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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON EDDIE COLEMAN et al., Defendants and Appellants.	B228221 c/w B233787 (Los Angeles County Super. Ct. No. SA072508)

APPEALS from judgments of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed as modified.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Jason Eddie Coleman.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant Jason Anthony Hurtado.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Gwindon Love Murphy.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General for Plaintiff and Respondent.

Defendants and appellants Gwindon Love Murphy (Murphy), Jason Anthony Hurtado (Hurtado), and Jason Eddie Coleman (Coleman), appeal their murder convictions.[1] Murphy contends that conspiracy is not a valid theory of criminal liability. Hurtado contends that his conviction was not supported by substantial evidence, and he joins in Coleman's contentions. Coleman argues that the trial court erred by excluding impeachment evidence, admitting evidence despite late discovery, refusing several proposed pinpoint jury instructions, and denying his petition to disclose juror information. Coleman also challenges the sufficiency of the evidence to support the jury's finding that his crimes were gang related, and he claims prejudice from cumulative error. In addition, Coleman seeks correction of the abstract of judgment to reflect joint and several liability for victim restitution. Respondent seeks modification of the judgment to impose a parole revocation fine.

We modify the judgment to include a parole revocation fine and direct the trial court to prepare amended abstracts of judgment. Otherwise, we reject defendants' contentions and affirm the judgments.

BACKGROUND

1. Procedural Background

In an amended information, defendants were charged in count 1 with the murder of Preston Brumfield (Brumfield) in violation of Penal Code section 187, subdivision (a).[2] In count 2, defendants were charged with conspiracy to commit assault by means likely to cause great bodily injury. (§§ 182, subd. (a)(1), 245, subd. (a)(1).) In counts 3 and 4, Murphy and Samuel Murphy were charged with solicitation to commit assault by means likely to cause great bodily injury. (§§ 653f, subd. (a), 245, subd. (a)(1).)

It was further alleged as to counts 1, 2, and 4, pursuant to section 186.22, subdivision (b)(1)(A), that the crimes were committed for the benefit of, at the direction

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[1] The jury was unable to reach a verdict against a fourth defendant, Samuel Murphy, and he is not a party to this appeal.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. Finally it was alleged, for purposes of section 667.5, subdivision (b), that Hurtado had served prison terms for felony convictions in 2002 and 2003.

Murphy was tried separately from Coleman and Hurtado. Murphy's jury found him guilty of counts 1, 2, and 3 as charged, but found not true the gang allegation. Coleman and Hurtado were found guilty of counts 1 and 2 as charged and the gang allegation was found to be true. Hurtado admitted one prior prison term allegation, and for the other, the prosecution presented evidence in a court trial. The trial court found both allegations to be true.

Murphy was thereafter sentenced to 15 years to life as to count 1, and the concurrent middle terms of three years each as to counts 2 and 3, were stayed pursuant to section 654. Murphy received 353 actual days of presentence custody credit.

The court sentenced Hurtado to 15 years to life as to count 1, with minimum parole eligibility of 15 years due to the gang finding, plus two consecutive years due to the prior prison terms. The court imposed the middle term of three years as to count 2, with a consecutive three years due to the gang finding, all stayed pursuant to section 654. Hurtado received 348 actual days of presentence custody credit.

The trial court sentenced Coleman to 15 years to life as to count 1, with minimum parole eligibility of 15 years due to the gang finding. The court imposed the middle term of three years as to count 2, with a consecutive three years due to the gang finding, stayed pursuant to section 654. Coleman received 342 days of actual presentence custody credit.

As to all three defendants the trial court ordered mandatory databank specimens, imposed statutory fines and fees, and entered a joint and several award of $7,674.60 in direct victim restitution.

Murphy and Coleman filed timely notices of appeal. Hurtado obtained relief from default and filed a late notice of appeal. On respondent's motion, Hurtado's appeal was subsequently consolidated with the appeals filed by Coleman and Murphy.

2. Prosecution evidence in the Coleman/Hurtado trial[3]

Evidence regarding the beating and death of Brumfield

Brumfield was beaten during the late evening of May 11, 2008. He was found unconscious and bleeding on a dark sidewalk on 20th Street in Santa Monica. The beating left Brumfield with a skull fracture and bleeding in the brain, which resulted in his death a few days later.

Margarita Jones (Jones) and her daughter Virjine Murphy (Virjine) lived in the neighborhood not far from where Brumfield was assaulted. Brumfield was homeless, and in exchange for help with household chores, Jones had fed him and allowed him to sleep in her garage during wet weather. Murphy was Virjine's father, and although he did not live with Jones and Virjine, he was a frequent visitor. At first, Murphy considered Brumfield a friend, but came to resent his attentions to Jones and was discomforted by Brumfield so frequently around Virjine.

In the months before Brumfield's death, he and Murphy argued weekly. Several times during such arguments, Jones and Virjine heard Murphy threaten to "knock the plate out of [Brumfield's] head." About three months before Brumfield's death, Jones heard Murphy threaten to hit Brumfield with his cane. Brumfield called 911 and several police officers came and took a report. Another time, Jones and Virjine saw Murphy swing his cane at Brumfield.

The day after Brumfield was beaten, Jones received a call from the hospital informing her that Brumfield was there and asking her to identify him as he had been found with no identification. Jones's telephone number was in Brumfield's cell phone. At the same time, Santa Monica Police Department (SMPD) Detectives Hee Seok Ahn and John Henry arrived at Jones's door. Murphy was there visiting, and the detectives interviewed both of them separately. Murphy immediately volunteered to Detective Ahn

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3 As the evidence presented at Murphy's trial was essentially the same as that presented at the Coleman/Hurtado trial and because Murphy's sole contention on appeal is a wholly legal one, without reference to the facts, we do not separately summarize the evidence adduced at Murphy's trial.

how much he disliked Brumfield, and that if he knew which hospital Brumfield was in, he would go there and spit in Brumfield's face. Murphy said that Brumfield had disrespected him over the years, adding that he hoped for Brumfield's death and if he died, Murphy would "piss on his grave." Murphy also said that if he could kill Brumfield he would do so, but a stroke had left his left side semi-paralyzed. He added that he would hire someone to do it if he had the money.

Virjine testified that about one week before the beating, Murphy told her that he had spoken with Samuel Murphy about Brumfield's disrespect, and that Samuel Murphy's response was that no one messed with the Murphys, this was "Murf's turf," and he had some boys who were going to get Brumfield. A few days later Virjine heard Murphy say, as he looked out the window at Brumfield, "I got some boys who done what they were going to do."

A day or two after the assault, Virjine listened to her father speaking on the telephone. She took notes and reported the conversations to Detective Henry. Among other statements, Virjine heard Murphy say: "They must have did what they said they were going to do" and "They should have knocked that plate out the back of his head." Several weeks after the assault, Virjine overheard another telephone conversation in which Murphy said that he had "put $350.00 up to Sammy to get a quarter ounce of dope and that was to get [Brumfield] beat up and if he ever come back out here that they gone beat him up again." After Virjine testified, the parties stipulated that if she were recalled as a witness, she would testify that Brumfield and Samuel Murphy never had any problems with each other.

A longtime neighborhood resident, Pius Walters (Walters), testified that about one month before Brumfield's death, Samuel Murphy said that he did not like Brumfield because he caused Jones to mistreat his brother, adding, "I'm going to fix this guy." Another time, at Eddie's Liquor Store, a neighborhood store, Walters saw Samuel Murphy say something inaudible to Brumfield. In response, Brumfield cast his eyes down and said, "I have nothing to say to you, you have nothing to say to me, and if you

do anything to me I'm going to call the police." Samuel Murphy replied, "I know you'll call the police. I know you will."

Neighbor Jason Rossel (Rossel), testified that everyone knew everyone else in the neighborhood. Rossel and Hurtado were cousins and had always been close. Rossel also knew Coleman very well and knew Paul Thompson (Paul) by name. He had seen Brumfield in the neighborhood for several years, and knew him as "Bones." Rossel testified that Hurtado and another cousin were associated with the Graveyard Crip gang.

The night that Brumfield was found beaten, Rossel had seen Brumfield at Eddie's Liquor Store, where he had gone with Hurtado around midnight. While there they saw Coleman and Paul, with whom Hurtado conferred privately for about a minute. Rossel did not join the huddle, declined Hurtado's invitation to go out with the three men, and then walked home alone.

