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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARTIN TOPETE et al., Defendants and Appellants.	B288850 (Los Angeles County Super. Ct. No. PA084639)

APPEAL from the judgment of the Superior Court of Los Angeles County. Hayden A. Zacky, Judge. Affirmed with directions.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant Martin Topete.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Federico Jesus Esparza.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

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In November 2015, Jose Burciaga was fatally shot by rival gang member Luis Angel Valdez. Valdez pled no contest to the murder and testified that defendants and appellants Martin Topete and Federico Jesus Esparza aided and abetted the shooting of Burciaga. A jury convicted Topete and Esparza of murder and shooting at an occupied vehicle and found true gang and firearm use enhancements.

Defendants challenge their convictions on numerous grounds: Both defendants contend there was insufficient corroboration of Valdez's testimony, the prosecutor committed misconduct, their constitutional rights were violated by the court forcing them to attend trial despite being physically ill, and both abstracts of judgment fail to accurately reflect the court's sentencing orders. Defendant Topete further contends it was error for the court to admit Esparza's jailhouse phone call and that the court erred in denying his request for a continuance of trial to substitute privately retained counsel. Defendant Esparza also contends there is no substantial evidence supporting his conviction on either count and that the court committed instructional error.

We affirm the judgments of conviction as to both defendants and direct the superior court on remand to prepare corrected abstracts of judgment that accurately reflect the court's sentencing orders.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants Topete and Esparza were charged by information, along with Valdez (who is not a party to this appeal), with the premeditated murder of Burciaga (Pen. Code, § 187, subd. (a) [count 1]) and of shooting at an occupied vehicle

(§ 246 [count 5]). Gang and firearm use allegations were alleged as to both counts (§ 186.22, § 12022.53, subds. (b)-(e)(1)).

The jury trial proceeded in February 2018. Shortly before the start of trial, Valdez made a plea agreement with the prosecution. Valdez agreed to plead no contest to the charges and admit his strike prior in exchange for an agreed-upon sentence of 15 years to life on the murder, a dismissal of the remaining charges and an agreement to testify truthfully about the events surrounding the shooting. Testimony at trial established the following material facts.

1. The Gang Evidence

Detective Danielle Tumbleson of the Los Angeles Police Department (LAPD) testified as the prosecution's gang expert.

Barrio Van Nuys is a Hispanic street gang operating in the city of Van Nuys. In 2015, Burciaga (the victim in this case) was an active member of Barrio Van Nuys as was Eldon Legarda. Burciaga's gang moniker was Grinch.

Wicked Pot Smokers (WPS) is a smaller gang of 10 to 15 active members that claims a territory within the territory claimed by Barrio Van Nuys. Defendant Topete is a founding member of WPS, which started out as a tagging crew in the early 2000's but became a gang shortly thereafter. Topete's gang moniker was Bad Boy, but he was also called Junior. Valdez's moniker was Wise. Defendant Esparza was not a member of WPS but was an associate of the gang with the nickname Yofui.

Sometime after WPS started operating as a street gang, Barrio Van Nuys told WPS it could become one of its cliques. Several members of WPS agreed to join Barrio Van Nuys, but Topete and several others refused. The WPS members who refused to join Barrio Van Nuys were targeted for retaliation.

Because of this history and the overlapping territories, Barrio Van Nuys and WPS became rival gangs with "a lot of conflict" that often erupted into shootings.

Sometime in 2012, Valdez, Topete, and another WPS gang member known as Fame were at the home of Topete's girlfriend. They saw a car driving slowly down the street. The car came back a second time and the individuals in the car started shooting at them. Valdez suffered an injury to his eye that caused permanent vision problems. WPS believed it may have been Barrio Van Nuys but they did not know for sure.

In May 2015, LAPD Officer Melvin Peraza stopped a black BMW 328I sedan because of its tinted windows. Topete was the driver, Esparza was the front seat passenger and a third person was seated in the backseat. During the traffic stop, Topete admitted being a member of WPS.

That same month, Topete was stopped a second time in the same BMW by a California Highway Patrol officer. During this traffic stop, fellow WPS gang member Fame was driving the BMW and Topete was the front seat passenger.

Detective Tumbleson explained the gang symbols and hand signs used by WPS and identified Topete's various gang-related tattoos. She said WPS members often wore clothing with the Washington Nationals baseball team logo (the cursive W). She confirmed that Topete and Valdez were active members of WPS and that Esparza was an associate of the gang. The parties stipulated that WPS is a criminal street gang within the meaning of Penal Code section 186.22.

