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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONNY SALAZAR, Defendant and Appellant.	B268273 (Los Angeles County Super. Ct. No. BA399678)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Reversed and remanded.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ronny Salazar appeals from the judgment entered after a jury convicted him on one count of first degree murder (Pen. Code, § 187; count 1)[1] and two counts of attempted willful, deliberate, and premeditated murder (§§ 664, 187; counts 2 & 3) with, as to each offense, personal and intentional discharge of a firearm causing death or great bodily injury (§ 12022.53, subd. (d)) and a finding he committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(4)).

Salazar claims the trial court prejudicially erred by admitting at trial (1) evidence referencing the Mexican Mafia; (2) Salazar's recorded jailhouse conversation with another inmate in which he made self-incriminating statements; and (3) an out-of-court statement that a gang member told the police Salazar had confessed to being the shooter. Salazar also contends the court committed prejudicial error by excluding third-party culpability evidence, specifically an eyewitness's identification of another man as the shooter. Even if these errors are not found to require a new trial, Salazar asserts that the matter must be remanded for the trial court to exercise its recently-bestowed discretion as to whether to strike the section 12022.53, subdivision (d) sentence enhancements. Finally, he contends there is insufficient proof supporting the restitution award for loss of child support from the murder victim.

We find no abuse of discretion in the trial court's rulings admitting Mexican Mafia evidence and the recorded jailhouse conversation. We do conclude, however, that the trial court abused its discretion in admitting an out-of-court statement relaying Salazar's confession and in excluding Salazar's proffered third-party culpability evidence—and while each individual error could be harmless on its own, we hold that taken together,

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

the errors denied Salazar a fair trial. We therefore reverse the judgment and remand for a new trial.[2]

I. EVIDENCE AT TRIAL

On July 17, 2007, Eduardo Gonzalez (the decedent, also known as Wham), Cristian Ramos (also known as Frex), and Karl Brown were drinking and smoking marijuana in Gonzalez's car, parked in a driveway near Ramos's residence on St. Andrew's Place. This was the friends' regular "hangout" spot. Gonzalez and Ramos belonged to Down to Skate (D2S), a tagging crew. Gonzalez was sitting in the driver's seat, Brown was in the front passenger seat, and Ramos was in the back seat.

At approximately 6:30 p.m., a man wearing a bandana over his nose and mouth approached Gonzalez's car on foot and began shooting at its occupants. He shot Gonzalez once in his upper chest and three times in his arm, and shot Brown twice in the back of his arm. He pointed the gun at Ramos, but the gun did not discharge, and the gunman then fled.

Gonzalez died from his gunshot wounds. Brown recovered from his injuries.

Salazar consistently denied any involvement with the crimes in interviews with the police. There was no physical evidence tying Salazar to the scene, and the murder weapon was never recovered. At trial, which took place eight years after the shooting, the key issue was the identity of the shooter, and thus eyewitness identifications and the statements of two cooperating accomplices were central to the prosecution's case. The parties stipulated Salazar is 6'2½" tall. Salazar is Hispanic with dark skin.

A. Ramos

On September 7, 2007, Ramos spoke with Detective John Shafia at the police station. Ramos admitted being a part of the tagging crew D2S, but said he was retired from it. He was reluctant to provide details about the shooting or to provide details about gangs, because he did not want it "on

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[2] Accordingly, we do not address Salazar's challenge to the restitution award or his claim that we should remand for resentencing to allow the trial court to exercise its discretion to strike the firearm enhancements under section 12022.53, subdivision (d).

paper" that he had said anything. A portion of the recorded video of his interview was played for the jury and transcripts of the interview were introduced into evidence.

In that interview, Ramos said he was sitting in the car laughing with his friends Gonzalez and Brown when he heard gunshots. He leaned his head forward and ducked. He lifted his head when he thought the coast was clear, but the shooter was still there, leaning into the car and pointing the gun at him. The shooter looked at him and squeezed the trigger, but nothing happened. Ramos described the shooter as between 5'7" and 5'9" tall, skinny, dark-skinned, and with brown eyes and a bald head. Ramos did not know if the shooter was Hispanic or African-American. The shooter was wearing dark-colored jeans, a navy blue jersey with yellow numbers, a blue bandana, and a hat. When the gun did not discharge, the shooter ran to a white Tahoe or Suburban truck with tinted windows in the back. He got into the front passenger seat and the car drove away.

On December 21, 2007, the police brought Ramos to the station again for a further interview. Ramos spoke with Shafia, rather unwillingly. He again was concerned about "being put on paper." However, he eventually began to tell the story of the events on July 17, 2007. Most of the information he provided was consistent with his account in September 2007, and he added more details.

Ramos told Shafia that D2S had aligned itself with the Third Avenue Killers gang (3AK), and that 3AK was enemies with the Bronson Avenue Trece gang (also known as B.S.E., Bronson, Bronson Trece, or Bronsero).[3] Due to that alignment, there was conflict between D2S and Bronson. Ramos told Shafia that Bronson members regularly came into the D2S's neighborhood to pick up "one of their [Bronson] homies," Christian Montoya. Adding to the friction between Bronson and D2S, Montoya had previously been a member of D2S and Ramos's friend, until Montoya joined Bronson. Because of this history, Ramos believed Montoya may have been connected

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[3] At trial, the prosecution's gang expert opined that in fact Ramos was a 3AK member in 2007.

with the shooting. Ramos heard the shooter call out "B.S.E. Putas" as he approached the car and began shooting.

During this December 21, 2007 interview, Ramos described the shooter as a male Hispanic, 5'9" tall, weighing 160 pounds, and having a medium-tone Hispanic skin color. Ramos also identified a white Tahoe parked in the impound lot of the police station as the vehicle involved in the shooting. (The Tahoe belonged to Bronson member Ronald Martinez and had been impounded when he was arrested in connection with the shootings, as discussed further below.)

Shafia testified that he met with Ramos again shortly before Ramos was going to be called to testify at trial. Ramos's "position was that he didn't remember, he didn't say anything, he doesn't want to get involved. He was representing that all he was going to do is protect himself."

At trial, Ramos testified about the shooting. He stated that after he heard gunshots, he grabbed his head and leaned down. When he looked up, he saw the gunman "on the right side, on the passenger door, leaning over [Brown]" and pointing the gun at Ramos. The gunman pulled the trigger but the gun did not discharge.

Ramos testified the shooter was wearing a bandana that covered only his lips and nose, but when the shooter was pointing the gun at him, Ramos "got a chance to actually get a great look at [the shooter's] eyes and his skin color." The shooter was "very light skinned," with hazel eyes. Ramos did not think the shooter was wearing anything covering his head, and he could not remember the color of the shooter's shirt.

Ramos denied previously having given the police any description of the shooter, stating, "where we come from, that's snitching." He specifically stated it was a lie that he told Shafia that the shooter had dark skin. He denied telling Shafia the shooter was around 5'9" tall. He testified he may have told Shafia the shooter was wearing a jersey with blue and yellow colors, but said he "probably said that just to get him off my back," as Shafia was very aggressive during the interview. He denied identifying the car in which the shooter fled the scene.

