvenience family members that have been waiting for a long time to address the court. And these cases have been going on in my courtroom for three and half years and if there are any issues on appeal they will be raised on appeal."

Castaneda asked to address the court and explained why he was dissatisfied with O'Hara's representation: "Your honor, . . . I want to terminate her services because there's been a breakdown in communication between us. I was here throughout the trial I know my case. I know this case since I first got it and pretty much the desperation I went through, going through her, pretty much, presentation of the case everything, the things that I had with her, legal things that I wanted to present, but she didn't want to. Since the ending of this trial she pretty much completely no communication. I can't get a hold of her. She'll come see me here and there sometimes. But like an example when the court reporter called her last week for a date or something she didn't call her back. That's an important thing. It's my life on the line. [¶] I pretty much, knowing that she's not giving me the attention she was giving me before that's why I was going to ask the court if I could get new counsel just so they can look over the trial for the ineffective use of counsel. She can't use her own performance on that, she's the trial attorney."

Castaneda added that he had spoken with his appellate attorney, who advised him it was important to have someone "ask questions because the ineffective use of counsel was the fact that she was under the flu, blood poisoning pretty much that's what hindered her performance."

The trial court reminded Castaneda that O'Hara took over after he fired the alternate public defender who represented him during the second trial, and "[t]hat was a year and a half in preparation. And now I've had a four-month delay which I found good cause to allow Ms. O'Hara to do a complete" and comprehensive new trial motion. "And to now put this matter over for another 120, 60 days to have a second bite of the apple by

somebody else reviewing it to review her work to see whether or not that there is a need for a motion for a new trial to be filed by yet another lawyer. When does it stop?"

The prosecutor agreed and said he was willing to submit on his written opposition to the new trial motion and stipulate to what the defense investigator would say. "Now is the time for pronouncement of judgment. If he wants to appeal thereafter he knows his appellate rights and he can exercise those. We're ready to have the victims make their impact statements which will take two minutes and we're ready to ask the court for some restitution and go forward."

The trial court said, "My concern is having Mr. Castaneda without counsel at this point in time. . . . [¶] . . . [¶] . . . I don't like the idea of having Mr. Castaneda not understanding the consequence of terminating [O'Hara's] employment. It wasn't raised this morning." The prosecutor replied that "[h]e understands. I think from listening to what he's saying he understand[s] that he will thereafter represent himself that the court is not going to appoint a lawyer at this point and that he would have to proceed. If he's doing that voluntarily, which it sounds like he is, there's no appellate issue in wanting to represent yourself. He's not entitled to lawyer shop at this stage of the game."

The trial court reiterated its belief that Castaneda's decision to terminate O'Hara was contingent on being appointed new counsel. O'Hara said that was her understanding as well, noting that Castaneda was nodding in agreement. The trial court then asked Castaneda, "Since I am not going to appoint subsequent counsel, is it your choice now to have Ms. O'Hara stay through the motion for a new trial and also with the declaration of the investigator?"

Castaneda responded with his own question, asking whether he would have time to review the new trial points and authorities. O'Hara confirmed that she had not provided copies to Castaneda, and then apologized for her poor performance at trial due to food poisoning and medication issues that left her exhausted. After expressing its confidence in the quality of O'Hara's representation, the trial court said it was inclined to continue the hearing for two weeks if Castaneda was representing himself. "If he hires new counsel or if Mr. Castaneda comes in on his own we will have a motion for a new

trial heard on that date. And sentencing if I deny the motion for a new trial. Two weeks. [¶] Due process consideration is what I'm looking at."

The prosecutor told the trial court that Castaneda had the right to discharge O'Hara unless the court found that it was a delaying tactic, and urged the court to make such a finding: "Do you believe there's adequate foundation at this point to point to the fact that this is Mr. Castaneda's attempt to delay the proceedings[?] If so we can move forward today." The court replied that it had made such rulings before "and then found that because of the due process considerations and for lack of specific the short period time that the court was specific to, that the court should have allowed an additional time to review."