Detective Tumbleson also explained aspects of gang culture generally. She said that cooperating with law enforcement, testifying in court or any form of "snitching" is frowned upon and

generally a gang member who snitches will be targeted for retaliation. She explained that a "hood gun" is a firearm that belongs to the gang and can be used by members for committing crimes and for defense from rival gang members. Often, hood guns are given to family members or other trusted persons for safe storage. Gangs are generally very secretive about their business but will often speak freely about their activities in front of trusted family members or associates

2. The Shooting on November 5, 2015

a. Valdez's testimony

Valdez met Topete when they were teenagers and WPS was just a tagging crew. Valdez had been a member of WPS since that time. Esparza was not a member of the gang but they regularly hung out at Esparza's home and he kept hood guns for the gang. They often talked about gang business in front of Esparza, and Valdez believed he may have been selling drugs for Topete.

On the evening of November 5, Valdez called Topete and asked him where he was. Topete said he was at Esparza's home and he should come over. Valdez drove his black Silverado pickup truck to Esparza's home and the three of them smoked pot and hung out for a while.

Topete then said he had obtained information that Barrio Van Nuys had been responsible for the 2012 shooting that resulted in Valdez's eye injury, and specifically that Grinch (Burciaga) had been involved either as the driver or one of the shooters. Topete told them he had also confirmed where Burciaga worked, what time of day he worked, and that he drove a silver Toyota Camry.

Topete said something to the effect that "we ha[ve] to get 'em back." The three of them decided to drive to Burciaga's workplace. Before they left, Esparza went into his house and came out with a handgun and put it in his waistband. Topete and Esparza got into Topete's black BMW and Valdez followed them in his truck.

They drove for about 10 minutes and then Topete pulled over at a taco truck parked near the freeway. Valdez pulled over, parked next to the BMW and rolled down his window. Esparza got out of the BMW and handed Valdez the handgun he had retrieved from the house before they left. Topete told Valdez to follow him again. Esparza stayed behind at the taco truck.

Valdez followed Topete's BMW to an area a short distance away. He parked his truck and watched Topete drive down Montero Avenue, turn around at the cul-de-sac and then return. Topete rolled down his window and told Valdez that Burciaga's silver Camry was parked on Montero and that he was sitting in the car looking at his cell phone.

Valdez put on his Washington Nationals baseball cap and pulled his hoodie sweatshirt tight around his head to try to disguise his face. He grabbed the gun Esparza had given him and left his truck engine running for a quick escape. He walked to Montero Avenue and looked for the car Topete had described.

Valdez walked down the opposite side of the street from where Burciaga was parked. When he reached the cul-de-sac, he sat down. Valdez thought there was too much activity on the street to do anything, so for several minutes he tried repeatedly to reach Topete on his cell phone but Topete never answered. Valdez then received an incoming call from Esparza's cell phone number, but when he answered the call, Topete was on the line.

Valdez told Topete it did not seem to be a good time to retaliate, but Topete said something to the effect that "you're already there. It's a perfect opportunity."

Valdez then hung up the phone and headed toward the Camry. He walked a few steps past the car, turned and fired several shots directly at Burciaga. As Valdez turned and started running back to his truck, he heard several shots behind him. Valdez jumped into his truck and fled the scene. While heading to the freeway, he noticed cars were following him. Once he saw the flashing lights, he realized the cars pursuing him were police officers so he threw the gun out the window. Valdez then attempted to make the turn onto the freeway but was going too fast, hit the curb and blew out a tire. He abandoned the truck on the onramp and took off running, not realizing he left his wallet inside the truck. His cell phone fell out of his pants at some point while he was running. He pulled off his sweatshirt and hat and threw them into the bed of a red pickup truck as he ran by. Valdez was able to escape by jumping the fence and going through the flood control channel. The next morning on his way to work, he was pulled over by several officers and arrested.

After Valdez was taken into custody, he was placed in a cell with a civilian informant wearing a wire. The conversation was recorded and the recording was played for the jury. During the conversation, Valdez described the shooting substantially the same as he did at trial, except he did not mention Esparza's involvement.

b. Other testimony

That evening, before the shooting, several plain clothes LAPD officers, including Detective Richard Guzman and his partner, were on a surveillance operation outside of Burciaga's

workplace on Montero Avenue in Sylmar. They were surveilling a Barrio Van Nuys gang member (Legarda) who was suspected of an attempted murder. Legarda worked at the same business with Burciaga. The officers saw the events unfold that led to the shooting.

Detective Guzman and his partner were seated in a car watching the activity along Montero Avenue. Sometime around 10:45 p.m., Detective Guzman saw Legarda walk out of the business with another individual later determined to be Burciaga. The two men each got into their respective cars that were parked at the curb. Burciaga got into a silver Toyota Camry and Legarda into a white Chevy Camaro.

As Detective Guzman continued to watch the two men, he saw that Burciaga appeared to be looking at videos on his cell phone. Sometime around 11:00 p.m., he saw a Hispanic male (later determined to be Valdez), wearing a two-tone sweatshirt, walking down the opposite side of the street from where the cars were parked. Valdez walked to the cul-de-sac at the end of the street and out of view. Shortly thereafter, Detective Guzman heard a "very rapid . . . five-round burst" of gunfire, followed immediately by another round of gunfire.