Ramos specifically testified that Salazar was not the shooter. He testified, "I'm looking at the man [Salazar] right there, and that's not the guy that murdered my friends. I'm looking at him, and that's not him. I can describe the guy that killed my friend by the face features, obviously. But the guy right there, that's not him. . . . I'll be damned if I'm going to be a part of any innocent man being condemned." He further stated, "If the gentleman that was here . . . killed my friend . . . I'll point him out, let him rot, but that's not him."

B. Brown

The night of the shooting, Brown spoke to the police. He said he was sitting in his friend's car when another vehicle made an abrupt stop next to them. A man exited the passenger side of the vehicle, holding what looked like a Glock handgun. The man approached the front of the car and opened fire. The shooter was about 5'9" tall, 160 to 170 pounds, a "male Hispanic who looked like an Ese"[4] with a shaved head. The shooter wore a black shirt.

On January 2, 2008, Shafia spoke with Brown. Brown described the shooter as a male Hispanic, with no facial hair and a big head. He estimated the shooter was approximately 28 or 29 years old, 5'8" or 5'9" tall, and weighing 165 pounds.

At trial, Brown testified that he was drunk at the time of the shooting. He testified he did not see the shooter at all, because he ducked when he saw Gonzalez get hit by gunfire. He denied giving any description of the shooter to the police in January 2008. He admitted he did not want to come to court to testify, and only did so under threat of arrest.

C. Martinez

On December 21, 2007, Bronson gang member Martinez, who went by the moniker "Lefty," was interviewed by Shafia after being arrested. At trial Martinez testified that he was under the influence of alcohol at the time of his interview with Shafia, having stayed out drinking at a club until 3:30 a.m. the night before. He was also scared during this interview, because he feared both going to jail and the consequences of "snitching" on his gang.

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[4] Officer Jeffrey Hillings testified that "ese" is a Hispanic slang term that equates to "homie."

During the recorded interview, portions of which were transcribed and provided to the jury, Martinez worried that due to his "snitching," he would be in danger from other inmates if he were imprisoned.

During this December 21, 2007 interview, Martinez initially denied knowledge of the shooting. He also stated that someone else had borrowed his truck on the day of the crime. Over the course of a lengthy interrogation, he eventually admitted to being present when the crime was committed.

Martinez first told the police he was a passenger in a car driven by the shooter, who exited the car and began shooting at the victim's car. Eventually, he identified his "homie Largo," also known as Slim, as the shooter, and admitted he had driven Largo in Martinez's Tahoe. Martinez later testified that Largo and Slim are Salazar's monikers. Martinez told the police Largo was tall and so dark-skinned he was "always mistaken for black."

The police told Martinez they believed *he* was the shooter, because witnesses identified the shooter as a light-skinned, bald, shorter man who shot left-handed (descriptions which matched the left-handed Martinez).[5] Martinez replied he had "another witness" who would testify he was not the driver – "the guy in the back" of the car, "the homie Criminal" (later identified by Martinez as Eddie Pacheco, who used the moniker "Criminal"). At trial, Martinez said he lied about Pacheco being in the car during the crime, and said he randomly picked Pacheco as someone who would back up his story.

Martinez subsequently agreed to accept a plea deal of 29 years in prison in exchange for his truthful testimony at Salazar's trial. A few days before Salazar's trial, the prosecutor agreed to reduce Martinez's prison sentence to 25 years, with the bargain remaining contingent upon his truthful testimony.

At trial, Martinez testified that, on the day of the shooting, he was with Salazar when he received a call from fellow Bronson member Montoya, who went by "Flaco." Montoya asked Martinez to pick him up because he was bored, but told Martinez to watch out because "the D2S are here." Martinez

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[5] Prior to June 8, 2009, Martinez was charged as the shooter.

knew the D2S and Montoya did not get along and that there was always drama between them because Montoya used to be a member of D2S and still lived in the D2S neighborhood. Montoya told Martinez, " '[D]on't trip, they're not going to do nothing, but . . . if they do, then we will fight.' "

Martinez repeated this to Salazar, who said, "let's go pick him up." Martinez drove Salazar to Montoya's home. Salazar rode in the front passenger seat of the Tahoe. During the drive, Salazar displayed a nine-millimeter pistol in his waistband and said, "[i]f anything, I got this." As the Tahoe approached Montoya's building, Salazar told Martinez to stop. Salazar, who was wearing a hat and possibly a black shirt, pulled a bandana over his face, pulled out his gun, exited the Tahoe, and ran to the victims' car. He fired approximately 16 shots into the car, then ran back to the Tahoe and told Martinez to go. Martinez and Salazar sped off. Martinez characterized the shooting as a "mission" for their gang.[6]

D. Montoya

On January 17, 2008, police arrested Montoya and Shafia spoke with him at the station. After several hours, Montoya indicated he was ready to tell the truth, but said he did not want people to think he was a rat. Montoya said he was home on the day in question and telephoned Martinez and asked him to pick him up. He saw D2S members sitting in their car, parked near his apartment building. He told Martinez, "These fools are out here. . . . You fools should come by and see what's up" and "[s]ee if they want to get down."

Montoya said he did not know there would be a shooting. He heard gunshots, looked out the window, and saw Martinez's white truck leaving. Montoya said he saw someone jump back into Martinez's truck, but initially denied knowing the shooter's identity, and merely said the man had on a black Raiders jersey and a bandana on his face. Montoya eventually identified Salazar as the shooter.

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[6] According to Martinez, when gang members go on a "mission," they go into rival gang territory for the purpose of fighting with or killing rival gang members.

In December 2014, Montoya pled guilty to murder and two counts of attempted murder based on the shooting, and promised to testify truthfully at Salazar's trial in exchange for a prison sentence of 21 years.

At trial, Montoya testified that once he switched from D2S to Bronson, his former good friend Ramos would "talk shit" to him about Bronson. On the day of the shooting, Montoya called Martinez to come and pick him up. He saw Gonzalez and Ramos hanging out in a car parked near his apartment but he denied mentioning them to Martinez. Montoya also denied seeing the shooting or Martinez's vehicle. He testified that he heard the gunshots but did not look out his window until a few minutes later when the perpetrator had already gone. He then called Martinez and said not to pick him up after all, because some people had just been shot outside.

Montoya testified that he lied when he told Shafia that he called Martinez and told him the D2S's were outside, and lied when he said he witnessed the shooting. He denied telling Shafia that he saw Salazar commit the shooting, and further testified in fact he did not see Salazar commit the crime. Montoya stated he still considered Salazar a friend.

He acknowledged that if he testified against any Hispanic gang member, he would get a "green light," meaning any other Hispanic gang member was required to attack and try to kill him. He denied that he was a "snitch," stated that he was not housed in protective custody where the "snitches" are kept away from the general jail population, and denied being fearful about testifying. Montoya's videotaped interview with the police from January 2008 was played for the jury, with a transcript provided to them as well.

Montoya testified on cross-examination that the police pressured him to adopt Martinez's story – including that Salazar was the shooter – and threatened that if he did not corroborate the story he would spend the rest of his life in prison. He stated he lied and went along with Martinez's version of events because it was the only way to save himself.

