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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARIO ALFORD et al., Defendants and Appellants.	B229548 (Los Angeles County Super. Ct. No. GA073596)

APPEALS from a judgment of the Superior Court of Los Angeles County, Janice Claire Croft, Judge. Affirmed and remanded for resentencing.

Law Offices of Bob Farahan and Babak Bobby Farahan for Defendant and Appellant Mario Alford.

Corona & Peabody and Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Rashon McDaniels.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, and Michael R. Johnsen and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Mario Alford of attempted murder (count 1) (Pen. Code, §§ 664 and 187, subd. (a)),[1] assault with a firearm (count 2) (§ 245, subd. (a)(2)), and shooting at an inhabited dwelling (count 3) (§ 246). The jury convicted codefendant Rashon McDaniels of counts 1 and 3, finding him not guilty on count 2. As to count 1, the jury found that the attempted murder was committed willfully, deliberately, and with premeditation, and that a principal personally used and intentionally discharged a firearm, proximately causing great bodily injury to another person. (§§ 12022.53, subds. (b)-(e)(1) & 12022.7, subd. (a).) The jury also found true allegations that counts 1 through 3 were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote criminal conduct by gang members. (§ 186.22, subd. (b).) Finally, as to counts 1 through 3, the court found true allegations that Alford had suffered a prior conviction of a serious and/or violent felony; it also found true that he had suffered two prior felony convictions, that he served prison terms for each, and that he thereafter committed another felony within a five-year period after completing said terms. (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i).) The court denied Alford's motion to strike his prior conviction for a serious felony pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

Alford was sentenced to 68 years to life in state prison, consisting of 55 years to life on count 1 and 13 years on count 2, to run consecutively. On count 1, the court imposed a term of 15 years to life under section 186.22, subdivision (b)(5), doubled to 30 years to life under the "Three Strikes" law, plus 25 years to life for the firearm use enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1). As to count 2, the trial court selected the upper term of four years, doubled to eight years under the Three Strikes law, plus five years for the gang enhancement under section 186.22, subdivision (b)(1). The court imposed a term of 55 years to life on count 3, to run concurrently with the term on count 1.

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

McDaniels was sentenced on count 1 to 40 years to life in state prison, consisting of 15 years to life for the attempted murder plus 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1). An additional term on count 3 of 40 years to life was stayed pursuant to section 654.

A third codefendant, Melvin Mapps, was charged with counts 1 through 3, along with additional counts of assault with a firearm (count 4), brandishing a firearm at a person in a motor vehicle (count 5) (§ 417.3), and possession of a firearm by a convicted felon (count 6) (§ 12021, subd. (a)). Mapps pled guilty shortly before trial. He is not a party to this appeal.

Appellant McDaniels contends on appeal that the trial court erred by (1) admitting Alford's statements that purportedly implicated McDaniels, in violation of *Aranda*/*Bruton*;[2] (2) rejecting his motion to sever his trial from that of Alford; (3) precluding him from calling a confidential informant to testify at trial; (4) excluding other evidence tending to show he was falsely implicated; (5) permitting the prosecution's gang expert to testify in a manner that usurped the role of the jury; (6) instructing the jury that a defendant is "equally guilty" of a charged crime whether he committed it personally or aided and abetted the perpetrator who committed it; (7) committing the foregoing errors such that those errors had a cumulative effect requiring reversal; (8) denying his petition for access to juror contact information to enable him to pursue a claim of juror misconduct; and (9) committing sentencing error by imposing an enhancement pursuant to both sections 12022.53 and 186.22. Other than the instruction given by the court on aiding and abetting we find no error, and that error we find to be harmless; we conclude there was no error that requires reversal. We agree with McDaniels that the trial court imposed an unauthorized sentence and therefore remand the matter to the trial court for resentencing. We otherwise affirm the judgment of conviction as to McDaniels.

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[2] *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518.

Appellant Alford contends on appeal that the trial court erred by (1) violating his speedy trial rights; (2) failing to require the jury to find he had a specific intent to strike an inhabited building to convict him on count 3; (3) failing to instruct the jury, s*ua sponte*, on the lesser included offense of negligent discharge of a firearm (§ 246.3) as a lesser included offense of shooting at an inhabited dwelling (§ 246); (4) punishing him for rejecting a plea offer and instead exercising his right to test the state's evidence at trial; and (5) imposing a sentence that constitutes cruel and unusual punishment. Finally, Alford contends that (6) the jury's true finding on the gang enhancement allegations were not supported by substantial evidence. As to Alford, we similarly find that the trial court imposed an unauthorized sentence by imposing an enhancement pursuant to both sections 12022.53 and 186.22, and therefore remand the matter to the trial court for resentencing. We otherwise affirm the judgment of conviction as to Alford.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Prosecution's Case

A. The Initial Incident

During the evening of February 9, 2007, Michelle McDermott went for a drive with her friend Jameelah Williams in a silver four-door Honda owned by Williams's mother. When Williams picked up McDermott at her home, Williams's boyfriend, whom McDermott identified in court as Alford, was driving. Williams was sitting in the front passenger seat. Alford's friend, whom McDermott identified in court as McDaniels, was sitting in the back seat. McDermott had never met either Alford or McDaniels before that night.

Alford drove to Williams's house so Williams could pick something up. McDermott moved to the driver's seat because she wanted to drive. She drove to a fast food restaurant where they briefly stopped to eat. With Williams in the front passenger seat and McDermott and McDaniels in the back seat, Alford began driving again and drove to an area near the north end of the 605 Freeway. Alford drove into a cul-de-sac

where he picked up another friend, a "skinny" African-American male whom McDermott had never met before. She did not know his name. McDermott sat in the middle of the back seat, with McDaniels to her right and the skinny man to her left.

McDermott realized at some point that the skinny man had a gun. She did not want to be in the car anymore and asked to be let out. The skinny man pointed the gun at her face and told her to shut up. The skinny man and McDaniels then began passing the gun back and forth.

Alford stopped at a red light and a red car stopped immediately to the left of Williams's silver Honda. A Hispanic male was driving the red car, and a Hispanic female, possibly in her teens, was sitting in the front passenger seat. The back windows of the red car were tinted and McDermott could not see if anyone was sitting in the back seat. Alford and the skinny man began challenging the occupants of the red car, shouting "Where you from?" and "What you lookin' at?" The skinny man waved the gun around and pointed it at the other car, which was about four feet away from him. With the light still red, the driver of the red car attempted to make a U-turn to get away from the silver car but the street was not wide enough. Alford turned and tried to block the red car to prevent its escape, but the driver of the red car was able to make a three-point turn and get away. McDermott said they followed the other car for about two or three minutes, driving at high speed, but eventually lost sight of it.

The driver of the red car was 20-year-old Richard Wagner, who lived nearby in a single family home on Los Angeles Street in Monrovia, along with his young son, his wife Nora, and her family, which included her parents, her two sisters, and her brother. One of those sisters, 15-year-old Lucero (Lucy) Calderon,[3] was the passenger in the front seat at the time of the encounter with the vehicle in which appellants were seated. Her two friends, Goldie Murdock and Gracie Perez, who were about Lucy's age, were passengers in the back seat of Wagner's car; Perez was sitting behind Lucy and Murdock behind Wagner. Wagner was driving Lucy and her friends to a street fair and movie

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[3] Several people with the surname Calderon were involved in this case, and we therefore refer to them by their first names, with no disrespect intended.

theater at the time of the incident. They were listening to music at a relatively loud volume.

Wagner's car was stopped in the turning lane on California Street, at the intersection with Huntington Drive in Monrovia. There were five people in the silver Honda in the lane immediately to the right. The driver, front seat passenger, and two people in the back seat were African-American males in their late teens or 20's, and the back seat passenger sitting in the middle was a blond female around 18 years old, who was either White or Hispanic.[4] The occupants of Wagner's car realized that the driver's side passenger in the back seat of the other car was yelling at them. At first, Perez and Wagner thought he was hitting on Lucy, and Wagner asked if she knew them. She said she did not. By this time the music had been turned off in Wagner's car. Wagner called out, "What?" in a confused tone. He then sensed the driver's side passenger was angry and told Lucy to roll up the window. Perez saw the driver's side passenger leaning out the window and heard him say something about "bust[ing] a 187" in an angry tone. Wagner heard him saying, "If we don't want any problems, if we don't know what a .45 is, then just to shut our mouth." Wagner also heard him say, "Cuz." At the time, Wagner had a shaven head and was wearing a white t-shirt. He had no gang affiliation, but realized that he might be mistaken for a Hispanic gang member. He knew there had been recent violent confrontations between African-Americans and Hispanics in the area.

As Wagner managed to make a three-point U-turn despite Alford's attempt to block him, Perez told Murdock to "put her head down" because she was afraid the driver's side passenger in the other car was going to begin shooting at them. Lucy used her cell phone to call her sister, Nora.

Wagner drove at high speed back down California, hoping to reach his home by turning left onto Los Angeles Street before the other car could see where he went. He quickly pulled into his driveway. He and Perez saw the silver car reach the intersection

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[4] McDermott agreed that Williams's appearance was such that she could be mistaken for a male. Williams did not testify at trial, but the jury was shown a photograph of her, which McDermott identified.

of California and Los Angeles Street. It stopped, but rather than continuing to approach, it made a U-turn and drove in the opposite direction on California.

Wagner's wife, Nora, was waiting outside the house. Wagner and the three girls talked to Nora about what had happened for five to ten minutes, then everyone went into the house. After about 10 minutes, Lucy got permission from her parents to continue with her plans to go out, so Wagner drove the three girls to the movie theater, taking a slightly different route than before. Wagner dropped them off and returned home, where he and Nora stayed for about three hours without incident. At around 11:00 p.m., Wagner and Nora went and picked up Lucy and her friends. They stopped at a fast food restaurant drive-through, then returned home. They did not see the silver Honda again.

B. The Motel

McDermott said that five minutes after the car chase ended, Alford stopped at a residence and one of the men went in and retrieved something. Alford then drove to a nearby motel. McDaniels was holding the gun while waiting in the parking lot for Williams to check into the motel. The group went inside the room and talked for a short time. No one mentioned the car chase.

Five minutes later, the three men left but did not say where they were going. Alford was holding the car keys as they left. McDermott and Williams stayed in the motel room and conversed. They did not discuss the car chase. McDermott estimated that about two hours had passed since the time she had been picked up in Williams's car.

About an hour and a half later, the three men returned to the motel room. They were jumping around and play wrestling with one another, and "seemed very hyper." McDermott recalled that McDaniels was drinking a particular kind of liquor. The three men smelled like firecrackers, or like smoke, as if they had been using methamphetamines or another drug, and they were acting "kind of crazy." McDermott did not recall anyone mentioning anything about a gang.

McDermott said she was going out to get herself a drink and left the motel room. She went across the street and called some friends to come and pick her up.

C. The Shooting and the Ensuing Investigation

Nora and Lucy's mother, Celia Calderon, was at home the evening of the car chase incident. Around 9:30 or 10:00 p.m., Celia heard a knock at the front door. Just as she answered the door, a man in a red hooded sweater turned away from the door and began walking away quickly. Celia said, "What happened?" The man said something in English that Celia did not understand and kept walking straight ahead without turning around. The man's hood was pulled up over his head, and Celia did not see his face to be able to describe him or even identify his race; he walked quickly and without any trace of a limp. As the man was walking away, Celia heard a sound like "pop, pop" and felt something hot on her shoulder. She did not see anyone else outside or see where the shots came from. Shortly thereafter one of her sons arrived home and called the police.

Wagner, Nora, and the three girls returned to the family home about 20 minutes after Wagner and Nora first left to pick up the girls. They entered the house and found Celia bleeding from gunshot wounds to her shoulder, neck, arm, and leg. Police and paramedics arrived about two minutes later and transported Celia to the hospital, where she remained overnight. The bullets were never removed from Celia's body. Wagner and Lucy spoke to Monrovia police officers and told them generally what had happened earlier in the evening.

Charles Robinson lived on the same street as the Calderons. Around 11:00 or 11:30 p.m. on the night of the shooting, he was standing with his nephew in his front yard drinking a beer. He heard two or three shots fired down the street, in the direction of California. He then saw a dark-colored, four-door car "c[o]me flying by," traveling eastbound on Los Angeles. The car ran a stop sign at the corner of Los Angeles and Sherman, and nearly hit the curb on the south side of the street. Robinson saw someone lying down in the back seat. He glared at the driver but did not see the driver's face very well. He could tell the driver was a light-skinned man, as was the person in the back seat. The car turned right onto Shamrock, traveling southbound. Robinson went into his house.