After putting out a "shots fired" call on his radio, Detective Guzman saw Valdez running back down the street. Legarda got out of his car and started to pursue him, ultimately firing several shots at Valdez before turning back, looking into Burciaga's car and making a call on his cell phone.

Valdez was seen by another plain clothes member of the surveillance team getting into a dark-colored Silverado pickup truck, parked a block over. The truck sped away from the scene, without any lights on, and headed for the freeway. Officers found

the truck abandoned on an onramp to the 210 Freeway with Valdez's wallet and identification inside. Valdez was arrested the next day on his way to work.

3. The Investigation

Detective Gene Parshall, a 24-year veteran of the LAPD, was assigned to investigate the Burciaga shooting.

In addition to recovering Valdez's abandoned truck, the officers found Valdez's cell phone on a nearby embankment. Officers were able to unlock and access the phone by using the password, "wicked." A two-tone gray and black sweatshirt and a baseball hat with the Washington Nationals W logo were found in the bed of a red pickup truck not far from where Valdez abandoned his truck. Security video footage from a nearby business showed Valdez running past while pulling off his sweatshirt and hat. Later testing revealed blood on the two-tone sweatshirt consistent with Valdez's DNA profile.

Detective Parshall recovered security video footage from several locations in the vicinity of the shooting. Various excerpts from that footage were played for the jury. One excerpt showed that a few minutes before 11:00 p.m. on November 5, a car consistent with a black BMW sedan drove down Montero Avenue, passed by Burciaga's vehicle, and then continued on to the end of the street. The black car turned around on the cul-de-sac and drove back down the street and out of view.

Additional footage, from a few minutes after the black car drove down Montero, showed Valdez, wearing a gray sweatshirt with black sleeves, walking down Montero Avenue across from where Burciaga was parked. Valdez continued walking to the cul-de-sac, sat down briefly, and then paced back and forth. Several minutes later, the video showed Valdez approaching

Burciaga's car, multiple muzzle flashes from Valdez's gun, and Valdez running northbound on Montero. Legarda then appeared firing a gun in Valdez's direction.

At the scene of the shooting, four Winchester nine-millimeter Luger shell casings were recovered, among other items. A loaded nine-millimeter handgun was recovered in the vicinity of Valdez's abandoned truck. The gun had scuff marks on it, consistent with having been thrown onto pavement. It had a live round in the chamber and 11 live rounds in the magazine. The ammunition in the gun was Winchester nine-millimeter Luger, consistent with the expended casings found at the scene. Testing established that a DNA sample lifted from the magazine of the recovered handgun was consistent with Esparza's DNA profile.

A search of Esparza's home, after he was taken into custody resulted in the recovery of a gun holster and two boxes of Winchester nine-millimeter Luger ammunition. A search of Esparza's car resulted in the recovery of his cell phone.

Special Agent Michael Easter of the FBI testified as an expert in analyzing cell phone records. He testified that Valdez's cell phone used a cell tower in the vicinity of the crime scene between 10:25 and 11:06 p.m. During this time, the records indicated Valdez was calling or received calls from two phone numbers: a T-Mobile phone with a number ending in -9734 recovered from Esparza's car, and a T-Mobile phone with a number ending in -5428. The records further showed that both of the T-Mobile phones used cell towers in the vicinity of the crime scene during the same time period.

Using the LAPD license plate reader system, Detective Parshall determined that the black BMW associated with Topete

had been photographed on several different days parked near Esparza's home. It was the same BMW Topete was in when he had twice been pulled over for traffic violations in the months preceding the shooting.

The medical examiner reported that Burciaga died from fatal gunshot wounds to his head and chest, with bullet fragments lodging in his brain and heart. Burciaga also suffered additional gunshot wounds to his stomach and arm.

4. Esparza's Jailhouse Phone Call

Shortly after Esparza was taken into custody, he made a phone call from jail to an unknown male. The phone call was recorded and the recording was played for the jury. A transcript of the conversation was also provided to the jury.

The material portions of the phone call are as follows. Esparza said the police were "raiding [his] crib" and that "[t]hey found the murder and some other shit. They're trying to hit me with a 187," referring to the Penal Code section for murder. The other male asked what "they" (presumably referring to law enforcement) told him. Esparza responded, "I don't know. I guess . . . some shit went down, and that my phone was right there. . . . [M]y phone number came out when these two f----n, I guess, . . . did something and shit." Esparza said they found his fingerprints on the "strap" (referring to a gun) and "some other bullshit." Esparza again complained about being "hit" with a murder charge, something "about November." The response from the other male is noted in the transcript as "Distorted." Esparza responded, "Yeah, back in November. That my DNA came out. I guess someone snitched that I was there. And some other shit. I don't know, dog, but they're trying to hit me with that 187."

