Filed 9/29/16 P. v. Arzate and Mendoza CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ALBERT ARZATE and JOHNNY MENDOZA, Defendants and Appellants.	B259259 (Los Angeles County Super. Ct. No. BA396381)

APPEAL from judgments of the Superior Court for the County of Los Angeles. Bob S. Bowers, Judge. Affirmed as to Defendant and Appellant Johnny Mendoza. Affirmed as modified as to Defendant and Appellant Albert Arzate.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant Albert Arzate.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Johnny Mendoza.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Noah P. Hill, and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

A jury convicted defendants Albert Arzate and Johnny Mendoza of the first degree murders of Samuel and Jose Martinez, the attempted murder of Marvin G., and assault with a firearm on April S. The jury also convicted Mr. Arzate of making criminal threats against April S., and found true various gang and special circumstance allegations, as well as firearm enhancements in Mr. Arzate's case. The court sentenced both Mr. Arzate and Mr. Mendoza (who was 17 at the time of the crimes) to state prison for terms that included two consecutive sentences of life without the possibility of parole (LWOP).

Both defendants appeal. Mr. Arzate asserts prosecutorial misconduct in connection with PowerPoint presentations he contends were designed to inflame the jury and that deprived him of a fair trial; insufficient evidence to support a true finding on the gang-murder special circumstance (including error in allowing police officers to opine he was an active gang member); and a sentencing error. Mr. Mendoza joins in Mr. Arzate's claims of prosecutorial misconduct and insufficient evidence of the gang-murder special circumstance. In addition, Mr. Mendoza contends the trial court erred in the admission of an inculpatory statement by codefendant Mr. Arzate; failed to instruct that Mr. Arzate was an accomplice and his out-of-court statements were subject to corroboration; erred in instructing that aiders and abettors are "equally guilty"; and erred in the admission of a photograph, uploaded to YouTube, showing gang member names (including his and Mr. Arzate's) written on a wall (Mr. Arzate joins in this claim). In the event they are found to have forfeited any of these claims, both defendants assert ineffective assistance of counsel. Mr. Mendoza also contends that his LWOP sentences are invalid because he was denied his right to a jury trial at sentencing, and his sentence violated the Eighth Amendment. Finally, Mr. Mendoza asserts ineffective assistance of counsel at sentencing, and both defendants claim cumulative error.

We agree with Mr. Arzate that, as respondent concedes, his sentence must be corrected in one respect. Otherwise, we conclude there was no prejudicial error, and affirm the judgments.

FACTS

1. The Background and the Crimes

Both defendants are members of the Cypress Park criminal street gang, a comparatively small gang that was "literally at war" with its larger rival gang, the Avenues. Cypress Park claimed as its territory an area surrounded by territory claimed by the Avenues. This case arose from three separate incidents, the first two on the night of September 24 into early morning hours of September 25, 2010, and the third on January 22, 2011.

a. The September 24, 2010 assault on April S.

Defendants were close friends of fellow gang member Gustavo "Husky" Flores, who was incarcerated at the time of these crimes. Flores had a child with the assault victim, April S. April S. was a friend of Mr. Mendoza's, and an acquaintance of Mr. Arzate's. Lillian R., who had previously had romantic relationships with both defendants, was a friend of April S.'s, as was Cecilia C., who was romantically involved with Mr. Arzate at the time of these offenses.

On the night of September 24, 2010, April S. and Lillian R. went to visit their friend Alejandra, who lived on Granada Street, an area within the territory claimed by the Cypress Park gang. Alejandra lived with her boyfriend Frank, who was a friend of defendants and Mr. Flores. The residence was the third (rear) of three houses on one parcel of land.

Defendants arrived at the residence while April S. was on the porch with her three-month-old baby. Mr. Mendoza had a shotgun "on his side" inside his pants, visible to April S. Mr. Arzate asked April S. about Mr. Flores, and then went inside the residence. April S. heard him referring to her as a "noodle" lover (a disparaging term referring to the

Avenues gang) and saying that she was cheating on Mr. Flores with an Avenues gang member. April S. and Mr. Arzate then had a heated argument.

Defendants left the house and started walking up the path toward Granada Street, and April S. followed them, still arguing with Mr. Arzate. April S. was about three feet behind defendants and turning a corner on the pathway when Mr. Arzate pointed a shotgun at her, "about one inch" away from her face, cocked the gun, and said, "Now what, bitch?" The noise of cocking the gun scared April S. Mr. Mendoza was next to Mr. Arzate, and April S. asked Mr. Mendoza "how could he [(Mr. Mendoza)] let him [(Mr. Arzate)] do that to me." Mr. Mendoza did not reply, and both defendants left, walking toward Isabel Street, which intersects with Granada Street.