Noting that Castaneda had not seen the new trial points and authorities, "it would be difficult for [him] just to say submitted even though I don't believe that Mr. Castaneda, and this is no offense to you Mr. Castaneda, it is as to the immensity of the law and the understanding of the cases that have been submitted that it would be difficult for a lay person to understand in great detail what Ms. O'Hara and what [the prosecutor] had brought before the court in argument and counter argument to the issue of motion for a new trial. I don't want to ever be seen by any court that I'm in a rush to judgment. . . . I've already indicated that if he does terminate the employment, if he goes out and hires a new lawyer to come in the new lawyer will be ready to argue the motion for a new trial and sentencing on the date that I set."

The defense investigator then described the efforts made to find Espinosa. The trial court again asked Castaneda if he was sure he wanted to discharge O'Hara, and Castaneda answered yes. The trial court said O'Hara was "now relieved as attorney of record," and reminded Castaneda that when the hearing resumed he must "be able and ready to argue the motion that has been previously filed and incorporate . . . any additional information that you want to provide . . . ." Castaneda said he understood and the court said it was granting him pro. per. privileges.

When the hearing resumed on December 12, 2011, Castaneda represented himself, although O'Hara appeared as a friend of the court who offered occasional assistance. There was no further request for appointed counsel.

2. *Legal Principles Applicable to the Right to Counsel*

Under the Sixth Amendment of the United States Constitution a criminal defendant is entitled to the assistance of counsel at all critical stages of the proceedings. (*People v. Ortiz* (1990) 51 Cal.3d 975, 982 (*Ortiz*).) This right extends to post conviction proceedings such as sentencing and motions for new trial. (*People v. Munoz* (2006) 138 Cal.App.4th 860.) The trial court has an absolute duty to appoint counsel to represent an indigent defendant. (*People v. Lara* (2001) 86 Cal.App.4th 139, 150 (*Lara*).)

The right to counsel includes the right to counsel of one's choice. Therefore, a defendant may discharge retained counsel with or without cause. (*Ortiz, supra*, 51 Cal.3d at p. 983.) This right is not absolute, however. The trial court has the discretion to deny a nonindigent defendant's motion to discharge retained counsel if the court finds the discharge will disrupt the orderly processes of justice. (*Ibid.*) Moreover, an indigent defendant does not have the right to appointed counsel of his choosing and, when seeking to substitute one appointed lawyer for another, must demonstrate either that his current lawyer is providing inadequate representation or that he and the lawyer are locked in an irreconcilable conflict. (*Id.* at pp. 984, 986.)

At issue in *Ortiz* was the trial court's denial of a defendant's motion to discharge retained counsel and provide him with appointed counsel after his first trial ended in a mistrial. By that time the defendant had become indigent, but the trial court denied the motion on the ground that the defendant failed to show retained counsel had been incompetent. The *Ortiz* court affirmed the Court of Appeal's decision to reverse the trial court, holding that an indigent defendant seeking to discharge retained counsel and substitute appointed counsel should be treated "no differently from a defendant who qualifies for representation by, and seeks appointment of, the public defender at the

outset of the proceedings against him. No additional public expense or drain on the state's limited resources is at issue, nor, as long as the motion is timely, is there any risk of any undesirable opportunity to 'delay trial and otherwise embarrass effective prosecution' of crime [citation]." (*Ortiz, supra,* 51 Cal.3d at p. 986.) Furthermore, such defendants otherwise face the prospect of proceeding without counsel, or being represented by unpaid counsel coerced into continued representation of the defendant. (*Id.* at pp. 985-986.)

In *United States v. Rivera-Corona* (9th Cir. 2010) 618 F.3d 976 (*Rivera-Corona*), the court considered a claim of error arising from the federal district court's refusal to appoint counsel in place of privately retained counsel in advance of a sentencing hearing after the defendant pleaded guilty to a drug trafficking charge. The lawyer asked for leave to withdraw because defendant was unhappy with the quality of his representation. The district court asked the defendant why he wanted to substitute in new counsel. The defendant asked to have a new lawyer appointed because counsel asked for another $5,000 to take the case to trial or he would "prosecute" the defendant's family. The defendant said he was indigent and wanted another lawyer so he could keep "fighting my case."