E. Gang Evidence

Martinez testified he belonged to a neighborhood tagging crew called B.S.E., which evolved into the full-fledged Bronson gang in approximately 2005. Los Angeles Police Detective Alex Jacinto, the prosecution's gang expert, testified that Bronson was a Hispanic street gang with 24 to 30 members as of 2007. Jacinto testified that in 2007, Salazar was an active, admitted Bronson member. At that time, Salazar had tattoos indicating he was a Bronson member. As of June 2014, he also had a tattoo on his arm depicting a man wearing a bandana, holding a smoking gun, and the words "Bronson Avenue Trece." On his head, he had a tattoo with two horizontal bars under three dots, a symbol used by Hispanic gangs in the Los Angeles area and earned from the Mexican Mafia. (Additional evidence connecting Salazar to the Mexican Mafia is discussed further below.)

Jacinto testified that by "putting in work," a tagging crew can get approval from the Mexican Mafia to claim the number "13" and become an official gang. A gang can "lose the 13" if they get a "green light" from the Mexican Mafia, i.e., if they cooperate with police or "snitch."

In response to a hypothetical question based on evidence, Jacinto opined the present shooting was committed for the benefit of, at the direction of, and in association with the Bronson street gang.

F. Salazar's Assault on Martinez and Recorded Conversations in Jail

Evidence was introduced that, during Shafia's January 3, 2008 interview with Salazar, Shafia played video clips from his interview with Martinez, during which Martinez identified Salazar as the shooter. In May 2008, Martinez was put in a holding cell with Salazar and nine to 15 other gang members. Martinez testified that Salazar accused Martinez of "snitch[ing]" and being a rat. Salazar and other inmates assaulted Martinez until he blacked out and was dragged out of the cell by deputies.

Shafia testified that, after Salazar assaulted Martinez in jail, Shafia had Salazar placed in a cell with a friendly gang member, Kevin Hernandez of the Hobart gang. Unbeknownst to Hernandez and Salazar, their conversations were recorded. The prosecution played for the jury a tape recording of portions of this conversation and provided them transcripts of the recording as well.

The recording captured Salazar telling Hernandez, "Supposedly, that fool was looking for . . . the jale[7] [that] me and Lefty [Martinez] and fucking other homie did? Bitch ass fucking Lefty no good?" "[T]he gang unit from Wayside, . . . they got pictures of [me] . . . on the wall. 'Oh, that's Largo, that fool is always fucking handling business. . . . They know it's business in here, fool. . . . Fucking child molester or fucking rapist, a fucking piece of shit snitch comes in, we're going to smash him . . . . Fool, they know me . . . and they found out I fucked up fucking Lefty for snitching on me, fool."

Hernandez asked, "[W]hat that fool snitch on, that fool Lefty?" Salazar replied, "He said we fucking did a jale, he said I was the shooter and this and that. First he was saying he was the driver and the shooter and that he did it. . . . Then he broke it down, fool, because the jura's[8] like, you are going to go to jail for 25 to life." "And he fucking broke it down, fool and told him I was the shooter. He was only the driver. . . . he told him all kinds of shit . . . ."

Salazar also said, "[T]hat fool [Lefty] told the jura I did a jale with him out there and — That fool opened his mouth, fool, he told jura, he fucking threw rata[9] on me, fool. So when I see him, I smashed on him. . . . piece of shit."

II. DISCUSSION

A. The Mexican Mafia Evidence Was Admissible

1. Salazar's Motion to Exclude Gang Evidence

During trial, Salazar moved to exclude gang evidence. The court denied the motion as to evidence of Salazar's gang activities and the fact that the numeral 13 was part of Salazar's gang, but, pursuant to Evidence Code section 352 (section 352), initially excluded evidence of references specifically to the Mexican Mafia. During a break in the testimony of the prosecution's

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7 Martinez testified that "jale" is Spanish slang for a job, and "doing a jale" means doing a mission or job.

8 Martinez testified that "jura" is a Spanish slang word meaning the police.

9 Martinez testified that "rata" is Hispanic slang for a "snitch."

first witness, Martinez, the prosecutor raised the issue again, arguing evidence regarding Mexican Mafia oversight of Hispanic gangs, including Bronson, was integrally connected with the evidence being presented. Salazar objected the proffered evidence involving the Mexican Mafia – a "vicious, ruthless prison gang" – amounted to impermissible character assassination, violated Evidence Code section 1101, should be excluded under section 352, and violated his rights to due process and a fair trial.

After extensive argument, the court ruled the Mexican Mafia evidence was relevant and admissible to show Salazar's motive and intent, as well as relevant to "the issue of fear and state of mind of witnesses as they relate to snitches and as to their status as being green lighted" by the Mexican Mafia. The court ruled section 352 did not require exclusion of evidence referring to the Mexican Mafia's procedures and activities, particularly since other gang evidence was already being admitted and thus references to the Mexican Mafia were not overly prejudicial.

2. Mexican Mafia Evidence Introduced at Trial

Martinez testified that all Hispanic gangs fall under the control of the Mexican Mafia. The Mexican Mafia is associated with the number 13, and determines if a group may use the designation "13" and call itself, and act as, a gang. Bronson had earned the right to claim "13" from the Mexican Mafia. Martinez further testified that if a gang claiming "13" was disrespected, the Mexican Mafia expected that gang to retaliate.

Martinez also testified that if a gang member "snitches," all Hispanic gang members are charged with punishing him. If a gang member "get[s] the green light," every single Hispanic gang in Los Angeles has a right to kill or hurt him.

Martinez testified that the Mexican Mafia had banned gangs from committing drive-by shootings. A gang would risk getting a "green light" if they violated this rule. Since the ban, instead of committing drive-by shootings, Hispanic gang members get out of the car they are riding in before shooting at targets.

Deputy Wasson, assigned to Los Angeles County's Wayside facility which primarily housed gang members, also testified about the Mexican Mafia's rules and controls over Hispanic inmates. The numeral "13" signified that gang members aligned themselves with the Mexican Mafia. A "green light" existed on any inmate charged with or convicted of a sex crime involving minors or anyone who testified in court.

Detective Jacinto testified that a tagging crew could elevate its status to a street gang by "putting in work" and getting approval from within the prison system so the crew could claim the number 13 and become an official gang. A gang could lose the designation "13" if the gang received a green light from the Mexican Mafia. Cooperating with police or "snitching" could result in a green light. The Mexican Mafia required "paperwork," i.e., written documentation of "snitching," to order a green light. A tattoo with three dots over two horizontal bars signified the numeral 13 and was earned from the Mexican Mafia.

While Martinez was in custody, he made a recorded telephone call to a friend in which he stated, "the gunner in my case, the nigga that really did the murder, he's right now in 1750 right here. 1750 is like . . . it's like super high power . . . that's where they take the big homies, the Mexican Mafia members . . . Mafia member associates. . . . They got him there because he's associated with the . . . Mexican Mafia." Martinez testified that the "gunner" in "1750" he was referring to was Salazar, and that Salazar was associated with the Mexican Mafia.

3. Analysis

Salazar claims the trial court erred in overruling his objection under section 352[10] to admission of the Mexican Mafia evidence. Evidence of Salazar's association with the Mexican Mafia plainly is inflammatory, and was not admissible to show he is a bad person who was likely to commit the charged offenses. Such evidence is only admissible when it is logically

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[10] Section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

relevant to a material issue at trial other than character evidence. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) Gang evidence should not be admitted if it is only tangentially relevant to the charged offenses. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.)

There is no dispute that, absent any Mexican Mafia evidence, there was sufficient evidence Bronson was a criminal street gang for purposes of the gang enhancements. However, the Mexican Mafia evidence was additionally relevant for other purposes.