April S. felt "[h]orrible, scared, shocked," but did not call the police because she did not want to deal with the consequences – "being threatened, harassed," "[b]eing afraid that something is going to happen to . . . my family, to me." She called her friend, Cecilia C., around midnight, and told her what had happened. Cecilia C. drove to Granada Street, and picked up April S., the baby and Lillian R. April S. seemed scared when she got into the car, and was "still crying" and emotional. Cecilia C. drove to Isabel Street and then to a street near April S.'s home, and parked the car.

b. The murders of the Martinez brothers and the attempted murder of Marvin G.

The murders and attempted murder occurred on Division Street, the "main thoroughfare" of the Avenues gang territory, about 10 blocks away from the house on Granada Street where April S. was assaulted.

On the night of September 24, 2010, Marvin G. and the Martinez brothers (his cousins) walked from the Martinez home to a liquor store on the corner of Division Street and Eagle Rock Boulevard. Marvin G. had had one beer that night. After they made their purchases, they were walking back along Division Street, across the street from a market, the Super A, in the early morning hours of September 25, 2010. They passed a pharmacy and came to some houses in the area. They were walking on a sidewalk, in a line, with Jose Martinez a few steps ahead and Marvin G. just behind his cousins.

Two males "popped out of the darkness." It appeared to Marvin G. that "they popped out behind the wall by the driveway." Marvin G. was "surprised" and "in shock." The two males were facing Marvin G. and his cousins (who were ahead of Marvin G.), and said, "Where you from?" a gang-related term known to Marvin G., who grew up and went to school with gang members.

Marvin G. heard one of his cousins "scream out 'no'." He saw what he thought was a shotgun pointed in their direction, and ran "to [his] left side towards the street just trying to get away." He heard three or four gunshots and tried to hide by a car, but he was hit and was bleeding and in pain. He lay on the ground and "[s]creamed out for help, screamed out 'it hurts, can't breathe' "; his whole chest hurt. He had been shot in the back and suffered injuries to his liver, ribs, abdomen, and chest, and internal bleeding, and had two surgeries. His cousins were dead, both shot in the head (one of them twice) from a distance ranging between a few inches to three or four feet.

c. The immediate aftermath

At about 12:52 a.m. on September 25, 2010, police officers driving southbound on Division Street came upon the crime scene, described by one of the officers as "the most gruesome crime scene" that he had ever seen. They also saw a security guard running toward them up Division Street, pointing in a southerly direction and gesturing "as if someone had just fled the location." They called for additional officers, an ambulance, an airship, and other support. Four expended shotgun shells were recovered from the scene, all fired from the same shotgun.

Cristina R., who knew defendants by sight but had never spoken to them, called 911 at 12:52 a.m. on September 25. She was returning by car to her house on Isabel Street near Division Street, and saw "individuals surrounding my dad's car," which was parked on Isabel Street about a block from the Super A Market. She thought they were trying to break into the car. (A day or two later, she talked to Cecilia C., who was a family friend. They talked about the murders, and she told Cecilia C. that she saw

Mr. Arzate trying to break into her father's car that night. At the trial, Cristina R. denied she saw Mr. Arzate.)

Another witness also called 911 at 12:52 a.m., when she was awakened by gunshots just outside her house and heard someone screaming for help.

Meanwhile, as April S. and Cecilia C. were talking in the car that night, Cecilia C. "was getting phone calls." (April S. and Cecilia C. were together that night for about 30 minutes.) Mr. Mendoza called Cecilia C. and April S. heard parts of the conversation. According to April S., Mr. Mendoza said, "Come pick me up," and April S. started to hear helicopters and police sirens. When Cecilia C. asked Mr. Mendoza why and what happened, Mr. Mendoza said, "cause we got into some shit. Come pick me up." When April S. heard that, she told Cecilia C. that she "wasn't going to go with her and pick them up after what had happened."