Gloria Hinostroza lived on the opposite side of the street and several houses down the block from Celia. She was watching television in her living room when she heard at least two gunshots. She looked out her window to see what was happening. She saw a silver or white Honda parked on the street with someone sitting in the driver's seat. She went out to her front porch. Hinostroza recalled seeing three or four people, all wearing hooded sweatshirts, running in the street toward the parked Honda. She could not see them well enough to identify their gender or race. When they got into the car, the Honda quickly drove away, driving at a high rate of speed eastbound toward Sherman. Hinostroza spoke to a Monrovia police officer shortly after the incident. Over a year later, on May 3, 2008, she met with Detective Timothy Brennan from the sheriff's department and was shown a photograph of a car, which she said looked like the silver or white Honda she had seen parked on her street the night Celia was shot.

Monrovia Police Department Officers Frederick Hirogoyan and Trevor Stevenson responded to the crime scene. They entered the house and found Celia and many other people in the house. Monrovia police officers took numerous photographs of Celia's wounds and later of the crime scene during the early morning hours following the shooting. Officer Stevenson photographed holes in the screen door at the front entrance, in the front-facing windows, in the living room wall, and in the stucco on the front wall of the home. Police officers recovered copper-jacketed, lead bullet projectiles from the sofa cushion and the floor, which appeared to be projectiles from a .45-caliber weapon. A later examination showed there were four bullet holes in the screen door, each about a quarter to half-an-inch in diameter, and a gouge in the white paint on the front door frame. There were also holes in the living room window next to the front door and in the living room wall above the sofa. The stucco on the edge of the garage wall was chipped off and there was paint missing from the right front area of a car parked in the Calderon's driveway. None of these holes or marks existed when Wagner and Nora left the house to pick up the girls.

Officer William Burkhalter went to the Calderon home that evening and located seven shell casings in the front yard of the house next door to the east. Six of the casings

were from a .45-caliber weapon and one was from a .32- or .25-caliber weapon. He found the larger casings near some palm trees about 32 to 33 feet away from the victim's front door; the smaller casing was on the driveway. Officer John Donchig went to the crime scene the following morning, February 10, 2007, and found a bullet lodged in a fence between the victim's yard and her next door neighbor's. He noted that the intersection of Los Angeles and California was clearly visible from the driveway of the victim's home.

Nora told Officer Stevenson that at around 8:00 p.m. on the night of the shooting, she received a phone call from Lucy, who said she was being followed by a gray Honda Civic. She was coming home and wanted Nora to wait in front of the house. When Lucy arrived, a silver Honda Civic was following. As Wagner's car stopped at the house, the Civic drove to a point two or three houses to the west of hers, then made a U-turn and drove away.

The day after the shooting, Lucy was at a shopping mall and saw one of the passengers in the Honda that had chased them. She recognized him as the passenger who had been sitting directly behind the driver.

Wagner and the Calderons had never received any threats before the shooting incident and did not have any feuds with anyone. None of the residents of the home were involved in any gang or drug activity. There had been shots fired at the house next door in the month or two prior to Celia being shot, but the person who lived there was apparently involved in questionable activities.

D. The Sheriff's Department Investigation

In early 2008, Deputy Sheriff Andrew Dahring joined his unit's Gang Task Force, which was investigating numerous cold cases dating back to 2006. Most of the incidents related to gang activity in the area involving the Duroc Crips, Monrovia Nuevo Varrio (MNV), and Duarte Eastside. The first is an African-American gang, and the latter two have predominantly Hispanic members. The Crips are rivals with the two Hispanic gangs and many of the cold cases involved violence between them.

Shortly after Detective Dahring joined the task force, he and his partner, Detective Timothy Brennan, were able to develop some leads in this case. On March 28, 2008, they spoke to a confidential reliable informant. This led them to obtain photographs of Alford and Mapps and to locate them. They were then able to locate Williams and identify her vehicle. McDaniels was not a person of interest at that time. They first interviewed Alford in May 2008 and spoke with Williams on three occasions in May 2008. After speaking with Alford and Williams, their investigation expanded to include McDaniels. They began looking for the second female in the car, but were initially told by Alford and Williams that her name was Christina Roy. Eventually Williams identified the other female in the car as being Michelle McDermott and the detectives located her.

On May 28, 2008, they interviewed McDermott for about 15 minutes. The interview was recorded. Before then, McDermott had not spoken to law enforcement about the events of February 9, 2007. At trial, she said that she was not completely truthful during the first interview in that she did not mention that a gun was involved. She did not mention McDaniels being in the car because she did not recall him being present. She said she did not remember smelling anything or seeing anyone with a gun when the three men returned to the motel room. However, on that same date, May 28, 2008, McDermott was shown a photographic six-pack lineup. Without hesitation, she stated the man in the fifth position was "Mario." She was shown a second six-pack and identified the photograph in the sixth position, depicting McDaniels, as the passenger in Williams's Honda. She was shown a third six-pack and noted that although she was "[n]ot positive," she believed the photograph in the fifth position looked "like the guy with the gun." The detectives interviewed McDermott again on June 13, 2008, for about 30 minutes. She stated she was completely truthful with them during the second interview. She was interviewed a third time by Detective Dahring and the prosecutor in March or April 2009, and again was completely truthful with them. She never felt threatened or coached in any way regarding what she should say. She was not offered anything in exchange for her testimony and cooperation. Sometime between the first and

second interviews, McDermott spoke to Williams about the case on one occasion for about five to ten minutes.

Detective Dahring and other members of the sheriff's department also interviewed Wagner, Lucy, Murdock, and Perez, the occupants in the car during the incident with the silver Honda. The detectives showed each of them a series of photographic six-pack lineups, after giving them the standard admonitions. Wagner did not make a positive identification, but said one person looked a lot like the man in the other car who had spoken during the confrontation. Lucy said that although she was not sure, the person in one photograph looked like the driver. The investigating officer identified the person in the picture as Melvin Mapps. Wagner and Lucy were both shown a photograph of a vehicle, and both said it looked like the one that had been involved in the confrontation and chase. Lucy was unable to identify in court any of the occupants of the silver Honda.

Perez viewed the photographic line-up and said she did not remember the men's faces well. The investigating officer had the impression that Perez was scared and did not want to be involved, especially because the interview took place at her school and she seemed concerned about being seen with the police. The officer noticed that Perez seemed to be drawn to the picture of Melvin Mapps. Perez eventually identified his photograph, saying it looked like the man sitting directly behind the driver.

Murdock was unable to identify anyone in the six-packs and any of the occupants of the silver Honda in court.

Detectives Dahring and Brennan interviewed Nora. She seemed uninterested in talking to them and had little information to offer, so the interview lasted only about 10 minutes. They showed her a photograph of the car, and she said it looked like the one she had seen make a U-turn on California when her husband and sister had come home.

Detectives Dahring and Brennan repeatedly attempted to locate Jameelah Williams in order to serve her with a subpoena to testify, but they were unsuccessful. In attempting to locate her, they placed Williams's mother Elaine Williams under surveillance, and they monitored and recorded Alford's telephone calls while he was in custody. On January 14, 2010, Alford was in the courthouse lockup and placed two

telephone calls to his mother, Patricia Griffen (aka Patricia Graves), and these conversations were recorded and transcribed.[5] Alford also spoke to Griffen by telephone twice from the Pitchess Detention Center on January 15 and 17, 2010. As reflected in the written transcripts of the conversations, the telephone calls were interrupted by automated warnings that the conversation might be monitored and/or recorded. Heavily redacted audiotapes of the telephone conversations were played for the jury.

E. Gang Expert Testimony

Melvin Mapps, who Lucy said looked like the driver, had several gang-related tattoos on his body. At least one of them was associated with the Duroc Crips.

Detective Brennan testified as an expert on gangs, and particularly on the activities of three area gangs, the Duroc Crips, Duarte Eastside, and MNV. He was one of the investigating officers in this case. He stated that different members of gangs varied in their level of participation in gang activities. Those members who participated in shootings, including those who drove and supplied guns in addition to the actual shooters, gained additional respect within their own gangs and from their rivals, and inspired more fear in their communities.

During 2007 and 2008, the Duroc Crips and MNV frequently crossed out each other's graffiti, and were considered rivals. Members of Duarte Eastside were also enemies of the Duroc Crips. As previously noted, the Duroc Crips gang members are African-American, while the other two gangs have predominantly Hispanic members.

The primary activities of the Duroc Crips included narcotics sales, robberies, auto thefts, burglaries, felony assaults, assaults with deadly weapons, vandalism, murder, and attempted murder. Money raised from narcotics sales was used to finance the gang's other activities. The gang engaged in shootings in order to assert control over the neighborhood and claim it as the gang's territory. Duroc members had been convicted in recent years of shooting at inhabited dwellings and vehicles, assault with a firearm, and

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5 The matter was called for trial on January 12, 2010; after numerous hearings on pretrial motions, jury selection commenced on January 27, 2010.

other crimes. The gang claimed territory in Duarte and the unincorporated portion of Monrovia.

Symbols used by the Duroc Crips included a "D" written in old English script, the abbreviation "DRC," and the number three. It was said their members would come at you three times harder than you would come at them. Gang members often used the phrase, "Where you from," when confronting people they suspected of being in a rival gang.

Detective Brennan recognized both appellants in court, and he had reviewed field interview cards for them as well as for codefendant Mapps. All three codefendants had tattoos that referred to the gang lifestyle and to the Duroc Crips. McDaniels's gang moniker was "Mac D" and Alford was known as "Peep Game." Mapps was known as "Buck" or Bucc."[6]

Detective Brennan and other officers executed a search warrant on June 10, 2008, at a home where McDaniels resided in Pomona. They found a photograph of McDaniels displaying a gang sign, a photograph of a deceased former member of the Duroc Crips who was killed in a shooting involving rival gang MNV, and a composition book with several gang-related phrases and names written on it. Other photographs also had various gang slogans, monikers, and symbols written on them. Detective Brennan opined based on all of the foregoing information that McDaniels, Alford, and Mapps were all members of the Duroc Crips. When a hypothetical that mirrored the events of the crimes involved here was described to Detective Brennan, he opined that such a shooting would be committed in association with the Duroc Crips, at the gang's direction, and for the gang's benefit. The driver of the car, the shooter, and the person who knocked at the door would all be entitled to claim credit for the shooting, and this would enhance their own prestige as well as the gang's image.

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6 Detective Brennan stated that Crips usually would not put a "K" after a "C" as that signifies Crip Killer; they use two C's instead.

II. The Defense Case

A. McDaniels

Leondra Brinson testified she had been in an intimate relationship with McDaniels for 10 years and had a five-year-old daughter with him. In December 2006, McDaniels was stabbed in his left leg and Brinson took him to the hospital. He was treated at Pomona Valley Hospital on December 28, 2006, for a 12-centimeter laceration to the thigh that extended to the musculature. The laceration was closed using three layers of stitches and staples. Brinson said he had a "nasty" wound on his thigh with staples in it and required the use of crutches to walk. After leaving the hospital, Brinson took McDaniels to her grandmother's home in Pomona, and later to the home Brinson shared with her mother, so she could care for him. McDaniels had the sutures removed on January 19, 2007.

McDaniels celebrated his birthday on February 3, 2007, at Brinson's home. Brinson went to Las Vegas on February 16, 2007, for the NBA All Star weekend, leaving McDaniels at her home. He was still using crutches to get around. When she returned at the end of the weekend, he was no longer using crutches, but he still could not walk normally and was hopping around on one leg. Brinson was certain that McDaniels was staying at her home in Pomona for the entire period of February 3 through February 15 or 16, 2007 (the shooting occurred on February 9).

B. Alford

Alford did not testify and did not call any witnesses.

At the conclusion of the defense case, the parties stipulated that a Robert McGehee was killed on August 6, 2007.