The other male then said that it probably had "something to do with Badboy." Esparza responded "yeah." Esparza repeated that his "DNA [was] on the strap . . . they got my phone number calling that fool, and all this shit." Esparza complained that he "wasn't even there" and it was "bullshit." Esparza asked the other male to tell his father where he was and that he apparently was going to find out on the following Monday what he was going to be charged with. Esparza then asked him to "tell Badboy [to] talk to Tray, to tell Guero to give him that 150 he owes me, dog, and put that shit . . . [¶] . . . [¶] . . . on my books."

5. The Verdicts and Sentencing

The jury found Topete guilty of first degree murder and Esparza guilty of second degree murder. The jury also found defendants guilty of shooting at an occupied vehicle and found true the gang and firearm use allegations.

The court sentenced Topete to a term of 25 years to life on count 1 (murder), plus a consecutive term of 25 years to life for the firearm use enhancement (Pen. Code, § 12022.53, subds. (d) & (e)(1)). The court imposed and stayed the lesser firearm use enhancements. The court also imposed and stayed sentence on count 5 pursuant to section 654. Topete was awarded 629 actual days of presentence custody credits.

The court sentenced Esparza to a term of 15 years to life on count 1, plus a consecutive 10-year term for the firearm use enhancement (Pen. Code, § 12022.53, subds. (b), (e)(1)). The court imposed and stayed the sentence on count 5, and struck the remaining firearm use enhancements. Esparza was awarded 737 actual days of presentence custody credits.

As to both defendants, the court imposed a $40 court security fee, $30 criminal conviction assessment, and a

$5,000 restitution fine. The court further imposed and stayed a $5,000 parole revocation fine. Restitution in the amount of $5,000 was ordered payable, jointly and severally, to the Victim Compensation Fund and another $16,126.10 to the victim's family (M.B.).

This appeal followed.

DISCUSSION

1. The Admission of Esparza's Jailhouse Phone Call

Defendant Topete argues the court prejudicially erred in admitting Esparza's jailhouse phone call. Topete contends Esparza's references to him during the phone call were unreliable hearsay and did not qualify as admissions or declarations against penal interest. We disagree.

Before the start of opening statements, the court and counsel discussed the bases for admitting Esparza's recorded jailhouse phone call. In the call, there are two references to "Badboy," Topete's gang moniker. The first occurred when the male to whom Esparza was speaking surmised that Esparza had been arrested for something that probably had "something to do with Badboy" and Esparza responded, "yeah." The second reference occurred at the end of the call when Esparza told the other male to tell Bad Boy to retrieve money he was owed so that it could be put on his "books."

Topete's objection to the jailhouse call focused solely on the first reference. At no time during the lengthy discussion with the trial court did Topete raise any objection to the admissibility of the second reference to Topete. The objection to that reference has therefore been forfeited. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 413.) In any event, the admission of the second reference was harmless by any standard. Esparza

merely asked the other male to get Topete to retrieve money owed to him so he could have money put on his account at the jail.

As for the first reference, Topete timely objected that it was unreliable hearsay that shifted the blame to him and did not qualify as a party admission or admission against penal interest. The court concluded the jailhouse phone call was substantially more probative than prejudicial, that it was admissible as an admission against interest under Evidence Code section 1230 and also for the nonhearsay purpose of establishing Esparza's state of mind. The court ordered the prosecutor to redact one sentence from the audio and the transcript: "They are trying to hit me with that 187 on the undercover cop."

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion." (*People v. Grimes* (2016) 1 Cal.5th 698, 711 (*Grimes*).) We find no abuse in the trial court's admission of the nontestimonial hearsay.

Topete urges us to review the court's ruling de novo, contending the court misunderstood the law governing the admission of the statement. We disagree.

Grimes underscored that the correct approach for judging the admissibility of nontestimonial statements against interest is contextual in nature. In assessing a statement's admissibility, " 'the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' " (*Grimes*, *supra*, 1 Cal.5th at p. 711.) "In short, the nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an

otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, *courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230*: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' " (*Id.* at p. 716.)

The trial court was not required to parse out each sentence and review it in isolation. The court referred to looking at the call in its totality and understanding Esparza's reference to Topete in that light. We believe the court's analysis was consistent with the contextual approach articulated in *Grimes*.

The conversation was properly admitted as a statement against penal interest. Esparza was not in a confrontational setting, but rather, was speaking to an apparent friend, lamenting the fact he had been arrested and taken into custody—circumstances that lend reliability to the statement. Moreover, while the conversation is peppered with various irritated references to his arrest being "bullshit," Esparza otherwise acknowledges that his DNA or fingerprints were found on the murder weapon, that "my phone was right there" and that someone must have "snitched that I was there." Esparza does not deny the truth of the facts implicating him in a murder "back in November."