According to Cecilia C., when Mr. Mendoza called her on the night of the murders, she put the call on speaker phone, said "hello," and asked him why he was calling. (Mr. Mendoza had not called Cecilia C.'s cell number before that night.) Mr. Mendoza told her "[t]hat Albert [(Mr. Arzate)] needed to be picked up, he needed a ride," and "he was on Division [Street] because he had just got into some shit." She understood that to mean "it was some type of trouble." Mr. Mendoza told Cecilia C. that "he was on Isabel [Street]," and when she asked "Where on Isabel," he did not know. When she was on the phone with Mr. Mendoza, Cecilia C. heard sirens and a helicopter, and Mr. Mendoza said that police were everywhere.

Cecilia S. did not pick up defendants. She went home. She said she "didn't want to pick them up," because "of what had happened and my kids." (She testified to a similar telephone call in the late summer of 2010. She had received a telephone call from Mr. Flores, telling her that he and Mr. Arzate needed a ride because "they got into some shit"; when she picked them up, they were hiding by some bushes and Mr. Arzate had a big gun (about two feet long) in his hands. He said it was "a gauge," and he wrapped it in his shirt "and kind of hid it." On that occasion, Cecilia C. drove both of them home. She

asked Mr. Arzate what he had done before she picked them up, and he told her "he had got into some shit and he didn't want to talk about it." Both men had been nervous when they got into the car, and "[j]ust seemed like they wanted to get out, like they wanted to get home quick.") After she took April S. and her other passengers home, Cecilia C. tried to call Mr. Mendoza back, and also called Mr. Arzate, but got no answer from either of them and went home.

Cecilia C. heard about the murders the next day. She had a telephone conversation with Mr. Arzate that day; told him she had heard about the two murders on Division Street, "right across the street from the market"; and told him "that everybody already knew about it in the neighborhood." Mr. Arzate replied "that that was them." (When asked, "Who did he say it was them?" Cecilia C. said, "him and Johnny [Mendoza].") Mr. Arzate "said that's why they were trying to stay low," and that "Johnny was being scared and he [(Mr. Mendoza)] didn't want to come out of his house."

About a week after the murders, Cecilia C. was on her way to the Montebello mall with April S. and Lillian R. when she got a call from Mr. Arzate, who told her he needed to get new shoes. Cecilia C. asked why, and Mr. Arzate said "he had thrown the other ones away," because "[t]hey were dirty from what had happened at Division." Mr. Arzate said that the shoes "had shit on them," and Cecilia C. understood what he meant by that. April S. told her she "shouldn't be buying anything for him," but Cecilia C. bought the shoes; she cared about Mr. Arzate, even "after [¶] . . . [¶] . . . he told [her] he had killed two people." After she bought him the shoes, she asked Mr. Arzate what he did with his clothes, and "[h]e said he got rid of them."

On October 4, 2010, Detective Harold DiCroce came to the hospital and interviewed Marvin G. for the first time. Marvin G. was still in shock and pain, and did not remember every detail. He could not give "a full height, weight, description," but told the detective that the attackers were two Hispanic men. One of them was wearing a hoody "a little bit past the ears" and had a moustache and light tan skin color, "lighter than a usual male Hispanic." The other assailant's "body looked a bit bigger, a bit

thicker"; he was heavier than the one with the moustache and hoody, and had hair shorter than a buzz cut, "between clean shaved and shaved." Marvin G. told the detective the assailants were "maybe between 24, 26 [years old]." He looked at three 6-packs of photographs, but did not recognize anyone.

On October 12, 2010, Detectives DiCroce and Lenchuk interviewed Marvin G. again, at his home, and there was a third interview as well, on June 8, 2011. During each interview, Marvin G. told Detective DiCroce that his memory was getting better, and he was able to provide more details about the night of the murders. At the October 12 interview, he told the detectives the assailants were in their early 20's, and he remembered their clothing at a later interview. "One was all black," and the hoody on the other (the person with the moustache) was dark blue and light gray in a "square shape" pattern.

At the second interview on October 12, Marvin G. looked at another six-pack of photographs. He told Detective DiCroce that one of the pictures, number five, looked familiar. "It was the facial hair, skin color, the shape of the face," which was slim, like the assailant with the hood. (This was Mr. Arzate.) The detectives also showed Marvin G. three other six-packs, but he recognized no one.

d. The January 22, 2011 criminal threats

On January 22, 2011, about four months after the murders, April S. was driving home with her brother, Lillian R. and another friend, Kristine M. She turned into her driveway, and told her brother to get out and open the gate. At the same time, defendants and two other Cypress Park gang members (Gabriel Estrada and Johnny "Little Boy" Medina) approached on foot.