The district court did not ask defense counsel whether the allegations were true and did not inquire into the defendant's eligibility for appointed counsel. Instead, the court interpreted the request as both a motion to withdraw his guilty plea and a request for new counsel. The court denied both, relying on defendant's statement that he was satisfied with the representation he had received up to that point. The district court told the defendant he had the right to hire new counsel, but had no right to have counsel appointed at public expense, especially when the only issue left for determination was sentencing. Defense counsel ended up representing the defendant at the sentencing hearing.

Relying on express federal law that provided for appointment of counsel at any stage of the proceedings if a defendant was indigent, the Ninth Circuit held that the district court erred by "summarily rejecting Rivera-Corona's request for appointed

counsel to replace retained counsel simply because of the expense and the stage of the proceedings." (*Rivera-Corona, supra,* 618 F.3d at p. 981, fn. omitted.) Because the district court did not advise Rivera-Corona of his right to counsel, including the right to appointed counsel, while taking his plea, he may have believed he had no alternative to pleading guilty apart from going to trial without a lawyer or exposing his family to financial threats if he was unable to pay his retained counsel. (*Id.* at pp. 982-983.) "Moreover, even if Rivera-Corona's request to withdraw his plea was properly denied, the constitutional right to counsel is fully applicable to sentencing." (*Id.* at p. 983, citation omitted.)

Based on these errors in handling Rivera-Corona's requests, the Ninth Circuit vacated the sentence and remanded the matter to the district court with directions to appoint counsel for Rivera-Corona if he were indigent and make the appropriate factual inquiries into his allegations concerning the reasons for his guilty plea if a formal motion to withdraw the plea were made. (*Rivera-Corona, supra,* 618 F.3d at p. 983.)

3. The Trial Court Erred By Refusing to Appoint New Counsel

Although the trial court in this case did not interfere with Castaneda's right to discharge his retained counsel, it did not, as required by *Ortiz, supra,* 51 Cal.3d at page 986, treat Castaneda as if he were an indigent defendant seeking the appointment of counsel at the outset of the proceedings.

Respondent's only challenge to the applicability of decisions such as *Ortiz* and *Rivera-Corona* is that Castaneda did not claim he was indigent. We see several flaws in this contention. First, the trial court did not deny the motion because it believed Castaneda was not indigent. It denied the motion because understandably it did not want to make the victim's family wait any longer to address the court and was afraid there might be successive requests to substitute counsel and repeated new trial motions. Second, Castaneda must have been indigent at some point because he had appointed counsel during his second trial. According to the trial court, it was Castaneda's family or friends of the family who retained O'Hara. Based on this, it was at least arguable that

Castaneda was still indigent. Third, as in *Rivera-Corona, supra,* the trial court did not ask whether Castaneda was indigent. Prejudice is presumed when a defendant is denied the right to counsel. (*Ortiz, supra,* 51 Cal.3d at p. 988.) The trial court's failure to make the proper inquiries leaves us unable to resolve the issue, requiring a remand for reconsideration of the request.

Respondent does not contend on appeal that the request for appointed counsel was a delaying tactic, perhaps because when the prosecutor urged the court to make such a finding as a ground for denying Castaneda's request to discharge O'Hara, the court declined to do so. We are not called upon to address whether the trial court could have denied Castaneda's request to discharge counsel as a dilatory tactic because it was made on the day of the new trial and sentencing hearing. Although the trial could have reasonably found that Castaneda's request, coming at such a late stage of the proceedings, was not timely, and that it would have resulted in the "disruption of the orderly processes of justice," (*Ortiz, supra,* 53 Cal.3d at p. 983 [citations omitted]), it did not base its decision on that ground.

4. *The Trial Court Also Failed to Properly Advise Castaneda About the Risks of Self-Representation*

A criminal defendant has the constitutional right to conduct his own defense so long as he knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel. (*Faretta v. California* (1975) 422 U.S. 806, 835-836.) A defendant who wants to represent himself should be made aware of the dangers and disadvantages of self-representation so the record establishes that he understands the consequences of his choice. (*People v. Burgener* (2009) 46 Cal.4th 231, 241 (*Burgener*), quoting *Faretta* at p. 835.) No particular form of words is required to properly admonish the defendant. Instead, the test is whether the record as a whole demonstrates that he understood the disadvantages of self-representation, including the risks and complexities of his case. (*Ibid.*) So long as the record shows the defendant understood the dangers of self-representation, no particular form of warning is required. (*Ibid.*)