At one point during the call, Esparza did minimize his involvement to a certain extent, apparently referring to the fact that he was not present at the actual shooting, but he does not attempt to shift the blame onto Topete entirely. "The cases that have considered Evidence Code section 1230 make it clear that

the fact a hearsay statement portrays the declarant as a more minimal participant in a crime by itself does not require exclusion or end our analysis." (*People v. Smith* (2017) 12 Cal.App.5th 766, 792.) "Only when there is both blame shifting by the declarant and *other* circumstances suggest some improper motive for the blame shifting have courts found admission of a hearsay statement error." (*Ibid.*) The record does not demonstrate any such improper motive here.

Esparza's statement overall was not self-serving and the brief reference to Topete is tied to and part of a conversation in which Esparza acknowledges the evidence that implicated him as a participant in a murder. As *Grimes* instructs, nontestimonial hearsay statements may be admitted even if they are not "independently disserving of the declarant's penal interests" so long as they are not "merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.' " (*Grimes*, *supra*, 1 Cal.5th at p. 715; see also *People v. Cortez* (2016) 63 Cal.4th 101, 127 [statement identifying the codefendant, viewed in context, was incriminating and therefore properly admitted because it linked the declarant to the codefendant who had already been arrested]; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1401 [incriminating statements implicating declarant in shooting and identifying two fellow gang members as shooters properly admitted].)

2. Corroboration of Valdez's Testimony

Defendants contend their convictions must be reversed because there was insufficient evidence corroborating the testimony of Valdez. Defendants argue the evidence merely corroborated aspects of Valdez's testimony but did not specifically connect them to the shooting. The contention is without merit.

It is well settled that a jury may rely on an accomplice's testimony about the circumstances of an offense, but it must find, without aid from the accomplice's testimony, that corroborating evidence tends to connect the defendant to the crime. (*People v. Romero and Self* (2015) 62 Cal.4th 1, 32; see also Pen. Code, § 1111 ["A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense"].) In so doing, " '[t]he entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.' " (*People v. Romero and Self,* at p. 32.)

Here, the gang evidence established a retaliatory motive for the shooting. Topete, as one of the founders of WPS, had a strong motivation for wanting to retaliate against a rival gang member who had shot at WPS gang members. Esparza was a gang associate who kept hood guns at his home for the gang's use. Security video footage showed a black sedan, consistent with Topete's BMW, driving down Montero Avenue, apparently scouting the location, minutes before Valdez shot Burciaga. Esparza's DNA was recovered from a sample lifted from the magazine of the murder weapon. Ammunition consistent with the murder weapon and the casings found at the scene were recovered from Esparza's home. Cell phone records showed there were phone calls between Valdez's and Esparza's cell phone at the time of the shooting and that Esparza's phone was in the vicinity of the shooting at the time it occurred.

This evidence and the reasonable inferences therefrom sufficiently tied both Topete and Esparza to the retaliatory gang shooting of Burciaga. Corroborating evidence need not

"corroborate every fact to which the accomplice testifies [citation], and ' "may be circumstantial or slight and entitled to little consideration when standing alone" ' " (*People v. Romero and Self, supra*, 62 Cal.4th at p. 32.) We find no basis for disrupting the jury's conclusion since there was abundant corroborating evidence. " 'The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.' " (*Id.* at pp. 32-33.)

3. Substantial Evidence Supports Esparza's Convictions

a. Count 1 (murder)

Esparza contends there is insufficient evidence he was guilty of implied malice murder. Esparza essentially asks us to reweigh the evidence. We decline to do so.

"[M]alice is implied when the killing resulted from an intentional act, the natural consequences of which are dangerous to human life, performed with knowledge of and conscious disregard for the danger to human life." (*People v. Thomas* (2012) 53 Cal.4th 771, 814.) Implied malice has " 'both a physical and a mental component. The physical component is satisfied by the performance of "an act, the natural consequences of which are dangerous to life." [Citation.] The mental component is the requirement that the defendant "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." [Citation.]' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.)

The evidence demonstrated that Topete, Esparza and Valdez were at Esparza's home discussing the 2012 incident in

which Valdez was injured in a shooting. Esparza was a longtime friend of Topete's, who was a founding member of WPS. Esparza was also an associate of the gang who allowed members to hang out at his house and stored guns for the gang's use. It is reasonable to infer that Esparza was well aware of the gang's desire and need to retaliate for the 2012 shooting to maintain their standing.

Topete told Valdez and Esparza he had learned Burciaga was involved in the 2012 shooting incident, had learned where and when he worked and that he drove a silver Toyota Camry. Topete said something to the effect that "we ha[ve] to get 'em back." Esparza went inside his house, retrieved a handgun and got into Topete's BMW. They drove, with Valdez following in his truck, to a location a few minutes from Burciaga's workplace. Esparza got out of the car and gave the handgun to Valdez. Valdez and Topete then drove to Burciaga's workplace where, after they both confirmed Burciaga was seated in his car outside, Valdez used the handgun to fatally shoot Burciaga.

