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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. LUIS VASQUEZ et al., Defendants and Appellants.	B230114 (Los Angeles County Super. Ct. No. BA341832)
In re DOUGLAS ESPINO, on Habeas Corpus.	B240442

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed as modified.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Petition denied.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Luis Vasquez.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner Douglas Espino.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Eric E. Reynolds and Allison H. Chung, Deputies Attorney General, for Plaintiff and Respondent.

A jury convicted Luis Vasquez of seven counts of attempted voluntary manslaughter and one count of shooting at an occupied motor vehicle, and convicted his codefendant Douglas Espino of seven counts of attempted murder and one count of shooting at an occupied vehicle. The jury found true gang and firearm enhancement allegations as to each defendant. Vasquez and Espino appeal. In Espino's petition for a writ of habeas corpus, which we previously ordered to be considered concurrently with this appeal, Espino argues that newly discovered evidence requires reversal of his conviction and a new trial. We affirm the judgment as to Vasquez. We remand for the correction of Espino's sentence and otherwise affirm the judgment as to Espino. We deny Espino's habeas petition.

BACKGROUND

An amended information filed September 15, 2008 charged Vasquez and Espino with seven counts of attempted willful, deliberate, and premeditated murder, in violation of Penal Code[1] sections 664 and 187, subdivision (a), and one count of shooting at an occupied motor vehicle in violation of section 246. As to all the charged offenses, the information alleged that Vasquez and Espino acted for the benefit of a street gang in violation of section 186.22, subdivisions (b)(1)(C) and (b)(4), and Vasquez and Espino personally used and discharged firearms causing great bodily injury, in violation of section 12022.53, subdivisions (b)–(d). Vasquez and Espino each pleaded not guilty to all counts and denied the special allegations.

Vasquez and Espino were tried together. On the first seven counts, the jury found Vasquez not guilty of attempted murder, but found him guilty of the lesser included offense of attempted voluntary manslaughter, in violation of sections 664 and 187,

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

subdivision (a). The jury also found Vasquez guilty of shooting at an occupied vehicle as alleged in count 8. The jury found Espino guilty as charged on all counts. The jury found true all the enhancement allegations as to both Vasquez and Espino.

The trial court sentenced Vasquez and Espino after denying Espino's motion for a new trial. Vasquez and Espino filed timely appeals, and Espino filed a habeas petition which we consider concurrently with this appeal.

The shooting on June 7, 2008

The testimony at trial was that at around 9:00 p.m. on June 7, 2008, Adrian Castro and his wife Bernice Castro[2] were the driver and front passenger in Adrian's uncle's van, heading down Valencia toward Pico in Los Angeles to get some milk for their one-year-old son, who was in a car seat between them. In the middle of the van were Adrian's mother Adela Garcia and his younger brother and sister (a minor), and Arturo Castro, Adrian's older brother, was lying down in the back. There was a blackout in the neighborhood and the lights were out.

Bernice heard someone yell "'Fuck 18,'" and she put her head out the window. She saw Espino, whom she had seen frequently in the neighborhood, wearing a white shirt and standing with three other men dressed in black, on the sidewalk on the van's passenger side. Adrian stopped the van and then moved it slowly forward. Espino walked toward the van, throwing gang hand signs and pulling something out from the pocket of his pants. Bernice heard what she thought were rocks being thrown against the van and felt something hot on her right arm, which she then saw was bleeding. Bernice turned toward the window and saw Espino walking toward the back of the van and shooting a handgun. She was hit twice, on the right hand and shoulder; the second shot hit her while she was hugging her son to protect him. Bernice had also seen Vasquez in the area, but she did not see him that night.

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[2] We refer to some members of the Castro family by their first names to avoid confusion. No disrespect is intended.

A couple of days later, Bernice identified Espino as the shooter in a six-pack photographic lineup. In an earlier incident, Espino had made her uncomfortable when he walked past her in the parking lot of a neighborhood market and looked at her as if he wanted to take her necklace.

Adrian's brother Arturo testified that he was sleeping on the van's floor next to the back doors when he heard gunshots and then "Fuck 18." He was hit by a bullet that went through his hand and then into his cheek, breaking his jaw and lodging in his throat, where the bullet remained at the time of his testimony.

Adrian testified that as he drove on Valencia toward Pico, he saw Espino (whom he knew from seeing him every day in the neighborhood) and some other men on the sidewalk on the passenger side of the van, and heard Espino say "'Fuck 18. Faketeen'" and "'It's all about Burlington, man.'" Adrian could see Espino clearly; he was wearing a black shirt. Adrian knew these epithets were references to another gang, 18th Street. Nobody in the van said anything to Espino.

Adrian stopped the van next to Espino to ask: "What's up? What's going on? [¶] . . . [¶] You always see me here." Espino ran toward the van, pulled a handgun from his waistband, and started shooting at the van. Adrian froze for about 10 seconds and then, after his mother yelled to go to the hospital because Arturo was hit, he drove off, with bullets still firing.