The scope of a proper advisement turns on the particular facts and circumstances of the case as well as the stage of the proceedings. (*Burgener*, *supra*, 46 Cal.4th at p. 242.) This calls for a pragmatic approach that asks what purposes a lawyer could serve at the stage of proceedings in question, and what assistance he could provide at that stage. (*Ibid.*)

Castaneda contends he was not properly advised about the risks of self-representation. We independently examine the record to determine whether he waived the right to counsel knowingly and intelligently. (*Burgener*, *supra*, 46 Cal.4th at p. 241.)

The trial court here was aware of its duty to advise Castaneda of the risks of representing himself. It asked him if was "sure that's what you want to do?" It also said it did not "like the idea of having Mr. Castaneda not understanding the consequence of terminating" O'Hara's services. However, the record shows that the trial court did not follow through on its concerns. The closest the trial court came to an advisement was when it told Castaneda he might have difficulty understanding the legal points raised by his lawyer and the prosecutor in connection with his new trial motion. No mention was made of the sentencing hearing, and nothing else was said that would let Castaneda know the pitfalls that self-representation often brings with it.[3]

Respondent contends that *Burgener* is inapplicable because the stage of the proceedings at issue in that case was a motion to modify a death penalty verdict. We reject the contention that the requirements of a proper admonishment depend on the severity of the punishment a defendant faces. Respondent also contends that Castaneda's repeated and unequivocal statements that he wanted to represent himself somehow suffice. We disagree. Those statements must be viewed in context with the trial court's erroneous refusal to substitute in appointed counsel, which left Castaneda with the choice

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3 When the trial court raised its concerns, the prosecutor said that Castaneda understood that "he will thereafter represent himself that the court is not going to appoint a lawyer at this point and that he would have to proceed." Likewise, the trial court also cautioned Castaneda that he would represent himself and make his own arguments at the hearing. This did no more than tell Castaneda that by choosing self-representation he would be representing himself. (*Burgener*, *supra*, 46 Cal.4th at p. 243.)

of foregoing representation or proceeding with retained counsel in whom he had lost faith, and who had also recognized some illness-induced shortcomings in the quality of her representation.

As the *Burgener* court recognized, the Courts of Appeal are split on whether the failure to give proper self-representation admonishments can be harmless error. The *Burgener* court did not resolve that issue, however. (*Burgener*, *supra*, 46 Cal.4th at pp. 243-245.) Applying the federal standard that error must be harmless beyond a reasonable doubt, we cannot say beyond a reasonable doubt that Castaneda would have still waived the assistance of counsel had he been properly admonished. First, he initially requested the appointment of counsel and only chose self-representation after that request was denied. Second, he had not previously represented himself in this case at any stage and there is no evidence that he ever represented himself before in any criminal proceeding or that he sought to abuse his self-representation right or been offered counsel after his waiver but refused it. (*Id.* at p. 429.) We therefore conclude on this record that the error was prejudicial.

5. *The Photo Lineup Identifications Were Not Unduly Suggestive*

Castaneda made a pretrial motion to exclude the eyewitness identification testimony of David L. and Jacqueline S. because the photo lineup process that led to those identifications was impermissibly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) The trial court denied the motion, and Castaneda contends the court erred. We review this issue de novo. (*Kennedy* at pp. 608-609.)

Castaneda first challenges the format of the photo lineups themselves. David L. and Jacqueline S. were shown two six packs, one that included a photo of Castaneda, and one that included a photo of Santillan. Each six pack included filler photos of the same three men who were not considered suspects. In the lineup with Castaneda's photo, his was the only one not looking straight at the camera. One of the photos showed a man other than Castaneda wearing a blue shirt but no witness said that anybody involved wore

a shirt of that color. Another photo showed a man wearing a goatee even though no witness ever said that any one they saw had such facial hair.

We must determine whether anything in the identification procedure suggested in advance the identity of the police suspect (*People v. Carter* (2005) 36 Cal.4th 1114, 1163-1164, superseded by statute on other grounds, as recognized in *Verdini v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107) or otherwise made the defendant stand out in a way that suggested the witness should select him (*People v. Carpenter* (1997) 15 Cal.4th 312, 367). The lineup need not include only individuals who are nearly identical in appearance. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.)