The Mexican Mafia evidence was uniquely probative to explain Salazar's motive and intent in conducting the hit on the D2S members. The prosecution put forth the theory that in order to maintain Bronson's recent accreditation by the Mexican Mafia as a gang worthy of claiming the "13," Salazar retaliated against D2S for their disrespect towards Bronson. Although gang evidence "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts—such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect." (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; see also *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 ["Cases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent."].)

The Mexican Mafia evidence was also relevant to explain Salazar's motive and intent in exiting Martinez's vehicle and shooting into Gonzalez's car at close range, instead of doing a drive-by shooting. That Salazar apparently was complying with a Mexican Mafia directive banning drive-by shootings demonstrated Salazar's intent to preserve his gang's Mexican Mafia accreditation, and also corroborated the theory that the shootings were gang-related, and not personal.

Finally, evidence that a witness is afraid to testify due to expected retaliation is relevant to that witness's credibility and therefore admissible. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1433.) The evidence pertaining to the Mexican Mafia was relevant to explain why multiple witnesses feared testifying at trial

(because they would be viewed as "snitches" and be "green-lighted") and relatedly to explain why, during their testimonies at trial, key prosecution witnesses Montoya, Ramos, and Brown all recanted their prior out-of-court statements to the police regarding identifications of the shooter and other details of the crime.

The prejudicial effect of the references to the Mexican Mafia did not substantially outweigh the substantial relevance of the evidence to the issues at trial. Thus, the trial court did not abuse its discretion by overruling Salazar's objections to the Mexican Mafia evidence. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 [" 'The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason. [Citation.]' "].)

B. **Salazar's Jailhouse Conversation with Hernandez Was Admissible**

1. Pertinent Facts

Salazar filed a motion to exclude evidence of the surreptitiously recorded jailhouse conversation between Salazar and Hernandez. Salazar sought exclusion on relevance, section 352, Evidence Code section 1101, and due process grounds and, in the alternative, sought redaction of inadmissible portions. The prosecutor agreed to delete portions of the conversation.

The court ruled that the remaining portions of the jailhouse conversation the prosecution sought to introduce were relevant "to the motive and intent, specifically, the specific intent under the gang enhancement," and Salazar's "state of mind." The court found Salazar's statements in the recorded conversation were unlikely to evoke emotional bias on the part of the jurors, and thus section 352 did not require exclusion of the evidence.

The recording played for the jury captured Salazar telling Hernandez, "Supposedly, that fool was looking for . . . the jale [that] me and Lefty and fucking other homie did? Bitch ass fucking Lefty no good?" "[T]he gang unit from Wayside, . . . they got pictures of [me] . . . on the wall. 'Oh, that's Largo, that fool is always fucking handling business. . . . They know it's business in here, fool. . . . Fucking child molester or fucking rapist, a fucking piece of shit snitch comes in, we're going to smash him . . . . Fool, they know me . . . and they found out I fucked up fucking Lefty for snitching on me, fool."

Hernandez asked, "[W]hat that fool snitch on, that fool Lefty?" Salazar replied, "He said we fucking did a jale, he said I was the shooter and this and that. First he was saying he was the driver and the shooter and that he did it. . . . Then he broke it down, fool, because the jura's like, you are going to go to jail for 25 to life." "And he fucking broke it down, fool and told him I was the shooter. He was only the driver. . . . he told him all kinds of shit . . . ."

Salazar also said, "[T]hat fool [Lefty] told the jura I did a jale with him out there and -- That fool opened his mouth, fool, he told jura, he fucking threw rata on me, fool. So when I seen him, I smashed on him. . . . piece of shit."

Additional portions of the conversation were played, in which Hernandez said, "Poor Looney got jumped . . . [b]y that fool Silent [from Mid City]," and Salazar replied, "Silent, yeah. . . . I didn't hear about that fool getting jumped. I would have been on the Mid Cities, fool. . . . I would have fucking blasted them . . . ."

Salazar also stated, "MS's be snitching, fool. They know the rule, . . ." "The majority of the MS's . . . are killers . . . ." "[Y]ou got a gang of bitches, too, but I hate that shit. They don't play the hood." "That's why now . . . I be dumping on paisas . . . ."[11] "I see . . . fool walking in . . . the MS hood . . . and looks like paisas. I'm going to lay them out . . . ." "I know I can get shot, I can get busted. I know everything, dog. I've knew it all. Fuck it." "[S]hit happens . . . . I don't regret shit that I done." "You know? I don't regret shit. We all chose our destiny, you know. . . . I love that hood, dog."

Salazar also said, "Smokey was with . . . fucking Casper and his jefa[12] . . . and that fool rolled up and stabbed him in front of his jefa . . . . I heard he's busted for that shit, the fool in here. If I see him, I'm going to rush him."

Hernandez said he was letting his hair grow. He said, "I been bald, but I got that gang enhancement shit on me." Salazar replied, "I got the gang enhancement shit, too, and I be walking in the court fresh bald, fool. . . . even for the judge keep looking at me like, damn."

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11 Deputy Wasson testified "paisa" was slang for "countryman."

12 Detective Jacinto testified "jefa" meant "mother, boss, female."

2. Analysis

Salazar claims the trial court erred by failing to exclude this conversation with Hernandez on the grounds it was irrelevant, inadmissible propensity evidence, and unduly prejudicial. We disagree.

First, Salazar's statements that he "fucked up . . . Lefty for snitching on me," that Lefty "broke it down, . . . and told [the police] I was the shooter," and that "[Lefty] told the jura I did a jale with him . . . he fucking threw rata on me, . . ." are all highly probative as they reasonably could be interpreted as admissions of guilt.

The other parts of the conversation played for the jury showed Salazar's deep allegiance to his gang and adherence to gang protocols and thus were relevant to his motive and intent to commit the shooting and also relevant to the gang enhancement allegations. Further, his statements about "smashing" "snitches" in jail corroborate the evidence that the witnesses reasonably would fear being killed if they testified and incriminated Salazar. The trial court acted within its discretion in admitting this evidence.

C. The Court Erroneously Excluded Third-Party Culpability Evidence

1. Pertinent Facts

Before trial, the prosecution moved to exclude evidence offered by the defense to show that Manuel Lara, another Bronson gang member who went by the monikers Silent and Rooks, was the shooter. Salazar's counsel represented to the court that Ramos saw Lara shoot Gonzalez in the ankle a year prior to the present offenses. Salazar's counsel read into the record Shafia's written account of his second interview of Ramos, which included the following: " 'Ramos knows [who] Lara is and seen [*sic*] him on several occasions. He was sure he was the one that shot Gonzalez in 2006. I asked him about the date Gonzalez was shot to death, and he said he believes it was a carryover from the shooting. I asked him if Lara was the shooter, and he said he believes Lara was the shooter. He explained to me that he thought the shooting was a set up by . . . Montoya. He thinks Montoya was at home. And when they pulled up to the party at the location, Montoya called [in]

Lara.[13] Ramos said he could not be positive . . . that the shooter was Lara, but the shooter had the same pale skin color and shape that Lara had.' "

Salazar's counsel represented that Lara was approximately 5'6" tall and light-skinned, while Salazar was 6'4" and 6'5" tall, and dark-skinned. Salazar wanted to elicit testimony on this identification and reference it in his opening argument.