This is ample evidence that Esparza harbored implied malice. Esparza contends there was no evidence he acted with a conscious disregard for human life because Valdez testified he did not have an intent to kill Burciaga when Esparza gave him the gun, and because no intent to kill had been expressly communicated to Esparza. Esparza argues it is pure speculation that he knew of any plan to kill Burciaga and it is more reasonable to infer from the evidence that he handed the gun to Valdez simply for protection because they were in rival gang territory. Esparza mischaracterizes the record.

When challenged on cross-examination to confirm that Topete never said "let's go kill him," Valdez responded, "It was

mostly kind of like that." Valdez was also asked repeatedly to confirm that the shooting was his own idea, which he denied. Valdez admitted he wanted to retaliate but said he did not know who had shot him. After Esparza handed him the gun, Valdez explained, "when I was handed the gun, yeah, I kind of knew the purpose. But . . . I didn't know how or where [Burciaga] was." Valdez testified that he then followed Topete to Montero Avenue to check out if Burciaga was there in order to retaliate. The plain inference from Valdez's testimony is the plan was to see if Burciaga was at his workplace, and if so, to shoot him in retaliation for the 2012 incident.

This inference is further bolstered by the fact that once Valdez walked down Montero and spotted Burciaga in the Camry, he made repeated calls to Topete to tell him it was not a good time to retaliate because of the level of activity on the street. If the plan had only been to scope out the location but not engage in any shooting, there would have been no reason for Valdez to call Topete to explain why he wanted to back out. When Topete told Valdez on the phone it was a perfect opportunity to do it, Valdez hung up the phone and shot Burciaga.

Because we conclude the evidence is sufficient to support the jury's finding that Esparza was guilty of murder in the second degree, we need not reach Esparza's other arguments attacking his conviction on count 1.

b. Count 5 (shooting at occupied vehicle)

Esparza also argues insufficient evidence with respect to his conviction on count 5. Once again, we conclude Esparza seeks a reweighing of the evidence and fails to persuade us the jury's verdict is unsupported.

Shooting at an occupied vehicle in violation of Penal Code section 246 is a general intent crime. (*People v. Watie* (2002) 100 Cal.App.4th 866, 879.) "Section 246 does not require a specific intent ' "to do a further act or achieve a future consequence" ' beyond the proscribed act of shooting 'at' an occupied building, [vehicle] or other proscribed target." (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1357.)

A violation of Penal Code section 246 is not limited to the act of shooting directly at the occupied vehicle. " 'Rather, the act of shooting "at" a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant's conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act.' . . . '[T]he statute does not require a specific intent to achieve a particular result (e.g., strike an inhabited or occupied target, kill or injure). [Citation.] Instead, *the statute only requires a shooting under facts or circumstances that indicate a conscious disregard for the probability that one of these results will occur*.' " (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1501 (*Hernandez*), italics added.)

People v. White (2014) 230 Cal.App.4th 305 is instructive. The defendant there was convicted as an aider and abettor of a shooting at an occupied building. *White* rejected the defendant's argument that he had to share the shooter's "particular intent to shoot at the building. Rather . . . it was sufficient to demonstrate that [the defendant] knowingly and intentionally encouraged [the shooter] to shoot the gun under circumstances showing that [the

defendant] was consciously indifferent to the probable consequence that the bullets would strike the building." (*Id*. at pp. 318-319.)

The evidence summarized above adequately establishes that Esparza gave the gun to Valdez under circumstances showing a conscious indifference to the probable consequence that Valdez would shoot Burciaga at or in his vehicle as he attempted to leave his workplace. The only reasonable inference from the record is that defendants were going to ambush Burciaga as he left his workplace, either getting into his vehicle or driving away.

4. The Jury Instructions

Esparza contends the court committed prejudicial instructional error by giving conflicting and erroneous instructions on intent. We are not persuaded.

The instructions given by the trial court were correct statements of law. None of the instructions relevant to intent was in conflict or irreconcilable, despite Esparza's assertion to the contrary. The trial court correctly instructed on the union of act and intent (CALCRIM No. 252), on the intent required for each of the substantive offenses (CALCRIM Nos. 520, 521 & 965), and on the requisite intent for aiding and abetting liability (CALCRIM No. 401).

Esparza did not seek any modification to these otherwise correct statements of law. "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638; accord, *People v. Jones* (2013) 57 Cal.4th 899, 969 [a " 'party may

not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language' "].)

Esparza contends the instructions were misleading because CALCRIM No. 252 directed the jurors to consult the instructions on the substantive elements of the charged crimes to understand the requisite intent but did not also direct the jurors to consult the instructions on aiding and abetting. Nothing in the CALCRIM bench notes or the case law requires a trial court to refer to the aiding and abetting instructions when giving CALCRIM No. 252.