About 15 or 20 minutes later, as Rossel was sitting in his front yard, Hurtado arrived, followed quickly by Coleman and Paul. Upon arrival Hurtado went into the alley and was out of Rossel's sight for several minutes. Coleman paced back and forth, apparently nervous. Shaky and "bug-eyed," Coleman said, "I think I killed that nigga Bones." Paul assured him that he was just knocked unconscious. Coleman disagreed, explaining that Brumfield had a steel plate in his head, was bleeding from his head after the attack, and was not moving. When Hurtado returned from the alley, Coleman asked, "Did you burn the nigga wallet?" Hurtado replied, "Yes."

Another longtime neighborhood resident and across the street neighbor of Jones, Stephon Simpson (Simpson) testified that occasionally he saw Brumfield in the neighborhood and at Jones's house. He had observed Murphy and Brumfield arguing. Murphy had told Simpson he did not like Brumfield, and once, when angry, Murphy asked Simpson whether he would "whoop [Brumfield's] butt up right now" in exchange for some money or some "dope." Simpson declined and Murphy told him not to say anything about their conversation.

Simpson had known Murphy and his brother for many years. Simpson had also known Coleman's mother and Hurtado's aunts and uncles for decades. He had seen

Coleman and Hurtado around the neighborhood for several years. He knew Coleman as "Lucky" and Hurtado as "C-Walk." Sometime after Murphy had offered to pay him to "whoop" Brumfield, Simpson heard Coleman say that he had "stomped the guy" in the head with his feet, perhaps delivering the final blow, and that he felt bad.

Simpson gave many inconsistent and obviously evasive answers during the morning session of his trial testimony. After lunch, Simpson apologized to the court for lying, and confirmed that on October 1, 2009, he had given a written statement to Detective Henry in which he wrote that Coleman had told Simpson that he and Hurtado had beaten Brumfield in the head with an iron rod with the intent to scare him but not to kill him. Simpson told Detective Henry that approximately six months after Brumfield's death, Coleman admitted that he hid in a dark area until Brumfield walked by, and then he and Hurtado beat and kicked Brumfield as he attempted to defend himself. Coleman told Simpson that Hurtado had hit Brumfield in the head with a stick or pipe, and that they left him lying on the ground bleeding. A recording of the interview was played for the jury. Simpson testified that he had not given Detective Henry this information in interviews in 2008 because he feared for his life, as he had been "jumped" in the past after being labeled a "snitch." Defendants objected to the question regarding the basis of Simpson's fear, as no discovery on the issue had been provided. To remedy the late discovery the trial court continued Simpson's testimony for one week to allow an interview with Simpson by a defense investigator.

When Simpson's testimony resumed one week later, he testified that his fear of being labeled a snitch arose during the winter of 2007, when Coleman and Hurtado confronted him after he had been released early from jail. Coleman asked why he was released early and whether he had been "telling" on somebody. Coleman took some swings at Simpson, and when Simpson fought back, Hurtado "got in [his] face." Simpson tried to run away but Coleman and Hurtado chased him and he fell down. As Coleman tried to hit him while he was on the ground, Hurtado pretended to have a gun, threatened to shoot him, and asked for his shoes, jacket, and wallet. Simpson gave up his shoes and jacket, but not his wallet, and then ran away. Sometime later, Simpson told

Samuel Murphy he was not a snitch and asked him to talk to these "youngsters." Thereafter, Coleman apologized to Simpson, but Hurtado did not.

Police interviews and witness relocation

Detective Henry testified that he first interviewed Simpson in August 2008 while Simpson was in a rehabilitation facility. Simpson said then he had heard rumors, but he would not provide any information about the beating due to fear for his safety and the safety of his family who lived and worked in Santa Monica. Then, in October 2009, Detective Henry learned that Simpson was about to be arrested on a narcotics charge and arranged with the narcotics detective to hold Simpson for an interview. Detective Henry did not promise Simpson any relief on the narcotics case, but told him that the narcotics officers had good case against him and it would be to Simpson's advantage to speak about the murder case and provide whatever information he had. Simpson then made the written statement about his conversation with Coleman.

Narcotics Detective Vincent Gamache testified that he informed Simpson of his detention on narcotics charges. Simpson was handcuffed when brought to the police station, but not during his interviews. Detective Gamache remained in the room while Detective Henry interviewed Simpson, and when that interview was over, Detective Gamache interviewed Simpson about the narcotics case. Detective Gamache told Simpson about photographs, video, and audiotape of the three cocaine sales he made to an informant named Lisa. Simpson signed a written confession to the narcotics transactions.

During the summer of 2008, Detective Henry tried to interview another neighbor, Maryann Holloway (Holloway), but she did not cooperate and later expressed a fear of testifying. When Detective Henry learned that Holloway was arrested on narcotics charges in October 2009, he also arranged to interview her. Detective Henry made no promise to Holloway regarding her narcotics case if she cooperated with him, but did promise to keep her safe.

Narcotics Detective Gerardo Leyva testified that he had a good case against Holloway for selling narcotics on two occasions. He had audio and video evidence of the

crimes. After Detective Leyva arrested Holloway, he turned her over to Detective Henry for an interview. Detective Leyva said that had she not given Detective Henry the information he wanted, Holloway would have been booked on the narcotics charges.

Holloway's interviews were recorded and played for the jury after Holloway testified that she did not recall meeting with Detective Henry.[4] Holloway told Detective Henry that she had known Brumfield from the neighborhood for about two years before his death. She related a conversation she heard about 10 days before Brumfield's death, while she was in a car with Samuel Murphy and Coleman. Samuel Murphy said he wanted to "put a hit" on Brumfield because he owed Murphy money. Samuel Murphy offered to pay Coleman with money and drugs, adding that he wanted him to do this soon.

Detective Henry testified that Holloway was given government assistance to move out of Santa Monica prior to the preliminary hearing. Jones, Virjine, Simpson, and Walters still resided in the same neighborhood. Rossel had recently been relocated after he provided information that justified his relocation. Detective Henry testified that he had arranged for funds to help Rossel, and that he had provided relocation assistance to witnesses especially in gang cases, on many past occasions. If the witness believed that his life or safety or that of his family was in jeopardy, and it was determined after an investigation that there had been a credible threat against the witness, the relocation program would be activated. Relocation funds were paid directly to the witness.

Gang evidence

Detective Henry had patrolled this neighborhood for about 14 years as a patrol officer, and had been a narcotics investigator in the same area before becoming a homicide detective. He was familiar with the gang activity there and testified that there

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4 Holloway testified that she did not remember her arrest or any statements given to Detective Henry, and she denied that she was afraid to testify. She testified that she suffered from both schizophrenia and bipolar disorder, was on several psychotropic medications and occasionally had visual and auditory hallucinations.

were two active gangs in the area, the Graveyard Crip gang and the Santa Monica 17th Street gang.

The prosecution's gang expert, SMPD Officer Alfonso Lozano, testified that he was familiar with the Graveyard Crip gang after having investigated 20 to 25 crimes committed by Graveyard Crip members or involving a Graveyard Crip member as the victim. He had also reviewed police reports prepared by other officers who had investigated crimes involving the Graveyard Crip gang. Officer Lozano regularly patrolled the Graveyard Crip gang territory, and made daily contact with gang members when he was on patrol. Most of Officer Lozano's contact with Graveyard Crip members occurred on the 1900 block of 18th Street and the 1900 block of 19th Street, as well as the alley between them. Graveyard Crip gang members also frequently patronized Eddie's Liquor Store at 20th Street and Pico Boulevard. Members of the Graveyard Crip gang called themselves Graveyard Gangsters, used "GYGC" as their common sign or symbol, and GYGC graffiti could be seen in the neighborhood. Hand signals forming a G, a Y, and a C were also used. The gang was established in the mid-1980's, and in 2008, it had 10 to 15 members.

Officer Lozano testified that the Graveyard Crip gang sold narcotics such as PCP, cocaine, and marijuana, in order to finance the purchase of firearms. In addition to selling narcotics, the gang's primary criminal activities were assault with a deadly weapon, robbery, burglary, witness intimidation, murder, and attempted murder. Its members committed such crimes anywhere, but mainly in their own territory.