DISCUSSION

McDaniels's Appeal

I. Background Relating to McDaniels's Contentions I and II

Before trial, McDaniels joined in the motion filed by codefendant Mapps to sever his trial from that of Alford based on the anticipated admission of inculpatory statements made to the police by Alford, implicating McDaniels and Mapps. Subsequently, Alford made statements to his mother during telephone conversations while he was incarcerated on January 14, 15, and 17, 2010. Alford could be heard discussing with his mother, for example, whether "they" would be using his statements, or Williams's statements, noting that "they looking for Jameelah [Williams], for Jameelah [Williams] can get on the stand and testify against me to make me get on the scene." Alford's mother said of Williams, "fuck that bitch, that bitch fucked you over." Alford said, "They find the bitch man, it's a wrap. They don't find that bitch my lawyer said, you are good. . . . [C]ause nobody never pointed you out Mr. Alford. Nobody ever said you was the driver Mr. Alford." They discussed that "Bucc" (Mapps) was no longer in the case, and his mother said, "[T]hat nigga was a killer. He did the bullshit anyway." (Mapps had at that time accepted a plea bargain and was no longer involved in the trial.) His mother said, "Y'all gonn be fine baby," and Alford responded, "They looking for them two bitches." His mother replied, "Nigga if they recording or listening I'll kill that bitch myself, I'll cut that bitch throat, on everything. I'll cut her motherfucking throat. And I mean that!" Alford later said that the only thing Michelle [McDermott] could say was about "[t]he altercation when we argued with the Mexicans, that was it. That's all she can say so they need Jameelah to fill in the whole picture." "They don't have nobody get on the stand and point me out and said I was the driver. They don't got nobody said I was the shooter." McDaniels could also be heard talking to Alford's mother during one of these conversations.

McDaniels argued that these statements were inculpatory and highly prejudicial to him, requiring severance.[7] The trial court reviewed the tape recordings of the conversations between Alford and his mother and redacted the portions of the conversation in which McDaniels participated, as well as any reference to McDaniels and any statements that were unduly prejudicial. Counsel for McDaniels argued that plural pronouns used by Alford still implicated McDaniels and offensive, prejudicial remarks made by Alford painted McDaniels with the same extremely unfavorable brush. After inviting counsel to propose any further deletions or additions, the trial court ultimately denied the motion to sever the trials.

Before playing the redacted audiotapes of the conversations between Alford and his mother, the court noted that portions of the statements had been deleted because they had nothing to do with the case. The court then gave the jury the following limiting instruction: "The other thing about the statement is that it pertains only to Mr. Alford. It's his statement. It has nothing to do with Mr. McDaniels. And in fact, you cannot use what you hear Mr. Alford saying in that conversation. You can't use it against Mr. McDaniels in any way, because it doesn't pertain to him at all. So during your deliberations, you can't even think about, well, I'm thinking about Mr. McDaniels, so I'm now going to remember about Mr. Alford. Because it has nothing to do with Mr. McDaniels' case. Let's see. So this is what we call a limiting instruction. So when you listen to — this. This now, you're hearing testimony. Remember, as [Alford's counsel] told you at the beginning, we have two trials in one. We have Mr. McDaniels' trial. We have Mr. Alford's trial. Now we're hearing something about Mr. Alford's trial and not Mr. McDaniels'."

In addition, the written instructions given to the jury included the following: "You are about to hear evidence of audio recordings. This evidence consists of extra-judicial

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[7] Alford also filed a motion in limine, pursuant to Evidence Code section 352, to exclude the evidence of his telephone conversations with his mother that were recorded while he was incarcerated. The trial court denied the request, pointing out that the tape recordings demonstrated that Alford was audibly warned several times during the telephone calls that his conversations could be recorded.

statements of Mr. Alford and others. These recordings are admitted only against Mr. Alford. You must not consider this evidence against Mr. McDaniels. In fact, this evidence must not enter into your consideration of the case against Mr. McDaniels in any way and must not be considered or discussed during your deliberations of the case against Mr. McDaniels."

II. *Bruton* Issue: Admission of Alford's Statements That Purportedly Implicated McDaniels

Because the admission of Alford's statements is central to many of the issues McDaniels raises on appeal, we first address his contention that the statements violated his right of confrontation under *Bruton v. United States*, *supra*, 391 U.S. 123, and *People v. Aranda*, *supra*, 63 Cal.2d 518. We later address McDaniels's contention that his trial should have been severed from Alford's, a claim that also involves Alford's statements.

McDaniels relies on isolated statements in which Alford and his mother referred to the availability or unavailability of evidence against "us" (Alford speaking) or "y'all" (his mother speaking), and also included Alford using "we" on occasion. According to McDaniels, because he was the only codefendant on trial with Alford, he was implicated in these plural references to "us", "y'all," and "we." As we have noted, the trial court edited Alford's statements to delete express references to McDaniels and instructed the jury not to consider Alford's statements against McDaniels. As we explain, under the circumstances of the present case, the trial court's instruction to the jury not to consider the statements against McDaniels was sufficient to protect against *Bruton* error.

A. The Law

"'In *Bruton*, the United States Supreme Court held that the admission into evidence at a joint trial of a nontestifying codefendant's confession implicating the defendant violates the defendant's right to cross-examination guaranteed by the confrontation clause, even if the jury is instructed to disregard the confession in determining the guilt or innocence of the defendant. (*Bruton*, *supra*, 391 U.S. at pp. 127-

128, 135-137.)" (*People v. Burney* (2009) 47 Cal.4th 203, 230.) The court concluded that "'when "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial" [citations],'" the presumption that the jury will follow a limiting instruction is rebutted. (*Ibid*.)

In *Aranda*, *supra*, the California Supreme Court reached a like holding, "but . . . also held that a codefendant's confession may be introduced at the joint trial if it can be edited to eliminate references to the defendant without prejudice to the confessing codefendant. (*Aranda*, *supra*, 63 Cal.2d at pp. 530-531; [citation].)" (*Burney*, *supra*, 47 Cal.4th at p. 231.) Later, in *Richardson v. Marsh* (1987) 481 U.S. 200, 211 (*Richardson*), the United States Supreme Court considered whether a redacted confession made by one defendant violated the codefendant's rights under *Bruton.* The *Richardson* court held that at a joint criminal trial, the confrontation clause is not violated by the admission of a nontestifying codefendant's confession when (1) a proper limiting instruction was given to the jury, and (2) the confession was redacted to eliminate the nondeclarant defendant's name and any reference to his or her existence. (*Id.* at p. 208.)

During the trial in *Richardson*, the trial court permitted the prosecution to present to the jury the redacted confession of one defendant, Williams, but only insofar as the confession would be redacted so as to "omit all reference" to his codefendant, Marsh—"indeed, to omit all indication that *anyone* other than . . . Williams" and a third person had "participated in the crime." (*Richardson*, *supra*, 481 U.S. at p. 203.) The trial court also instructed the jury not to consider the confession against Marsh. (*Id.* at p. 205.) As redacted, the confession indicated that Williams and the third person had discussed the murder in the front seat of a car while they traveled to the victim's house. (*Id.* at pp. 203-204, fn. 1.) The redacted confession contained no indication that Marsh—or anyone other than Williams and the third person—had been in the car. (*Ibid*.)

Later in the trial, however, Marsh testified that she had been in the back seat of the car when Williams and the third person discussed the murder. (*Richardson*, *supra*, 481 U.S. at p. 204.) For that reason, in context with other evidence presented at trial,

Williams's confession could have helped the jury conclude that Marsh knew about the murder in advance and that she had knowingly participated in the crime. (*Ibid*.) Nevertheless, the *Richardson* court determined that the admission of the confession at issue was sufficiently dissimilar from the admission of the codefendant's confession in *Bruton* so as not to constitute *Bruton* error. Specifically, the *Richardson* court noted that the declarant's confession in *Bruton* was "incriminating on its face," and "'expressly implicat[ed]'" Bruton, whereas, Williams's confession amounted to "evidence requiring linkage" that "became" incriminating with respect to Marsh "only when linked with evidence introduced later at trial." (*Id.* at p. 208.)

In *Gray v. Maryland* (1998) 523 U.S. 185 (Gray), the United States Supreme Court considered a redacted confession that fell somewhere between the confessions at issue in *Bruton* and *Richardson*. In *Gray*, "the prosecution . . . redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word 'deleted.'" (*Id.* at pp. 188, 192.) The *Gray* court concluded that simply redacting a confession to replace a defendant's name "with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol," is insufficient under *Bruton* to eliminate the constitutional confrontation problem identified in *Bruton*. (*Id.* at pp. 192-194.) The court explained: "*Bruton*, as interpreted by *Richardson*, holds that certain 'powerfully incriminating extrajudicial statements of a codefendant'—those naming another defendant—considered as a class, are so prejudicial that limiting instructions cannot work. [Citations.] Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the *Bruton* Court found. Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result." (*Id.* at p. 192.)

Gray further distinguished *Richardson* as follows: "*Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson's* inferences involved statements that did not refer directly to the defendant himself and which became incriminating 'only when linked with evidence introduced later at trial.' [Citation.] The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson's* words, '*facially* incriminates' the codefendant. [Citation.] Like the confession in *Bruton* itself, the accusation that the redacted confession makes 'is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.' [Citation.]" (*Gray, supra*, 523 U.S. at p. 196.)

The *Gray* court suggested that further redaction, beyond simply using a blank space, the word "delete," or a symbol in place of a proper name, could render a confession admissible in a joint trial. (*Gray, supra*, 523 U.S. at p. 196.) The *Gray* court provided an example of an alternative method by which the prosecutor and/or court could have redacted the confession in that case that would have met *Bruton's* standards:

"Consider as an example a portion of the confession before us: The witness who read the confession told the jury that the confession (among other things) said,

"'Question: Who was in the group that beat Stacey?

"'Answer: Me, deleted, deleted, and a few other guys.' . . .

"Why could the witness not, instead, have said:

"'Question: Who was in the group that beat Stacey?

"'Answer: Me and a few other guys.'" (*Gray, supra*, 523 U.S. at p. 196.)

Whether specific editing satisfies the confrontation clause cannot be resolved by a "'bright line'" rule, but must be determined on a case-by-case basis in light of other evidence. (*People v. Fletcher* (1996) 13 Cal.4th 451, 456.) "The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors

could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (*Ibid*.)

B. The Statements

In the first colloquy cited by McDaniels, Alford said that "they wanna find that bitch Jameelah to use . . . on me." His mother replied, "Use on all y'all, on all y'all," to which Alford added, "On all of us." His mother then stated, "You feel me, if they get her, it's done. But it will never happen on my breath." Alford then declared that "[t]hey said it in court . . . gonna use Jameelah against us."

These statements do not refer directly to McDaniels, unlike the express reference to the codefendant in *Bruton* or the implicit reference to the codefendant created by the redactions in *Gray*. Rather, any tendency to incriminate McDaniels depended on the jury inferring that Williams had some knowledge about the charged crimes (precisely what was not mentioned), that she might testify to that knowledge, that such knowledge involved Alford and one or more others ("us," "y'all"), and that one of those others was McDaniels, who was being tried with Alford. This chain of inferences is analogous to the situation in *Richardson*. There, the incriminating inference required reference to evidence introduced at trial. Here, the incriminating inference requires reference to some expected but unexplained testimony that might be introduced at trial, and is not the kind of inference that "a jury ordinarily could make immediately, even were [the exchange] the very first item introduced at trial." (*Gray*, *supra*, 523 U.S. at p. 196.) Therefore, under *Richardson*, the court's limiting instruction was sufficient to obviate any claim of *Bruton* error.

In the second exchange, Alford's mother referred to several teenage witnesses being sworn in. Alford replied that "they can't identify us." This statement is not facially or obviously incriminating of McDaniels. Any inference tending to incriminate McDaniels required the jury to first consider whether McDaniels was involved in the crimes so as to be in danger of being identified at trial as one of the perpetrators. That determination required the jury to refer to the trial testimony of McDermott, which

implicated McDaniels in the crimes. Thus, this second exchange is likewise analogous to *Richardson*, and a limiting instruction was therefore sufficient.

In the third exchange, Alford said that if they find Williams (referred to as "that motherfuckin girl" and that "bitch"), then "your son is out of here." His mother said simply, "I got y'all. Baby I got y'all." This exchange is not remotely incriminating of McDaniels. Alford's mother's reference to "y'all" appears to be a colloquial reference to Alford alone. In any event, "y'all" did not obviously refer to McDaniels and the jury would not immediately infer that it did or that Alford's statement that "your son is out of here" somehow applied to McDaniels as well.

In the fourth discussion, it was mentioned that Mapps was no longer in the case, and Alford's mother stated that "that's a good thing. That nigga . . . was a killer. He did the bullshit anyway. . . . [L]ike I told Rhonda, 'They gone be fine.'" Alford responded, "Yeah, we . . . . Because we gone be straight cuz." His mother then said, "Y'all gonn be fine baby," and Alford said in relevant part, referring to some unidentified "motherfuckers," "that's for somebody else . . . , our lawyer said not for us." His mother agreed that "[t]hey weren't for ya'll," and Alford added, "You know? That wasn't for us . . . my lawyer said no. . . . "

It is difficult to find an inference incriminating McDaniels in this exchange, but assuming one existed, it depended on the jury linking the statement to evidence at trial that Mapps and McDaniels were involved in the commission of the charged crimes. It thus clearly falls within the scope of *Richardson*.