Adrian knew Vasquez as "Shrek." Vasquez used to live on Valencia, and Adrian would see him hanging out with Espino on the corner of Pico and Valencia. Before the shouting and shooting on that night, he saw Vasquez on the driver side of the van, across the street from Espino. Later that night, Adrian told the officers that he knew Vasquez, but that he was not the shooter. Photographs showed that the van had bullet holes by the back license plate, on the right side of the back of the van, and in the window of the sliding door on the passenger's side. A bullet also had popped out a wing window.

A week later, Adrian saw Vasquez and Espino walking on Venice. When Adrian stopped the (different) van he was driving, Vasquez approached and said: "'Hey, are you the guys that we were shooting?'" Adrian replied angrily, and drove after a sheriff's car

to flag the officer down. Adrian told the sheriff he had just seen the man who shot at him. The sheriff went back to Venice and with Adrian, followed a bus Vasquez and Espino had boarded, eventually taking the two men off the bus.

Adela (Adrian's mother) testified that she heard some guys on the right side of the van yell "'Fuck you, 18,'" but did not notice who it was. Adrian drove backwards a little, and then she saw Espino take something out of his waistband. Espino then started shooting; Adela was sure it was him, although she could see sparks only, and not the gun. She pushed Adrian's brother and his sister (a minor) down and ducked down with them, feeling a bullet pass her head. She told Adrian to step on it.

Adrian's sister, 12 years old at the time of trial, testified that she heard Espino yell "'Fuck 18,'" and that looking out of the windows on the van's passenger side, she saw Espino searching for something inside his pants. The shooting then began (she saw sparks, but no gun) and her mother pushed her down. She had seen Espino once before, hanging out with friends on Valencia and Pico.

Jesus Torres testified that on June 7, 2008, he lived in a second-floor apartment on the west side of Valencia, midway between 14th Street and Pico. At around 9:00 p.m., Torres was on his balcony and saw Vasquez on the street outside the apartment gate. Torres knew Vasquez as "Smokes," and saw him every day "kicking it on the street." Torres could also see Espino, whom he knew as Sparks, across the street, wearing a black shirt. Torres went downstairs to tell Vasquez "[n]ot to kick it in front of my house." Although there was a blackout, there was enough light from passing cars for Torres to see Vasquez, who was "hand shake close."

Vasquez was about to leave when Torres heard Espino yell "Faketeenth" and heard gunshots, both coming from across the street, and saw a van passing by going towards Pico. Torres saw Espino shooting and walking towards the van; he was sure that Espino fired the gun. When he finished shooting, Espino ran diagonally toward Torres's side of the street. Vasquez took a handgun out of his waistband. Vasquez shot at the van as it moved toward Pico; Torres heard four or five shots. Torres did not hear any yelling, or hear or see any shooting, from the van.

Torres ran upstairs with his wife, who had come down, and locked the doors. He heard a noise in the back and someone messing with his neighbor's and his doors. He grabbed a souvenir mini bat, opened his door, and saw Espino and Vasquez. Vasquez tried to give Torres the gun and told him to hold it for him, but Torres closed the door and locked it. Vasquez and Espino ran downstairs by the back entrance.

The next day, Torres saw several cars parked on his side of the street with bullet holes. In photographic lineups, Torres identified Espino and Vasquez.

Los Angeles Police Department (LAPD) Officer Jose Sanchez testified that he responded to the crime scene on June 7, 2008, recovered six .22-caliber shell casings from the east sidewalk of Valencia, and saw three vehicles with bullet impact marks or holes. On June 9, two days after the shooting, another officer recovered a .45-caliber shell casing on the curb street line on the west side of Valencia, near Torres's apartment.

LAPD criminalist Kathleen Hafeli conducted a bullet path analysis on the van and concluded that all five impact marks were created by bullets from the outside, and two of the impact marks were consistent with two persons firing from the sidewalks on the opposite sides of the van.

Gang evidence

LAPD Officer Susie Gras testified that she had had numerous contacts with Vasquez in the area of Pico and Valencia. On four to six occasions Vasquez admitted being a member of the Burlington Locos gang. Officer Gras recognized Espino as being from the same area.

LAPD Officer George Diego testified as an expert on the Burlington Locos street gang. The gang had 30 to 40 active members. The gang's primary activities were homicide, robbery, extortion, assault with a deadly weapon, criminal threats, carjacking, rape, home invasion, and narcotics sales. In the 1980's, the Burlington Locos broke away from the 18th Street Gang which controlled the same area, and ever since the two gangs had feuded. "Faketeen" was a derogatory name for 18th Street. Evidence was presented of two predicate offenses by Burlington Locos members.

A shooting committed by Burlington Locos members after they shouted anti-18th Street epithets would elevate the Burlington Locos' status in the community and would intimidate people from reporting other crimes by Burlington Locos members. A respected 18th Street member had been shot and paralyzed on Pico and Valencia two days before the shooting, and Officer Diego had seen tagging in the area about a week later with crossed out "Burras" (a derogatory term for Burlington Locos) and the 18th Street name written nearby.

On most days that he worked, Officer Diego had seen Vasquez loitering on Valencia, even after he had moved out of the area, and opined that he was a Burlington Locos member who went by the street name of "Shrek." Based on markings in a notebook found in Espino's bedroom and the witnesses identifying Espino as yelling "'Fuck 18th Street'" and "'Faketeenth,'" Officer Diego opined that Espino was also a Burlington Locos member.