With these principles in mind, we see nothing unduly suggestive about the photo lineups. The use of the same three people in each lineup would have made those three men stand out, not Castaneda. The photo of Castaneda does show his head tilted slightly away from the camera and his eyes directed slightly in that direction, but the angle is so slight that it could have had no suggestive effect. As for photo 6 showing the man with the goatee, his extra facial hair would have drawn more attention to him, not to Castaneda. The same is true for the lone photo of the man wearing a blue shirt.

Castaneda's next complaint involves a statement by the investigating sheriff's detective, who told David L. that he was "awesome" and did an "outstanding job" after he selected Castaneda's photo as someone who looked like the man he saw in the right rear passenger seat of the Honda. We do not approve of the detective's comments, but find them harmless. The detective told David L. that the photos might or might not include the person who committed the crime and that he should take his time. When the detective asked David L. why he settled on Castaneda's photo, David L. said it was because the photo was the closest match to the person he saw. The detective's comments came after David L. made his choice, and David L. testified that the detective's comments had no effect on his identification.

Castaneda also contends that the identifications by David L. and Jacqueline S. were unreliable. This includes the fact that David L.'s initial identification was unsure and it was only over time that David L. achieved near certainty. It also includes

impediments to their view of the incident such as distance and distractions, differences between their verbal descriptions and the photo of Castaneda, and Jacqueline S.'s statement that Castaneda was seated behind the driver, not the front seat passenger. These discrepancies and weaknesses raised credibility questions that the jury was free to resolve. (*People v. Alexander* (2010) 49 Cal.4th 846, 903; *People v. Cook* (2007) 40 Cal.4th 1334, 1356.)

6. The Court Was Not Required to Instruct the Jury on Theories of Perfect and Imperfect Self-Defense

The trial court denied Castaneda's request to instruct the jury on the theories of perfect self-defense and imperfect self-defense as to the murder and attempted murder counts.[4] Castaneda contends this was reversible error. Respondent contends the instructions were not warranted because they were inconsistent with Castaneda's theory of defense that he had not been present and was therefore not involved in the incident at all. However, as Castaneda correctly points out, so long as there was substantial evidence to support giving those instructions, the trial court was obliged to do so upon request even if they were inconsistent with Castaneda's defense theory. (*People v. Elize* (1999) 71 Cal.App.4th 605, 615.)

A killing that occurs in self-defense or defense of others is neither murder nor manslaughter, but is instead justifiable homicide. (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305.) The defense is established if the defendant actually and reasonably believed in the need to use deadly force to defend himself or others from immediate harm. (*Id.* at pp. 1305-1306.) Imperfect self-defense exists when a defendant kills in the actual but unreasonable belief that he must defend himself or others from immediate danger of death or great bodily harm, thereby negating the element of malice and reducing the crime to voluntary manslaughter. (*Id.* at p. 1305.)

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[4] The jury was instructed on voluntary manslaughter arising from a sudden quarrel or in the heat of passion.

The subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the defendant must actually believe in the need to defend himself against imminent peril to life or great bodily injury. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 82 (*Oropeza*).) As noted, the trial court was obligated to instruct on these theories only if there was substantial evidence: evidence sufficient enough for a reasonable jury to conclude that the particular facts underlying the instruction existed. We independently review the question whether there was such evidence. (*Id.* at p. 78.)

Castaneda contends there was evidence that he actually believed, rightly or wrongly, that he needed to use deadly force to defend himself or his fellow passengers from imminent death or great bodily harm when he fired several shots into the pursuing Honda. He bases this partly on expert gang testimony that the Honda occupants' flashing of gang signs was a very provocative act that often ends in violence. He also bases this on the fact that Guevara gave chase in his car and swerved toward the Honda several times. We disagree.