The prosecutor acknowledged that Ramos had seen Lara shoot Gonzalez a year earlier, and indeed Lara was serving time for that crime. He indicated he had no objection to the defense eliciting testimony about the shooter's skin tone or height, but objected to the defense specifically introducing evidence of Ramos's identification of Lara as the shooter. The prosecutor contended that this identification of Lara "was based on prior conduct and because of history." He noted that the shooter had a bandana on his face, and thus witnesses could provide only "a general description."

The court ruled that the defense should not touch on the identification of Lara in its opening argument, but otherwise deferred ruling on the matter. In his opening argument, defense counsel noted only that Ramos' description of the shooter – 5'6" to 5'9" tall, with light skin, a medium build, and a shaved head – did not match Salazar.

Later during the trial, the court returned to the issue. Defense counsel again indicated that according to Shafia's written records, during his second interview, Ramos identified Lara as the person who shot Gonzalez non-fatally a year previously. That crime had previously been unsolved. After being identified by Ramos, however, Lara was subsequently convicted of that 2006 shooting. Salazar's counsel once again referred to Shafia's notes stating that "Ramos said he could not be positive that the shooter was Lara but that the shooter had the same build, skin color, and shape that Lara had. I showed Ramos a photograph of Lara, and he verified it, and it was the person he knew as [Rooks] and the person that shot Gonzalez . . . the first time – and the person he thinks shot and killed Gonzalez." Salazar's counsel continued,

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13 Defense counsel read these notes into the record a second time, and from comparing the two readings and from context, it is clear that the notes stated that Ramos believed Montoya "called in Lara."

"and then there is a note, Ramos described the shooter as a male Hispanic, 5'9", 160 pounds, and he believes . . . Lara is the shooter that killed Gonzalez." Salazar's counsel further represented that at a prior hearing involving Martinez and Montoya, Shafia had testified that Ramos identified Lara as the shooter.

Salazar's counsel argued that he should be permitted to introduce evidence of Ramos's identification of Lara as the person who shot Gonzalez in both 2006 and 2007. He indicated he intended to call Ramos as a witness and either elicit his identification of Lara as the shooter in 2007, or impeach him with his prior inconsistent statements to Shafia. Defense counsel stated he also intended to call Brown as a witness; although Brown did not identify Lara, Lara matched Brown's physical description of the shooter.

The prosecutor objected that Salazar was offering evidence that was inadmissible as third-party culpability evidence because Ramos merely guessed that Lara was the shooter in 2007 because he was the one who shot Gonzalez in 2006. The prosecutor argued that Ramos's description of Lara was generic.

On June 24, 2015, the court granted the prosecution's motion to exclude third-party culpability evidence. The court found that Ramos's belief that Lara was the present shooter was "speculative" to the extent it was based on Lara's physical characteristics, and there was no evidence linking Lara to the murder of Gonzalez. Relying primarily on *People v. Brady* (2010) 50 Cal.4th 547 (*Brady*), discussed further below, the court found, "Ramos believes that Lara is the perpetrator of this particular murder based on his build, color of skin, ethnicity, height, and weight. Those are all speculative evidence" that did not demonstrate "an actual link to the person who committed the murder in this case." The court also excluded the evidence under section 352 on the ground the probative value of the evidence would be substantially outweighed by the likelihood of confusion of the issues and undue consumption of time.[14]

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[14] The trial court later also denied Salazar's motion for a new trial that was based on the exclusion of the third-party culpability evidence.

2. Analysis

(a) The Proffered Evidence of Third Party Culpability Was Relevant

Salazar claims the trial court erroneously excluded evidence suggesting that a third party, Manuel Lara, committed the shooting. We agree.

"[T]hird-party culpability evidence is admissible if it is 'capable of raising a reasonable doubt of [the] defendant's guilt.' " (*People v. Robinson* (2005) 37 Cal.4th 592, 625 (*Robinson*).) "[E]vidence that another person had a motive or opportunity to commit the crime, without more, is irrelevant because it does not raise a reasonable doubt about a defendant's guilt; to be relevant, the evidence must link this third person to the actual commission of the crime. [Citation.] Evidence that is relevant still may be excluded if it creates a substantial danger of prejudicing, confusing, or misleading the jury, or would consume an undue amount of time. (See Evid. Code, § 352)." (*Brady, supra,* 50 Cal.4th at p. 558.) We review for abuse of discretion a trial court's exclusion of third-party culpability evidence. (*Ibid.*)

"[T]rial courts [must] avoid hasty conclusions that third-party-culpability evidence is 'incredible'; this determination, we have affirmed, 'is properly the province of the jury.' " (*People v. Cudjo* (1993) 6 Cal.4th 585, 610 (*Cudjo*), quoting *People v. Hall* (1986) 41 Cal.3d 826, 834 (*Hall*).) In *Hall*, the court reasoned that " 'if the evidence [of a third party's guilt] is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.' [Citation.]" (*Hall,* at p. 834.) "[I]nquiry into the admissibility of [third-party culpability] evidence . . . will always turn on the facts of the case . . . [and] courts must weigh those facts carefully." (*Ibid.*)

The Attorney General contends the trial court correctly excluded evidence supporting the theory that Lara was the shooter, because there was insufficient and "speculative" evidence linking Lara to the crime. Our analysis of this contention is guided chiefly by two California Supreme Court decisions, *Brady* and *Hall*.

In *Brady*, the defense sought to introduce evidence that someone other than the defendant had shot and killed a police officer after a traffic stop. Specifically, the defense wished to introduce evidence that several eyewitnesses to the murder described the assailant as an Asian male, and that soon after that murder, an Asian male was killed after shooting two members of a nearby police department. (*Brady, supra*, 50 Cal.4th at p. 558.) The Supreme Court found that "[a]lthough the man's ethnicity and his possible involvement in an unrelated robbery and killing of other police officers initially might have suggested some involvement in [the] murder, defendant presented no evidence actually linking this person to [the] murder." (*Ibid.*) Therefore, the trial court did not abuse its discretion in excluding the evidence. (*Ibid.*)

By contrast, in *Hall*, the court found there was sufficient evidence linking a third party – a man named Foust – to the murder committed in that case. Foust was the person who initially identified the defendant as the killer, telling the police that the defendant had confessed to him. Evidence showed that Foust wore "waffle-stomper" shoes, and prints from this type of shoe were found in the victim's bedroom. (*Hall, supra,* 41 Cal.3d at pp. 831, 833.) In addition, Foust (unlike the defendant) was left-handed, and the autopsy results suggested the perpetrator of the murder by strangulation was likely to be left-handed. Finally, Foust revealed unique details about the murder that the defendant never disclosed, tending to suggest he may have been present. (*Id.* at p. 833.) The Supreme Court held that this evidence was sufficient to link Foust to the murder, although it ultimately found the error in excluding the evidence to be harmless. (*Id.* at pp. 833, 835.)

In the instant case, the defense did not merely proffer evidence that Lara had a motive to commit the 2007 shooting; it offered evidence that Ramos, the best eyewitness to the shooting, had identified Lara as the shooter, based on various physical characteristics that he recognized as

belonging to Lara, whom he had seen on multiple occasions.[15] Therefore, unlike in *Brady*, some evidence *did* link Lara to the crime. The question is whether this eyewitness identification of the masked perpetrator, about which Ramos "could not be positive," and which was based on the perpetrator's ethnicity, height, weight, build, and "shape," was specific and definite enough to be admissible.