Officer Lozano had previously investigated and arrested suspected Graveyard Crip gang member Asjah Ainslie Boldware (Boldware). A certified court document showing Boldware's felony conviction in December 2007 of unlawful possession of a firearm in violation of section 12021, subdivision (a)(1) was admitted. Officer Lozano was also acquainted with self-admitted Graveyard Crip member Kendrick Jaron Dove (Dove). Officer Lozano produced a certified court document showing Dove's conviction of possession of a controlled substance in violation of Health and Safety Code section 11351.

Officer Lozano also knew Hurtado, who had personally admitted to the officer that he was a member of the Graveyard Crip gang. Officer Lozano had numerous contacts with Hurtado, had arrested him, and investigated crimes in which Hurtado was involved. Other Graveyard Crip gang members identified Hurtado as a member of the gang and noted that the C in his moniker, C-Walk, stood for Crip. In addition, other police officers had confirmed that Hurtado was a member of the gang and that C-Walk was his moniker. Based on his contacts and the information provided, Officer Lozano gave his opinion that Hurtado was a member of the Graveyard Crip gang.

Coleman admitted to Officer Lozano in 2007 that he was an active member of the Graveyard Crip gang and that his moniker was Lucky. In June 2009, Officer Lozano came into contact with Coleman, when Coleman was with Paul and another Graveyard Crip gang member in front of Eddie's Liquor Store.

Officer Lozano identified three photographs found in Hurtado's possession on August 3, 2010, depicting Hurtado with other gang members, including Boldware and Hubert Cole, an older gang member known as an "OG" -- an "original gangster" of the Graveyard Crip gang. Officer Lozano testified that although he was not personally acquainted with Samuel Murphy, he had reviewed relevant documents and had spoken about him with other officers, residents of the neighborhood, and currently active Graveyard Crip members. In Officer Lozano's opinion, Samuel Murphy was a Graveyard Crip gang member with a moniker of "Murf." Other Graveyard Crip members referred to him as an OG and as someone they admired. Officer Lozano explained that in African-American gang culture, an OG was an older member who had been around for a long time, and had "put in" a lot of "work" for a specific gang by committing many crimes.

Officer Lozano was asked to assume: "[T]wo members of a gang commit a beating at the request or at the direction of a senior member of the gang and this beating is done within territory that's claimed by the gang," and then asked for his opinion, whether such a crime benefitted the gang or was committed in association with a gang. Officer Lozano testified to his opinion that such a beating benefitted the gang because

beatings or killings showed the citizens of the community that gang members were willing to kill, which intimidated them and caused them to be too frightened to call the police. Officer Lozano added that it also instilled fear and intimidation in rival gangs in the area. Such a crime was the highest form of "work" for the gang and would bring "the gang up a few notches."

Officer Lozano also opined that if the crime had been committed by "youngsters" (younger members) at the request of an OG, the beating was committed at the direction of the gang, because youngsters aspired to be like the OG and would be willing to commit the crime to impress the OG and bolster their reputations by demonstrating a willingness to commit violent crimes.

3. Defense evidence

The defense called the investigating officer in this case, Detective Maury Sumlin, who was involved in witness relocations during the first week of trial. Detective Sumlin authenticated a memorandum from the City of Santa Monica which showed that on March 3, 2010, a check in the amount of $1,500 was issued to Rossel, and later cashed. Page two of the memorandum reflected that on August 24, 2010, an additional $2,300 check was authorized and generated for Rossel. Detective Sumlin testified that relocation expenses were justified by evidence of witness intimidation and that the service was offered to witnesses who were fearful of retaliation and thus might not otherwise testify.

Coleman's cousin and Paul's older brother, Isaiah Michael Thompson (Michael), testified that he found Brumfield unconscious and bleeding on the sidewalk when he arrived home shortly before 11:00 p.m. on May 11, 2008. After unsuccessfully trying to flag down a patrol officer, Michael went into his residence and asked his mother, Sandra Tolbert (Tolbert), to call 911. Tolbert went outside with the telephone and Paul followed.

Michael also testified that the two gangs in the area were the Graveyard Crip gang and the Santa Monica 17th Street gang, but claimed that the Graveyard Crip gang no longer had active members, although there was still sporadic gang activity in the neighborhood. Michael did not know whether Coleman was a member of the Graveyard Crip gang, but believed that the only association Coleman or Paul had with the gang was

to have gone to school with its members, as had anyone who lived in Santa Monica, including Michael.[5]

Tolbert testified that she was Coleman's great aunt, and that she lived with her sons Michael and Paul, and Paul's young daughter. Tolbert saw Coleman at approximately 9:00 p.m. on May 11, 2008, in the alley behind her home, when she went out to ask Paul to come inside. Paul was in the alley with Coleman, his daughter, and his mother. Paul then came inside and watched television with Tolbert and did not leave the house until after Michael came home between 10:30 and 11:00 p.m. and he was questioned by police.

Defense investigator Thomas Maeweather, a retired Los Angeles Police Department captain, testified that when he interviewed Simpson on August 20, 2010, Simpson told Maeweather that he had been in jail with Coleman, and that they had gone to court at the same time. About three months after Simpson was released, he saw Coleman with Hurtado and four others. Simpson and Coleman fought, and when Simpson fell to the ground, Hurtado came and both continued to assault Simpson, including by pulling off his jacket. Simpson told Maeweather that Hurtado pretended to have a gun and threatened to shoot Simpson, before ordering him to take off his shoes. Simpson removed his shoes and fled. Coleman apologized a week later. Simpson said nothing to Maeweather about a wallet.

4. Rebuttal

Detective William Heric clarified that he arrived at the crime scene moments after the 911 call, at approximately 11:48 p.m., and did not see Paul during the 45 minutes he was there. Detective Heric spoke to Michael and Tolbert at the scene, and Michael denied knowing the victim. Michael did not say he had searched for a patrol car, but did tell Detective Heric that he had found the victim at 11:40 p.m.

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[5] At the time of trial, Michael was 31 years old, a teacher and a professional basketball player.

DISCUSSION

I. Murphy's Appeal

Murphy contends that conspiracy is not a valid theory of criminal liability under California law and thus cannot be the basis of his murder conviction.[6] Murphy argues that the trial court erred by instructing the jury that he could be found guilty of murder if it found that he conspired to commit the assault on Brumfield which resulted in his death as the natural and probable consequence of the assault.

Murphy's contention is without merit. Although section 31 does not contain the words "conspiracy" or "conspirator" it is fairly encompassed by the broad definition of "principal" as "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." Moreover, as Murphy acknowledges, the California Supreme Court has held for at least 100 years that "[O]ne who conspires with others to commit a felony is guilty as a principal. [Citation.]" (*In re Hardy* (2007) 41 Cal.4th 977, 1025-1029, citing § 31; see also *People v. Kauffman* (1907) 152 Cal. 331, 334.) Further, as Murphy also concedes, the California Supreme Court first applied the rule of natural and probable consequences to a conspirator in 1907 in *People v. Kauffman*, at page 334, and continues that rule today. (*In re Hardy*, at pp. 1025-1026.) Thus, "'"[e]ach member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design." [Citations.]' [Citation.]" (*Ibid.*)

Despite Murphy's concessions, he asks that we abrogate this theory of liability and instead declare it inconsistent with section 31 and contrary to law. We must decline Murphy's request, as we are bound by Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As respondent notes, in addition to adhering to Supreme Court authority, another appellate court has rejected identical arguments on the merits. (See *People v. Mohamed* (2011) 201 Cal.App.4th 515, 523-525

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[6] Murphy does not challenge his conviction of count 2, conspiracy in violation of section 182, subdivision (a)(1).

(*Mohamed*).)[7] We agree with the *Mohamed* court that "'"[c]onspiracy comprehends nothing that is not included in the definition of 'who are principals.' . . . .' [Citations.]" (*Id*. at p. 524.)

II. Hurtado's Appeal

A. Substantial evidence

Hurtado contends that the evidence was insufficient to support his conviction. When a criminal conviction is challenged as lacking evidentiary support, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*Ibid*.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Hurtado has based his contention on a summary of the evidence in the light *least* favorable to the judgment by "[t]emporarily stripping out all statements" made by Coleman as related by Simpson and Rossel, and by considering other evidence from which his innocence can be inferred. Hurtado contends that Coleman's statements implicating him must be disregarded as unreliable because the prosecution witnesses were not "sufficiently credible . . . to satisfy the requirements of proof beyond a reasonable doubt."