Oropeza, supra, arose from similar facts. The drivers of two trucks engaged in a road-rage chase that ended with the passenger of one truck firing shots into the other, killing a passenger in that vehicle. The driver of the shooter's truck testified that the other driver cut them off, leading to an exchange of heated words and hand gestures. This soon turned into a chase, with each car getting in front of the other and tapping its brakes. The victim's truck swerved toward the shooter's truck several times. The trial court refused to instruct on perfect or imperfect self-defense, and the Court of Appeal affirmed.

Although the defendant did not testify, his state of mind could be established through other witness testimony. (*Oropeza*, *supra*, 151 Cal.App.4th at p. 82.) However, no witness testified that the defendant fired out of fear or appeared fearful, and no witness testified they believed deadly force was necessary to protect them. The passenger from the shooter's car who testified "went no farther than to state that the mutual acts of 'road rage' in which he was admittedly engaged were 'scary.' The only substantial evidence of [defendant's] state of mind is found in testimony concerning his aggressive and

provocative behavior. It suggests only that he fired the shot as an act of aggression." (*Ibid.*, citation omitted.)

We recognize that there are some differences between the facts here and those in *Oropeza*. This was an encounter between rival gangs that carries an inherent risk of violence, and Castaneda's co-passenger Diane H. testified that she was afraid the occupants of the Volvo were armed and that everyone in the Honda ducked right before the shots were fired. As it turned out, nobody in the Volvo had a gun. Regardless, Diane H.'s fear that their pursuers had guns had little or no bearing on the state of mind of Castaneda, who in fact had a gun. As for the Honda occupants ducking, Diane H. testified that occurred on the command of Santillan seconds before Castaneda fired, suggesting only that Santillan knew Castaneda was about to shoot and wanted his companions out of the way. Finally, the entire incident, along with its risk of escalating violence, was set in motion by Castaneda and his companions. As in *Oropeza, supra*, his conduct suggest only that he fired his gun as an act of aggression. Ultimately, we reject the notion that Castaneda actually believed he needed to fire several rounds at the Honda passengers in order to protect himself or others from death or great bodily injury. Accordingly, the trial court did not err by refusing to instruct the jury on self-defense and imperfect self-defense.

7. *Any Error In Failing to Instruct on Accomplice Testimony Was Harmless*

At Castaneda's second trial, the court instructed the jury that it could determine Diane H. had been his accomplice and, if so, that her testimony must be viewed with caution and be corroborated. (*People v. Avila* (2006) 38 Cal.4th 491, 562.) Castaneda contends the trial court erred by denying his request to give the same instructions at the third trial.

Castaneda contends there was sufficient evidence to let the jury reach this issue. Diane H. used her mother's car without permission to pick up several gang members, allowed one of them to drive, took no steps to get out of the car or make the others leave when she learned someone had a gun, or when they started the incident by mad-dogging

and flashing gang signs at members of a rival gang. She also washed the car right after the incident. Finally, she testified under a grant of immunity at the first two trials and believed (incorrectly) that she did so at the third trial.

We need not resolve this issue, however. Instead, assuming for argument's sake that the trial court should have given the accomplice instructions, its error is harmless if the record contains sufficient corroborating evidence. (*People v. Gonzales* (2011) 52 Cal.4th 254, 303-304.) This corroborating evidence may be slight, entirely circumstantial, and insufficient on its own to establish every element of the charged offense. It need only tend to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*Id.* at pp. 303-304.)

David L. identified Castaneda as the person seated in the right rear seat of the car. Although Jacqueline S. thought Castaneda was seated behind the driver, she also placed him at the scene. Castaneda contends that the various flaws in their eyewitness identification preclude our reliance on their testimony. However, as previously discussed, the photo lineups were not improper. Whatever inconsistencies or weaknesses existed in their testimony were for the jury to resolve, and this evidence was at a minimum the slight corroboration required to render the error harmless.

DISPOSITION

The judgment is reversed and the matter is remanded. Upon remand, the trial court shall hold a hearing to determine whether Castaneda wants, and is eligible for, appointed counsel, or wishes to proceed with new retained counsel, and if so, the trial court will then hold a new hearing to consider the issues raised in the new trial motion except for the claims of instructional error that we resolved because they were appealable independently of that motion. If the trial court denies the remainder of the new trial

motion, it shall then conduct a new sentencing hearing. If no new counsel is appointed or retained, the court shall reinstate the judgment.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.