Officer Diego responded to the crime scene on the night of the shooting. He and his partner had detained Vasquez nearby; he was sweaty and nervous. When Adrian did not identify Vasquez as involved in the shooting (although he saw him in the area), the officers let him go.

Given a hypothetical mirroring the facts of this case, Officer Diego opined that the shooting was committed for the benefit of and in association with the Burlington Locos.

Defense case

Neither Vasquez nor Espino testified or presented witnesses. Vasquez introduced photographs of the van, another car, and buildings in the area of the shooting. A photograph introduced by Espino showed the moon as it appeared at the time of the crime.

DISCUSSION

I. Vasquez's appeal

Vasquez argues that the trial court committed prejudicial error when it did not instruct on imperfect self-defense regarding count 8, shooting at an occupied motor vehicle, and that his counsel was ineffective in failing to request such an instruction. He

also argues that the evidence was insufficient to support the true findings on the gang enhancement as to each count. We disagree.

A. An imperfect self-defense instruction was not required for count 8.

The trial court gave an instruction on perfect self-defense regarding all counts, including count 8, shooting at an occupied motor vehicle in violation of section 246. The court instructed the jury with CALCRIM No. 965, the standard instruction on shooting at an occupied motor vehicle, including a statement that the prosecution must prove: "As to defendant Vasquez, Defendant Vasquez did not act in self-defense." [3]

The trial court also gave an instruction on imperfect self-defense, but at the request of the prosecutor, added that imperfect self-defense "applies only to counts 1 through 7," in effect instructing that it did not apply to count 8, shooting at an occupied motor vehicle. Vasquez's counsel neither objected to the prosecutor's request, nor argued that the jury should be instructed on imperfect self-defense as to count 8.

Vasquez now argues that the trial court erred prejudicially when it failed to instruct on imperfect self-defense regarding count 8, and that his trial counsel rendered ineffective assistance by failing to request such an instruction.

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Watie* (2002)

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[3] The third element of the standard instruction on shooting at an occupied vehicle, CALCRIM No. 965, provides: "The defendant did not act (in self-defense/ [or] in defense of someone else").

The written instruction as given to the jury did not include the third element particularized with Vasquez's name. Vasquez does not raise this as error. (See *People v. Wilson* (2008) 44 Cal. 4th 758, 804.)

The trial court also gave CALCRIM No. 970, describing shooting a firearm in a grossly negligent manner (§ 246.3), a lesser included offense to shooting at an occupied motor vehicle.

100 Cal.App.4th 866, 881.) A court does not, however, have a duty to instruct on a principle of law *not* closely and openly connected to the facts. "'[A] legal concept that has been referred to only infrequently, and then with "inadequate elucidation," cannot be considered a general principle of law such that a trial court must include it within jury instructions in the absence of a request.' [Citations.]" (*Id*. at p. 882.)

As in this case, the defendant in *People v. Watie, supra,* 100 Cal.App.4th 866 was charged with a violation of section 246,[4] and argued that the court had a sua sponte duty to instruct on imperfect self-defense, and the failure to do so deprived him of a defense. (*Id*. at p. 822.)[5] This contention "falters," because "'"unreasonable self-defense" is . . . not a true defense; rather it is a shorthand description of one form of voluntary manslaughter.'" (*Ibid.*) "Section 246 is a general intent crime." (*Id*. at p. 879.) The statute does not require the malice aforethought necessary for a conviction of murder, but instead, like mayhem, requires "'a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.'" (*Ibid.*) At the time of Watie's trial and the appellate decision, "no authority suggest[ed] that the nondefense of imperfect, or unreasonable, self-defense could apply in a prosecution for violation of section 246. Such a legal theory would be at odds with [the] characterization of unreasonable self-defense as a species of voluntary manslaughter. Because there was no [such] authority," the theory of imperfect self-defense "could not be considered 'a general principle of law' that was 'openly connected with the facts before the court,' and the trial court had no duty to instruct on that theory sua sponte." (*Id*. at p. 882.)

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[4] Watie was charged with shooting a firearm at an inhabited dwelling. Section 246 as in effect at the time of the shooting in this case provided: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, [or] occupied motor vehicle is guilty of a felony. . . ."

[5] Imperfect self-defense is a "partial defense to a charge of *murder* that the defendant killed the victim while under the honest but mistaken belief that his conduct was necessary in self-defense. The basic rationale of the doctrine is that a genuine belief in the need to defend oneself, even if unreasonable, negates the 'malice aforethought' which is required for a conviction of murder. [Citation.]" (*People v. Hayes* (2004) 120 Cal.App.4th 796, 801.)