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[7] We note that Murphy does not mention *Mohamed* although the opinion was published four months before Murphy filed his opening brief in this case. (See *Mohamed, supra*, 201 Cal.App.4th 515.)

"'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Indeed, we do not reject testimony believed by the jury unless it was physically impossible or inherently improbable, meaning "that the challenged evidence is 'unbelievable per se . . . .' [Citation.]" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 725; see also *People v. Young*, *supra*, 34 Cal.4th at p. 1181.) Hurtado does not contend that the testimony was impossible or inherently improbable.

Upon reviewing all the evidence in the light most favorable to the judgment, we conclude that substantial evidence supported the verdicts against Hurtado. About one week before the beating, Murphy told Virjine that Samuel Murphy had some boys who were going to retaliate against Brumfield for his disrespect toward Murphy. A few days later, while looking at Brumfield, Murphy said, "I got some boys who done what they were going to do."

Samuel Murphy was a Graveyard Crip OG, admired by younger members of the gang, who were willing to commit crimes requested by an OG in order to impress him and elevate their reputations within the gang. The jury could observe that Hurtado and Coleman were both younger members of the Graveyard Crip gang.[8] About 10 days before Brumfield's death, Holloway overheard Samuel Murphy tell Coleman that he wanted to "put a hit" on Brumfield and would pay Coleman with money and drugs.

Rossel recalled that late one evening, he went to Eddie's Liquor Store with Hurtado, who conferred there in a huddle with Coleman and Paul. About 20 minutes later, as Rossel sat in his front yard, Hurtado went past him to the alley, where he

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[8] According to the probation reports, Coleman was 28 years old at the time of trial and Hurtado was 27. We found no reference to Samuel Murphy's age, but his brother Murphy was 66 at the time of trial.

remained out of sight for several minutes. Coleman and Paul arrived moments after Hurtado had gone into the alley. Rossel heard Coleman say, "I think I killed that nigga Bones." When Hurtado returned from the alley, Coleman asked him, "Did you burn the nigga wallet?" Hurtado replied, "Yeah." Brumfield, who was known as Bones, was later found unconscious without any identification.

Approximately six months after Brumfield's death, Simpson heard Coleman admit that he and Hurtado had beaten Brumfield and that Hurtado had hit Brumfield in the head with a stick or pipe.

We conclude from this evidence and the inferences that may reasonably be drawn therefrom that a rational jury could have found, beyond a reasonable doubt, Hurtado guilty of murder and conspiracy to assault Brumfield. (See *People v. Johnson*, *supra*, 26 Cal.3d at p. 576.)

B. Joinder

Hurtado joins in Coleman's contentions to the extent that they benefit him and he incorporates the arguments regarding Coleman's first three assignments of error into his opening brief. Hurtado adds a claim of prejudice peculiar to him as a result of the errors alleged in Coleman's first and third points, which challenge both the impeachment of Simpson and the refusal to read Coleman's proposed jury instruction to view with caution the testimony of witnesses given immunity, leniency, or other benefit. We defer discussion of Hurtado's claim of prejudice until discussion of Coleman's contentions.

III. Coleman's Appeal

A. Exclusion of impeachment evidence

Coleman contends that the trial court abused its discretion by excluding two types of impeachment evidence: Simpson's older felony and misdemeanor convictions and evidence regarding three uncharged narcotics offenses in July 2009. Coleman contends that the exclusion of this evidence resulted in a denial of due process as guaranteed by the United States Constitution by preventing him from mounting a complete defense. As a result, Coleman argues, he was unable to show that Simpson's claim of hearing Coleman

confess to beating Brumfield was fabricated in order to "work off" Simpson's new charges.

1. Standard of review

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion. [Citations.]" (*Id.* at p. 932.)

The party who claims that the trial court abused its discretion bears the burden to demonstrate that the trial court's decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) It is not enough to argue that reasonable people could disagree with the trial court. (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573.) Nor is it sufficient to present facts which would merely support a different opinion. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

"'[A]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 52, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.) To establish a constitutional violation, the defendant must show that the impeachment evidence "'would have produced "a significantly different impression of [the witness's] credibility."' [Citation.]" (*People v. Dement*, at p. 52.) As Coleman did not make a constitutional argument below, we do not reach his due process claim unless and until he establishes error under state law. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444; *People v. Partida* (2005) 37 Cal.4th 428, 435-439.)

2. Simpson's prior convictions

In a motion in limine, the prosecution asked the trial court to limit Simpson's past conduct impeachment to two 2007 felony convictions, one for selling or transporting narcotics in violation of Health and Safety Code section 11352, and the other for assault with a deadly weapon in violation of section 245, subdivision (a)(1). The prosecution sought to exclude five other convictions: two felony convictions in 1988 and 1989 for selling or transporting narcotics; a 1989 felony conviction of possession of narcotics for sale; a 2007 misdemeanor conviction of being under the influence of a narcotic (committed in 2004); and misdemeanor spousal abuse in 1994.

The trial court found the 1988 and 1989 felonies to be remote, and apparently agreed with the prosecution that the 2007 conviction of being under the influence of a narcotic was not a crime of moral turpitude. While Coleman did not claim that the offense was a crime of moral turpitude, he argued that it demonstrated ongoing criminality because it was committed in 2004, within 10 years of the misdemeanor spousal abuse conviction. The court permitted impeachment with the two 2007 felony convictions.

As respondent notes, a trial court may act within its discretion by disallowing impeachment with convictions that are more than 20 years old. (*People v. Clair* (1992) 2 Cal.4th 629, 654.) It is not unreasonable to exclude remote convictions, particularly when other impeachment evidence is admitted, as it was here. (See *People v. Dement*, *supra*, 53 Cal.4th at p. 52.)

Coleman counters that the 1988 and 1989 convictions were not really remote because the 2004 offense showed that Simpson's criminality was ongoing. He suggests that in such a circumstance less weight may be given to the older convictions, but they are not rendered inadmissible. Coleman relies on authority that addresses the admissibility of prior convictions as aggravating circumstances in sentencing. (See *People v. Catlin* (2001) 26 Cal.4th 81, 172; *People v. Gaston* (1999) 74 Cal.App.4th 310, 321.)

The issue here, however, is not whether Simpson's older criminal conduct was admissible or inadmissible. We agree that the convictions were admissible, subject to the trial court's excluding them under Evidence Code section 352. (*People v. Clark, supra*, 52 Cal.4th at p. 931.) Coleman's argument begs the question whether he has shown that the trial court's ruling was irrational or arbitrary. (See *People v. Superior Court (Alvarez), supra*, 14 Cal.4th at p. 977.) We conclude that he has not made that showing. Before ruling, the trial court heard and considered counsel's arguments, including Coleman's contention that the older convictions were not remote because a 2004 offense showed Simpson's continuous criminality. The trial court then balanced the probative value of the proffered evidence against the time in which it would take to make the presentation and concluded in favor of exclusion. Thus, the trial court "did no more than it was permitted." (*People v. Clair, supra*, 2 Cal.4th at p. 656, fn. 3.)

3. Uncharged misconduct and promise of leniency

Coleman contends that the trial court unduly limited evidence relating to Simpson's narcotics purchases conducted on July 22, 23, and 24, 2009. Coleman does not make clear what evidence was excluded. After Coleman sought leave to present evidence of the three narcotics transactions, the trial court ruled that defendants would be permitted to impeach Simpson's credibility with them.

In his reply brief, referring to respondent's observation that Coleman failed to make clear just what evidence was erroneously excluded, Coleman suggests that his cross-examination was cut short. Coleman contends that the trial court prohibited him from asking "whether the detective promised that the three new charges would not be filed in exchange for his testimony against Coleman."

Coleman has taken the trial court's comments out of context. The trial court ruled that defendants would be permitted to ask whether Simpson was on probation and whether he was under arrest or felt free to leave at the time he was brought to the police station in October 2009. The court explained that if the responses did not suggest exploitation of the narcotics charges by Detective Henry, the defense would not be permitted to consume additional time attempting to develop its impeachment theory that

promises of leniency were made to Simpson. The court did not rule that Simpson could not be asked whether the police made promises of leniency. Indeed, as Coleman concedes, the prosecution asked Simpson whether he had been promised leniency. It was Simpson's evasiveness that prevented the answer, not the trial court's ruling.