In the fifth exchange, in discussing the evidence that would be used at trial, Alford said that the prosecution got "the white girl" but "she ain't saying nothing . . . . [W]e ain't worried about her." In this exchange, the use of "we" is ambiguous. It does not obviously refer to McDaniels, and could just as likely be a reference to Alford and his lawyer. Even if Alford did mean to refer to himself and McDaniels as not worrying about "the white girl['s]" testimony, Alford's statement does not obviously incriminate McDaniels. McDaniels's lack of worry does not tend to prove he was involved in the crimes, unless: (1) it is linked to trial evidence that McDaniels was involved in the

crimes, and (2) then it is inferred that his lack of worry implies a consciousness of guilt or some other implicit inference of guilt. As with the other exchanges, this one, too, falls squarely within the ambit of *Richardson*.

In the sixth conversation, Alford discussed the expected evidence at trial and said "they taking us off Michelle's. . . . [Michelle] can say what happened. The altercation when we argued with the Mexicans . . . . That's all she can say so they need Jameelah to fill in the whole picture." His mother replied that "y'all had an altercation. Y'all argued with it." She later asked, "[s]o y'all not getting on the witness stand right?"

In this exchange, Alford (and perhaps his mother) refers to the existence of accomplices, but does not obviously refer directly to McDaniels. Indeed, Alford's reference to "[t]he altercation when we argued with the Mexicans" and his mother's reference to "y'all had an altercation" are nonspecific, just like the suggested permissible redaction in *Gray* ("'Me and a few other guys'" beat the victim). (*Gray*, *supra*, 523 U.S. at p. 196.) In both cases, the statements simply indicate that multiple people were involved in the crime. Moreover, it was clear from all of the evidence that Alford had not acted alone in the commission of the crimes, so the fact that he used the word "we" and his mother referred to "y'all" added nothing new. This exchange, too, falls under the ambit of *Richardson*.

Finally, we note that McDaniels's attempt to aggregate all these statements into a single theory on which *Bruton* error occurred reinforces the conclusion that this case is analogous to *Richardson.* According to McDaniels's theory, the incriminating inferences arise because: (1) the jury might understand that Alford and his mother are referring at one point to Mapps, the third perpetrator implicated by evidence at trial who is no longer part of the case; (2) therefore, because Mapps is no longer part of the case, every plural reference made by Alford and his mother refers only to McDaniels; (3) further, from that, the jury might understand that Alford is saying that "Michelle" would place McDaniels and appellant in the vehicle during the Wagner assault; and, (4) the jury might also understand that "Jameelah" would be able to fill in the holes that Michelle could not by incriminating Alford and McDaniels in the later shooting.

Only by a string of inferences based on evidence at trial could the jury reach these conclusions. In short, all the statements McDaniels cites were admissible against him with a proper limiting instruction under *Richardson*.

C. Crawford Issue

McDaniels contends that the admission of Alford's phone calls with his mother violated *Crawford v. Washington* (2004) 541 U.S. 36, 51, which held that out-of-court testimonial statements are admissible against a criminal defendant only if the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination of the declarant. We disagree. Even assuming (without deciding) that the phone calls were testimonial, *Crawford* does not overrule, limit or even address the rule of *Bruton* and its progeny, including *Richardson*. When, as here, one defendant's statement is properly redacted and the jury is instructed not to use it against the codefendant, the declarant defendant is not a "witness against" the codefendant, and the statement does not implicate the confrontation clause. The same redaction and instruction that prevents *Bruton* error also prevents *Crawford* error. (See *People v. Stevens* (2007) 41 Cal.4th 182, 199, quoting *United States v. Lung Fong Chen* (2d Cir. 2004) 393 F.3d 139, 150 ["The same redaction that 'prevents *Bruton* error also serves to prevent *Crawford* error.'"].)

D. Due Process

McDaniels contends that Alford's statements violated his due process rights because they constituted an unreliable confession of a codefendant that implicated him. As we have already held, the reasoning is flawed because under *Richardson* the court's limiting instruction was adequate to ensure that the jury did not consider Alford's statements against McDaniels. Hence, no violation of due process occurred.

III. Severance

McDaniels contends that the trial court erred in refusing to sever his case from Alford's. According to McDaniels, Alford's incriminating statements implicated him and

were so inflammatory as to make McDaniels guilty by association. Also, McDaniels asserts that a joint trial with Alford prevented him from presenting the theory that Alford falsely implicated him. We find no error.

As previously noted, McDaniels's attorney joined in the motion for severance filed by Mapps. In so doing, McDaniels argued that one of his defense theories conflicted with Alford's. According to McDaniels's attorney, Alford would contend at trial that he was only driving and did not know what his passengers were going to do. The trial court indicated that Alford's statements would not be used against Mapps and that the purportedly inconsistent defenses of Alford and McDaniels were not sufficient to justify severance. Subsequently, the prosecution provided discovery of the recorded phone conversations between Alford's mother and Alford (which contain the statements we have discussed in rejecting McDaniels's *Bruton* contention). The court ruled that redacted versions of Alford's conversations would be admissible with a limiting instruction that they could not be considered against McDaniels. McDaniels twice renewed his motion for severance, arguing (in his second renewal) that even with the redactions, plural references to perpetrators in the statements prejudiced McDaniels, and the portion of the statements admissible against Alford was unduly prejudicial to McDaniels. The trial court denied the severance.

A. The Law

As stated in *People v. Souza* (2012) 54 Cal.4th 90, 109 (*Souza*): "Our Legislature has expressed a strong preference for joint trials. [Citations.] 'Section 1098 provides in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." The court may, in its discretion, order separate trials if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses.' [Citations.] 'Additionally, severance may be called for when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from

making a reliable judgment about guilt or innocence."' [Citations.] [¶] 'We review a trial court's denial of a severance motion for abuse of discretion based upon the facts as they appeared when the court ruled on the motion.' [Citations.] 'If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial.' [Citations.] 'If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder "'resulted in "gross unfairness" amounting to a denial of due process.'"' [Citations, including *People v. Soper* (2009) 45 Cal.4th 759, 783 ['"if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law."']."

B. Analysis

Because McDaniels and Alford were charged with common crimes involving the same events and victims, this was a "classic case" for joinder. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) To the extent McDaniels argues severance was required on the theory that Alford's statements implicated him, we have already rejected that theory. The court's limiting instruction was sufficient to protect McDaniels's rights.

McDaniels also contends that Alford's and his mother's statements contained inflammatory references, including threats to kill Williams by Alford's mother and references by both to Williams being a "bitch" and use of other unsavory language. According to McDaniels, because he was forced to sit next to Alford during trial when these statements were introduced, he was so unduly prejudiced by them as to require severance. The contention is without merit. McDaniels was not part of these conversations and was never mentioned. The notion that the threats and language used by Alford and his mother would color the jury's view of McDaniels and require severance is pure speculation. No severance was required on this ground.

McDaniels contends that the joint trial with Alford prevented him from presenting one of his defense theories, namely, that "Alford manipulated the investigation to falsely implicate him and persuaded Jameelah [Williams] and Michelle [McDermott] to participate." As best we understand the claim, it is that Alford and his mother arranged Williams's disappearance and conspired with McDermott so as to bolster evidence that Alford was the driver in the shooting and that someone else, perhaps McDaniels, was the shooter. The primary problem with this claim is that there was no evidence in the record to support it: no evidence that Alford was seeking to frame McDaniels, no evidence that Williams's failure to appear at trial was because of actions taken by Alford or his mother, and no evidence that McDermott participated in a conspiracy to frame McDaniels. The unavailability of this theory of defense was not caused by a joint trial with Alford, but by basic rules of evidence: it was entirely speculative and no evidence supported it.

McDaniels also contends that he and Alford had antagonistic defenses. But McDaniels's defense at trial was alibi. Alford's defense (to the extent he mounted one without calling any witnesses) was that he was only the driver. There is no inconsistency in these defenses. (See *People v. Hardy* (1992) 2 Cal.4th 86, 168 ["'to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.] Stated another way, '"mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the other.' [Citations.]".)

In short, the trial court properly denied severance. Further, there is nothing in the record to substantiate any claim that the joint trial resulted in gross unfairness to McDaniels amounting to a denial of due process. (*Souza, supra*, 54 Cal.4th at p. 110.)

IV. Trial Court's Ruling Precluding McDaniels From Calling the Confidential Informant

McDaniels contends that the trial court deprived him of the opportunity to present a defense when it refused to disclose the identity of the confidential informant (CI) and permit counsel to call that person as a witness at trial. We are not persuaded.

We note initially that despite the phrasing by McDaniels, this is not an issue about disclosure of the identity of an informant. Before trial, the identity of the informant was disclosed to defense counsel, with a limiting order that it not be disclosed publicly. The issue, rather, is a question of the admissibility of evidence at trial. McDaniels appears to argue that it is inconsistent for one judge before trial to order disclosure of the informant's identity because that witness was material to possible innocence, but then for another judge at trial to exclude the informant's testimony because it was inadmissible under the rules of evidence. If he is making such an argument, it is specious. The admission of evidence at trial is governed by the rules of evidence. The proposed testimony of the CI was simply one part of a larger offer of proof that Williams, as part of a conspiracy with Alford, convinced McDermott to falsely implicate McDaniels. We conclude, first, that the issue is forfeited by failing to present an adequate record on appeal. Second, in the alternative, this entire defense theory was wholly unsupported by any evidence, thus making the proposed testimony of the CI irrelevant.

A. Background: The Motion to Compel Disclosure of the Identity of the CI

Before trial, McDaniels filed a motion to compel disclosure of the identity of the CI, arguing that the informant's statement to police implicating McDaniels had been recently fabricated in order to scapegoat McDaniels and exculpate Alford. McDaniels argued the confidential informant was a necessary witness whose testimony—that around the time of the commission of the crime Alford never mentioned McDaniels's involvement—was crucial to McDaniels's defense. The trial court (Judge Laura F. Priver) conducted an in camera interview with the investigating detectives on September 8, 2009. The detectives said the statement by the CI was that Alford drove and Mapps

was the shooter. McDaniels's counsel stated his intention to use the statement as exculpatory evidence, and on that basis the prosecutor acceded that disclosure of the identity of the CI would be necessary. The court granted the motion to the extent it directed disclosure of the informant's identity to counsel only.

Subsequently, on January 12, 2010, the court (Judge Janice C. Croft, who presided at trial) held a hearing during which counsel informed the court that the identity of the CI was revealed to all counsel, and that at the interview with defense counsel the CI essentially denied everything, stating that the police officer was lying about what the CI had purportedly said.

McDaniels's counsel requested that the informant's name be revealed in court and that he be given permission to call that person as a witness. According to defense counsel, when the CI initially went to the police, the CI said that Alford had said that he and Mapps were involved in the shooting—that Alford was the driver and Mapps was the shooter. He did not mention a third person (though he did not say that only two people were involved). Only later, in a May 21, 2008 interview with the police, did Alford mention McDaniels as being involved. According to counsel, this was the first time anyone mentioned McDaniels. When Williams was interviewed on May 23, 2008, she told the police that she knew McDaniels, but did not remember him being in the car on the date of the incident. Williams then visited Alford in jail on May 31, 2008, and said, "They [the police] . . . said there was a second shooter. I don't know about no second shooter." Alford replied that "[t]hey got Mac D," referring to McDaniels. Williams responded, "[T]hat's what he said." Alford said, "They got him. That's a new upgrade. See. Manipulation works."

Seizing on Alford's statement that "[m]anipulation works," defense counsel argued that the defense theory was that Alford's initial statement to the CI (which the CI later disclosed to the police) that Alford and Mapps were involved in the shooting (with no mention of McDaniels) was the truth. Thereafter, Alford "manipulated" the investigation by telling the police that McDaniels was involved, telling Williams to implicate McDaniels and to convince McDermott to identify McDaniels as being

involved in the crimes. He proposed to demonstrate this theory by the evolution of Alford's statements—his first telling the CI that he and Mapps were involved, and then only later implicating McDaniels. In support of this theory, he intended to call the CI to ask about Alford's initial statement that incriminated only Alford and Mapps.

On this showing, the trial court denied the request to call the CI, finding the proffered evidence was irrelevant to his defense, and properly so, as we explain.

B. Analysis

There are at least two fatal problems with the contention that the trial court erred in denying the request to call the CI as a witness.