A similar argument was rejected in *Hernandez*, *supra*, 181 Cal.App.4th 1494. There, the defendant conceded the court had given a correct instruction on aiding and abetting liability. (*Id*. at p. 1502.) The court also correctly instructed on the elements of the charged crime (discharge of a firearm from a motor vehicle). In rejecting the defendant's argument the court had failed to correctly instruct on the requisite mental state, the court explained, "[t]hat the mental state requirement for aiding and abetting was not repeated in conjunction with [the instruction on the elements of the offense] is immaterial, as jurors were also told to consider the instructions together. It is axiomatic that '[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]' " (*Ibid*.)

For the same reason, we find no error here.

5. Defendants' Right to Be Present at Trial

Defendants contend they were denied the right to be present at trial because the court required them to appear when

they were physically ill and thus incapable of meaningfully assisting their attorneys. We are not persuaded by defendants' arguments which rest largely on a mischaracterization of the court's actions.

On the morning before the start of opening statements, Topete reported he did not feel well. He apparently had vomited in the morning and reported that to jail staff before leaving for court but was told he had to be transported to court regardless. The court responded: "Well, I don't have a medical excuse. But if you see a doctor later, I will sign an order for you. And if you are medically unable to come to court, then we will deal with that issue." The court then arranged for Topete to be provided a surgical mask in court and admonished the jurors that Topete was not feeling well and he was wearing the mask to prevent spreading germs to others. He told the jurors they were to disregard it.

Before the lunch break, the court advised counsel that it had contacted the jail and signed an order to make sure defendants would be seen by a doctor that evening after court was complete.

At the end of the court day, the court confirmed again the signing of the medical order and that the court had contacted the jail about having defendants seen by a doctor, saying "I am going to call again right now and make sure you are seen by a doctor."

After discussing a few scheduling matters, the court then said, "I will see both the defendants tomorrow morning here in court. [¶] You will be seen by a doctor. If it's just a cold or flu, I mean, hopefully you will be . . . ." Topete's counsel interrupted saying that his client had been given a shot. The court said perhaps they could be provided some type of medication to

alleviate symptoms like DayQuil. The court then continued, "But I certainly want you to be here tomorrow because I want to keep moving forward." The next day, defendants appeared and reported no further concerns about being ill or otherwise being unable to participate.

Having a cold or flu does not rise to the level of being mentally incompetent. Defendants have not shown they were experiencing symptoms so severe that they could not comprehend the proceedings or assist their attorneys. That a defendant may be "somewhat distracted by pain and other symptoms of physical distress does not establish incompetence or mental absence." (*People v. Avila* (2004) 117 Cal.App.4th 771, 780.) Defendants' constitutional rights to be present at trial were not violated.

6. Topete's Request to Substitute Counsel

Topete contends the trial court abused its discretion in refusing his request for a continuance to substitute privately retained counsel. We find no such abuse.

"The right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution. [Citations.] In California, this right 'reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.' [Citations.] The right to discharge a retained attorney is, however, not absolute. [Citation.] The trial court has discretion to 'deny such a motion if discharge will result in "significant prejudice" to the defendant [citation], or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice" [citations].' " (*People v. Verdugo* (2010) 50 Cal.4th 263, 310-311.)

Here, on February 26, 2018, after the case had been pending for over two years and was in an assigned trial department on day 7 of 10, Topete sought to substitute a private attorney for his court-appointed bar panel attorney who had been representing him since the preliminary hearing. Topete did not indicate he had any specific concerns about his appointed attorney's representation. The new attorney (Mr. Spiga) advised the court he had been unaware in speaking with Topete and his family that trial was set to begin. He further advised the court he would be unable to take over representation of Topete without a continuance of the trial date.

The trial court denied the request as untimely, noting that "everybody has witnesses under subpoena" and "we are all ready to go."

The court did not err. " '[T]he "fair opportunity" to secure counsel of choice provided by the Sixth Amendment "is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of 'assembling the witnesses, lawyers, and jurors at the same place at the same time.' " ' " (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 428 [affirming denial of eve of trial request for continuance to substitute counsel when case had been pending for two and a half years]; see also *People v. Turner* (1992) 7 Cal.App.4th 913, 919 [no abuse to deny request on first day of trial as allowing substitution of counsel would necessarily have caused "a significant disruption, i.e., a continuance with the attendant further inconvenience to witnesses and other participants"].)

7. Prosecutorial Misconduct

Defendants raise two claims of prosecutorial misconduct. We are not persuaded either act was misconduct or prejudicial.

a. The failure to redact transcript of Esparza's jailhouse phone call

After ruling portions of Esparza's jailhouse phone call were admissible, the court ordered the following sentence to be redacted from the audio and the written transcript: "They are trying to hit me with that 187 on the undercover cop." Counsel mentioned they believed the odd reference was to a popular song lyric (the audio reflected laughter after it was said), but all agreed the line should be redacted. The prosecutor redacted the line from the recording played for the jury, but it was inadvertently left in the written transcripts. Defense counsel failed to notice the error and therefore did not object before the transcripts were passed out.