Likewise, at the time of the 2008 shooting on Valencia and at the time we write this opinion, no authority suggests that imperfect self-defense was a general principle of law applicable to facts showing a violation of section 246, thus requiring the trial court to give a sua sponte instruction. Vasquez cites *People v. McKelvy* (1987) 194 Cal.App.3d 694, 701–702, in which a single justice in a lead opinion concluded that imperfect self-defense was applicable to charges of mayhem, which also is a general intent crime. This conclusion has been roundly rejected. (See *People v. Hayes*, *supra*, 120 Cal.App.4th at pp. 802–804; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 835–836.) Vasquez does not cite any cases following *People v. McKelvy* on this point, and we have found none. No general principle of law requires an instruction on imperfect self-defense when a defendant is charged with shooting at an occupied motor vehicle, and it was not error for the trial court not to instruct on imperfect self-defense as to count 8.

Given our conclusion that imperfect self-defense does not apply to shooting at an occupied vehicle under section 246, we necessarily reject Vasquez's claim that his counsel was ineffective in failing to request an instruction on imperfect self-defense as regards count 8. Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

B. Sufficient evidence supported the true findings on the gang enhancement.

Vasquez argues that there was insufficient evidence that he committed the charged crimes for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further or assist criminal conduct by gang members. (§ 186.22, subd. (b).) Vasquez admits that Officer Diego's expert opinion established that he and Espino were members of the Burlington Locos gang at the time of the crimes, and that the primary gang activities included murder, robbery, assaults and carjacking. Nevertheless, he claims that no evidence supported the conclusion that in shooting at the van, he acted for the benefit or at the direction of the gang or any of its members.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Abillar* (2010) 51 Cal.4th 47, 59–60.)

The evidence established that Vasquez shot at the van after Espino, across the street, shouted anti-18th Street epithets at the van and fired at the vehicle. Espino's gang epithets were loud enough for Torres to hear on the other side of the street, where Vasquez then pulled his gun and shot at the van. When Adrian saw Vasquez and Espino walking on Venice a week later, Vasquez asked him "Hey, are you the guy we were shooting?" Officer Diego testified that for Burlington Locos members to procure weapons, yell anti-18th Street epithets, and follow with a shooting would benefit the Burlington Locos by elevating their status with rival gangs and the community, intimidating people from reporting crimes by Burlington members. This was sufficient evidence from which a rational jury could conclude that Vasquez acted in concert with a fellow Burlington Locos member, Espino, for the benefit or at the direction of the gang.

II. Espino's appeal

Espino argues that the trial court prejudiced him by denying him a continuance during trial and by denying his motion for new trial. Espino also argues that his sentence is cruel and unusual punishment. We reject his first two arguments and need not address the third, as we order the correction of his sentence.

A. The trial court did not abuse its discretion in denying a continuance.

On January 7, 2009, the trial court ordered defense witnesses Chris Cerritos and Jose Hernandez to return to court on February 10 without further order or subpoena. On February 10, the court ordered Cerritos and Hernandez to return on February 25. On February 25, the court ordered body attachments issued and held to March 2, 2009.

On March 2, 2009, the case was transferred for trial. Cerritos was present. The trial court ordered him to return without further court order on March 9, and defense counsel gave Cerritos a note with the date, time, and courtroom. Cerritos asked if that would be the last day of trial. The court responded, "Probably. [¶] . . . [¶] So we will see you back then, and you can go," giving Cerritos the court phone number "just in case."

On March 9, 2009, the trial court issued a body attachment for Cerritos but held it to March 10. On March 10, the court asked if there were any defense witnesses other than Cerritos, and the answer was no. The court issued and ordered a body attachment with bail at $10,000, and told the defense to "call the witness . . . and tell him it is not going to get cleared up until he comes to court. It is outstanding and operates as an arrest warrant." Counsel advised, "I'll be forced to ask for a continuance if the witness is not here tomorrow," and the court responded, "We can take that up at that time. Obviously, you are only entitled to a reasonable continuance. If someone is evading you, I'll need verification he hasn't fled the jurisdiction because he doesn't want to testify. You don't get indefinite continuances if the person absconded." The court added, "All I need is a defense investigator to tell me whatever efforts you made to secure this person's presence and how likely it is you will be able to get this person into court, if I do choose to grant a continuance, how long that will be."

The next day, March 11, 2009, Cerritos failed to appear. Defense counsel stated that Cerritos had made a statement "which is basically completely exculpatory as it applies to Mr. Espino."[6] Counsel explained that a defense investigator went twice to the

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[6] The statement was in a defense investigator's report that he interviewed Cerritos on August 30, 2008, two months and three weeks after the shooting. Cerritos told the investigator that he and Hernandez were riding bikes on the night of July 7, 2008, when he saw his friend Espino arguing with people in a van, and then heard gun shots and saw two unknown Hispanic males firing a handgun and a rifle at the van, while Espino ran and ducked for cover.

We note that Cerritos told the investigator that Hernandez was present during the shooting, and Espino's motion for new trial states that Hernandez, also a friend of

house where he saw Cerritos in the early evening, knocked on the door with no answer, left a note on the door, and returned around 10:00 p.m., when again no one answered his knock. He checked with neighbors who confirmed that Cerritos lived there, but they had not seen him for a couple of days. Cerritos had consulted with a lawyer (whom he had not retained), and the lawyer had advised him to appear. Counsel spoke to the lawyer the day before, and he told counsel he would try to get hold of Cerritos. Counsel requested a 24- or 48-hour continuance "to try to find this witness. I think he has got to be around. I have no information that he's doing anything other than probably sleeping somewhere else to avoid this case . . . ." The prosecution stated that it had called a cell phone number on the report from court the day before, which was out of service or not taking calls.