Although Simpson was initially evasive regarding his narcotics cases and was reluctant to answer when asked whether any promises were made, he did acknowledge that officers confronted him with information about narcotics sales and told him that if he cooperated "this might work itself out." Before his interview by Detective Henry, officers told Simpson "basically [to] help them out, resolve the case." After conferring with the prosecutor during the lunch recess, Simpson admitted that he had been evasive, and told the court that he had been surprised by questions about his narcotics case. Further, Detective Henry acknowledged that he told Simpson the narcotics officers had a good case against him and it would be to Simpson's advantage to share with him any information Simpson had about the murder case.

Cross-examination was not curtailed. The defense was freely permitted to elicit testimony suggesting an implied promise of leniency in exchange for Simpson's cooperation. Simpson confirmed that on July 22, 23, and 24, he went with "Lisa" to purchase crack cocaine. Simpson admitted that the narcotics detectives told him that they had audio recordings of the purchases, and that he then wrote out a statement. Simpson admitted that he knew when he was interviewed that he was on probation for narcotics sales and for assault and that a probation violation could result in an 18-year prison term. Finally, defense counsel was permitted to read to the jury Simpson's preliminary hearing testimony concerning a condition of his probation that required him to cooperate with police officers.

Contrary to Coleman's contentions the issue was thoroughly explored with Simpson and Detective Henry, and Coleman has failed to demonstrate what cross-examination was curtailed or what evidence of an express or implied promise of leniency to Simpson Coleman was prevented from presenting.

4. Prejudice

We agree with respondent that had the trial court erred, any such error would be found harmless under any test for prejudice. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [no reasonable probability].)

a. No prejudice to Coleman

Coleman's counsel was able to present ample evidence of Simpson's criminal behavior and the favorable treatment he received from the police. In all, Simpson's credibility was well impeached: he admitted lying under oath; he admitted that he had three drug charges pending; he was arrested on those charges, handcuffed when brought to the station, and told that the evidence against him was strong; and Detective Henry admitted that he told Simpson it would be to his advantage to share his information about the murder. Coleman's trial counsel was able to argue extensively that Simpson was a liar and had fabricated the overheard conversation because he was given a "get out of jail free" card. Simpson's impeachment, far from being curtailed, was quite extensive.

Coleman contends that prejudice is demonstrated by the prosecutor's false statement to the jury that Simpson's narcotics charges were still pending. Coleman is mistaken. The prosecutor argued truthfully that Simpson had testified that as far as he knew the narcotics arrests were still hovering over his head. Further, the prosecutor's mention of the issue came in her rebuttal argument, in response to the closing argument by Coleman's counsel in which he emphasized Simpson's belief that the charges were still viable.[9]

Moreover, as respondent points out, even without Simpson's testimony there remained "powerful evidence" of Coleman's guilt. Rossel described the huddle among

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[9] Defense counsel argued: "[W]hy would Mr. Simpson . . . make up something? Well, hello. He was on probation for two felonies . . . . He knew he was looking at [17] years"; "he bought himself out of prison"; "He even told us for all I know they could still be out there. They could still be charges. He never even got booked. Three sales, the 22nd, the 23rd, and the 24th"; and "he's got a motive to stay out of [17] years of prison by being a good boy. He thinks that case is still out there."

Coleman, Hurtado, and Paul at the liquor store shortly before the beating as well as Coleman's incriminating behavior and statements 20 minutes later. Virjine heard Murphy admit to arranging with Samuel Murphy to have his "boys" beat Brumfield. And Holloway overheard Samuel Murphy conspire with Coleman to beat Brumfield. Samuel Murphy was an older, respected member of the Graveyard Crip gang, and Coleman had admitted to law enforcement that he was an active member of that gang. The jury could observe that Coleman was a young man[10] and consider that fact together with the gang expert's testimony that younger gang members were willing to commit violent crimes at the direction of an OG to impress the older member and bolster their reputations within the gang.

Given the strength of the evidence and the effectiveness of the impeachment allowed by the trial court, it appears beyond a reasonable doubt that the absence of any additional impeachment evidence did not contribute to the verdict, and was thus harmless under any standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.)

b. Hurtado

Hurtado contends that he too suffered prejudice from the alleged limitation on impeachment, because other than Rossel's testimony placing Hurtado near the scene of the beating shortly before and after the assault on Brumfield, Simpson's testimony "was *the only evidence* against [him]." Hurtado exaggerates. To reach the conclusion that there was no other evidence against him, Hurtado argues that the statements made by Murphy and Samuel Murphy must be disregarded because they did not directly implicate him, and that his admission that he burnt the wallet did not imply guilt because there was no evidence that Brumfield's wallet had been stolen.

First, Hurtado is mistaken. Although there was no direct evidence that a wallet was taken from Brumfield, he was found with no identification. Indeed the hospital identified him by calling Jones's number, found in Brumfield's cell phone. Taking the

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10 See footnote 8, *ante*.

lack of wallet when Brumfield was found together with Hurtado's admission that he burned Brumfield's wallet, a clear inference is that Brumfield's wallet was stolen by those who beat Brumfield, including Hurtado.

Second, Hurtado fails to support his arguments with citation to any authority. In particular, he does not cite authority for a harmless error review that would require disregarding all evidence that does not *directly* implicate the defendant. In fact, any harmless error review requires an examination of the entire record, including all the evidence. (See Cal. Const., art. VI, § 13; *People v. Breverman* (1998) 19 Cal.4th 142, 174; *Watson*, *supra*, 46 Cal.2d at p. 836.)

In any event, as we discussed in relation to Coleman, Simpson's credibility was well impeached, and our conclusion that Hurtado's conviction was supported by substantial evidence was based primarily on evidence other than Simpson's testimony: Hurtado's gang membership; a gang culture in which younger members do the bidding of older, respected members; Hurtado's association with Coleman immediately before and after the assault; and most damning, Hurtado's admission of having burned Brumfield's wallet, made within moments of Coleman's expression of fear that he had killed Brumfield. Based upon this evidence and the effectiveness of the impeachment allowed by the trial court, it appears beyond a reasonable doubt that the absence of any additional impeachment evidence did not contribute to the verdict, and was thus harmless under any standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.)

B. Delayed discovery

Coleman contends that the prosecution's delay in disclosing four items of information amounted to "*Brady* error" and violated the California discovery statute. (See *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*); § 1054.1.) In particular, Coleman contends that the prosecution failed to disclose the following evidence: (1) Simpson's fear due to a prior assault by Hurtado and Coleman that prevented Simpson from giving information to Detective Henry in August 2008; (2) the statement overheard

by Walters in which Brumfield told Samuel Murphy that if Samuel Murphy harmed him, he would call the police; and (3) witness relocation payments.[11]

1. No *Brady* violation

In general, a prosecutor must disclose favorable and material evidence to the defendant. (*Brady*, *supra*, 373 U.S. at p. 87.) The obligation to disclose exists regardless of whether the defendant has made a specific request for the evidence. (*Strickler v. Greene* (1999) 527 U.S. 263, 280.) A *Brady* violation is composed of three elements: (1) the evidence must have been suppressed; (2) the suppressed evidence must have been favorable; and (3) it must have been material. (*Strickler v. Greene*, *supra*, at pp. 281-282.)

No *Brady* violation occurs if the evidence is disclosed at trial. (*People v. Verdugo* (2010) 50 Cal.4th 263, 281 (*Verdugo*).) Such evidence is not considered suppressed, even when it was not presented in discovery. (*Ibid*.) None of the challenged evidence was suppressed in this case. Indeed, Coleman concedes that the allegedly undisclosed information was disclosed during trial. There was no *Brady* violation. (See *Verdugo*, at p. 281.)

2. No prejudicial discovery violations

Coleman also contends that the delay in providing the categories of evidence enumerated above was a violation of the California discovery statutes.
Under section 1054.1, the prosecutor must "disclose to the defendant or his or her attorney" certain "materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." That material includes "[r]elevant written or recorded statements

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11 In his opening brief, Coleman also complained that a recorded interview of Laetitia Robinson was not provided. The audiotape of Robinson's interview was not offered into evidence, she did not testify, and Coleman did not object or suggest any further sanction. In reply to respondent's contention that any issue relating to the Robinson interview was "forfeited and meritless," Coleman explains that he raised it solely as an "example of the prosecutor's pattern of discovery abuse." We construe defendant's explanation as conceding respondent's point, and discuss the Robinson issue no further.

of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial," as well as "[a]ny exculpatory evidence." (§ 1054.1, subds. (e), (f).) The material must be disclosed at least 30 days before trial or immediately, if learned within 30 days of trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. (§ 1054.7.) "'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation.' [Citations.]" (*In re Brown* (1998) 17 Cal.4th 873, 879.)