Mr. Arzate said, "Shut up, bitch." April S. said, " 'Hey, this is my house,' " and Mr. Arzate said, "This is my hood. Shut the f--- up, stupid bitch." April S. understood him to mean "[t]hat he could do what he wanted, it was his neighborhood," meaning "[g]ang neighborhood." Then Mr. Arzate slapped her on the face. April S.'s brother got out of the car to defend his sister, and Mr. Arzate hit him in the face with a closed fist.

April S. said she was "going to call the cops," and Mr. Arzate said, "Call the f------ cops, bitch. The cops ain't got shit on me. Do something, bitch." April S. told Mr. Arzate to leave, and he responded, "It's all right, I'll kill you bitch, you're dead." As he was walking away, Mr. Arzate lifted up his shirt, displaying a Cypress Park gang tattoo on his stomach.

April S. feared for her life and took his words to mean she was "going to end up dead." She "[f]inally called the cops on him." Officer Joseph Bain responded to a radio call, and found April S. "crying, physically distraught," and "riding [an] emotional roller coaster" from "anger to crying and fear, back to anger . . . ." She had "very minor swelling and redness" on the right side of her face.

The next day, police arrested Mr. Arzate for making criminal threats.

e. Later events

About nine months after the murders, on June 8, 2011, police interviewed Marvin G. again, at the police station. Marvin G. was shown two 6-packs. On one of them, he did not recognize anyone. On the other, he wrote, "It's number two, five, six, looks similar to what I remember based on the moustache and thin body shape." (This was apparently the same six-pack on which number five looked familiar on October 12, 2010.) One of the three was Mr. Arzate.

On February 21, 2012, 17 months after the murders, Marvin G. viewed two lineups. In one case, he wrote on the documentation, "I know faces can change by facial hair, weight, but from the little I remember, five has some similarities. Can't really tell." Mr. Mendoza was in position five.

At the preliminary hearing in March 2013, Marvin G. identified both defendants, and testified that Mr. Arzate was the armed assailant.

Both defendants were charged by information with two counts of first degree murder (counts one and two) and one count of attempted murder (count three). The information alleged that in each of those crimes, a principal personally used and intentionally discharged a shotgun, causing great bodily injury and death. The

information charged three special circumstance allegations as to both murders: that defendants intentionally killed the victims while they were active participants in a criminal street gang; multiple murders; and lying in wait. The information charged both defendants with assault with a firearm upon April S. (count four) and alleged personal use of a firearm. The information also charged Mr. Arzate with criminal threats (count five); alleged both defendants committed each of the charged offenses for the benefit of a criminal street gang; and alleged Mr. Mendoza was a minor when he committed the charged offenses.

2. Other Evidence Presented at Trial

In addition to the evidence already recited, expert gang evidence and other evidence was adduced at trial, including the following.

Javier A. testified that on September 24, 2010, around midnight, he parked his car about half a block from Division Street (near the crime scene). When he checked his car the next day, the letters VCP had been scratched on the hood and trunk of the car with some sort of sharp object. VCP means "Varrio Cypress Park," defendants' gang.

A special agent for the Federal Bureau of Investigation conducted an analysis of cellular phone records and cell tower locations, and concluded that Mr. Mendoza's cell phone moved from an area consistent with the Granada Street residence at 11:44 p.m. to an area consistent with the location of the murders at 11:51 p.m., and the call he placed at 12:54 a.m. was placed from an area consistent with the murder scene.

Officer Arthur Castro, who had 13 years of experience with gang investigations and previous experience as an expert witness, testified as a gang expert. He explained police interactions with gang members, gang culture, the history of the Cypress Park gang, its geographic boundaries, the gang's hatred of rival gang the Avenues ("mortal enemies") and their violent incursions into Avenues gang territory to show disrespect for the Avenues, the gang's signs and symbols, the nicknames or monikers of various Cypress Park gang members, and gang tattoos. (Both defendants had several monikers, including "Grumpy" for Mr. Mendoza and "Stranger" for Mr. Arzate.)

Officer Castro identified a photograph he described as Cypress Park gang graffiti; it was taken from a video that was uploaded and posted on YouTube on October 14, 2010. Officer Castro did not know who posted the video, but he described the graffiti as "a roll call for the [Cypress Park] gang" and identified the monikers of both defendants, as well as other gang members on the list.

Officer Castro testified to the primary activities of the Cypress Park gang, including assaults, murders and attempted murder, and shooting from a vehicle, and the prosecution presented certified court documents evidencing predicate offenses committed by Cypress Park gang members.

Based on hypotheticals mirroring the facts of the crimes charged, Officer Castro opined that the assault, the murders, and the criminal threats were committed "for the benefit of, in association with, or at the direction of a criminal street gang with the specific intent to promote, further, and encourage gang activity by gang members."

Officer Castro also opined that Mr. Arzate was an active member of the Cypress Park gang, and that he was "still active to date."[1] Officer Castro also opined that Mr. Mendoza was an active member of Cypress Park. He testified that Mr. Mendoza had

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[1] Officer Castro was asked to explain the difference between a documented gang member and an active gang member, and said this: "Well, a documented gang member is somebody that we have . . . come in contact with. We have documented them as a gang member. [¶] They openly admit they are a gang member and for whatever reason we lost contact with that member of the gang. [¶] So for instance, if I stop someone and document him as a gang member and . . . five years later I do not see him, or he has no contact, he moves out of the area, or for whatever reason, he gets purged out of the system. [¶] So in that five year span someone has contacted that individual and he has admitted that he is a member of the gang. [¶] Now, speaking of active gang members, those are the members that we are seeing on a daily or weekly basis. They're the names that we are hearing from the community, you know, these guys are active. [¶] We are seeing those names tagged on the walls. We are making arrests of those individuals. We are completing investigation reports alleging that they have committed certain acts on other members of the community. [¶] So it's the day-to-day contact that we are having with the individuals and the information that we are receiving from a multitude of sources within the Northeast Division."

no gang tattoos, but he (Officer Castro) had seen a change in the trend of tattooing by gang members; "[t]he current trend is . . . guys are trying to stay under the radar. They're trying to remain undetected to law enforcement." Mr. Mendoza admitted gang membership to Officer Castro. Officer Castro had also reviewed several field identification cards showing Mr. Mendoza admitted gang membership to other officers (several of whom also testified), and was wearing clothing indicative of Cypress Park gang membership. "He has been in the gang area, and oftentimes on those stops he has been in association with several members of the Cypress Park gang." Officer Castro testified: "[S]omebody that's not a member of the gang, you're not going to see them continually being stopped with those members of the gang." He found no evidence "to suggest that Mr. Mendoza was out of Cypress Park and no longer associating with Cypress Park." Officer Castro concluded that both defendants were active members of Cypress Park in 2009, 2010, and 2011.

Mr. Arzate presented no defense. Mr. Mendoza presented testimony from an eyewitness identification expert, and from Josefina M., who owned the three houses on Granada Street and lived in the front house. Josefina M. testified she had known defendants for about six or seven years. (Her son Frank lived in the back house, and her grandson is a Cypress Park gang member.) She testified that on the night of the assault on April S., she saw defendants running, with April S. and another girl behind them, hitting them on their backs. Defendants went out toward the corner, and about 10 minutes later a car came and picked the girls up. About 10 minutes after the girls left, defendants came back and were sitting on the sofa on the porch. This was at about 11:30 p.m. or 12:00 a.m. Josefina M. was trying to fall asleep when she heard a helicopter. She went outside and saw patrol cars driving by. Defendants were sitting there; Josefina M. talked to them for about 10 minutes, and they were still there until 3:00 a.m.

The prosecutor presented rebuttal evidence from Detective DiCroce, who interviewed Mr. Mendoza on January 4, 2012. Mr. Mendoza told him that he had not

been with Mr. Arzate on the night of September 24, 2010, never saw anyone point a firearm at April S., and was not with Mr. Arzate when he slapped April S. Officer Juan Aguilar testified that, at an interview with him and Detective DiCroce on March 21, 2012, Josefina M. told them "that she did not know [defendants], maybe one is named Albert and the taller boy is Johnny"; that her son Frank took the girls home; and that defendants "stayed at the residence until about 1:30 a.m."

Other evidence will be described in our discussion as necessary in connection with the claims on appeal.

4. The Verdicts and Sentencing

The jury convicted both defendants of the first degree murders of Samuel and Jose Martinez and the attempted murder of Marvin G. As to Mr. Arzate, the jury found true the allegations that in each of those crimes, a principal personally used and intentionally discharged a shotgun, causing great bodily injury (Marvin G.) and death. (These allegations were found not true as to Mr. Mendoza.) The jury found true three special circumstance allegations as to both murders: that defendants intentionally killed the victims while defendants were active participants in a criminal street gang; multiple murders; and murder by means of lying in wait. The jury found both defendants guilty of assault with a firearm upon April S., and found Mr. Arzate personally used a firearm. The jury also found Mr. Arzate guilty of the criminal threats charge, and found true the allegations that each defendant committed each of the offenses for the benefit of a criminal street gang. The jury found true allegations that Mr. Mendoza was a minor at least 14 years old when he committed the crimes.