The court read Cerritos's statement and stated: "[O]bviously you've exercised due diligence . . . this witness is going to say someone else shot at the van—that's the crux of what he would say—other than your client. So the question is would the witness be secured in a time that is reasonable? And if he's avoiding process, I am not sure that's going to happen." The court stated it would rule after a brief recess, any continuance "would just be 24 hours," and arguments and instructions would occur the next day. Counsel responded that 24 hours would be sufficient, as Cerritos was ordered back the week before for Monday, and it was now Wednesday. The court stated: "[O]bviously [the statement is] material. The question is are we likely to get him? But 24 hours is not . . . going to, I think, impede the progress of this trial significantly." After a brief recess, the trial court granted a 24-hour continuance "to see if [defense counsel] can locate and convince Mr. Cerritos to come in."

The next day, March 12, 2009, Cerritos was not in court. Defense counsel explained that his investigator had gone to Cerritos's home and posted a letter on the door with counsel's phone number, indicating that there was a bench warrant out for Cerritos and he needed to be in court that morning. There was no one at home. Counsel

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Espino, could have testified that someone other than Espino fired a rifle at the van. Hernandez also said that Vasquez did fire at the van with a handgun from the same side of the street as Espino.

requested another 24-hour continuance. The court replied: "At this point I am going to deny that request. You've had since Monday to try and find him. At this point, while I do agree that he is material and I agree that you have exercised due diligence in trying to secure his presence here in court and that he was ordered back to court, you have had from Monday until today, which is Thursday, so four days to try and find him. [¶] And he seems to be actively avoiding coming to court, and there is no likelihood or time frame with which you could give the court that you think you may have him. So without the certainty of him even being here, I think the four days has been sufficient to try and get him, and I am not going to give you any more time at this point." Counsel responded: "I am sure if the court keeps the bench warrant out, he will be here very soon, but I can't say specifically when." The court denied any further request to continue.

"[T]he trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) The defendant must establish that he exercised due diligence to get the witness to court, that the testimony was material, that the facts could not otherwise be proven, and "'that the testimony could be obtained within a reasonable time.'" (*Ibid.*) It is not an abuse of discretion, arbitrary, or in violation of due process to deny a continuance when "the asserted need for continuance is caused by [a] persistent failure . . . to cooperate with counsel." (*Id*. at p. 1037.) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion and an order denying a continuance is seldom successfully attacked. [Citation.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920.) The court abuses its discretion "only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.] Moreover, the denial of a continuance may be so arbitrary as to deny due process. [Citation.] However, not every denial of a request for more time can be said to violate due process, even if the party seeking the continuance thereby fails to offer evidence. [Citation.]" (*Id.* at pp. 920–921.) We assess the circumstances present in the case, particularly those presented to the trial court at the time it denies the request. (*Id.* at p. 921.)

The circumstances in this case are that Cerritos, subject to a body attachment, appeared in court on the day the case was transferred for trial. The court ordered him to return in a week, and Cerritos received written information on the date, time, and courtroom, as well as the court phone number. Cerritos did not appear a week later; the court held a body attachment for the next day. That following day, the court issued the body attachment with $10,000 bail, warning defense counsel that if Cerritos had absconded, the court would not grant indefinite continuances. A day later Cerritos again failed to appear, and counsel reported that a defense investigator had left a note on the door of Cerritos's address; no one was home, and the neighbors had not seen him for a couple of days. The prosecutor had called Cerritos's cell phone, which was out of service or not taking calls. The court stated that if Cerritos was avoiding process, he might not appear in a reasonable time. Counsel responded that 24 hours would suffice, and the court granted the 24-hour continuance. After the continuance expired the next day, Cerritos still did not appear. Counsel stated another letter had been left on his door. The court denied the request for a second 24-hour continuance because Cerritos was actively avoiding coming to court, counsel had been trying to get him for four days, and counsel could give no time frame for when Cerritos might appear.

Considering those circumstances, the trial court did not exceed the bounds of reason in denying the second continuance. The court granted one 24-hour continuance, and did not act arbitrarily in denying another continuance when Cerritos had persistently failed to cooperate with counsel or respond to the body attachment (with $10,000 bail) by appearing in court, and apparently had absconded. Cerritos's likely testimony would have been contradicted by Adrian, Bernice, Adela, and Torres, all of whom recognized Espino before the shooting and testified that Espino shot at the van. Counsel could give no assurance that Cerritos would appear within a reasonable time. We perceive no abuse of discretion.