A trial court's ruling on discovery matters is reviewed for an abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) As the appellant, Coleman bears the burden to establish that there was a violation and that the trial court's ruling was an abuse of discretion. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366, 377-378.) His first task on appeal is to establish the violation.[12] Further, "[i]t is a defendant's burden to show that the failure to timely comply with any discovery order is prejudicial, and that a continuance would not have cured the harm." (*People v. Jenkins* (2000) 22 Cal.4th 900, 905.) A violation of section 1054.1 does not compel reversal, but "is subject to the harmless error standard set forth in [*Watson*]. [Citations.]" (*Verdugo*, *supra*, 50 Cal.4th at p. 280.)

a. Simpson's fear

Coleman contends that section 1054.7 was violated when the prosecution failed to disclose new information "*immediately*." The prosecutor learned of Simpson's fear and the 2007 assault by Coleman and Hurtado during a midtrial lunchtime interview, and began her examination in the afternoon without first disclosing the information.

The trial court found a discovery violation, offered a continuance, ordered the prosecutor to turn over her notes of her interview with Simpson, and postponed Simpson's cross-examination. Although defense counsel did not accept the offer of a continuance, the trial court ruled that Simpson's testimony would not recommence until

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12 Coleman apparently begins with the assumption that the enumerated items of evidence fit within the categories set forth in section 1054.1, as he quotes the statute but offers no further analysis on that point.

defense counsel had the opportunity to do whatever investigation was needed. The remainder of Simpson's testimony was delayed for more than one week, during which all defense counsel and investigators had the opportunity to interview Simpson.

Coleman makes no effort to demonstrate that the trial court's ruling was an abuse of discretion, that the one-week continuance did not cure the harm, or even that any harm was caused by learning of Simpson's fear one week before cross-examination began. (See generally *People v. Jenkins*, *supra*, 22 Cal.4th at p. 905.) Coleman mistakenly asserts that the trial court imposed no sanction at all for any of the alleged discovery violations, and the only harm he cites is a claim that the defense was "continuously stumbling around" because of the "pattern" of late disclosures. Coleman has not met his burden to establish either an abuse of discretion or prejudice.

b. Walters's overheard conversation

The day before the prosecutor called Walters to testify, she learned he had overheard the conversation between Samuel Murphy and Brumfield in which Brumfield said he would call the police if Samuel Murphy harmed him. The prosecutor gave the defense a summary of the new information first thing the following morning, just before Walters was scheduled to testify. Coleman lists Walters's overheard conversation as one of the discovery violations, but makes no specific argument about the incident. Indeed, Coleman does not describe in what manner he believes the trial court abused its discretion or what prejudice he suffered due to the allegedly late discovery of this information. We need not address perfunctory assertions made without supporting argument. (*People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.)

Moreover, it was Samuel Murphy, not Coleman, who objected to Walters's testimony, and Coleman did not join in the objection. After counsel for Samuel Murphy objected, the prosecutor informed the court that Walters's new statement was then being typed and she would provide copies to the defense as soon as it was finished. She further offered to make Walters available immediately for an interview, and called a different witness to testify in the meantime. Samuel Murphy's attorney made no further objection

or comment, and the other prosecution witness was examined prior to Walters's testimony.

In general, the failure to join in a codefendant's objection or motion forfeits the issue on appeal, unless such joinder would have been futile. (*People v. Wilson* (2008) 44 Cal.4th 758, 792.) The delay in Walters's testimony apparently satisfied Samuel Murphy's counsel and the notes of the interview were apparently turned over as promised. Coleman has not suggested that his joinder in the objection would have been futile, or that some special harm to Coleman was not avoided by the actions taken by the prosecutor. Coleman has thus not only failed to develop the issue sufficiently, he has failed to preserve it for review.

c. Witness relocation funds

Coleman contends that he was surprised midtrial by evidence that witnesses were paid relocation expenses. When Coleman objected, the trial court ordered the prosecutor to find and provide all information regarding witness relocation and funds paid. The prosecutor complied with the court's order later the same day. In the meantime, Coleman's counsel was permitted to cross-examine Detective Henry extensively regarding relocation expenses paid to Rossel and Holloway. Additional extensive cross-examination was permitted the day after the relocation information was provided. Coleman requested no sanctions.

As with the other alleged discovery violations, Coleman makes no attempt to show that the trial court's ruling was an abuse of discretion or that the delayed discovery harmed his defense. Coleman merely states his conclusion that "delayed production deprived him of adequate time and opportunity to prepare to impeach important prosecution witnesses." Coleman has not shown that having the evidence sooner would have given him any advantage or benefit; nor has he demonstrated a reasonable probability that without the delays, Coleman would have attained a more favorable result at trial. (See *Watson, supra,* 46 Cal.2d at p. 836.)

As there is no reasonable probability under such circumstances that earlier discovery of such evidence would have benefitted Coleman or altered the trial result, any delay disclosure was harmless. (See *Verdugo*, *supra*, 50 Cal.4th at p. 285.)

C. Pinpoint jury instructions

Coleman contends that the trial court erred in rejecting five of the six pinpoint jury instructions he proffered, and that the error resulted in a violation of his due process rights under the United States Constitution. Coleman argues that the instructions were necessary to his defense given the promises made to Holloway, implied promises made to Simpson, Simpson's fear of Coleman and Hurtado, and payments made to Rossel for relocation.

1. Standard of review

Coleman cites the general rule that "[a] criminal defendant is entitled, on request, to a[n] instruction 'pinpointing' the theory of his defense. [Citations.]' (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) He acknowledges that the trial court is required to give only those pinpoint instructions that are correctly phrased. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Wharton*, *supra*, at p. 570.) However, as we construe Coleman's scant argument supporting each proffered instruction, Coleman appears to contend that the trial court was required to give the requested pinpoint instructions solely because they were predicated upon defense theories.

In fact, "a trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 30.) "In a proper instruction, '[w]hat is pinpointed is not specific evidence as such, but the *theory* of the defendant's case.' [Citation.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) An improper pinpoint instruction is one that implies certain conclusions from specified evidence. (*Ibid*.)

In general, instructional error is reviewed de novo. (See *People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

2. Informant instructions

Coleman proposed two alternative instructions regarding informants. The first instructed in essence that the testimony of an in-custody informant should be viewed with caution and close scrutiny.

The first pinpoint instruction tracks the language of section 1127a which the trial court must read whenever an "in-custody informant" testifies, and instructs the jury to view such testimony with "caution and close scrutiny." Section 1127a, subdivision (a) defines "an 'in-custody informant' [as] a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." This requested instruction was inapplicable, as there were no such witnesses.

Coleman suggests that Simpson and Holloway were in-custody informants, because they were in custody and gave information about statements made by defendants. However, the information they gave did not concern statements made by Coleman while Simpson and Coleman were in custody or while Holloway and Samuel Murphy were in custody. Simpson testified that he overheard Coleman's statements in the neighborhood. Holloway testified that she overheard Samuel Murphy's statements while they were riding in a car. The instruction was therefore properly refused. (*People v. Bivert* (2011) 52 Cal.4th 96, 120-121.)

Coleman's second requested instruction reads as follows:

"The testimony of an informant, someone who provides evidence against someone else for money, or to escape punishment for his or her own misdeeds or crimes, or for other personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated. The jury must determine whether the informer's testimony has been affected by self-interest, or by the agreement he or she has with the government, or his or her own interest in the outcome of this case, or by prejudice against the defendant."