In order for an eyewitness identification to be admissible, " 'it is not essential that a witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime, and the want of positiveness goes only to the weight of the testimony.' [Citation.]" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522 (*Mohamed*); see *People v. Rist* (1976) 16 Cal.3d 211, 216 ["Confusion, or lack of clarity and positiveness in a witness' identification testimony goes to the weight, not the admissibility of the testimony."]; CALCRIM 315 [jurors instructed to consider how "certain was the witness when he or she made an identification" in determining the weight to give to the eyewitness testimony].) Moreover, " '[i]t is not necessary that any of the witnesses called to identify the accused should have seen his face. [Citation.] . . . [T]he identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing.' [Citation.]" (*Mohamed, supra*, at p. 522; see *People v. Barrett* (1968) 267 Cal.App.2d 135, 146 [identification need not be based on facial features, and "may be sufficient when such identification relies on size, appearance, talk, walk and voice"].)

Under these standards, the evidence of Ramos's identification of Lara based on his pale skin color, height, weight, build, and shape, which Ramos

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[15] On appeal, Salazar also relies on evidence introduced at trial that both Montoya and Martinez made phone calls to Lara in the hours before the shooting. However, that evidence was not before the trial court when it ruled on the prosecution's motion to exclude the third-party culpability evidence, and thus we do not consider it in determining whether the court erred in its ruling.

said he recognized as matching Lara's, was admissible.[16] Given that it is undisputed that the man who shot at Gonzalez, Brown, and Ramos was wearing a bandana covering his face, an identification based on physical characteristics other than facial features is understandable.

Further, the fact that Ramos was not certain of his identification did not go to its admissibility, but rather to the weight the jury should give to it. Once Ramos was called as a witness at trial, and assuming that he testified in keeping with his statements during his second interview with Shafia, the People could have probed whether Ramos truly observed that the shooter was Lara or whether his identification of Lara was influenced by preconceptions that Montoya had called in Lara to finish the job Lara had started a year earlier. However, the trial court erred in ruling that the evidence of a link between Lara and the crime was too speculative to be admitted.

(b) The Trial Court Abused its Discretion in Excluding Evidence of Lara's Culpability Under Section 352

The trial court also ruled that Salazar's proffered evidence identifying Lara as the shooter should be excluded under section 352 because the probative value of the evidence was outweighed by the likelihood of confusion of the issues and undue consumption of time. We evaluate a ruling under section 352 for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 723-724.) However, " 'section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense.' " (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, quoting *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) "To withstand a challenge under Evidence Code section 352, evidence of a third party's culpability 'need only be capable of raising a reasonable doubt of [the] defendant's guilt.' [Citation.]" (*Cudjo, supra,* 6 Cal.4th at p. 609; accord, *People v. Yeoman* (2003) 31 Cal.4th 93, 140-141.)

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[16] Because courts must treat third-party culpability evidence "like any other evidence" (*Robinson, supra*, 37 Cal.4th at p. 625), the same standard for admitting an eyewitness identification of a *defendant* applies to identification of an alleged third party perpetrator.

In *Cudjo*, the Supreme Court held that the trial court erred in relying on section 352 to exclude testimony that the defendant's brother had confessed to the murder in that case. (*Cudjo, supra*, 6 Cal.4th at p. 610.) As part of the defendant's offer of proof, a witness testified outside the presence of the jury that the defendant's brother had confessed to the murder while sharing a jail cell with the witness. (*Id.* at p. 605.) Although the brother also fit an eyewitness's description of the assailant, and "much of the other evidence, in particular the incriminating shoe prints, was as consistent with [the brother's] guilt as with defendant's," the trial court concluded that the evidence was "unreliable and untrustworthy" and excluded it under section 352. (*Id.* at pp. 606, 607.)

However, the Supreme Court concluded that the proffered testimony about the confession by the defendant's brother "raised the requisite doubt of defendant's guilt." (*Cudjo, supra*, 6 Cal.4th at p. 609.) Further, the trial court's reasonable and legitimate doubts about the credibility of the witness's testimony did not constitute "prejudice" under section 352. (*Cudjo,* at p. 610.) Thus, the Supreme Court held the trial court abused its discretion in excluding the testimony. (*Ibid.*; see also *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1679 [finding court abused its discretion by excluding under § 352 testimony that third party had admitted he was the shooter].)

The trial court in the instant case found that admitting evidence of Ramos's identification of Lara as the shooter would cause confusion and consume too much time. Salazar's counsel indicated he intended to call the two surviving victims – Ramos and Brown – to establish Lara's link to the shooting. The prosecution already intended to call Ramos, whose testimony as a victim and eyewitness to the shooting was a key component of the case. Similarly, Brown was another key prosecution witness whose description of the shooter was a central issue at trial. Given that Ramos's identification of Lara as the shooter was capable of raising a reasonable doubt of Salazar's guilt, the probative value of the additional testimony from these two existing witnesses outweighed any concerns about undue consumption of time or confusion of the issues. Further, doubt as to the strength of Ramos's identification of Lara is not a basis for exclusion under section 352. (*People v. Alcala* (1992) 4 Cal.4th 742, 790 (*Alcala*) ["Eyewitness testimony may be

vulnerable to impeachment for numerous reasons, including the possible existence of prior, conflicting testimony; such vulnerability, however, does not render the evidence irrelevant or unduly prejudicial."].) Accordingly, the trial court erred in excluding the evidence under section 352.

D. The Trial Court Should Have Excluded Pacheco's Statement That Salazar Admitted Being the Shooter

1. Pertinent Facts

During the prosecutor's redirect examination of Martinez, over the objection of the defense, the prosecutor was permitted to elicit testimony from Martinez relaying the contents of a police report that included a supposed confession from Salazar to another gang member, Pacheco (aka Criminal), that Salazar had committed the shooting of the D2S's. Defense counsel objected on hearsay grounds and also objected that the probative value of the evidence was outweighed by its unduly prejudicial effect on the jury. The court ruled the out-of-court statements that included the alleged confession were not hearsay, because they were not offered for their truth.

The explanation for the admission of the out-of-court statements is rather convoluted. During the cross-examination of Martinez, defense counsel played for the jury tapes of jailhouse telephone conversations between Martinez and a friend, and between Martinez and his mother, in which Martinez vociferously made clear he did not want Pacheco to cooperate with the police or come to court to testify. Pacheco was the fellow Bronson member whom Martinez had initially said could corroborate his story that he was the driver, not the shooter, because Martinez said Pacheco was in the back seat of Martinez's Tahoe during the shooting. During the recorded phone calls, Martinez told his friend and his mother to tell Pacheco that if Pacheco cooperated and testified, Martinez would send the "paperwork," it would be a "wrap" for Pacheco, Pacheco's "career [would be] gone," and Pacheco would be a "snitch" and a rat.

On redirect, the prosecutor attempted to rehabilitate Martinez by delving into the reason he did not want Pacheco to come to court. He asked Martinez what kind of "paperwork" he had seen on Pacheco, and Martinez said he had seen police reports connected to this case. At that point, defense counsel objected to the statements in the reports as testimonial hearsay. The

prosecutor responded that he was "not offering the statements by . . . Pacheco for their truth." At that point, defense counsel asked for a limiting instruction, and the court instructed the jury, "[T]he testimony that you are going to hear from this witness . . . is out-of-court statements, but it's not offered for its truth."