B. The motion for new trial was properly denied.

On August 12, 2009, and January 15, 2010, Espino's counsel filed motions for new trial based in part on the failure of the trial court to grant a continuance to procure

the presence of witnesses Cerritos and Hernandez. The court heard and denied Espino's motion. On appeal, Espino argues that the trial court's failure to grant an additional continuance to procure Cerritos's presence was reversible error, and required the trial court to grant a new trial.[7] We reverse based on a trial court's failure to grant a new trial motion only if "'"'a manifest and unmistakable abuse of discretion clearly appears.'" [Citations.]'" (*People v. Howard* (2010) 51 Cal.4th 15, 42–43.) As we conclude above that the trial court did not abuse its discretion in denying the continuance, it therefore was not an abuse of discretion for the trial court to deny a motion for new trial which was based on that denial.

C. Espino's sentence was incorrectly stated in the minute order and abstract of judgment and must be corrected.

Espino argues, and respondent denies, that his sentence of 280 years to life constitutes cruel and unusual punishment. We need not consider that argument. Although the minute order and the abstract of judgment both show consecutive sentences on counts 1-7 for a total sentence of 280 years, both are incorrect. The trial court sentenced Espino to forty years to life on each of seven counts of attempted murder to be served *concurrently*, not consecutively, and stayed the sentence on count 8.

The prosecution's sentencing memorandum requested consecutive sentences of forty years to life on each of the seven counts of attempted murder, for a total of 280 years to life, with the sentence on count 8 (shooting at an occupied motor vehicle) stayed pursuant to section 654. In his sentencing memorandum, Espino urged the court to "find direction" in the state constitutional prohibition against cruel and unusual punishment in setting a sentence, and stated "arguably, the punishment requested by the government runs afoul" of that prohibition.

At the sentencing hearing, the prosecutor requested that Espino be sentenced on the first count of attempted murder and that the remaining attempted murder sentences

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[7] Espino does not argue any of the other grounds for a new trial cited in his motions, including his arguments therein regarding newly discovered evidence.

should be concurrent ("as to count 1 for Mr. Espino and the rest concurrent"). Espino's counsel agreed that the sentences should be concurrent: "I don't know how much can be said. These sentences are so impossible to comprehend. I just submit it. [The prosecutor] has asked for concurrent time on everything that can be concurrent, and I would simply request that." The court stated: "I am going to follow the deputy district attorney's recommendation regarding the sentencing," and addressed Espino and Vasquez. The court then pronounced: "Mr. Espino, on counts 1 through 7, the term prescribed for premeditated, willful, and deliberate attempted murder, . . . section[s] 664/187 in the first degree, is a life term with an eligibility of parole, with a minimum of 15 years, pursuant to the [section] 186.22 enhancement that was found to be true with the consecutive 25 to life term for each count based upon the use of the firearm pursuant to . . . section 12022.53 [subdivision] (d)." The court stayed the sentence on count 8 pursuant to section 654.

Espino's counsel asked: "I don't know if I heard the court stay [sic] counts 2 through 7." The trial court answered: "I am sorry. Thank you. Counts 2 through 7 will have the same sentence for Mr. Espino as count 1, and they will all run concurrent [¶] . . . [¶] to count 1."

The minute order of the sentencing hearing, however, states that the 40 years to life sentences on counts 2 through 7 are to be served *consecutively* to the sentence on count 1.[8] The abstract reflects this error.

An unauthorized sentence is reviewable "regardless of whether an objection or argument was raised in the trial and/or reviewing court." (*People v. Welch* (1993) 5 Cal.4th 228, 235.) "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; see *People v. Mesa* (1975) 14 Cal.3d 466, 471.) "'It is not open to question that a court has the inherent

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[8] The minute order regarding the December 21, 2010 sentencing hearing is described as amending nunc pro tunc the original minute order.

power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] . . .' . . . Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.]" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

The oral judgment of the trial court was that Espino was to receive concurrent sentences on counts 1 through 7. We have identified a glaring discrepancy between that judgment as reflected in the transcript, the minute order, and the abstract of judgment. The minute order of December 21, 2010 and the abstract of judgment must be corrected to state that Espino is to serve the 40-years-to-life sentences on counts 2 through 7 concurrently to the 40-years-to-life sentence on count 1.

III. The prosecutor's use of Vazquez's and Espino's names in the gang hypothetical does not require reversal of the convictions.

In questioning Officer Diego, the prosecutor stated: "I am going to ask you a hypothetical question," and continued: "Assume that on June the 7th, 2008, at about 9:20 p.m., a little after 9:00 o'clock p.m., a van full of seven family members, Adrian Castro, who you met [¶] . . . [¶] and his siblings, wife, child, mother, are traveling in a van northbound on Valencia, crossing 14th Street, heading towards Pico." Officer Diego responded, "That's correct." The prosecutor went on: "Assume further that Douglas Espino is on the east sidewalk, approximately four houses north of 14th Street." Officer Diego responded: "Correct." The prosecutor continued: "And Mr. Vasquez is on the west sidewalk, approximately across the street, maybe up north one more house." Officer Diego responded: "Okay." The prosecutor concluded: "Assume further that as this van travels up to the area where Mr. Espino is, Mr. Espino yells out either 'Fuck 18th Street' or 'Fuck Faketeenth Street, this is Burlington,' words to that effect. [¶] Assume further then that the van slows and comes to a stop, perhaps backs up a couple of feet. [¶] Assume further that Mr. Espino produces a weapon, a .22 caliber weapon or any other type of firearm and begins shooting into the van, into the passenger's side of the van. [¶] Assume further that Mr. Vasquez, from across the street, after the first shooting starts

with Mr. Espino, Mr. Vasquez then produces his own weapon and begins firing from the west side of the street into the van. [¶] Assuming that hypothetical situation, do you have an opinion as to whether or not any crimes that were committed on that occasion were committed for the benefit of, in association with, or at the direction of the Burlington Locos street gang?"