This alternate informant instruction directs the jury to examine and weigh informant testimony with greater care, and defines "informant" as "someone who provides evidence against someone else for money, or to escape punishment for his or her own misdeeds or crimes, or for other personal reason or advantage." The proposed instruction was duplicative of pattern instructions. As Simpson and Holloway were not in custody, the trial court properly instructed the jury with CALCRIM No. 358, to "[c]onsider with caution any statement made by a defendant tending to show his guilt unless the statement was written or otherwise recorded." (*People v. McKinnon* (2011) 52 Cal.4th 610, 679.) Further, as Coleman acknowledges, the trial court read CALCRIM No. 226, which provides factors to evaluate the credibility of witnesses. One such factor is whether "the witness [was] promised immunity or leniency in exchange for his or her testimony and, if so, the nature of that immunity or leniency."

Coleman contends that he was entitled to his more "explicit view-with-caution" language and that *special* credibility instructions were required because the evidence showed that the witnesses expected and obtained a benefit in exchange for testimony favoring the prosecution. We disagree. A trial court properly denies a pinpoint instruction that duplicates a pattern instruction while merely providing "a lengthier and more detailed expression of the law . . . ." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1112.) Coleman provides no authority for his definition of informant as "someone who provides evidence against someone else for money, or to escape punishment for his or her own misdeeds or crimes." Moreover, the definition serves only to emphasize the defense interpretation of the impeachment evidence, and is thus argumentative. As such, it was properly refused. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 330.)

Coleman also requested the following instruction on evaluating informant testimony:

> "In determining the weight to be given the testimony of an informant, you should consider the believability of the informant as well as other factors, including, but not limited to, any of the following:
>
> "(1) Was the testimony, in other parts, false;

"(2) Any terms of immunity from the prosecution;
"(3) Any leniency or hoped for benefit; or
"(4) Any financial or other reward;

"While such a witness may be entirely truthful when testifying, you should consider that testimony with more caution than that of ordinary witnesses should you find any of these factors to be present."

Coleman's third pinpoint instruction was properly refused for the same reasons as the others. It is duplicative of CALCRIM Nos. 226 and 358, incorporates the argumentative definition of informant, and eliminates the 13 factors suggested in CALCRIM No. 226 for evaluating credibility. Instead, Coleman's instruction lists just four factors: falsity in other testimony; immunity; leniency or hoped for benefit; and any financial or other reward. By eliminating all other factors, Coleman's instruction focuses jurors' attention on the inferences he would have them draw from the police interviews of Simpson and Holloway and the relocation expenses paid to Rossel. It was properly denied. (See *People v. Mincey* (1992) 2 Cal.4th 408, 437.)

3. Immunity instruction

Coleman contends the trial court erred in refusing the following instruction: "The testimony of a witness who provides evidence against a defendant for immunity from punishment should be viewed with distrust."

Coleman makes no attempt to provide any individualized argument in relation to this instruction. We need not address perfunctory assertions made without supporting argument. (*People v. Smith, supra*, 30 Cal.4th at p. 616, fn. 8.) Moreover, as the instruction was not supported by any evidence of immunity, it was properly rejected. (See *People v. Moon, supra*, 37 Cal.4th at p. 30.)

4. Fear instruction

Coleman proposed the following instruction regarding the evaluation of fearful witnesses:

"Evidence has been presented that a witness was afraid to testify. If you conclude that the witness was afraid you may consider this fact solely on the issue of his or her credibility. You are not to consider it for any

> other purpose. [¶] There is no evidence that the defendant was in any manner responsible for the witness'[s] fear and you may not infer that the defendant threatened the witness. Nor may you consider the witness'[s] fear as establishing a consciousness of guilt on the part of the defendant."

Again, Coleman makes no argument to support his contention or even explain why he believes the trial court erred in refusing the instruction. Thus, it need not be addressed. (See *People v. Smith, supra*, 30 Cal.4th at p. 616, fn. 8.) Moreover, it is duplicative and argumentative, as the trial court added the following language to CALCRIM No. 226 and read it to the jury:

> "Now, evidence was admitted that certain witnesses were afraid to testify in fear of retaliation if they did testify. Such evidence, if believed, may be considered by you only in evaluating the believability of the particular witness and for no other purpose. You may not conclude from this evidence that any of the defendants is a person of bad character or that he has a disposition to retaliate against such witnesses."

In addition, during Simpson's testimony regarding the earlier assault by Coleman and Hurtado resulting in his fear of testifying, the trial court admonished the jury:

> "I'm not going to permit this for the truth of what he says but rather – you're assessing his credibility so you're entitled to evaluate why he might be conducting himself in court as he is, whether he's got fears that relate to his testimony or fear of retaliation for testimony or other things. That's up to you to decide. But you may consider it for that reason. If he feels that he's in fear, that snitching puts him in danger and so forth, you can consider his statement for that purpose but not for the truth of what he says."

These instructions given by the trial court covered, in a neutral manner, all of the material contained in Coleman's instruction other than the argumentative statement that there was "*no evidence* that the defendant was in any manner responsible for the witness['s] fear . . . ." (Italics added.) It was thus properly rejected by the trial court. (See *People v. Moon, supra*, 37 Cal.4th at p. 30.)

5. Neither Coleman nor Hurtado suffered prejudice

As we have found no error, there is no need to address prejudice. Nevertheless, as respondent notes, the failure to give pinpoint instructions is generally evaluated for prejudice under the standard of *Watson, supra*, 46 Cal.2d at page 836, and no prejudice results where the rejected pinpoint instructions were covered in other instructions given by the court. (See *People v. Earp* (1999) 20 Cal.4th 826, 887.) As CALCRIM Nos. 358 and 226, as modified, adequately instructed on the legal principles contained in the proposed instructions, it is not reasonably probable that the jury would have come to any different conclusion had the trial court given the requested duplicative instructions. (See *Watson, supra*, at p. 836.)

D. Gang evidence

Coleman contends that the evidence was insufficient to support a gang finding and sentence enhancement under section 186.22, subdivision (b)(1), which provides in pertinent part: "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]"

A gang enhancement finding is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*).) "In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

Coleman contends that the evidence was insufficient to support a finding that "the crime was committed with the specific intent to benefit the gang." Coleman's contention has no merit, as "specific intent to *benefit* the gang is not required." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).) The gang enhancement finding has two prongs: (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (*Villalobos*); see *Albillar*, *supra*, 51 Cal.4th at pp. 67-68.) "Benefit" appears only in the first prong of the statute, not in the second prong requiring a specific intent. (*People v. Leon* (2008) 161 Cal.App.4th 149, 162 (*Leon*).)

Specific intent to promote, further or assist gang members in the commission of the crime -- the second prong of the statute -- may be established with substantial evidence "that the defendant intended to and did commit the charged felony with known members of a gang . . . ." (*Albillar*, *supra*, 51 Cal.4th at p. 68; see also *Villalobos*, *supra*, 145 Cal.App.4th at p. 322; *Morales*, *supra*, 112 Cal.App.4th at p. 1198.) Coleman does not contend that the prosecution failed to prove that he and Hurtado were gang members or that he and Hurtado committed the crime together. There was also ample evidence from which the jury could reasonably infer that Coleman and Hurtado knew they were fellow gang members when they jointly assaulted Brumfield. Officer Lozano testified that the Graveyard Crip gang territory was a fairly small area between Olympic and Pico Boulevards, consisting mostly of the 1900 block of 18th Street, the 1900 block of 19th Street, and the alley between them. Detective Henry testified that the neighborhood was "close knit" and Rossel testified that everyone knew everyone else in the neighborhood. Rossel had been close to his cousin Hurtado all his life, and he knew Coleman very well. He also testified that Coleman and Hurtado were both Graveyard Crip gang members, and that they "[ran] together" as fellow gang members. Under such circumstances, Coleman most certainly knew that Hurtado was a gang member and Hurtado most

certainly knew that Coleman was a gang member. Thus the specific intent prong of the statute was satisfied. (See *Albillar*, *supra*, at p. 68.)

Relying on the interpretation of section 186.22 in two federal cases, *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, and *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, Coleman contends that proof of the second prong failed for the additional reason that there was no evidence of a specific intent to promote or further some *other* criminal activity of the gang. That interpretation was repudiated by the California Supreme Court in *Albillar*, *supra*, 51 Cal.4th at pages 65 to 66, in which our high court explained that there was no "requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." (*Albillar*, at p. 67.) We are bound by the *Albillar* interpretation. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

In what appears to be a challenge to the evidence supporting the first prong of the statute, Coleman also contends that the evidence was insufficient to establish any motive on his part to benefit the gang. It was not necessary to establish a motive to benefit to the gang. Because the first prong is worded in the disjunctive, a gang enhancement may be imposed without evidence of any benefit to the gang so long as the crime was committed in association with or at the direction of another gang member. (*Leon*, *supra*, 161 Cal.App.4th at p. 162.) Thus the first prong may be established with substantial evidence that two or more gang members committed the crime together, unless there is evidence that they were "on a frolic and detour unrelated to the gang." (*Morales*, *supra*, 112 Cal.App.4th at p. 1198; see also *Leon*, at p. 162.)