The prosecutor resumed his questioning about how and when Martinez saw the police reports. After Martinez testified that the police reports included statements from Pacheco pertaining to the shooting at issue, the prosecutor asked, "What was your understanding of what Mr. Pacheco had said? Again, not offered for its truth; for the effect on the listener."

Defense counsel objected, and at a lengthy sidebar, defense counsel asserted the statements the prosecutor was seeking to elicit were testimonial hearsay, as Pacheco made them while under arrest for possession of weapons that had been used in a shooting. Defense counsel further objected that the statements were unreliable, as Pacheco made them in the hopes of getting released from custody.

The prosecutor argued that the defense had opened the door to this evidence by introducing Martinez's phone calls regarding Pacheco. The prosecutor stated he wished to elicit testimony that the police reports included statements from Pacheco that Salazar told him he "did the shooting on St. Andrews." These statements were not offered for their truth, but rather were relevant to Martinez's state of mind, i.e., to explain the basis for Martinez's desire to dissuade Pacheco from coming to court. The prosecutor explained that Martinez believed Pacheco's testimony incriminating Salazar would render Martinez's testimony superfluous; if Pacheco did not come to court, the prosecution would be inclined to cut Martinez a better deal in exchange for his testimony.

Defense counsel responded that "the jury will not limit it for this witness's state of mind. They will assume that the government has another witness who corroborates [Martinez] because my client is the shooter based on an alleged admission that my client made." Counsel argued that allowing these out-of-court statements into evidence would be "more prejudicial than probative, and [a] violation of defendant's due process rights."

The court found the statements were not hearsay, because they were not admitted for their truth and allowed the following testimony:

"Q. Mr. Martinez, after reviewing the documentation about Criminal Pacheco, what was your understanding of what he had told the police?

"A. Well, he got arrested for gun possession at his apartment. [¶] . . . [¶] He was booked along with all of us that day, the same day. And he told the squad car, the policeman that was escorting him to the hall, juvenile hall, that they had information about the shooting on St. Andrews. He said that -- he told him that, if they helped him out in his case and the gun possession, that *he will give him information that Mr. Salazar called him and told him that he killed the D2S's and that Lefty was driving*." [¶] And Pacheco said . . . Ronny Salazar basically told him what happened. . . .

"[¶] . . . [¶]

"Q. *Your understanding was that Criminal had told police that Largo, Ronny Salazar, had called him and told him that Largo had done the shooting on St. Andrews?*

"A. Yes, sir, and that Lefty was with me.

"Q. And that the defendant had told Criminal that you were -- were the driver?

"A. Was the driver, yeah.

"[¶] . . . [¶]

"Q. And why was it important to you that Criminal not show up at trial?

"A. Because if he showed up, then that means District Attorney didn't need my help. So that means I would have been sitting there too, getting possibly life, too.

"Q. Did you think it also gave you leverage in terms of trying to negotiate that deal?

"[¶] . . . [¶]

"A. Yes. Yes, it did.

"Q. By Mr. Sisak: So you were trying to make yourself more important to this case; is that right?

"A. Exactly. . . ."

The court did not give any further limiting instructions with respect to the jury's consideration of the statement in the police report that Pacheco said Salazar admitted he did the shooting. During the final charge to the jury, the court gave CALCRIM No. 303, which provided, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other."

During closing arguments, the prosecutor referred to this testimony, noting Martinez had been on the phone from jail "talking about how he wants to get less time and talking about how he knows that Criminal gave a statement that the defendant confessed to him, and therefore, he has to keep Criminal from coming to court so he can work a better deal . . . ."

2. Analysis

The statement in the police reports that Pacheco told police that Salazar confessed to him implicated three layers of extrajudicial statements. Although Salazar's original statements would fall under the hearsay exception for party admissions (Evid. Code, § 1220), the other two layers do not fall within any exception to the hearsay rule. Relying on *Crawford v. Washington* (2004) 541 U.S. 36, 53-54, which held that the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination," Salazar argues these statements made by Pacheco while under arrest constituted inadmissible testimonial hearsay. Further, Salazar contends the statements should have been excluded under section 352.

(a) The Statements Were Admitted for a Non-Hearsay Purpose, and Thus No Crawford *Violation Occurred*

"[A]n out-of-court statement is hearsay only when it is 'offered to prove the truth of the matter stated.' (Evid. Code, § 1200)." (*People v. Jurado* (2006) 38 Cal.4th 72, 117.) A statement offered to prove its effect on the hearer is nonhearsay because " 'it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.' " (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.)

We accept that the trial court admitted Pacheco's statements to the police (as recorded in the police report) not for their truth, but rather for the non-hearsay purpose of demonstrating Martinez's state of mind at the time he made active efforts to dissuade Pacheco from coming to court to testify. *Crawford*'s "rule of exclusion applies only to testimonial *hearsay*; the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted'—that is, for nonhearsay purposes." (*People v. Hopson* (2017) 3 Cal.5th 424, 432.) Thus, we need not reach the issue of whether Pacheco's challenged statement relating Salazar's confession was testimonial. It was nonhearsay, and thus introduction of Pacheco's out-of-court statements did not violate *Crawford* or the Sixth Amendment.

(b) The Court Should Have Excluded the Statements Under Section 352

" 'A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." [Citations.].' " (*People v. Bridgeford* (2015) 241 Cal.App.4th 887, 904–905 (*Bridgeford*), quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 296.)

Even if the statements by Pacheco relaying Salazar's confession were technically not admitted for a hearsay purpose, this is one of those rare instances where we must find the trial court erred by failing to exclude the evidence under section 352. We agree with Salazar that the reason for admitting the statements – to explain Martinez's reasons for dissuading Pacheco from testifying – was wholly "collateral and tangential to the disputed issues at [Salazar's] trial." (See *People v. Lewis* (2001) 26 Cal.4th 334, 374–375 [§ 352 gives trial court broad power to prevent " ' "nitpicking" ' " over " ' "collateral credibility issues" ' "].) If considered only for the purpose for which it was offered, the probative value of the evidence was low. Moreover, we agree that the trial court easily could have required a sanitized

version of the evidence to be presented, so that the jury heard enough to ascertain why Martinez did not want Pacheco to testify, without learning that Salazar supposedly had confessed to the crime.

While the probative value of the evidence considered for the prosecutor's express purpose was low, its prejudicial effect on the jurors was extremely high. The California Supreme Court has "expressed a 'recognition that confessions, "as a class," "[a]lmost invariably" will provide persuasive evidence of a defendant's guilt [citation], . . . that such confessions often operate "as a kind of evidentiary bombshell which shatters the defense" [citation], . . . [and therefore] that the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial. . . .' [Citation.]" (*People v. Neal* (2003) 31 Cal.4th 63, 86 (*Neal*).)