First, defense counsel presented an elaborately constructed offer of proof, in which he took statements from an (apparently) unidentified police report of an interview with the CI, transcripts of a police interview with Alford, police interviews with Williams, and a jail visit between Williams and Alford. The record reflects that before ruling, the trial court reviewed the transcripts from which defense counsel drew the bulk of his offer of proof.[8] But these transcripts are not part of the record on appeal. Defense counsel chose only a few statements and sought to portray them in a particular light. But because we do not have the transcripts reviewed by the court, we cannot know the context in which the

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[8] The court specified that before ruling it reviewed the entirety of the following transcripts: (1) the May 21, 2008 interview of Alford with Detectives Brennan and Dahring, (2) the May 16, 2008 interview of Williams with Detectives Dahring and Brennan, (3) the May 23, 2008 interview of Williams with Detectives Burnin and Brennan, (4) the May 27, 2008 interview of Williams with Brennan and Geary, and (5) the May 31, 2008 conversation during a jail visit between Williams and Alford.

No reference is made to the existence of a transcript of the April 22, 2008 interview with the confidential informant. The court questioned the detectives involved on September 8, 2009, and they stated in general terms that the CI reported that Alford was the driver and Mapps was the shooter. In arguing the motion to call the CI to testify, the prosecutor stated, without objection from defense counsel, that the CI did not say that Alford stated definitively that no one else was involved. As the prosecutor pointed out, the occupants of Wagner's car told the police from the outset that there were five people in the silver car, four of whom were male (apparently based on their mistaking Jameelah Williams for a man).

statements were made or how the statements appeared to the trial court before it ruled. Indeed, we do not even know precisely what the CI said. Because of these deficiencies, the record on appeal is insufficient and the issue is forfeited. (See *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 [failure to provide adequate record forfeits contention on appeal].)

Second, only relevant evidence—evidence that possesses a tendency in reason to prove or disprove a material fact in dispute—is admissible. (Evid. Code, § 210.) The defense theory lacked evidentiary support, and therefore had no tendency in reason to prove that McDermott's identification of McDaniels was the product of a conspiracy with Alford and Williams to falsely incriminate McDaniels.

Nothing in defense counsel's offer of proof suggested that Alford or Williams influenced McDermott to identify McDaniels. Without this necessary link, the theory as portrayed to the trial court in the offer of proof was wholly speculative. The key dates in the offer of proof were May 21, 2008, when Alford was purportedly the first person to mention McDaniels to the police, and May 31, 2008, when Williams visited Alford in jail and he told her that the police had McDaniels. The evidence at trial showed that in between these dates, on May 28, 2008, McDermott identified McDaniels to police as a passenger in the car at the time of the Wagner assault. Also, in separate meetings with the police in mid-June 2008 and with the prosecutor and police in March or April of 2009, McDermott further implicated McDaniels. Significantly, there is no evidence in the record of any contact between McDermott on the one hand, and either Alford or Williams on the other, except that *after* McDermott's first interview on May 28, 2008, and before her second interview on June 13, 2008, she met with Williams once for about five to ten minutes. Thus, that meeting occurred after McDermott had already identified McDaniels as a passenger during the Wagner car chase. Thus, there was nothing but speculation to suggest that Williams, at Alford's behest, convinced McDermott to identify McDaniels.

Without a supportable connection to McDermott being involved in a conspiracy to falsely accuse McDaniels, the entire defense construct failed. That Alford and Williams

might have conspired to falsely implicate McDaniels (a point itself unsupported by any evidence) was irrelevant in and of itself. No statements made by Alford were used against McDaniels and Williams did not testify. Therefore, the suggestion of a conspiracy between them to implicate McDaniels was not admissible to impeach any statements by Alford or testimony by Williams and was not admissible for any other purpose.

In short, the entire defense theory of which the CI's proposed testimony was a part was unsupported by the evidence, speculative, and therefore irrelevant. The trial court therefore properly excluded it.

In light of our reasoning, it is therefore unnecessary to discuss McDaniels's argument that Alford's purported statement to the CI qualified as a declaration against interest and was therefore admissible over a hearsay objection.

V. Exclusion of Other Evidence to Demonstrate False Inculpation of McDaniels

As discussed above, McDaniels's defense counsel wanted to demonstrate to the jury that the CI did not mention McDaniels and that only Alford mentioned him, during a May 21, 2008 interview, and late in the interview at that. Williams said she did not recall McDaniels being in the car when she was interviewed on May 23, 2008. McDaniels's counsel expressed keen interest in introducing the May 31, 2008, jailhouse conversation between Alford and Williams in which Alford said it was an "upgrade" that McDaniels was part of the case: "See. Manipulation works." By introduction of this evidence, the defense proposed to demonstrate that Alford and Williams conspired along with McDermott to falsely implicate McDaniels.

The court indicated it would permit McDaniels to cross-examine Williams about the "manipulation" comment if she testified. However, despite extensive efforts by the prosecution and McDaniels's investigator to locate Williams and subpoena her to testify, she could not be located and did not appear at the trial. McDaniels's counsel did not propose any other means of presenting her testimony to the jury.

After it became apparent Williams would not testify, McDaniels's counsel requested once again that he be permitted to inquire of the investigating officer about Alford's statements to police during his initial interview. The trial court denied the request, stating that Alford's statements were hearsay, to which no exception applied.

We conclude that the trial court properly excluded the evidence. First, because we do not have the transcripts of the police interviews with Alford and Williams, or of the conversation between Alford and Williams, the record on appeal is insufficient and the issue is forfeited. (See *Stasz v. Eisenberg*, *supra*, 190 Cal.App.4th at p. 1039.) Second, the only possible relevance of the statements would be to undercut McDermott's credibility. But as discussed above, absent *any* evidence of McDermott's involvement in the purported plan to falsely implicate McDaniels, the statements ultimately had no relevance. Third, although McDaniels argues on appeal that none of these statements was hearsay because they were not offered for their truth, but rather to prove the falsity of the implication of McDaniels, we disagree. Particularly with regard to the linchpin statement by Alford to Williams that "manipulation works," the statement was offered for the truth of the matter asserted, i.e., that Alford had orchestrated the implication of McDaniels and that his efforts to do so had succeeded.

We note that the trial court's proper evidentiary rulings did not deter counsel from suggesting this conspiracy theory to the jury. During closing, counsel referred to "how it is that this investigation came to focus at least partially on Mr. McDaniels," then stated that Williams was an important defense witness and her absence was a great loss to McDaniels, implying that she would have had to admit or that counsel could demonstrate that she falsely accused McDaniels. Counsel pointed out that after speaking to the confidential informant, police did not pull photographs of McDaniels, "So I think it's fair to assume that, whatever the information from the informant was, it had nothing to do with Mr. McDaniels[.]" Counsel told the jury, inaccurately (but without objection), that Williams came to McDermott's work before McDermott was interviewed by police. Counsel then stated, again inaccurately, that McDermott did not identify McDaniels as being in the car until her second interview with police. From this, the argument runs that

the implication was clear that McDaniels was not really in the car and that McDermott conspired to place him there. However, the evidence to support that theory did not exist, rendering the excluded statements irrelevant.

VI. The Gang Expert's Testimony Was Proper

McDaniels next argues that Detective Brennan's testimony as an expert on gangs was improper because he offered opinions on the ultimate issues: McDaniels's guilt and intent, and the detective's knowledge of the codefendant's intent. He asserts that Brennan's dual roles as gang expert and investigating officer, coupled with the fact the hypothetical as asked specifically referenced the appellants rather than a truly hypothetical situation, meant that the opinion he offered was tantamount to his saying that, based on the evidence he gathered, the crimes charged were in fact committed by these individuals. He argues this lessened the prosecution's burden of proof and violated his Fifth, Sixth, and Fourteenth Amendment rights, requiring reversal. We disagree.

The prosecutor presented to Detective Brennan in some detail the facts of this case, at times using appellants' names—frequently interjecting that he wanted the detective to assume the facts given—and asked him to opine whether the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. Defense counsel objected, unsuccessfully, that the question was an improper hypothetical and called for an ultimate opinion on an issue the jury was to decide. Detective Brennan responded that the crime was committed in association with the Duroc Crips gang, and for its benefit.

The jury was later instructed pursuant to CALCRIM No. 332 that it should consider the expert's opinions, but it was "not required to accept them as true or correct." It was told it "must decide whether information on which the expert relied was true and accurate," and that it was free to "disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." The instruction further explained that "[a] hypothetical question asks the witness to assume certain facts are true and to give an

opinion based on the assumed facts," and that it was the jury's responsibility "to decide whether an assumed fact has been proved."

The California Supreme Court addressed the propriety of "thinly disguised" hypothetical questions in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*). *Vang* held that a prosecutor's hypothetical question needs to be based on the evidence in the case because "[a] hypothetical question not based on the evidence is irrelevant and of no help to the jury." (*Id.* at p. 1046.) It held that in response to a hypothetical question, a properly qualified expert witness could give an opinion that a crime was committed to benefit the defendant's gang as long as the question was based on evidence presented at trial. The court explicitly rejected the defense argument that there was a requirement "to disguise the fact the questions are based on that evidence." (*Id*. at p. 1041.) The court commented that expert testimony regarding whether the specific defendant at issue acted for a gang reason might be objectionable, but it declined to address the issue because the expert there did not testify directly about the defendant. (*Id.* at p. 1048 & fn. 4.)

Here, by using appellants' names and a detailed recitation of the facts, the prosecutor essentially asked Detective Brennan to testify directly about appellants in his hypothetical. Nonetheless, "[t]he erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 247.)

"[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided. (Evid. Code, § 805.) The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang*, *supra*, 52 Cal.4th at pp. 1049-1050.) As in *Vang*, the trial court here instructed the jury that the meaning and the importance of expert opinion was for the jury to decide, and that it was for the jury to decide whether facts used in a hypothetical have been proved. (*Id.* at p. 1050.) Thus, even if it was error for the prosecutor to use

appellants' names in his hypothetical, it is not reasonably probable that a result more favorable to appellants would have been reached in the absence of the error. Detective Brennan, although he was one of the investigating officers, did not opine that the evidence he gathered proved the appellants' guilt. As long as the expert does not opine that the defendants did in fact commit the crime in this way, the hypothetical posed can track the evidence. "The expert did *not* give an opinion on whether the defendants did commit [the charged crime] in that way, and thus did *not* give an opinion on how the jury should decide the case." (*Id.* at p. 1049.)

VII. The Aiding and Abetting Instruction

A. Background

The jury was instructed on attempted murder and premeditated attempted murder (CALCRIM Nos. 600 & 601), as well as on shooting at an inhabited dwelling (CALCRIM No. 965). The jury was also instructed regarding aider and abettor culpability using CALCRIM No. 400, as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

Over objection by Alford's counsel that there was no evidence Alford was the shooter, in which objection McDaniels joined, the jury was also given a modified version of CALJIC No. 3.00.01, as follows: "Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime. You need not unanimously agree, nor individually determine, whether the defendant is an aider and abettor or a direct perpetrator. [¶] The individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. There may be a reasonable doubt that the defendant was the direct perpetrator, or a reasonable doubt that the defendant was an aider and abettor, but no reasonable doubt that he was one or the other." The court stated that the instruction would be given

because there was no evidence which defendant was the driver, which person knocked on the door, and which person was the shooter.

B. Contention on Appeal

McDaniels contends the court incorrectly instructed on aider and abettor culpability by informing the jury that a defendant is "equally guilty" of the charged crime "whether he committed it personally or aided and abetted the perpetrator who committed it." We agree. In *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*), the Supreme Court held that "[i]f that [aider and abettor's] mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id*. at pp. 1117, 1122.) "'[O]nce it is proved that "the principal has caused an actus reus, the liability of each of the secondary parties should be assessed according to his own mens rea."'" (*Id.* at p. 1118, italics omitted.) *McCoy's* conclusion that an aider and abettor may be guilty of a greater offense than the direct perpetrator, "leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164 (*Samaniego*); accord, *People v. Nero* (2010) 181 Cal.App.4th 504, 507 ["In [*McCoy*], our California Supreme Court held that an aider and abettor may be found guilty of greater homicide-related offenses than those the actual perpetrator committed. Extending that holding, we conclude that an aider and abettor may be found guilty of lesser homicide-related offenses than those the actual perpetrator committed."], italics omitted.) Accordingly, courts have held that the version of CALCRIM No. 400 given to the jury here—a version stating that the perpetrator and aider and abettor are "'equally guilty'"—may be misleading.[9] (*Samaniego*, *supra*, at p. 1165; *Nero*, *supra*, at pp. 518-519.)

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9 The current version of CALCRIM No. 400 omits the word "equally."