Coleman contends that the assault was unrelated to the gang and the motive was entirely personal, the result of Murphy's jealousy of and hatred for Brumfield. Coleman points out that Murphy was not shown to be a member of the gang, and he readily admitted his personal desire to have Brumfield beaten. Coleman contends that we must assume that Samuel Murphy was not a gang member, because the jurors were unable to

reach a verdict with regard to Samuel Murphy.[13] Coleman's assumption is faulty and we reject it. An inconsistent "verdict regarding one defendant has no effect on the trial of a different defendant." (*People v. Superior Court* (*Sparks*) (2010) 48 Cal.4th 1, 5.)

The evidence did not suggest a "frolic and detour" here. (*Morales, supra,* 112 Cal.App.4th at p. 1198.) Assuming Murphy's motive was unrelated to gang activity, it would not necessarily follow that Coleman and Hurtado did not harbor a gang motive. Samuel Murphy, a respected OG member of the Graveyard Crip gang, "put a hit" on Brumfield by asking a younger gang member to assault Brumfield. Officer Lozano opined that such a request amounted to direction by the gang, because younger members aspired to be like the OG and would be willing to commit the crime to impress him and bolster their reputations within the gang. Further, when such a crime is committed within the gang's territory it benefitted the gang by causing citizens of the community to be too frightened to call the police when they engaged in criminal activities, by intimidating rival gangs in the area, and by enhancing the gang's reputation.

Coleman seeks a comparison with the facts of several cases in which the expert's opinion was not sufficiently supported by the evidence. (See *Ochoa, supra,* 179 Cal.App.4th at pp. 654-655 [expert opinion was speculative; no evidence the crime was committed in gang territory or with special gang permission]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [circumstances did not suggest any gang connection]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195-1197 [expert's testimony based only on weak inferences]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851-853 [evidence of

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13 Coleman relies on dictum in *Pulido v. Chrones* (9th Cir. 2007) 487 F.3d 669 (*Pulido*), in which the Ninth Circuit Court of Appeals made a similar assumption for purposes of its discussion of instructional error. As respondent notes: the federal appeals court cited no authority and attempted no analysis; its decision in *Pulido* was vacated and reversed by the United States Supreme Court in *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 62; and the Supreme Court has held that collateral estoppel or issue preclusion cannot be based upon the jury's failure to reach a verdict. (*Yeager v. U.S.* (2009) 557 U.S. 110, 121 ["A contrary conclusion would require speculation into what transpired in the jury room"].)

two gang members in a stolen car found insufficient to support expert opinion as possession of stolen vehicles was not shown to be a primary activity of the gang].)

Coleman's comparison fails. Unlike the cited cases, the evidence in this case showed the assault was committed in gang territory by two members of the gang at the request of an older, respected member of the gang; one of them used a stick, bat, or pipe; and assault with a deadly weapon was one of the gang's primary activities. We conclude that substantial evidence supported the expert's opinion and the jury's finding.

E. Confidential juror records

Coleman contends that the trial court abused its discretion in denying his petition to unseal juror contact information. Code of Civil Procedure section 237 provides that juror identification information may be unsealed after the verdict in a criminal trial only upon application establishing good cause. (Code Civ. Proc., § 237, subds. (a)(2), (b).) We review for abuse of discretion the trial court's ruling that the declarations were insufficient to make a prima facie showing of good cause. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1096; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.) We uphold the court's discretion unless it was arbitrary or capricious. (*People v. Santos* (2007) 147 Cal.App.4th 965, 978.)

Coleman's petition was supported by defense counsel's declaration in which he stated his "belief" that "misconduct may have occurred," based upon defense counsel's receipt of the following email sent by the prosecutor after the verdict:

> "Following our verdict, one of the jurors from the trial contacted me by telephone. The juror explained to me that as to Samuel Murphy, the jury was hung 11 to 1 for guilt. The one juror who voted not guilty for Samuel Murphy initially voted not guilty for defendants Coleman and Hurtado as well. The juror explained to me that this juror appeared to have some sort of bias which the juror would not discuss, and was fairly quiet during deliberations. When the other jurors attempted to inquire as whether there was some sort of bias or incident in the juror's past, the juror responded that, 'It's none of your business.' This juror eventually agreed with the other jurors as to the guilt of Coleman and Hurtado, but would not be convinced of Samuel Murphy's guilt. [¶] Detective Maury Sumlin was present and also heard the phone conversation I had with the juror."

Coleman's purpose in seeking the juror contact information was to ask the holdout juror "if s/he was pressured in changing his/her vote or whether there was a tacit agreement that if the juror change her/his vote of not guilty regarding [Coleman] and [Hurtado], the other jurors would then state they were hopelessly deadlock [*sic*] regarding co-defendant, Sammy Murphy in order that the jurors could end their deliberations." Hurtado joined in the petition.

Coleman contends that the trial court considered only the effect of disclosure upon jurors' future willingness to serve, and that it failed to balance that consideration with the defendant's right to a fair trial. Coleman's contention lacks merit. The trial court denied the petition after finding that Coleman had not shown good cause to disclose juror information, as he presented no evidence of bias and the prosecutor's email showed only speculation on the part of the reporting juror.

To demonstrate good cause for the release of juror identification information pursuant to Code of Civil Procedure section 237, subdivision (b), a defendant must "'[set] forth a sufficient showing to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial. . . .' [Citation.]" (*Townsel v. Superior Court*, *supra*, 20 Cal.4th at pp. 1093-1094, quoting *People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.) 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*, at p. 552.)

Coleman's petition was wholly inadequate to establish good cause for disclosure of juror information. Defense counsel merely speculated that misconduct may have occurred, and admitted that to develop evidence of misconduct, the juror would have to be questioned regarding his or her thoughts and reasoning processes. "[W]ith narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of '*statements* made, or conduct, conditions, or *events* occurring, either within

or without the jury room, of such a character as is *likely* to have influenced the verdict improperly,' but '[n]o evidence is admissible . . . concerning the *mental processes* by which [the verdict] was determined.' [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 294; Evid. Code, § 1150, subd. (a).)

Coleman has suggested no exceptions to the above rule and has in effect admitted to requesting an opportunity to investigate in the hopes of obtaining inadmissible evidence. We thus find no abuse of discretion. The petition was properly denied. (See *People v. Rhodes*, *supra*, 212 Cal.App.3d at p. 552.)

F. No cumulative effect

Coleman argues that the cumulative effect of all the errors heretofore discussed was to deny him a fair trial. Because "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must reject Coleman's claim of prejudicial cumulative effect. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

IV. The abstracts of judgment

The trial court awarded victim restitution, payable jointly and severally by all defendants. As none of the abstracts of judgment reflects a joint and several order, Coleman asks that we direct the trial court to issue amended abstracts for all three defendants. (See *People v. Neely* (2009) 176 Cal.App.4th 787, 800.) Respondent has no objection.

Respondent asks that we also modify the judgments to include a parole revocation fine of $5,000, the same amount as the restitution fine which the court did impose, as required by section 1202.45. (See *People v. Smith* (2001) 24 Cal.4th 849, 851.) Murphy and Hurtado did not reply, and Coleman agrees to the modification so long as the judgment reflects that the fine is stayed as provided in the statute. (See § 1202.45 [the fine "shall be suspended unless the person's parole is revoked"].) We thus modify the judgments as requested and direct the trial court to issue amended abstracts of judgment.

DISPOSITION

The judgment against each defendant is modified to impose a parole revocation restitution fine of $5,000, which is suspended unless parole is revoked. The superior court is directed to prepare an amended abstract of judgment for each defendant reflecting this modification as well as reflecting the trial court's award of victim restitution as the joint and several liability of all defendants. The superior court is further directed to forward the amended abstracts to the Department of Corrections and Rehabilitation. As so modified, and in all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST