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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL CERVANTES et al., Defendants and Appellants.	B259727 (Los Angeles County Super. Ct. No. BA398431)

APPEAL from judgments of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Cervantes.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant Angela Marie Garcia.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Daniel Cervantes and Angela Marie Garcia appeal from the judgments entered following their convictions by jury of attempted willful, deliberate, and premeditated murder, and conspiracy to murder, with findings as to each offense that a principal personally used a firearm and the offense was committed for the benefit of a criminal street gang. (Pen. Code, §§ 664, subd. (a), 187, subd. (a), 182, subd. (a)(1), 186.22, subd. (b)(1), 12022.53, subds. (c) & (e).) We affirm.

FACTUAL SUMMARY

1. *People's Evidence.*

a. The October 2002 Shooting.

The People presented evidence that appellants, Lott 13 gang (Lott) members, were accomplices to the attempted shooting by fellow Lott members Lucio Ramirez and Eddie Chavira of rival gang member Jaime Arciniega. Cervantes provided a handgun and instruction on how to use the weapon, while Garcia served as the getaway driver.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence established the following.

(1) *Pre-shooting planning.*

During the afternoon of October 7, 2002, Garcia was driving a black Ford Explorer with George Barraza in the front seat. Barraza (also known as "Trooper") was a Lott shot-caller. They drove to Schurr High School and picked up two juveniles, 17-year-old Lucio Ramirez and 14-year-old Saul Herrera. The group drove into rival gang territory, and saw a Stoners gang member, Arciniega, at 1018 Leonard Avenue. Barraza gave Garcia instructions to "kind of recon the area, go around it." He

also directed her on how to commit the shooting, showing her where to park "so she can get away from the back streets."

Using his cell phone, Barraza called Cervantes (also known as "Snaps") and told him to get guns. Barraza then informed the group that they were going to the Jack in the Box to get the guns. Garcia drove to the Jack in the Box parking lot where they met Cervantes and Cervantes's cousin, another juvenile, Eddie Chavira. Barraza directed Cervantes to show the juveniles how to use the gun and told Garcia to drive the three juveniles back towards the Leonard Avenue location. Barraza and Cervantes drove in Cervantes's car, following Garcia. Barraza and Cervantes were at the corner of Montebello and Leonard Place, where they stood outside the car and later watched the shooting.

(2) *The attempted shooting at Leonard Avenue.*

Garcia drove back to the location near Leonard Avenue. Ramirez and Chavira jumped out of the SUV, each wielding a weapon. Ramirez tried to shoot Arciniega but his gun's safety was on and it did not fire. Chavira fired several shots at Arciniega but missed. Ramirez and Chavira ran back to the SUV, where Garcia and Herrera had remained with the engine running. Once the boys were back in the car, Garcia sped off.

(3) *Lay witness testimony.*

Luis Mendoza, Arciniega's neighbor, testified that he was inside his house when he heard shots coming from across the street or in front of his house. He mounted his motorcycle, chased the car, and ultimately flagged down a sheriff's deputy. Los Angeles County Sheriff's Deputy Angela Contreras and other deputies stopped the SUV, detained all four occupants, and recovered a nine-millimeter semiautomatic handgun from the car and a .22-caliber handgun from Chavira. Contreras identified a booking photograph of Garcia as the driver of the SUV.

Two more lay witnesses were present during the shooting, Jesus Rios and Jaime Sierra. Rios told a deputy that he had seen the SUV circling the area just before the shooting. Rios concluded that because the SUV was driving back and forth, "the people in the SUV were going to blast" the Stoners member. He had also seen two Lott members from Schurr High School fire at the victim, enter the SUV, and speed away. Finally, Jaime Sierra testified he was on his front porch when he heard the gunshots. He saw two males run past him with guns, then saw a black Ford Explorer SUV pass him. He later identified Ramirez and Chavira as the ones who committed the shooting.

Eleven days after the shooting, on October 18, 2002, Brenda Sierra (Jaime Sierra's sister; hereafter, Brenda) disappeared while walking to Schurr High School. On October 19, 2002, Brenda was found dead in San Bernardino County.

(4) *Ramirez's accomplice testimony.*

Ramirez testified at trial, identifying Barraza (by his moniker "Trooper") and Cervantes as leaders of the Diablos clique of Lott. Ramirez testified that Chavira was a mid-level Lott soldier, and Ramirez and Herrera were low-level Lott members who had recently joined. Ramirez confirmed that the Stoners were a rival gang.

A female driver picked up Ramirez and Herrera from Schurr High School the day before, and the day of, the shooting. On the day of the shooting, October 7, 2002, the female was again driving Barraza, Ramirez and Herrera around looking for rival gang members. When they saw gang members at 1018 Leonard Avenue, Barraza said, "There they are" and that they were from Stoners. He further stated, "We're going to come back and smoke 'em." The phrase "smoke 'em" meant "kill him, shoot him."

Barraza, Ramirez, and Herrera exited the SUV to speak with Cervantes and Chavira but the female remained inside. Barraza mentioned in Cervantes's presence what the guys were going to do with the guns, explaining, "We're going to go smoke 'em." Ramirez testified that Barraza told Cervantes, "Show them how to use the gun." With Herrera standing nearby, Cervantes gave Ramirez a .22-caliber semiautomatic gun and showed him how to operate its safety. Ramirez assumed the gun was loaded and put it in his waistband. Barraza then gave directions to the female, telling her, "[j]ust drive in the opposite direction after you do the shooting." The female did not protest and appeared to be friends with Barraza.

Ramirez testified that the female drove back to a location near 1018 Leonard and parked. Ramirez and Chavira exited the SUV, each with a gun. No one in the SUV told the female that they were there to pick up a sweater. Ramirez testified he was depending on the female to "take you out of this once you did the shooting."

Ramirez further testified that he and Chavira approached and were about 26 feet from Arciniega when they "pointed and started shooting." The plan was to kill Arciniega, and Ramirez pointed his gun at him with intent to kill. However, the safety on Ramirez's gun was on and it did not shoot. Chavira fired four or five loud shots at Arciniega but missed. Ramirez and Chavira ran back to the SUV where Herrera was still seated in the front passenger seat. Per their plan, the female quickly drove away.

As the group was driving away, someone shouted, "a guy is chasing us." Ramirez saw a man on a motorcycle chasing them on Whittier. The man flagged down a sheriff's deputy and the deputy pursued the SUV. The female was on a cell phone asking Barraza what to do. Ramirez and Chavira were sitting in the back seat when all four occupants were arrested. As a result of the shooting, Ramirez was convicted of "assault with a firearm." Ramirez, Herrera, and Chavira each pled to the same charge and received the same punishment.

(5) *Herrera's testimony.*

Herrera testified that in 2002, he was 14 years old and had been a Lott member for about a year. He testified "Trooper" was Barraza, and Herrera identified Garcia at trial as the person who, driving a black Ford SUV, picked up Herrera and Ramirez from Schurr High School on October 7, 2002. Herrera's testimony corroborated Ramirez's testimony regarding the search

for rival Stoners gang members, Barraza's call to Cervantes to bring guns, the pre-shooting meeting at the Jack in the Box, and the attempted shooting on Leonard Avenue. Herrera denied helping "them" commit the shooting in any way. From the time the SUV arrived at the shooting site until Ramirez ran back to the SUV, neither Herrera nor Garcia exited the vehicle and the engine was running. At all times, Garcia was the driver and she was on the phone talking with Barraza until the SUV's occupants were arrested. According to Herrera, Garcia had not followed Barraza's instructions about where to park before the shooting, and "that's why we got caught."

At trial, Herrera testified if he had said he did not want to enter the SUV, he probably would have been shot. Garcia's counsel asked Herrera if he was a lookout. Herrera replied he was left behind with no gun, he did not know if he was a lookout, and he was not told to "just look for cops." Counsel then asked what if anything Herrera was supposed to be doing, and Herrera replied, "Going with them. I'm supposed to be earning my stripes here, remember? I'm 14. The shot caller sent me to shoot some people or . . . sent three people to shoot another person. I mean, I'm supposed to be involved." Just being present earned Herrera's stripes.

Herrera suggested that if he had said, "No, I want to go home," "they have guns in the car, they just shot this guy across the street, and they're going to shoot me now or something." He did not think it was a great deal and testified, "I didn't think it was fair that I had to do years out of my life for something I didn't commit, but unfortunately, if I would never pled guilty to that, I could have got more time. That was the reason I pled guilty to that charge."

During Cervantes's recross-examination of Herrera, he was asked, "What is it that you did that caused you to plead guilty in the court?" Herrera answered, "I didn't do anything." Counsel then asked, "You did nothing?" Herrera replied, "No, but sit in the car." On redirect examination, Herrera acknowledged the shooting happened, he had been present during the incident, and he had done his time for it. However, he also denied he was guilty of anything. He testified his only mistake had been to enter the SUV.

Herrera remained a Lott member until about 2008, during which period he suffered several felony convictions. He ultimately left the gang and Lott members repeatedly tried to kill him. He was granted immunity at the preliminary hearing. The sheriff's department gave Herrera and his family money to relocate.

b. Gang Evidence.

Los Angeles County Sheriff's Detective Robert Gray testified as a gang expert, explaining that Lott was based in East Los Angeles and engaged in murder, robbery, drug selling, and assaults with deadly weapons. In 2002, the Stoners were a rival gang and the two gangs claimed overlapping territory. They had an established hierarchy with experienced shot-callers telling younger soldiers what to do. They used women drivers during shootings because they would attract less law enforcement attention and used juveniles to commit shootings.

Gray identified Barraza and Cervantes as Lott shot-callers, and opined that Herrera and Ramirez were low-level Lott soldiers and that Garcia was an associate. In response to a hypothetical question, Gray opined that an individual who stays in the vehicle during the shooting and never touches any guns, or alerts any other participants, might be there as just a witness to the attack. A lookout generally would get out of the car to watch for law enforcement.

The prosecutor also asked Gray a lengthy hypothetical question which assumed facts that closely tracked, inter alia, the testimony of Ramirez and Herrera regarding the facts of the shooting, the pre-shooting search for a rival gang member, and the meeting in the Jack in the Box parking lot. The hypothetical question asked Gray to assume a female driver picked up a 17 year old and a 14 year old from Schurr High School, and there were photographs of the female in the company of a senior Lott member involved in the hypothetical shooting.

2. *Defense Evidence.*

Garcia testified in her own defense. She indicated that about 5:00 p.m. or 6:00 p.m. on October 7, 2002, she was in her black Ford Explorer at a Jack in the Box when she saw Chavira, Ramirez, and Herrera. Chavira asked for a ride to a friend's house so Chavira, Ramirez, and Herrera could pick up a sweater the three had loaned to someone. Garcia drove the three to Leonard Avenue. Herrera was in the front seat and Chavira and Ramirez were in the back seat. Garcia did not see any weapons. Garcia parked and exited the SUV to get ice cream from an ice cream truck. At some point Chavira and Ramirez exited.

Garcia returned to the SUV with ice cream, then reentered the SUV and heard shots. Chavira and Ramirez ran back to the SUV, jumped in, told Garcia to go, and she drove away, not knowing what was happening. A motorcyclist followed Garcia, then talked with a deputy, and the deputy followed Garcia. The deputy activated her patrol car's lights and Garcia stopped in a parking lot. Garcia denied talking to Barraza on her cell phone that afternoon.

According to Garcia, from about 2009 through 2012, Los Angeles County Sheriff's Detective Larry Brandenburg threatened Garcia with incarceration if she could not provide information about the murder of Brenda, Jaime Sierra's sister. Garcia testified that Brandenburg said Garcia's children would be taken away. On June 8, 2012, Garcia was arrested. While in custody, Brandenburg threatened to have her incarcerated for years prior to trial if she did not tell him what he wanted to know.

Shelly Juarez testified she met Garcia in 2006 or 2007, and Juarez described the relationship she once had with Garcia as a marriage. Brandenburg and a partner talked with Juarez approximately four times about Garcia and the Brenda murder. Initially, Brandenburg was nice, but later became aggressive and told Juarez that he was going to do whatever he had to do to put Garcia behind bars. Brandenburg also said he would get people to say what they had to say to take Garcia's children from her. Cervantes presented no defense witnesses.

3. *Rebuttal Evidence.*

In rebuttal, Brandenburg testified that he never threatened to charge Garcia with crimes and that Juarez falsely testified that Brandenburg was intimidating and threatening. Brandenburg contacted Garcia multiple times because she did not respond to his efforts to contact her and most of his visits involved dropping off subpoena requests. In about April 2012, Brandenburg told Garcia he had enough evidence and her arrest was pending. He told her he knew she cared for her children and she should make arrangements for a relative to take care of her children as opposed to them being placed in a home. We will present additional rebuttal evidence where pertinent *post*.

4. *Pretrial Investigations and Filings.*

Deputies arrested Garcia and the three juveniles, Herrera, Ramirez and Chavira on the date of the offense, October 7, 2002. Garcia was interviewed and released that day pending further investigation. On November 6, 2002, Herrera, Ramirez and Chavira admitted to "assault with a deadly weapon" and were committed to the California Youth Authority (CYA) for two years.

From 2002 to 2008, Brenda's murder was investigated by the San Bernardino County Sheriff's Department. In 2008, the Los Angeles County Sheriff's Department took over the investigation of the murder case.

On October 11, 2011, Los Angeles County sheriff's detectives interviewed Herrera for the first time about the 2002 shooting. During this and other interviews, he provided new information regarding the involvement of Garcia, Cervantes, and Barraza in the planning and execution of the incident. On February 21, 2012, sheriff's detectives interviewed Ramirez about the shooting. He also provided new information concerning Barraza's role in planning the attempted shooting, Cervantes's role in providing guns, and Garcia's role as the getaway driver.

On June 6, 2012, the People filed the felony complaint and an arrest warrant was issued for Garcia. On June 18, 2013, the People filed the information. In April 2014, the jury convicted appellants.

ISSUES

Appellants claim (1) the trial court erroneously refused to instruct that Herrera was an accomplice as a matter of law, (2) gang expert Gray presented inadmissible opinion testimony about appellants' guilt and intent, and (3) appellants were denied due process of law by prearrest prosecution delay. Cervantes claims insufficient evidence supports his convictions. Garcia claims (1) she was denied effective assistance of counsel and denied a fair trial due to her trial counsel's failure to redact a transcript and audio recording of Juarez's interview by detectives, and (2) cumulative prejudicial error occurred.

DISCUSSION

1. *The Trial Court Did Not Err by Refusing to Instruct the Jury that Herrera Was an Accomplice as a Matter of Law.*

The trial court refused to instruct the jury that Herrera was an accomplice as a matter of law. Appellants claim that was reversible error. We reject the claim. "Whether a person is an accomplice within the meaning of [Penal Code] section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 679.)

Even if a trial court erroneously fails to instruct that a witness was an accomplice as a matter of law, the error is harmless if there is sufficient corroborating evidence. Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. (*People v. Williams* (2008) 43 Cal.4th 584, 636 (*Williams*).) "Corroborative evidence sufficient to satisfy [Penal Code] section 1111 need not corroborate every fact to which the accomplice testified or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy a fact finder the accomplice is telling the truth." (*People v. Williams* (1997) 16 Cal.4th 153, 246.)

The trial court noted that there was conflicting evidence concerning whether Herrera was an accomplice and "reasonable minds could decide either way." Unlike Ramirez, who directly participated in the shooting attempt, Herrera remained in the SUV throughout the shooting incident, he did not use or hold either gun, nor did he aid and abet the commission of the crime by procuring the guns or serving as a getaway driver. "[M]ere presence at the scene of a crime and the failure to take steps to prevent a crime" do not amount to liability under an aiding and abetting theory. (See *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 744.*)*

Moreover, Herrera, only 14 years old at the time, was significantly younger than the other participants. He denied even having the role of a lookout. He was sitting unarmed inside the car, and was not told to "just look for cops." This is in contrast to Barraza and Cervantes, who stood outside their vehicle, watching the shooting from a safe distance.

Further, Herrera repeatedly denied criminal involvement in the shooting. For instance, he stated, "I didn't do anything." He also repeatedly indicated that his participation in the shooting had been involuntary. Herrera testified that if he had said he wanted to go home from school and not enter the SUV, he probably would have been shot. He suggested that if he had said "No, I want to go home," "they have guns in the car, they just shot this guy across the street, and they're going to shoot me now or something." (Cf. *People v. Austin* (1961) 198 Cal.App.2d 669, 676 [where any participation by witness in defendant's offense was involuntary, witness was not an accomplice].) Herrera clearly indicated the reason he pled guilty to felonious assault based on the shooting was that the plea was in his best interests

given his maximum incarceration exposure in this case, not because he was criminally involved.[1]

In sum, there was substantial evidence from which the jury reasonably could have decided that Herrera was not an accomplice. The trial court did not err by giving CALCRIM No. 334 (permitting the jury to decide whether Herrera was an accomplice), instead of CALCRIM No. 335 (instructing that Herrera was an accomplice).

Even if the trial court erred, there was adequate slight evidence corroborating Ramirez's testimony incriminating Garcia. Rios's statements to a deputy provided evidence the SUV's occupants were engaged in casing activity in preparation for shooting Arciniega. The testimony of Sierra and Contreras provided evidence Garcia was the SUV's driver during the casing activity. Garcia herself testified she drove the group to a location near the shooting scene. This was evidence of Garcia's preparation (see *People v. McKnight* (1948) 87 Cal.App.2d 89, 90) and corroborated Ramirez's testimony inculpating her. The testimony of Sierra, Mendoza, Sanchez, and Contreras provided evidence of Garcia's flight from the shooting scene. Garcia herself testified she drove the group away from the shooting vicinity after she heard shots. Evidence of flight may adequately corroborate accomplice testimony. (*People v. Garrison* (1989) 47 Cal.3d 746, 773.) Deputies found a gun in the SUV Garcia had

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[1] Cervantes's new trial motion urged the trial court erred by not instructing that Herrera was an accomplice as a matter of law. We note the trial court, denying the motion, stated, inter alia, "My evaluation of the evidence comes down squarely on the side that Mr. Herrera took a deal as a juvenile, because he believed it was in his best interest to do so, not because he was involved."

been driving; this was evidence she constructively possessed a gun used in the shooting. Any instructional error was harmless as to Garcia.

2. *Sufficient Evidence Supported Cervantes's Convictions.*

Cervantes claims there was insufficient evidence supporting his convictions. He argues (1) his convictions were based on the uncorroborated testimony of two accomplices, i.e., Ramirez and Herrera, and (2) even if Herrera were not an accomplice, his testimony was impeached by a grant of immunity, prior felony convictions, and financial assistance from law enforcement. We reject the claim.

As to Cervantes's first argument, we previously have concluded that there was substantial evidence Herrera was not an accomplice. In *People v. Santo* (1954) 43 Cal.2d 319, our Supreme Court stated, "[s]ince it could be inferred that [a witness] was not an accomplice, the question whether he was, was properly left to the jury, and as a reviewing court, we are bound to presume in favor of affirming the judgment that the jury found that he was not an accomplice." (*Id.* at pp. 326-327; see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 432 [no need to decide if corroboration existed where jury reasonably could have found witness was not an accomplice].) Herrera's nonaccomplice testimony properly served as requisite "slight" (*Williams, supra,* 43 Cal.4th at p. 636) evidence corroborating Ramirez's accomplice testimony incriminating Cervantes.

Moreover, "[o]ur power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557,

576-577.) The test on appeal is not whether we believe the evidence at trial established the defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Provencio* (1989) 210 Cal.App.3d 290, 306.)" (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.) The reviewing court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the factfinder. (*Ochoa, supra,* 6 Cal.4th at p. 1206.) Herrera's nonaccomplice testimony provided independent substantial evidence supporting Cervantes's convictions.

Cervantes's second argument is that Herrera's testimony as nonaccomplice testimony did not corroborate Ramirez's accomplice testimony because Herrera's testimony was impeached by the facts that he testified pursuant to immunity, suffered felony convictions following his release from CYA, and received financial assistance from law enforcement.

However, as mentioned above, Herrera's nonaccomplice testimony needed to provide only slight evidence to corroborate Ramirez's testimony inculpating Cervantes. Moreover, the testimony of a single nonaccomplice witness is sufficient to support convictions unless the testimony describes facts or events that are physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Herrera testified as a percipient witness to facts that closely tracked the testimony of accomplice Ramirez. The facts that Herrera was granted immunity and his testimony may have been impeached did not render such evidence insubstantial. (Cf. *People v. Todd* (1959) 175 Cal.App.2d 508, 521-522.) There was sufficient evidence to

convince a rational trier of fact, beyond a reasonable doubt, that Cervantes committed attempted willful, deliberate, and premeditated murder and conspiracy to murder. (Cf. *Ochoa, supra,* 6 Cal.4th at p. 1206.)

3. *Detective Gray Did Not Give Inadmissible Opinion Testimony Concerning Cervantes's and Garcia's Guilt or Intent.*

During the People's direct examination of Gray, a gang expert, the People asked him the previously mentioned lengthy hypothetical question which assumed facts that closely tracked the testimony of Ramirez and Herrera. Garcia posed an unspecified objection once and asked to approach the bench twice. Cervantes neither objected nor asked to approach. Gray answered the question, testifying the crime was committed for the benefit of the gang and testifying as further discussed *post*.

After Cervantes's cross-examination of Gray had begun, and outside the presence of the jury, the trial court acknowledged it had precluded Garcia from approaching the bench, and the court permitted Garcia to approach and make a record. Garcia's counsel stated, "because the court brought it up, I was actually going to pass on that. I thought I was going to make an objection to the foundation on one thing, which had to do with the photograph, but I'm fine." Garcia's counsel later added, "I'm not making an objection." Cervantes objected that the predicate hypothetical facts too closely matched the evidence. The court overruled Cervantes's objection.

Appellants claim that Gray's answer to the hypothetical question constituted an improper expression of his opinion on appellants' guilt and intent during the shooting. The claim is unavailing. Neither appellant timely objected to the hypothetical question. Cervantes's objection was untimely since he only

objected after cross-examination of Gray had begun. Appellants waived any admissibility issue. (Cf. Evid. Code, § 353, subd. (a).)

Even if the admissibility issue were not waived, appellants' claim lacks merit. There is no dispute that the hypothetical question was based on assumed facts tracking the evidence admitted at trial. Appellants do not argue that the hypothetical questions were misleading, or based on speculation or inadmissible hearsay. Rather, appellants argue the hypothetical question was too similar to the case-specific facts and thus specifically identified appellants. Appellants assert that assumed facts such as the age of the juveniles, the gender of the driver, and a photograph depicting a female with a gang member, as well as the assumed fact that the senior gang members and the driver were adults, were all unnecessary details added merely to identify appellants. Appellants urge that, by responding to this allegedly objectionable hypothetical question, the expert usurped the role of the jury. We reject the claim.

An expert may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (Evid. Code, § 801, subd. (a).) Gang expert testimony regarding the culture and habits of criminal street gangs meets this criterion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*). "An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts" (*People v. Sanchez* (2016) 63 Cal.4th 665, 676-677) and the "expert is permitted to give his opinion because the significance of certain facts may not be clear to a lay juror lacking the expert's specialized knowledge

and experience." (*Id.* at p. 677.) A "hypothetical question must be rooted in facts shown by the evidence." (*Gardeley*, at p. 618.)

In *People v. Vang* (2011) 52 Cal.4th 1038, 1046 (*Vang*), the Supreme Court reaffirmed its prior holdings that a gang expert may properly testify that a particular crime was committed for the benefit of a gang even though such testimony embraces an ultimate issue to be decided by the jury. (*Id.* at pp. 1045-1046, 1048-1051.) *Vang* held that the "Court of Appeal erred in condemning the hypothetical [gang expert's] questions because they tracked the evidence in a manner that was only 'thinly disguised.' " (*Id.* at p. 1045.) *Vang* observed, "[t]his conclusion transforms the *requirement* that a hypothetical question be rooted in the evidence into a *prohibition*—or at least into the confounding rule that the party posing the question must disguise from the jury the fact it is rooted in the evidence." (*Id.* at p. 1046.) "[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.)

In the present case, the details in the hypothetical question were not gratuitous. Indeed, according to the expert, the age and gender of the hypothetical gang members played a critical part in their assigned roles. For instance, Gray testified that gangs used women to drive during drive-by shootings because they would attract less attention from law enforcement and that senior gang members often had juveniles commit shootings. Hypothetical questions should not be prohibited "solely because they track the evidence too closely." (*Vang*, *supra*, 52 Cal.4th at p. 1051.)

Gray was responding to a hypothetical question supported by admissible evidence and did not testify about appellants directly or by name. While it is true that the expert's opinion, if found credible, might, together with the rest of the evidence, cause the jury to find the attempted shooting was gang-related, this would only make the expert testimony probative, not inadmissible. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 947.) The prosecutor was not required to disguise the fact that the assumed facts of the hypothetical question were based on case-specific evidence, and the expert testimony did not invade the province of the jury. (*Vang, supra* 52 Cal.4th at p. 1051.) The trial court did not abuse its discretion in admitting the gang expert's testimony.

4. *Appellants' Federal and State Due Process Rights Were Not Violated by Prearrest Delay; The Trial Court Properly Denied Cervantes's Motion to Continue Sentencing.*

Appellants claim their state and federal due process rights were violated by a pre-accusation or prearrest delay in prosecution. Cervantes also claims the court abused its discretion in refusing to continue sentencing so he could join in Garcia's *Serna*[2] motion. We reject both claims.

Garcia first raised a *Serna* issue during an oral Penal Code section 1118.1 motion. The trial court noted it was not appropriate to raise the due process issue in that context and the court did not reach the issue. Garcia renewed the prosecutorial delay argument in her motion for new trial filed October 9, 2014. Cervantes did not address prosecutorial delay in his motion for

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[2] (*Serna v. Superior Court* (1985) 40 Cal.3d 239 (*Serna*).) *Serna* pertains to prosecutorial delay and a defendant's rights to a speedy trial and due process.

new trial but, at his sentencing hearing, Cervantes asked the court for a short continuance to join in Garcia's *Serna* motion. The court noted that the matter had been repeatedly continued, denied Cervantes's request for a continuance, denied his motion for new trial, and sentenced him.

During the December 18, 2014 hearing on Garcia's new trial motion, the court noted that law enforcement had no case against Garcia until Herrera and Ramirez were interviewed in 2011 and 2012, respectively. Finding that the "primary players" were present and able to testify, the court impliedly concluded that Garcia suffered no prejudice from the delay and denied her motion for new trial.

"Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions." (*People v. Catlin* (2001) 26 Cal.4th 81, 107 (*Catlin*).) However, "[a] claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*Ibid.*)

"A defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time. [Citation.] . . . In addition, although 'under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process[,] . . . [i]f the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.' [Citation.] [Fn. omitted.] If the defendant establishes prejudice, the

prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay. [Citation.] But if the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified. [Citations.]" (*People v. Abel* (2012) 53 Cal.4th 891, 908-909 (*Abel*).) Our Supreme Court has repeatedly found that speculative arguments are inadequate to establish the actual prejudice required in order for delayed prosecution to constitute a due process violation. (*People v. Lewis* (2015) 234 Cal.App.4th 203, 213.)

"We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them [citation]." (*People v. Cowan* (2010) 50 Cal.4th 401, 431.) Finally, "[t]he determination of whether a continuance should be granted rests within the sound discretion of the trial court." (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) Absent a showing of abuse of discretion and prejudice to the defendant, the denial of a motion for a continuance does not require reversal of the judgment. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

Appellants argue that the police were negligent in failing to interview Herrera and Ramirez for 10 years. Because appellants fail to demonstrate any tactical advantage the prosecution gained by this delay and appellants allege such delay was negligent (not intentional), their federal due process claim fails. (*Catlin, supra,* 26 Cal.4th at p. 107.) However, their state due process claim remains and requires a showing of actual prejudice. (*Abel, supra,* 53 Cal.4th at pp. 908-909.)

Appellants allege that the delay prevented the defense from: (1) obtaining video footage of the Jack in the Box parking lot; (2) speaking to witnesses, such as Jack in the Box employees, (3) recovering phone records to show that Garcia was not speaking to Barraza after the shooting; (4) obtaining cassette recordings of any statements by the three juveniles after their arrest, where the recording could have contained exculpatory information, and (5) fingerprinting the recovered guns and magazines. We reject appellants' claims of prejudice as highly speculative and at most minimal.

First, as to the Jack in the Box video, it is unknown whether the restaurant had any operating cameras positioned to capture footage of the parking lot in which the juveniles allegedly approached Garcia. Second, it is mere speculation that there were witnesses in the restaurant who would have remembered a presumably uneventful encounter between the juveniles and Garcia when she was allegedly placing a food order. Third, appellants argue that phone records would have shown that she was not speaking to Barraza after the shooting, contrary to the testimony of Ramirez and Herrera. We reject this argument as speculative and unsupported with citations to the record. (Cf. *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.)

Fourth, appellants offer no evidence that what, if anything, the juveniles said after their arrest would have contradicted their trial testimony or that those contradictions would have been material. Appellants speculate as to the content of any conversations on the tape and, for all Garcia's citations to the record reflect, the tape might have first gone missing shortly before or even during trial. Finally, two witnesses placed Garcia

in the SUV at the time of the attempted shooting, Garcia admitted driving to Leonard Avenue before the shooting, but no one alleged that she held or shot a gun. Garcia does not explain how evidence that "prints could have shown that someone other than Cervantes provided the guns" would have helped her case. Appellants have failed to demonstrate that evidence from any of the above items was more likely to be exonerating than incriminating.

The trial court correctly observed that the "primary players" in the present case remained present and able to testify. The court's implied conclusion was that Garcia suffered no prejudice from the delay and this finding was supported by substantial evidence. The trial court's denial of Garcia's new trial motion was well within its discretion.[3] It follows that Cervantes has failed to demonstrate either an abuse of discretion or prejudice from the trial court's denial of his continuance motion and, to the extent he joins Garcia's argument, his argument is also without merit. The trial court did not err, constitutionally or otherwise, as to either appellant.

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[3] Because the trial court properly denied Garcia's new trial motion on the ground she failed to demonstrate prejudice, we need not reach the issues of whether any delay was negligent or justified, or whether difficulty in allocating scarce prosecutorial resources was a valid justification for delay in this case. (See *People v. Nelson* (2008) 43 Cal.4th 1242, 1256-1257.)

5. *Garcia Was Not Denied Effective Assistance of Counsel or a Fair Trial*

Garcia contends that she received ineffective assistance of counsel when her counsel did not redact the transcript and audio recording of defense witness Shelly Juarez, failed to object to its admission on due process grounds, and failed to request a limiting instruction. We find these contentions to be without merit.

During the defense case, Juarez testified that Detective Brandenburg talked to her several times about Garcia's possible involvement in the Brenda murder. Juarez stated that, at first, the detective's questioning was cordial and professional, but it then became aggressive when Juarez said she did not know anything. Juarez felt intimidated because Brandenburg threatened to incarcerate Garcia and take away her children because she was withholding information about the Brenda murder.

After Juarez testified, and outside the presence of the jury, the prosecutor indicated that he wanted to play a tape of Brandenburg's interview of Juarez. The court indicated it had read the interview transcript and it was clear its tone was very different from Juarez's characterization of it at trial. Garcia's counsel said he had listened to the tape and he agreed "it's a business-like conversation" and "there does not appear to be [a] raising of the voice." He added, "[s]ome of [the tape] I would concede, actually—there's some statements that are consistent with what Shelly Juarez and [another witness] said." The court replied, "Absolutely. There are some statements in there that are helpful to your client. I appreciate that."

The court asked what portions of the tape Garcia wanted excluded. Garcia complained that Juarez's statements regarding Garcia's use of drugs and her once having called "Child Services" on Garcia were excludable as unduly prejudicial. The court indicated Garcia needed to meet with the prosecutor and identify, line by line, each allegedly objectionable portion of the transcript before the court would rule.

The court ultimately indicated as follows. The prosecutor had demonstrated the tape's probative value and in some form it would be played to the jury. The tape cast Juarez's interaction with law enforcement in a vastly different light than what was presented during trial. The trial court initially had found Juarez to be a credible witness but the interview transcript caused the court to conclude otherwise. Garcia's defense theory was she was being prosecuted for the present offenses because law enforcement viewed her as uncooperative during the Brenda investigation. The tape was critical to the jury's determination of whether that theory was plausible.

Garcia objected to the whole tape as unduly prejudicial and said it contained irrelevant material. However, Garcia's counsel indicated if the court found that a portion of the tape was relevant and admissible, he was not asking that the tape "be taken apart piecemeal." Instead, Garcia maintained that either none of the tape, or all of it, should be played. The court replied, "Very well. Okay." Garcia did not secure from the trial court an express ruling on counsel's objections to the entire tape. The transcript and tape were admitted into evidence as rebuttal.

Garcia claims she was denied effective assistance of counsel at trial and denied a fair trial. She focuses on various categories of information in the tape, including: (1) Garcia's suspected

involvement in the Brenda murder, (2) her threats to Juarez, (3) her drug usage, (4) her bad parenting (the reference to Child Services), (5) Juarez's agreement with the detective's statement to Juarez that Garcia was involved in a lot of things, (6) Juarez's statement that Garcia had "dark secrets," and (7) Juarez's statement concerning Garcia that "everything bites you in the ass at the end." Garcia argues this information was, under Evidence Code section 1101, subdivision (a), inadmissible evidence of character to prove conduct, and excludable under Evidence Code section 352, therefore, the failure of Garcia's trial counsel to object to, and seek redaction of, that evidence on due process grounds, and failure to request a limiting instruction, constituted ineffective assistance of counsel.

" 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.]' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1189 (*Carter*).) This is a "highly demanding" test that essentially requires a criminal defendant to prove "gross incompetence" by counsel. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382.)

" 'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' " (*Carter*, *supra*, 36 Cal.4th at p. 1189.) Moreover, " '[a]n attorney representing a criminal defendant generally has the right to control trial tactics and strategy, despite differences of opinion or even open objections from the defendant.' " (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1024 (*Scheer*).) "Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Finally, "[a]dmitting relevant, admissible evidence does not violate due process, [or] the right to a fair trial." (*People v. Johnson* (2015) 60 Cal.4th 966, 996.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) "[A]s the United States Supreme Court recently stated, '[o]nly when evidence "is so *extremely unfair* that its admission violates fundamental conceptions of justice," [citation], [has the court] imposed a constraint tied to the Due Process Clause.' (*Perry v. New Hampshire* (2012) 565 U.S. [228], [237] [181 L.Ed.2d 694, 706]; [citations].)" (*People v. Fuiava* (2012) 53 Cal.4th 622, 696-697 (*Fuiava*), italics added.)

The trial court found the tape evidence of Garcia's suspected involvement in the Brenda murder to be probative and admissible for two reasons. First, it was relevant and admissible to demonstrate the tone and nature of Detective Brandenburg's interaction with Juarez because the court found Juarez's

characterization of it at trial to be vastly different from what was reflected in the recording. Second, the evidence was relevant and admissible on the issue of the plausibility of Garcia's defense that she was being unfairly prosecuted for her lack of cooperation in the Brenda murder investigation. Garcia's trial counsel reasonably could have refrained from objecting on due process grounds to this evidence after reasonably concluding, for both above reasons, it would have been relevant and admissible.

As for the remaining previously enumerated categories of evidence in the tape, including Garcia's undated threats to Juarez (threats with which Juarez claimed she was unconcerned), Garcia's undated and unspecified drug usage, and her undated referral to Child Services by Juarez, trial counsel reasonably could have refrained from objecting on due process grounds to this evidence after reasonably concluding its admission into evidence would not be "extremely unfair" (*Fuiava, supra*, 53 Cal.4th at p. 696) for purposes of due process and that portions of the tape that were favorable to Garcia more than compensated for any unfairness in other portions. Garcia's counsel may have not asked for a limiting instruction as to the challenged evidence to avoid unduly emphasizing that evidence. (Cf. *People v. Freeman* (1994) 8 Cal.4th 450, 495.) We will not second-guess defense counsel's trial tactics and strategy regarding whether to object to certain evidence or to seek particular instructions. (See *Scheer, supra,* 68 Cal.App.4th at p. 1024.) The prosecution never proffered any of the challenged evidence as character evidence or as character evidence to prove conduct.

Nonetheless, even assuming counsel erred in not seeking to redact certain parts of the interview, Garcia cannot show that she would have received a more favorable result but for counsel's shortcomings. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) As discussed below, there was overwhelming evidence of Garcia's guilt.

Garcia admitted that she drove her black Ford Explorer SUV with the three juveniles inside during the shooting. Garcia was arrested as the driver immediately after the shooting. Accomplice Ramirez and nonaccomplice Herrera testified that Garcia knew the purpose of the shooting was to kill a rival gang member and that she was involved in locating the victim. She was present when Barraza told Cervantes to get the guns and she drove to the pre-shooting location and then took the three juveniles to the shooting site. As Ramirez and Chavira got out of the SUV armed with weapons, Garcia waited in the car with the engine running. When the shooters returned, Garcia sped away.

Three lay witnesses corroborated testimony of Herrera and Ramirez. Rios told a deputy that he saw the SUV circling the area just before the shooting, thought "the people in the SUV were going to blast" the Stoners member, saw the SUV return to the shooting location, watched the shooters jump back into the SUV after shots were fired, and saw the SUV speed away. Sierra saw the SUV speed away immediately after the shooting. Mendoza chased the SUV as it fled the shooting scene. And Deputy Contreras testified Garcia was the driver.

In addition, gang evidence connected Garcia to Lott. Photographs were discovered that depicted Garcia with several Lott members, including Barraza. Finally, a gang expert testified that gangs often used women drivers because they were less likely to attract attention from law enforcement. There was overwhelming evidence that Garcia participated as a getaway driver during a gang-related shooting. Because of the overwhelming evidence of Garcia's guilt, her ineffective assistance of counsel claim fails. (Cf. *People v. King* (2010) 183 Cal.App.4th 1281, 1312.)[4]

[4] In light of our above discussion, no cumulative prejudicial error occurred.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOSWAMI, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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