C. Forfeiture

Respondent contends the issue was forfeited by trial counsel's failure to object to the language used in CALCRIM No. 400. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163.) We disagree. An instruction which is incorrect in law implicates the defendant's right to due process; this type of claimed error "is not . . . the type that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) As stated in *People v. Andersen* (1994) 26 Cal.App.4th 1241: "[F]ailure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. [Citations.] Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was. Accordingly, it seems far better to state straightforwardly . . . that an appellate court may ascertain whether the defendant's substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court." (*Id*. at p. 1249.)

D. Prejudice

The effect of an instruction that omits or misdescribes an element of a charged offense is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.) An instructional error may be deemed harmless if the jury necessarily resolved the pertinent factual issues against the defendant under other, properly-given instructions. (*Ibid.*; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [correctness of jury instruction determined "'from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction'"].) Here, the jury was properly instructed in accordance with CALCRIM No. 401, which stated in relevant part as follows: "To prove that defendant is

guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime *the defendant intended to aid and abet the perpetrator in committing the crime*; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] *Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime*." (Italics added.)

Thus, in order to find McDaniels guilty on an aiding and abetting theory, the jury knew that it had to find that the shooter/perpetrator (whoever that was) committed attempted murder, that McDaniels: knew that he intended to commit murder and that before or during the commission of the crime, McDaniels either was the shooter or intended to, and by word or conduct did, aid and abet the perpetrator's commission of the shooting either by being the individual who knocked on the door or the driver. The jury was specifically instructed that in order to find an individual defendant guilty, it had to find that that person knew of the perpetrator's intent to murder prior to aiding and abetting him by word or conduct.

"[A]n appellate court may find the [instructional] error harmless . . . if it determines beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.) The evidence in this case pointed inexorably to each participant knowing that their shared intent was to go to the Calderon house in order to shoot somebody in retaliation for the events that took place earlier in the evening. They had a gun during the previous encounter and at the motel room, which Mapps and McDaniels passed back and forth in the car. While one person laid down in the back of the car, the driver knowingly drove them to the neighborhood where they had seen the red car park and the occupants get out. One person, wearing his hood so that it covered his head and obscured his face, knocked on the door and knew to immediately turn around and walk away when someone answered

the door, giving the shooter the opportunity to fire shots at the person at the door. The driver waited while this occurred, then drove away at a high rate of speed. Back at the motel room all three men were jumping around and played wrestling with one another, and "seemed very hyper" and were acting "kind of crazy." None of them was acting upset or frightened about what had just happened or trying to distance himself from the others.

McDaniels argues there was no evidence that they discussed plans or their intent to use a gun or discharge a gun at a person. He argues the jury could have found that McDaniels knew his associate was armed and intended to shoot and kill an occupant of the Calderon home, or it could have inferred that he remained in the car because of his leg injury and although he knew something would occur and intended to wait and/or drive the perpetrator away, he was unaware the direct perpetrator intended to use his gun to commit a premeditated murder.

The jury could have credited the defense's argument that McDaniels was not there but rather was home recovering from a stab wound to his leg. However, had the jurors credited Brinson's testimony that at the time of the crimes here McDaniels was incapable of walking without crutches or a limp and was with her in Pomona, they would have returned a verdict of not guilty, as defense counsel urged. Having rejected the defense's evidence, they could not reasonably have found that McDaniels, whatever precise role he played, made no effort to aid and abet the perpetrator and the other aider and abettor after his murderous intent became clear.

E. Competence of Trial Counsel

McDaniels contends that trial counsel's failure to object to the "equally guilty" language in the instructions on the liability of aiders and abettors demonstrated a lack of competence. "To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the

absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Our conclusion, that any error in giving the former version of CALCRIM No. 400 was harmless under the evidence presented, forecloses reversal on this basis.

VIII. Cumulative Error

McDaniels next argues that as a cumulative result of the errors committed at trial, discussed in the preceding portions of this opinion, he was deprived of his due process rights, his right to a fair trial, and his right to present a defense and have a jury consider his defense.

We have found possible but harmless error in the manner in which the prosecutor posed his hypothetical to the gang expert and in the instruction on aiding and abetting liability, and have otherwise rejected McDaniels's claims of error. There is no basis for reversal due to cumulative error. (*People v. Robinson* (2005) 37 Cal.4th 592, 655.) The "'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) We conclude McDaniels's claim of error fails. He received a fair trial.

IX. Denial of Petition for Access to Juror Contact Information

A. Background

The jury returned its verdict and after it was read and the jury was polled, Alford had an emotional outburst in court, saying "I'll be back on appeal. This is whacked. Fuck. Like I'd kill somebody, shoot somebody. Fuck. Bitches is trippin' man." The court instructed the jury, "Ladies and Gentlemen, at this time your jury service is completed. You don't have to talk to anybody about this case. If any attorney or representative wants to talk to you about it, they have to ask our permission. All of your — that information about home[] address, names are all sealed. Nobody has that information. It will not be released."

Three months later, McDaniels's trial counsel filed a petition for access to jury information requesting disclosure of the personal identifying information and contact

information for the jurors. Counsel noted that he had seen two of the jurors (Juror Nos. 4 and 8) crying as the verdicts were read and another juror (Juror No. 6) sat sideways to avoid looking at the counsel tables. Counsel speculated that perhaps one or more of the jurors had engaged in some form of misconduct, asserting "[s]omething was wrong with jury deliberation and verdict." Counsel asked for the jurors' contact information to enable him to develop a juror misconduct claim.

The matter was heard on August 4, 2010. The court clerk indicated that when the jury buzzed and said that it had a verdict, "I informed them that counsel may want to talk to them; and if they wanted to talk to counsel, that they would meet them out in the hallway. But all jurors informed me that they wanted to be escorted out of the building with the sheriffs and did not want to talk to anyone." Defense counsel argued that he needed to know why the two jurors were crying and the other refused to look at counsel.

Recalling that the two jurors were not "weeping and sobbing," the trial court denied the petition, finding that a prima facie case sufficient to warrant disclosure of the jurors' personal identifying information had not been presented.

McDaniels asserts on appeal that this ruling constituted an abuse of discretion because the fact jurors were visibly upset and crying "supported the belief that jurors may have been intimidated or subjected to undue pressure overcoming their will following more than 16 hours of deliberations," spanning one week.

B. The Law

Code of Civil Procedure sections 206 and 237 are designed to maximize the safety and privacy of individuals after they have served as trial jurors, while retaining the defendant's ability to contact jurors after trial if he or she shows sufficient need for such information. (See *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087, 1096; *People v. Granish* (1996) 41 Cal.App.4th 1117, 1124.) Under section 206, "'jurors have "an absolute right" either to speak to defense counsel, the prosecutor, or the respective representatives of either party, *or to decline to do so*.'" (*People v. Santos* (2007) 147 Cal.App.4th 965, 976, italics added.) A criminal defendant may petition for access to

personal juror identifying information—their names, addresses, and telephone numbers—when the sealed information is "necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).) The petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of the information. (Code Civ. Proc., § 237, subd. (b).) If the court determines the petition and supporting declaration establish a prima facie showing of good cause for release of the juror information, the court must set a hearing, unless the record establishes a compelling interest against disclosure. (*Ibid*.) If the court does not set a hearing, it "shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure." (*Ibid*.)

To demonstrate good cause, a defendant must make a sufficient showing "'to support a reasonable belief that jury misconduct occurred.'" (*People v. Jones* (1998) 17 Cal.4th 279, 317.) The alleged misconduct must be "'of such a character as is likely to have influenced the verdict improperly.'" (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) A petition to disclose juror identification information must be supported by more than mere speculation and may not be used as a "'fishing expedition[]' by parties hoping to uncover information to invalidate the jury's verdict." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.) We review an order denying a request for personal juror identifying information for abuse of discretion. (*Jones, supra*, at p. 317.)

We agree with the trial court that McDaniels did not show good cause to release juror identifying information. There is nothing in the crying of jurors after rendering a verdict in an emotionally charged, gang-related attempted murder trial that in and of itself suggests juror misconduct. The vague assertion by McDaniels's trial counsel that "[s]omething was wrong with jury deliberation and verdict," clearly illustrates that the defense allegation of misconduct was purely speculative. Such speculative allegations do

not provide good cause to disclose juror identifying information. (*People v. Wilson*, *supra*, 43 Cal.App.4th at p. 852.)

The trial court committed no error in denying the petition. Notably, after the jury returned its guilty verdicts, each juror, including Juror Nos. 4, 6, and 8 answered "yes" when polled as to whether the verdicts were their individual verdicts. There was no evidence of any hesitation or equivocation from the jurors. The outburst by Alford occurred after the jurors came back into court to have the verdicts read, and after they all had indicated that they did not want to talk to anyone and wished to be escorted out, apparently out of fear for their safety. That fear is the most plausible explanation for the jurors' behavior. Since no juror misconduct was shown, there was no good cause to disclose juror identifying information.

X. Error in Imposing Sentence Enhancements Under Both Sections 12022.53, Subdivision (d) and 186.22, Subdivision (b)(5)

Finally, McDaniels contends, and respondent correctly concedes, that the trial court erred in imposing sentence under both sections 186.22 and 12022.53 on counts 1 and 3. Because McDaniels was not found to have personally used or discharged a firearm on any count, the court was precluded from imposing sentence on both the firearm and the gun enhancement. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590 (*Brookfield*).) Here, the jury found only that *a principal* personally used and discharged a firearm in the commission of counts 1 and 3. Although defense counsel failed to object in the trial court to the sentence imposed, a claim that a sentence is unauthorized may be raised for the first time on appeal. (See *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

Pursuant to section 12022.53, subdivision (e)(2), a defendant who does not personally use a firearm cannot be punished under both section 186.22 and section 12022.53. In choosing which of those two provisions to apply, the trial court must, consistent with section 12022.53's subdivision (j), choose the provision that will result in a greater sentence. (*Brookfield*, *supra*, 47 Cal.4th at pp. 596-597.) Because the

applicable sentence under section 12022.53 is greater, the term imposed for the section 186.22 enhancement must be stricken and the sentences on counts 1 and 3 modified accordingly. Thus, the sentence on count 1 should be life, plus 25 years to life for the firearm allegation pursuant to section 12022.53.[10] The sentence on count 3 should be a determinate term of three, five, or seven years (§ 246), plus 25 years to life, stayed pursuant to section 654.

Respondent contends, however, that the court also erred by failing to impose a second firearm enhancement on count 3. We disagree.

The enhancements in section 12022.53 are mandatory and, where applicable, the defendant "shall be punished by an additional and consecutive term of imprisonment in the state prison" for 10 years, 20 years, or 25 years to life, depending on whether he merely used the firearm or actually discharged it, and on whether someone suffered great bodily injury as a result. (§ 12022.53, subds. (b), (c), (d).) Special allegations under section 12022.53, or findings bring a person within its provisions, may not be stricken under any circumstances. (§ 12022.53, subd. (h).) Nor may "the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section." (§ 12022.53, subd. (g).) Such enhancements must be imposed for every count and every offense as to which the necessary conditions are met. (*People v. Oates* (2004) 32 Cal.4th 1048, 1056-1057.) This is true even where the qualifying crimes were all based on a single act, and even where all but one are subject to a stay under section 654. (*Id.* at p. 1068.) Respondent argues that because the requisite conditions needed to

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10 As relevant here, section 12022.53 provides:

"(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), [or] Section 246 . . . , personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

"(e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) *Any principal* in the offense committed any act specified in subdivision (b), (c), or (d)." (Italics added.)

trigger the enhancement under section 12022.53, subdivision (e)(1) applied to both the attempted murder and the shooting at an occupied dwelling, imposition of consecutive 25-year-to-life terms was mandatory on both counts. Respondent thus contends that McDaniels should have been sentenced to a total term of at least 57 years to life, instead of 40, consisting of life imprisonment with the possibility of parole as the base term on count 1 (§ 664, subd. (a)), "which translates into seven years to life under Penal Code section 3046." He should have also received two enhancements of 25 years to life each under section 12022.53, subdivisions (d) and (e)(1).

McDaniels argues in response that the trial court did impose a sentence for the enhancement attached to count 3 when it imposed 15 years to life based on the gang enhancement, plus 25 years to life for the gun allegation. The court stayed the sentence pursuant to section 654. McDaniels argues that the trial court's sentence is in accordance with *People v. Bui* (2011) 192 Cal.App.4th 1002 (*Bui*). In that case, the court held that where the substantive offense is required to be stayed pursuant to section 654, the section 12022.53 enhancement must likewise be stayed; the enhancement is not a separate crime but merely follows the substantive offense. (See also *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310 ["'[t]he procedure for sentencing a person convicted of two or more felonies does not contemplate imposing an enhancement separately from the underlying crime'"], quoted in *Bui, supra*, at p. 1014.) We agree.

Accordingly, we conclude that the trial court erred in sentencing McDaniels to both the 15-year-to-life sentence under section 186.22, subdivision (b)(5), and the 25-year-to-life sentence enhancement under subdivisions (d) and (e)(1) of section 12022.53 on count 1. As to count 1, the term of 15 years to life pursuant to section 186.22 shall be stricken, and instead the sentence shall be life with the possibility of parole,[11] plus 25 years to life for the firearm allegation pursuant to section 12022.53, subdivisions (d) and (e)(1).

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[11] Because the jury found McDaniels and Alford guilty of attempted murder, but also found the offense was willful, deliberate, and premeditated, count 1 was a felony punishable by life imprisonment. (See § 664, subd. (a).)

As to count 3, the trial court imposed an additional term but properly ordered it stayed pursuant to section 654, reflecting the court's implied finding that the two crimes arose from a single, indivisible course of conduct, pursuant to a single objective. There was no evidence appellants had independent objectives for the two crimes that would justify multiple punishment. (See *Bui, supra,* 192 Cal.App.4th at p. 1015.) The court erred, however, in sentencing McDaniels to both the 15-year-to-life sentence (§ 186.22, subd. (b)(5)) and the 25-year-to-life sentence enhancement (§ 12022.53, subds. (d) & (e)(1)). The matter is remanded to the trial court for resentencing on count 3, with directions to select among the determinate terms of three, five, or seven years (§ 246), plus an additional term of 25 years to life (§ 12022.53, subds. (d) and (e)(1)), the sentence on count 3 to be stayed pending completion of the sentence on count 1, the stay thereafter to become permanent under section 654.

Alford's Appeal

XI. Error in Imposing Sentence Enhancements Under Both Sections 12022.53, Subdivision (d) and 186.22, Subdivision (b)(5)

The trial court similarly erred in imposing sentence on Alford under both sections 186.22 and 12022.53 on counts 1 and 3.

Alford was sentenced to 68 years to life in state prison, consisting of 55 years to life on count 1 and 13 years on count 2, to run consecutively. On count 1, the court imposed a term of 15 years to life under section 186.22, subdivision (b)(5), doubled to 30 years to life under the Three Strikes law, plus 25 years to life for the firearm use enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1).[12] The court

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[12] As to count 2, the trial court selected the upper term of four years, doubled to eight years under the Three Strikes law, plus five years for the gang enhancement under section 186.22, subdivision (b)(1). Alford does not contend that the sentence on count 2 was unauthorized.

imposed a term of 55 years to life on count 3, but erroneously stated that it was to run concurrently with the term on count 1 despite the effect of section 654.

As we have discussed, pursuant to section 12022.53, subdivision (e)(2), a defendant who does not personally use a firearm cannot be punished under both section 186.22 and section 12022.53. In choosing which of those two provisions to apply, the trial court must select the provision that will result in a greater sentence. (*Brookfield*, *supra*, 47 Cal.4th at pp. 596-597.) Because here the applicable sentence under section 12022.53 is greater, the term imposed for the section 186.22 enhancement must be stricken and the sentences on counts 1 and 3 modified accordingly.

As to Alford, his conviction on count 1 of attempted, premeditated murder carries the base term of life with the possibility of parole. (§ 664, subd. (a).) Consequently Alford will not be eligible for parole until he serves a term of at least seven calendar years (§ 3046) doubled to a base term of 14 years to life in accordance with the Three Strikes law. (*People v. Acosta* (2002) 29 Cal.4th 105, 113-114). When the 25 years to life term for the firearm allegation pursuant to section 12022.53, subdivisions (d) and (e)(1) is added, the resulting sentence on count 1 becomes a term of 39 years to life. Alford's sentence of 13 years on count 2 shall remain unchanged, and shall run consecutively, resulting in an aggregate sentence of 52 years to life.

As to count 3, the trial court properly imposed an additional term, although the court should have ordered it stayed pursuant to section 654, since there was no evidence appellants had independent objectives for the two crimes that would justify multiple punishment. (See *Bui*, *supra*, 192 Cal.App.4th at p. 1015.) The court erred, however, in sentencing Alford to both the 15-year-to-life sentence (§ 186.22, subd. (b)(5)) (doubled to 30 years to life under the Three Strikes law) and the 25-year-to-life sentence enhancement (§ 12022.53, subds. (d) & (e)(1)). The matter is remanded to the trial court for resentencing on count 3, with directions to select among the determinate terms of three, five, or seven years (§ 246), to be doubled under the Three Strikes law, plus an additional term of 25 years to life (§ 12022.53, subds. (d) and (e)(1)), the sentence on

count 3 to be stayed pending completion of the sentence on count 1, the stay thereafter to become permanent under section 654.

XII. Alford Waived His Speedy Trial Right and Failed to Move to Dismiss

Alford contends on appeal that he was deprived of his statutory right to a speedy trial under section 1382, as well as his due process and equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution. We conclude that Alford waived his speedy trial claim by waiving his statutory time and failing to move for dismissal on a timely basis.

As relevant here, after numerous continuances (to which Alford objected on three occasions and refused to waive his speedy trial rights but thereafter consented), on January 7, 2010, this case was transferred to the Northeast District. By stipulation, the case was continued to January 12, 2010, as day 8 of 10. The matter was called for jury trial on Tuesday, January 12, 2010. Before jury selection commenced, defense counsel had several pretrial motions that required resolution, including (but not limited to) a motion in which all three defendants joined to limit the prosecution's examination of the gang expert, and McDaniels's motion to introduce Alford's statement to the confidential informant. The court indicated it would need time to consider and rule on the motions, and asked counsel if they would agree that trial had begun. The three defense attorneys agreed. Alford's counsel stated, "I want to join we're in trial; and on behalf of Mr. Alford, I'll stipulate that these motions constitute the act of commencement of jury trial." Alford himself did not voice any objection at that time or thereafter.

On January 14, 2010, the parties discussed possible plea bargains, and the fact a holiday and mandatory court closure were occurring on January 18 and 20, 2010, respectively. Alford's counsel asked Alford whether it was all right to start jury selection on January 21, and Alford agreed. On that date, the audiotapes of Alford's conversations with his mother were provided, and the matter was continued, with Alford's express agreement, to January 25, 2010, to enable the court to thoroughly review the recordings. After further discussions about the recordings on January 25 and 26, jury selection

commenced on January 27, 2010. At no time did Alford move to dismiss the charges against him based on violation of section 1382.

Alford now contends on appeal that trial did not commence on January 12, 2010, because by definition trial commences only when a case is called for trial by a judge who is available and ready to try the case to its conclusion, the court has committed its resources to the trial, and the parties are ready to proceed before a panel of jurors summoned and sworn. He contends that hearing pretrial motions for only a portion of each day does not constitute commencement of trial.

Alford concedes that a defendant's only duties concerning statutory section 1382 speedy trial deadlines are to object when the date is set beyond the time period, and to move to dismiss when the period expires, or simply to move to dismiss if the period expires without a date being set. (*Sykes v. Superior Court of Orange County* (1973) 9 Cal.3d 83, 94.) Both the constitutional right to a speedy trial and the statutory requirements may be waived. (*People v. Wilson* (1963) 60 Cal.2d 139, 146.) Alford argues, however, that his attorney was not authorized to stipulate that trial had begun without informing him that, as a matter of law, trial did not start on the day of stipulation. Had he been so informed, Alford argues he could have objected to the stipulation and asked for a dismissal. He contends, "[i]t would be unreasonable to expect him to object when his lawyer conspired with the court and deputy district attorney to violate Appellant's speedy trial rights." Expanding on this conspiracy theory, Alford asserts that "because the court was not ready to start the trial, a plan was hatched to make it appear the trial had started when, in fact, it had not."

Although Alford does not phrase it in these terms, his claim that there was a conspiracy in which Alford's counsel participated to dupe him into waiving his speedy trial rights is in fact a claim of ineffective assistance of counsel. However, the record on appeal is entirely insufficient to enable this court to evaluate that claim, as the record contains nothing to suggest the existence of a purported conspiracy between the court and counsel. By failing to provide an adequate record, or present any argument and authority

supporting his claim of ineffective assistance of counsel, he has forfeited this claim on appeal.

XIII. Section 246 Does Not Require a Showing of Specific Intent to Strike an Inhabited Dwelling

Alford was convicted of violating section 246, which provides in relevant part that "[a]ny person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house . . . is guilty of a felony . . . ." He now contends on appeal that long-standing case law, *People v. Chavira* (1970) 3 Cal.App.3d 988 (*Chavira*), "that allows the word 'at' in section 246 to be interpreted as 'in the direction of,' without a showing of an intent to strike the house with a bullet, violates the Separation of Powers Doctrine." He argues that the prosecution presented no evidence to support a conclusion that the intent of the shooting was anything other than a desire to shoot the person behind the opened security door. We agree with *Chavira* and we are not persuaded by Alford's attempt to define "at" as used in section 246 as requiring evidence that a defendant intended to strike the house itself.

In *Chavira*, *supra*, the defendant asserted the evidence was insufficient to support his conviction of shooting at an inhabited dwelling house, where the jury was instructed that the offense required a specific "intent to hit the building." Defendant argued that the evidence showed the shots were aimed at a group of persons standing outside the house, not that the shots were aimed specifically at the house. (*Chavira*, *supra*, 3 Cal.App.3d at p. 993.) The court rejected defendant's contention, holding that: "An act done with a reckless disregard of probable consequences is an act done with 'intent' to cause such result within the meaning of the words used in the instruction. Defendant and his associates engaged in a fusillade [fn. omitted] of shots directed primarily at persons standing close to a dwelling. The jury was entitled to conclude that they were aware of the probability that some shots would hit the building and that they were consciously indifferent to that result. That is a sufficient 'intent' to satisfy the statutory requirement." (*Ibid*.)

In this case, the jury received no such instruction, but rather was instructed in terms of the language of section 246. More to the point, that statutory language encompasses the definition of "at" impliedly announced by the court in *Chavira*: that shooting in the direction of an inhabited dwelling with a reckless disregard of the probable consequences (i.e., hitting the house with bullets) is sufficient to satisfy the statutory requirement. (See also *People v. Overman* (2005) 126 Cal.App.4th 1344, 1355-1356 (*Overman*) [§ 246 not limited to shooting directly at inhabited target; statute proscribes shooting either directly at or in close proximity to inhabited target under circumstances showing conscious disregard for probability one or more bullets will strike target or persons in or around it].) The first definition of the word "at" provided in Webster's Collegiate Dictionary (10th ed. 1995) at page 72 states: "1—used as a function word to indicate presence or occurrence in, on, or *near* . . . ." (Italics added.) Thus, under the plain meaning of the word "at," section 246 does not require an intent to hit the building itself, but only an intent to discharge a firearm knowing the projectile of the expelled bullets will be "near" or in the direction of the inhabited dwelling.

XIV. No *Sua Sponte* Duty to Instruct on Section 246.3 as Lesser Included Offense of Section 246

Alford next argues that the trial court had a *sua sponte* duty to instruct the jury on the elements of section 246.3, negligent discharge of a firearm, in addition to instructing it on section 246. We disagree.

A trial court must instruct the jury on a lesser included offense when it is supported by the evidence, "but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 154.) This duty to instruct applies when there is "substantial evidence," that "a reasonable jury could find persuasive." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 414.)

Section 246.3, subdivision (a) is a lesser included offense of section 246. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985; *Overman, supra*, 126 Cal.App.4th at pp. 1358, 1360.) The elements of section 246.3 are: "'(1) the defendant unlawfully discharged a

firearm; (2) the defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person.'" (*Overman*, *supra*, 126 Cal.App.4th at p. 1361; *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538.) The only differences between sections 246.3 and 246 are the latter's "require[ment] that a specific target (e.g., an inhabited dwelling or an occupied building) be in the defendant's firing range" (*Overman*, *supra*, at p. 1362), as well as "the latter's heightened requirement of 'conscious disregard' for the probability of injury or death to persons, rather than gross negligence" (*Alonzo*, *supra*, at p. 538).

Under the evidence here, however, a violation of the lesser included offense rather than the greater was not supported by the evidence. The nature and circumstances of the shooter's actions demonstrated a conscious disregard for the probability that people in or around the Calderon house would be injured or killed. One of the appellants was either the shooter, or both aided and abetted the shooter, who shot directly at the front door of the home, striking both a human being and the house itself several times. The shooter and his aiders and abettors that evening necessarily violated section 246, and not the lesser included offense of section 246.3. A trial court need not instruct on a lesser included offense when the evidence shows the defendant is either guilty of the crime charged or not guilty of any crime. Accordingly, the trial court had no duty to instruct *sua sponte* on the lesser included offense of negligent discharge of a firearm.