Officer Diego responded: "Yes, I do." Officer Diego then described the Burlington Locos, and stated: "Initially yelling 'Fuck 18,' when you yell that out, you're calling someone out. You're not going to yell that out unless you're willing to fight and you're willing to battle it out. [¶] So all that said and done, absolutely it's benefiting the gang." Officer Diego explained that if "someone" yelled an anti-18th Street epithet, "you're challenging someone." The prosecutor continued to ask Officer Diego about the significance if "someone" challenged the other gang and a violent act followed, and Officer Diego explained that if a rival gang member had been in the van, if people "see or hear that Burlington Locos took out or wounded one of the 18th Street gang members, that's just going to cause more fear and intimidation within the community, and people are not going to want to report," allowing Burlington Locos to commit other crimes.

We requested supplemental briefing from the parties whether the prosecutor's use of the names of Vasquez and Espino in posing the gang "hypothetical" to Officer Diego constituted error, and if it was, whether the error was prejudicial. We conclude that Vasquez and Espino waived the issue by failing to object at trial, and in any event no evidence was improperly admitted, as the gang expert did not reference the name of either defendant.

In *People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*), our Supreme Court held that a prosecutor's hypothetical questions used to elicit testimony from gang experts did not violate the defendant's constitutional rights, even when the questions only "'thinly disguised'" the evidence. The court added: "Obviously, there is a difference between testifying about specific persons and about hypothetical persons" and noted that "'[a] witness may not express an opinion on a defendant's guilt. [Citations.]'" (*Id*. at pp. 1047–1048.) In a footnote, the court further explained: "It appears that in some

circumstances, expert testimony regarding the specific defendants might be proper. [Citations.] The question is not before us. Because the expert here did not testify directly about defendants, but only responded to hypothetical questions, we will assume for present purposes the expert could not properly have testified about defendants themselves." (*Id.* at p. 1048, fn. 4.)

Neither defense attorney objected to the prosecutor's questions or to Officer Diego's answers. Generally, a failure to object at trial bars the defense from asserting that erroneously admitted evidence is a basis for reversal on appeal. (Evid. Code, § 353, subd. (a); *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140.) Even viewing the prosecutor's improper questions as prosecutorial misconduct, a timely objection and admonition would have cured any harm, and therefore we would also reject any claim of prosecutorial misconduct for the first time on appeal. (*People v. Stewart* (2004) 33 Cal.4th 425, 498.)

Even if there had been an objection, however, we would find no error.[9] While the prosecutor used the names of Vasquez and Espino in phrasing his question, Officer Diego responded without testifying regarding either defendant, using "you" and "someone" in his responses, and the prosecutor followed suit. Officer Diego did not testify about the defendants themselves, and therefore did not improperly express an opinion on Vasquez's or Espino's guilt. While the prosecutor's use of the names in posing the hypothetical was inadvisable, in the context of Officer Diego's response and the prosecutor's further questioning, the testimony shifted to a hypothetical using the "thinly disguised" facts of the case. (See *Vang*, *supra*, 52 Cal.4th at p. 1045.)

IV. Espino's habeas petition

In his petition for a writ of habeas corpus, Espino argues that newly discovered evidence requires the reversal of his conviction. We disagree.

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[9] We therefore necessarily reject Vasquez's and Espino's arguments that the failure of counsel to object constituted ineffective assistance.

Attached to the habeas petition, is a declaration by yet another friend of Espino's, Sergio Guevara, and signed January 26, 2012. Guevara states that after 8:00 p.m. on June 7, 2008, he was walking on Valencia and heard a male voice that he did not recognize shout "'fuck faketeen.'" When he turned in the direction of the yelling, Guevara saw a Hispanic male from the neighborhood he recognized as "Sinner," standing at the curb holding a "rifle-type weapon and pointing toward the van." He noticed Espino and another male Hispanic standing several feet behind Sinner.

Guevara heard several shots and saw a muzzle flash from the rifle: "It appeared to me that Sinner was shooting at the van." Sinner, holding the rifle, followed the van as it moved north on Valencia. Espino ran across Valencia out of sight. Guevara had a clear view of Espino as he ran. "At no point during the incident did Espino have any weapon." Guevara ran into a friend's home, and heard several additional gun shots that sounded as if they came from more than one weapon.

Guevara had been identified earlier as a potential defense witness, in Espino's first motion for new trial filed on August 12, 2009. Espino's initial trial counsel, Mark Bledstein, stated that after the guilty verdict, he learned of Guevara as a potential exculpatory witness, and asked for more time to prepare a required declaration.[10] Attached was an investigator's report of an interview with Guevara on June 21, 2009. The investigator's report contains essentially the same information as appeared in Guevara's declaration, with the additional detail that "Sinner" was possibly speaking to the occupants of the van when it was stopped. The investigator did not report that Guevara said that Espino had no weapon at any time. Guevara stated that he wanted to help his friend Espino by testifying, but he had heard rumors of threats against witnesses who had appeared in court. Guevara did appear in court for the sentencing hearing on September 15, 2009, and when sentencing was continued, was ordered to return on

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[10] Counsel also learned of another witness, Juan Ramirez (also a friend of Espino), whose possible testimony is not addressed by Espino in his habeas petition.

December 10, 2009; on that date, the court issued and held to the next court date a body attachment for Guevara.

Bledstein filed a second new trial motion on January 15, 2010, attaching Guevara's testimony on September 30, 2009, at a preliminary hearing in another case, in which Luis Martinez was charged with shooting at an occupied motor vehicle (with gang enhancements) in the June 7, 2008 shooting at the van.[11] Guevara testified that he saw Martinez, whom he knew as a Burlington member with the moniker "Sinner," with Espino. Martinez was holding a rifle, and shot seven or eight times at the van. Guevara then heard shots from a second gun farther down the street but did not see anyone else shooting. He reported this to the police over a year later.

Ten days after the new trial motion on January 25, John Yzurdiaga substituted in as defense counsel for Espino, and the court ordered Guevara's body attachment held to the next court date of March 10, 2010. Guevara apparently never appeared thereafter.

After several continuances, the motion for new trial was heard on December 21, 2010. Yzurdiaga stated that Martinez had been acquitted, but argued that the prosecution should not have charged two different people with the same crime.[12] He requested a mistrial based on the inconsistency. The trial court denied the motion for new trial, stating that the lack of a declaration by (among others) Guevara left the court with little choice.[13]

"Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a prisoner is actually innocent." (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) The standard for determining whether to grant habeas relief is whether "'such evidence

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[11] The motion for new trial also states that an LAPD firearms analyst's laboratory report, attached as exhibit A, showed that all the .22-caliber casings at the scene were fired by the same gun. Exhibit A is an interview report by the defense investigator. No ballistics report appears in the exhibits to the new trial motion.

[12] In a declaration by the defense investigator attached to the motion, the investigator states he attempted to locate Guevara during Espino's trial and could have produced him if given more time.

[13] Espino does not challenge the denial of the new trial motion on this basis.

casts "fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. [Citations.]" [Citation.] "[N]ewly discovered evidence does not warrant relief unless it is of such character 'as will completely undermine the entire structure of the case upon which the prosecution was based.'" [Citations.] If 'a reasonable jury could have rejected' the evidence presented, a petitioner has not satisfied his burden. [Citation.]" (*In re Lawley* (2008) 42 Cal.4th 1231, 1239.) "'"It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. [Citations.]" [Citation.]' [Citation.]" (*In re Hardy*, at p. 1017.)

The defense knew the essential details of Guevara's story as early as June 21, 2009 (the date of the defense investigator's interview report). The defense first presented the investigator's report to the trial court in the first motion for new trial. Guevara did not appear in court in support of the new trial motions, despite a body attachment. Guevara's declaration on January 26, 2012, contains little that was not in the investigator's report two and a half years earlier, or in his preliminary hearing testimony at Martinez's trial. "'"[N]ewly discovered evidence" is evidence that could not have been discovered with reasonable diligence prior to judgment.' [Citation.]" (*In re Hardy*, *supra*, 41 Cal.4th at p. 1016.)

Even assuming the unlikely event that we were to consider Guevara's declaration as newly discovered evidence, we conclude that Espino did not carry his burden to show that the evidence (as it appears in Guevara's declaration) casts fundamental doubt on the accuracy and reliability of his trial, completely undermines the prosecution's case, or points unerringly to innocence or reduced culpability. (*In re Lawley*, *supra*, 42 Cal.4th at p. 1239.) A reasonable jury could have concluded that Guevara's evidence did not establish that Espino did not shoot at the van. Guevara described Espino as "my friend." He saw "shots coming from the area of where the van was stopped" but only a single muzzle flash from Martinez's rifle; it "appeared" that Martinez was shooting at the van. Although Guevara stated that Espino never had a weapon, he also testified that after he

ran inside he heard several other gun shots which sounded like more than one weapon had been fired, which leaves open the possibility that Espino did fire at the van at some point. There was ample testimony at trial from four of the victims and an independent witness that Espino had fired a handgun at the van. Even if the evidence in Guevara's declaration "'"might have weakened the prosecution case or presented a more difficult question for the judge or jury,"'" that is insufficient to demonstrate that Espino has carried his burden of demonstrating that he is actually innocent. (*In re Hardy, supra*, 41 Cal.4th at p. 1017.)

DISPOSITION

As to Luis Vasquez, the judgment is affirmed.

As to Douglas Espino, the trial court is directed to amend the December 21, 2010 minute order to reflect that the trial court sentenced Espino to serve the sentences on counts 2 through 7 concurrently with the sentence on count 1. The court is directed to prepare an amended abstract of judgment accordingly and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Espino's petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.