Nor, as we discuss in more detail below, was the trial court's limiting instruction sufficient to prevent the jury, in weighing Salazar's guilt, from considering the fact that Salazar had supposedly confessed to being the shooter. Our Supreme Court has held that " 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.' " (*People v. Fletcher* (1996) 13 Cal.4th 451, 461, quoting *Bruton v. United States* (1968) 391 U.S. 123, 135–136 [holding that in joint trial where codefendant's confession is introduced that incriminates defendant, giving limiting instruction to jury to disregard the confession in determining the defendant's guilt or innocence does not effectively prevent prejudice to defendant].) We "may justifiably doubt" the ability of a jury to put a defendant's confession out of their minds "even if told to do so." (*Bridgeford, supra*, 241 Cal.App.4th at pp. 904–905.)

E. Cumulative Error

To reiterate, we find the court erred by (1) excluding evidence that an eyewitness identified Lara, another gang member, as the shooter in this case, and (2) allowing a cooperating accomplice to testify that he saw a police report documenting Pacheco's claim that Salazar had confessed to him. Even if each error alone was harmless—an issue we need not and do not reach—we

agree with Salazar that the cumulative effect of these errors deprived him of a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 844 [a "series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]"].)

"An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376.) Certainly, this case was closely balanced. Since the gunman had a bandana covering most of his face and no physical evidence connected Salazar to the crime, identity was the key issue at trial. But most of the evidence incriminating Salazar came from two purported accomplices who received reduced sentences in return for their testimony. And while a jailhouse recording of Salazar speaking to another inmate about punishing snitches was damaging, it was also subject to multiple interpretations. On the other hand, the errors, taken together, were devastating to the defense. A defendant's confession is uniquely damaging; courts have long recognized that it is very difficult for even a properly admonished jury not to consider it for its truth. Yet this jury, which was not properly admonished, not only heard the confession but was also *prevented* from hearing evidence that an eyewitness had identified someone else—someone who (unlike Salazar) matched the shooter's description and who (unlike Salazar) had been convicted of shooting the same victim a year earlier. We address these issues in turn.

As we have discussed, the California Supreme Court recognizes "that confessions, 'as a class,' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt [citation], and that such confessions often operate 'as a kind of evidentiary bombshell which shatters the defense' [citation]." (*People v. Cahill* (1993) 5 Cal.4th 478, 503.) In an analogous context, the United States Supreme Court has held that it is improper to admit the confession of a nontestifying codefendant that names and incriminates the defendant at a joint trial, even where the jury is instructed to consider the confession only against the codefendant, because jurors cannot be expected to ignore the statements of one defendant that are "powerfully incriminating" as to another defendant. (*Bruton v. United States*, *supra*, 391 U.S. at p. 135; see *id*. at pp. 124–126, 135–136.)

Here, the instructions did not diminish the risk that the jury would misuse Pacheco's statements about Salazar's confession as substantive evidence of Salazar's guilt. To be sure, the court provided the standard instruction about evidence admitted for a limited purpose. (CALCRIM No. 303 ["During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."].) But the court did not tell the jury how it *could* use the confession evidence. Instead, the court merely said, "the testimony that you are going to hear from this witness, again, is out-of-court- statements, but it's not offered for its truth."[17] Whatever the jurors were supposed to glean from the court's remarks, it is not obvious that they should have understood that CALCRIM No. 303 applied to the confession evidence. It is more likely that the jury instead relied on CALCRIM Nos. 358 and 359, which directly discussed Salazar's statements.

CALCRIM No. 358 provided in part, "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the

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[17] In the course of overruling a litany of hearsay objections during the previous three days of testimony, the court had commented on the hearsay rule several times. On June 16, 2015, the court explained: "Ladies and gentlemen, his answer is limited only to the effect on his mind, not on the truth of the matter of whether or not other members told him about that. Okay?" On June 17, 2015: "Ladies and gentlemen, yesterday I explained to you the admonition with this witness is just saying from another witness. It's not offered for the truth, offered for the truth to what that person is saying. It's only offered for the state of mind of this witness." And on June 18, 2015: "Okay. Ladies and gentlemen, the hearsay rule—hearsay is an out-of-court statement that's offered for its truth of the matter asserted. I have given you some limiting instructions before. You are hearing some statements that are out of court. [¶] And so the question is whether or not they are offered for its truth, meaning the truth of what he is saying. I have given you this limiting instruction before, and it applies again. Some of these out-of-court statements are offered not for the truth, but only on the effect it has on this witness." The testimony about the confession to Pacheco occurred on June 19, 2015—day four of Martinez's testimony.

statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements." CALCRIM No. 359, concerning the corpus delicti rule, warned that Salazar could not be convicted based only on his out-of-court statements. It explained: "You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime . . . was committed." (CALCRIM No. 359.) "That other evidence may be slight," however, "and need only be enough to support a reasonable inference" that a crime was committed. (*Ibid*.) Moreover, the identity of a perpetrator "may be proved by the defendant's statements alone." (*Ibid*.) These instructions allowed the jury to use Salazar's purported confession to Pacheco as direct evidence of guilt. And unlike the court's—at best—ambiguous remarks about how the jury could use the confession, these instructions provided clear guidance: the jury could accord the confession whatever weight it wished (CALCRIM No. 358) as long as there was enough other evidence to support a reasonable inference a crime had been committed (*id.*, No. 359). The admission of Salazar's purported confession, however, was not the only error.

While a confession is extremely powerful evidence for the prosecution, third-party culpability evidence is critical to the defense. (See Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense* (2007) 44 Am. Crim. L.Rev. 1069 [discussing the importance of the alternative perpetrator theory to the right to present a defense]; Griffin, *Avoiding Wrongful Convictions: Re-Examining the "Wrong-Person" Defense* (2009) 39 Seton Hall L.Rev. 129; *Chambers v. Mississippi* (1973) 410 U.S. 284 [exclusion of third-party guilt evidence violated the defendant's constitutional right to present a complete defense].) Here, Ramos described the shooter as between 5'7" and 5'9", skinny, with light skin—a description that matched Lara but did not match Salazar, who was 6'2½" tall with dark skin. Ramos had seen Lara several times and was sure Lara shot Gonzalez in 2006. (Indeed, this identification led to Lara's ultimate conviction for the 2006 shooting.) Ramos believed Lara had come back to finish the job.

This evidence was not only powerful on its own, however. It would also have given the defense an alternative explanation for the witnesses' ever-shifting stories. For example, the prosecution introduced credible evidence that Ramos was afraid of retaliation for "snitching," which the jury may have concluded led him to deny making many of the statements he previously made to the police. But admission of his statements identifying Lara would have supported an inference that Ramos was afraid not of Salazar but of Lara. And while impeaching Ramos with his prior statements may not have been enough to convince the jury that Ramos had firmly identified Lara, defense counsel did not have to convince the jury that Lara was the actual shooter: he just had to create reasonable doubt that it was Salazar.

Finally, the jailhouse recordings about punishing snitches did not obviate the prejudice from these combined errors. The recording was subject to multiple interpretations. After all, it stands to reason Salazar would be angry about a fellow gang member implicating him in a crime regardless of whether the informant were telling the truth. Yet the confession to Pacheco and the exclusion of the Lara identification made it significantly more likely that the jury would view the jailhouse statements as admissions.

"We therefore conclude the combined effect of the two errors substantially impaired [Salazar's] constitutional right to a fair trial. The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.] Under the facts here, there is a reasonable probability the jury would have reached a verdict more favorable to defendant in the absence of both errors." (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

DISPOSITION

The matter is reversed and remanded for retrial in accordance with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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