XV. Alford Was Not Punished for Exercising His Right to Test the State's Evidence at Trial

Alford next claims that he was punished for exercising his right to test the state's evidence by going to trial (citing e.g., *In re Lewallen* (1979) 23 Cal.3d 274 (*Lewallen*); *United States v. Medina-Cervantes* (9th Cir. 1982) 690 F.2d 715, 716), resulting in a violation of his federal constitutional right to due process. He further asserts that in fact he never rejected the plea offer on the record. We are not persuaded.

Alford acknowledges that when a defendant voluntarily chooses to reject or withdraw from a plea bargain, he retains no right to the rejected sentence; having rejected

the offer of a lesser sentence, he assumes the risk of receiving a greater sentence. (*Frank v. Blackburn* (5th Cir. 1980) 646 F.2d 873, 887.) Here, Alford claims that he never rejected the offer, and therefore the case should be returned to court to determine if he will or will not accept the 21-year offer.

Alford further argues that the court immersed itself too deeply into the plea bargain negotiations, and that "[t]he court's sentencing power was used as a carrot" when the court "repeatedly *threatened* Appellant with 40 years to life if he rejected the plea offer." (Italics added. See *United States v. Stockwell* (9th Cir. 1973) 472 F.2d 1186 (*Stockwell*).) He claims that by stating that the court "would not be the one doing the 40 years to life by a rejection of the offer," the court was "browbeating" him. Alford asserts that the court was required to state its reasons on the record for sentencing him so harshly and that its failure to do so demonstrates that improper weight was given to his failure to plead guilty, and thus he was indeed punished for exercising his right to test the state's evidence at trial. In *Stockwell*, *supra*, 472 F.2d at pages 1187-1188, the court stated that "once it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. [Citation.]"

The rule of *Stockwell* does not apply in this case because the trial court was not involved in the plea bargaining process as was the court in *Stockwell*, in which the court itself proposed the plea bargain. In contrast, here the court made the following statement when informed that a plea bargain was being discussed: "Okay. You know, I know that — I don't know anything about your cases. I don't know anything about your lives. I don't know any of what you're facing every day or anything of that nature. All I know is that there's been an offer of a determinant time that gives you a light at the end rather than the 40 to life if you're convicted. I want you to have the opportunity to see — explore that and see if you want it. I don't want to rush you anywhere. The people in the

audience seem to be shaking their head. You're shaking your head. I want the attorneys to be able to have some time to speak with you. If it comes to pass that you do not take this offer — and that's really up to you — and we go through a trial and you have the bad luck of being convicted and I have to sentence you each to 40 years to life, that I will know that you had an opportunity to discuss a determinant sentence that you would get out. I just want you to know, if I have to do that, that you've been given that opportunity. I don't want to rush you in 20 minutes here to tell me yay or nay. That's why I think it's good we went over to the 21st [of January 2010] to give you that extra day to talk."

On January 19, 2010, outside Alford's presence, the trial court asked defense counsel whether their clients had considered the prosecutor's offer. McDaniels's counsel expressed doubt that his client would accept, and the prosecutor commented that he would keep Alford's offer open until Thursday. The court again urged Alford's counsel to carefully consider the matter, stating, "I'm not the person, if convicted, is going to do 40 years to life. There's been an offer of 21 years. That means they do about 17, 18 years and they come home. You can leave and come back on Thursday. You're saying your client doesn't want it. I'm not going to — there's no way you're going to make him take it, but I'm not looking at the 40 years to life. He is. So you come back on Thursday." Addressing Alford's counsel, the court continued: "You're telling me Mr. McDaniels doesn't want it, that your client doesn't want it. So we wasted a day here, but we did finish the motion. We should start picking a jury. [The prosecutor] says, if he tells him Thursday morning before we start bringing the panel in that he wants the deal, that's fine. If he doesn't, we're no worse off." On the next court date, no further mention was made of the plea offer.

The situation in this case is quite similar to that in *United States v. Morris* (9th Cir. 1987) 827 F.2d 1348 (*Morris*), in which the Court of Appeals found inapplicable the rule of *Stockwell* where the trial court merely informed the defendant that in considering the plea offer, he should bear in mind that he was charged with four counts, three of which carried the 15-year maximum sentence, and the other a 10-year maximum sentence, whereas the prosecutor had made a plea offer that if defendant pleaded guilty to the latter

count, he would move to dismiss the other three counts. The court stated it would give defendant an opportunity to meet with his counsel to discuss the alternatives, "'simply stating they're offering you a 10-year maximum versus a potential 55 years maximum. That's something you want to think about before you say yes or no too quickly.'" (*Morris*, *supra*, at p. 1353.) The Court of Appeals stated that it saw no involvement in the plea bargaining process comparable to that found in *Stockwell*. "The quoted passage shows only that, when told that Morris was considering changing his plea, the district judge was careful to make certain that Morris understood and considered carefully what the implications would be in relation to his maximum possible sentence. We hold that such a purely explicatory role does not constitute 'involvement in plea bargaining' for purposes of *Stockwell* and [*United States v.*] *Carter* [(9th Cir. 1986) 804 F.2d 508, 510, 513]. [Citation.] Nor does the quoted passage give rise to any inference of vindictive sentencing. The rule of *Stockwell* and *Carter* is therefore inapplicable to the case before us." (*Morris*, *supra*, at p. 1353.)

We reach the same conclusion here. The trial court merely ensured that Alford understood and considered carefully the implications of his apparent intention of rejecting the plea offer. Therefore, there is no requirement here that the record must affirmatively show that no improper weight was given the failure to plead guilty, or that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. (*Stockwell*, *supra*, 472 F.2d at pp. 1187-1188.) The sentence the trial court ultimately imposed (albeit somewhat erroneously, see section XI, *ante*) was mandatory, other than its decision not to strike Alford's previous strike and to select the midterm of four years on count 2.

Alford has not stated a cognizable claim for relief under *Lewallen*, *supra*, 23 Cal.3d 274, because here the sentencing judge "did not say anything reasonably giving rise to the inference that [s]he was penalizing defendant for exercising his right to jury trial. The mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that

he was penalized for exercising his constitutional rights." (*People v. Szeto* (1981) 29 Cal.3d 20, 35.)

Regarding Alford's claim that he never rejected the plea offer in open court, there is no requirement that he do so in order for his rejection of the plea to be effective. Our Supreme Court has stated that in order to discourage postconviction claims that a defendant received inaccurate information from counsel concerning the consequences of rejecting an offered plea bargain in future cases, "we *encourage* the parties to memorialize *in some fashion* prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer, its precise terms, and the maximum and minimum punishment the defendant would face if the plea bargain offer were accepted or, alternatively, if it were rejected and the case proceeded to trial, and (3) the defendant's response to the plea bargain offer. We recognize that although generally it may be easy to memorialize these matters by reciting on the record the terms of an offered plea bargain and the defendant's response, there may be instances where one or more parties will not want the trial court to be privy to failed plea bargain discussions, especially where a court trial is anticipated. We also note that memorializing plea bargain discussions in this particular manner could be burdensome in high-volume courts were it to be followed as a general practice." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938, fn. 7, italics added.) The record here plainly shows that Alford was personally apprised of the plea offer, had the full opportunity to discuss it with counsel, and definitively chose to reject it. He does not argue that his counsel failed to accurately communicate the offer and its implications to him, or that he wished to accept it and his counsel erroneously informed the court that he rejected it.

XVI. The Gang Enhancement Allegations Were Supported by Substantial Evidence

Finally, Alford contends there was insufficient evidence to support the gang enhancement allegations. We disagree. After reviewing the evidence in the light most favorable to the jury verdicts (see *People v. Thompson* (2010) 49 Cal.4th 79, 113), we

conclude there was substantial evidence to support the jury's finding that the assault with a firearm on Wagner and the occupants of his car, and the attempted murder of Celia Calderon, were committed "for the benefit of, at the direction of, or in association with" a gang, "with the specific intent to promote, further, or assist in . . . criminal conduct by gang members." (§ 186.22, subd. (b).)

The manner in which the crimes were committed, when coupled with Detective Brennan's expert opinion concerning gang activities, provided ample support for the jury's findings that each crime was committed for the benefit of a criminal street gang. "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1). (See, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354 [relying on expert opinion that the murder of a nongang member benefited the gang because 'violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents who are, as a result, "fearful to come forward, assist law enforcement, testify in court, or even report crimes that they're victims of for fear that they may be the gang's next victim or at least retaliated on by that gang"']; *People v. Romero* (2006) 140 Cal.App.4th 15, 19 [relying on expert opinion that 'a shooting of any African-American men would elevate the status of the shooters and their entire [Latino] gang'].)" (*People v. Albillar* (2010) 51 Cal.4th 47, 63.)

Here, substantial evidence supported the jury's finding that the assault and attempted murder were done in association with a gang. Alford does not contest for purposes of this appeal that all three codefendants "have been" members of the Duroc Crips gang. However, Alford contends Detective Brennan's testimony did not satisfy the purported requirement that one or all of the defendants were *active* members of the Duroc Crips. Although gang membership is an element of the substantive crime of participation in a criminal street gang (§ 186.22, subd. (a)), it is not required for application of the enhancement prescribed by subdivision (b) of section 186.22. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402.)

Detective Brennan's testimony that the crimes described were committed in association with the Duroc Crips, at the gang's direction, and for its benefit, coupled with the circumstantial evidence indicating the crimes were gang-related, was sufficient to support the jury's finding. During the confrontation with Wagner, who could easily have been mistaken for a Hispanic gang member based on his appearance, the gunman asked "Where you from?," a question commonly used by gang members to ascertain another person's gang membership. The defendants' excessive overreaction to a perceived slight by Wagner and his passengers—which resulted in one of the defendants brandishing a gun and the driver engaging in an aggressive car chase, and culminated in the three defendants going back to the home they had seen Wagner go to and opening fire on whoever happened to open the front door—were explainable in the context of the defendants' gang membership and perceived need to put Wagner and his companions in their place for disrespecting them.

Alford quibbles with the fact Celia Calderon said the gunman was wearing red, a color associated with Blood gangs, and suggests that because there was no evidence of graffiti or other indications of the Duroc Crips taking credit for the crime, and no retaliation for the crime, that Detective Brennan's opinion was critically undercut and amounted to nothing more than boilerplate gang testimony. However, it stands to reason that there would be no retaliation for a crime where neither the victim nor her family was thought to have any gang affiliation. It is also not a prerequisite that a gang take public credit for a crime in order for the crime to have been committed for the benefit of the gang. News of such an attack would inevitably spread through a community and cause the people there to feel frightened and intimidated, without gang members having to explicitly claim credit. In short, we find there was substantial evidence to support the gang enhancement allegations.[13]

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13 As Alford's sentence will be recalculated, we need not address his contention that the sentence imposed constituted cruel and unusual punishment.

DISPOSITION

The judgment of conviction as to McDaniels is affirmed. Regarding McDaniels's sentence, the matter is remanded to the trial court with directions as to count 1 to strike the term of 15 years to life pursuant to section 186.22, and instead impose a sentence of life with the possibility of parole, plus 25 years to life for the firearm allegation pursuant to section 12022.53, subdivisions (d) and (e)(1). Also as to McDaniels, the matter is remanded to the trial court for resentencing on count 3, with directions to select among the determinate terms of three, five, or seven years (§ 246), plus an additional term of 25 years to life (§ 12022.53, subds. (d) and (e)(1)), the sentence on count 3 to be stayed pending completion of the sentence on count 1, the stay thereafter to become permanent under section 654.

The judgment of conviction as to Alford is affirmed. Regarding Alford's sentence, the matter is remanded to the trial court with directions as to count 1 to strike the term of 55 years to life, and instead impose a sentence of life with the possibility of parole, for which parole he shall not be eligible until he serves a term of at least 14 calendar years, plus an additional 25 years to life for the firearm allegation pursuant to section 12022.53, subdivisions (d) and (e)(1), resulting in a sentence on count 1 of a term of 39 years to life. Alford's sentence of 13 years on count 2 shall remain unchanged, and shall run consecutively, resulting in a sentence of 52 years to life. The matter is also remanded to the trial court for resentencing on count 3, with directions to select among the determinate terms of three, five, or seven years (§ 246), to be doubled under the Three Strikes law, plus an additional term of 25 years to life (§ 12022.53, subds. (d) and (e)(1)),

the sentence on count 3 to be stayed pending completion of the sentence on count 1, the stay thereafter to become permanent under section 654.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.