We conclude the error was harmless under any standard. The sentence was not highlighted or referenced by any party. It was a brief reference included in a transcript in which Esparza repeatedly referenced that he was being "hit" with a "187." As we have already explained, there was ample evidence corroborating Esparza's involvement in the shooting of Burciaga. Considering it in context with the totality of evidence presented, defendants have not demonstrated the mistake was so egregious that it rendered the trial fundamentally unfair. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*); accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 679.) Nor have they shown it is reasonably probable they would have obtained a more favorable result had the error not occurred. (*People v. Crew* (2003) 31 Cal.4th 822, 839 ["conviction will not be reversed for prosecutorial misconduct . . .

unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct"].)

b. The argument regarding presumption of innocence

Esparza further contends the prosecutor committed misconduct during the rebuttal portion of closing argument by implying to the jury that defendants were not entitled to the presumption of innocence because they did not afford the victim due process before shooting him in retaliation for the 2012 shooting of Valdez.

The prosecutor told the jury that Burciaga was not gang banging that night but was just a guy, like anyone else, at his job. The prosecutor then said: "How much research did [defendants] do before they executed [Burciaga]? Did they give Mr. Burciaga a presumption of innocence that he was the guy that shot Mr. Valdez? Did they give him due process before they went in and shot a guy just sitting in his car?"

Esparza failed to object to this argument in the trial court and has therefore forfeited the contention on appeal. "It is well settled that making a timely and specific objection at trial, and requesting the jury be admonished . . . , is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328; accord, *People v. Davenport* (1995) 11 Cal.4th 1171, 1209.) Moreover, nothing in the record suggests that making an objection would have been futile, or that an admonition would have been insufficient to cure any alleged harm. (*Hill*, *supra*, 17 Cal.4th at p. 820.) We therefore have no basis on which to excuse the forfeiture.

The argument has no merit in any event. A defendant challenging a prosecutor's remarks before the jury "must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

The prosecutor's argument focused on the evidence. The challenged statement, read in context, does not give rise to a reasonable inference the prosecutor was trying to minimize defendants' rights to due process or the presumption of innocence. Rather, the prosecutor was arguing defendants killed Burciaga in cold blood when Burciaga was obliviously sitting in his car looking at his cell, based on a rumor Topete had heard that Burciaga was involved in the shooting of Valdez. This was fair argument and not misconduct.

8. Cumulative Error

"There can be no cumulative error if the challenged rulings were not erroneous." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [finding that to the extent any errors occurred, they were minor and "[e]ven considered collectively" they did not result in prejudice].) As explained above, defendants have not shown cumulative prejudicial effect.

9. The Sentencing Errors

a. The restitution amounts

The trial court ordered Topete, Esparza and Valdez were jointly and severally liable to pay total restitution of $21,126.10. Of that amount, $5,000 was payable to the Victim's Compensation Board which had already paid that amount to Mr. Burciaga's family. The court ordered the balance ($16,126.10) paid to the victim's family (M.B.).

However, the abstracts of judgment for both defendants incorrectly state total restitution of $25,810.10. The transcription error on both abstracts must be modified to accurately reflect the court's oral order regarding restitution. On remand, the trial court is directed to prepare and transmit a new abstract of judgment for each defendant correctly stating the amounts of restitution: joint and several restitution payable in the amount of $5,000 to the Victim Compensation Board and $16,126.10 payable to M.B.

b. Esparza's sentence on count 1

Esparza's abstract of judgment contains a second transcription error that warrants correction. The trial court imposed a sentence of 15 years to life on count 1, plus a 10-year enhancement. The abstract erroneously counts the 10-year enhancement twice by stating the term on count 1 as "25 years to Life . . . . [¶] PLUS enhancement time shown above" (referencing the 10-year term). On remand, in preparing the new abstract of judgment for Esparza referenced above, the trial court is directed to correctly identify the term on count 1 as 15 years to life, plus the 10-year enhancement.

DISPOSITION

The superior court is directed to prepare a modified abstract of judgment for Martin Topete that correctly states restitution as follows: joint and several restitution payable in the amount of $5,000 to the Victim Compensation Board and $16,126.10 payable to M.B. The judgment of conviction as to Martin Topete is affirmed in all other respects.

The superior court is directed to prepare a modified abstract of judgment for Federico Jesus Esparza that (1) correctly states joint and several restitution payable in the amount of $5,000 to the Victim Compensation Board and $16,126.10 payable to M.B., and (2) that correctly states the sentence on count 1 as 15 years to life plus the 10-year enhancement. The judgment of conviction as to Federico Jesus Esparza is affirmed in all other respects.

The superior court is directed to transmit the modified abstracts of judgment to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.