The court sentenced Mr. Arzate to a base term of seven years on count three (the attempted murder), plus a consecutive term of 25 years to life for the firearm enhancement (Pen. Code, § 12022.53, subds. (d) & (e)(1))[2] and a consecutive 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)); a consecutive term of one year on count four, plus a consecutive four-year firearm enhancement (§ 12022.5) and a consecutive

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[2] Further statutory references are to the Penal Code unless otherwise specified.

10-year gang enhancement; a consecutive term of eight months on count five, plus a consecutive five-year gang enhancement (§ 186.22, subd. (b)(1)(B)); and two consecutive terms of LWOP, plus consecutive terms of 25 years to life for the firearm enhancement (§ 12022.53, subds. (d) & (e)(1)), on counts one and two.

The court sentenced Mr. Mendoza to a base term of seven years on count three, plus a consecutive 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)); one year consecutive on count four; and two consecutive terms of LWOP (counts one and two).

In both cases, the court made other orders not at issue in these appeals, and both defendants filed timely appeals.

DISCUSSION

We treat defendants' assertions of error in the order raised in Mr. Mendoza's opening brief, and conclude with Mr. Arzate's claim of sentencing error.

1. Admission of Mr. Arzate's Statements Implicating Mr. Mendoza

Mr. Mendoza contends the admission of Mr. Arzate's statements to Cecilia C. – that he and "Johnny" committed the crime and "that's why they were trying to stay low," and "Johnny was being scared and he didn't want to come out of his house" – violated his Fifth, Sixth and Fourteenth Amendment rights to confront and cross-examine his accusers, to a fair trial and due process of law. He also contends the statements were inadmissible hearsay under state law. None of his contentions has merit.

The substance of Mr. Mendoza's first contention is that the testimony in question consisted of hearsay statements of a nontestifying codefendant, and that such statements are inadmissible under *Bruton v. United States* (1968) 391 U.S. 123, 137 (*Bruton*) (introduction of a codefendant's confession implicating the defendant in a joint trial violated the right of cross-examination secured by the confrontation clause, even if the jury is instructed to consider the confession only against the codefendant). Mr. Mendoza is mistaken.

We rejected a similar claim in *People v. Arceo* (2011) 195 Cal.App.4th 556, 571-574 (*Arceo*), and there is no basis for a different conclusion in this case. As we pointed

out there, "the confrontation clause has no application to out-of-court nontestimonial statements . . . ." (*Id.* at p. 571, citing *Whorton v. Bockting* (2007) 549 U.S. 406, 420 ["[u]nder *Crawford* [*v. Washington* (2004) 541 U.S. 36 (*Crawford*)], . . . the Confrontation Clause has no application to [out-of-court nontestimonial] statements"]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812 ["[o]nly the admission of testimonial hearsay statements violates the confrontation clause"].) This principle includes out-of-court nontestimonial statements by codefendants. (*United States v. Vasquez* (5th Cir. 2014) 766 F.3d 373, 378 ["Many circuit courts have held that *Bruton* applies only to statements by co-defendants that are testimonial under *Crawford*," citing cases]; *U.S. v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 [*Bruton* must be viewed "through the lens of *Crawford* and *Davis* [*v. Washington* (2006) 547 U.S. 813 (*Davis*)]"; if the challenged statement is not testimonial, the confrontation clause has no application]; see also *Davis,* at p. 821 ["[o]nly statements of this sort [(testimonial statements)] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. [Citation.] It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."].)

Mr. Mendoza contends *Arceo* was wrongly decided, and that *Arceo* suggested *Crawford* has overruled *Bruton*. *Arceo* suggested nothing of the sort; quite the opposite. (*Arceo, supra,* 195 Cal.App.4th at p. 575 ["nothing in the cases applying that principle [that the confrontation clause applies only to testimonial statements] to extrajudicial statements by nontestifying codefendants is inconsistent with or purports 'to overrule *Bruton*' "].) The *Bruton* rule simply has no application here.

Accordingly, if Mr. Arzate's statements to Cecilia C. "were admissible under state law as exceptions to the hearsay rule, there was no error in the admission of that testimony." (*Arceo, supra,* 195 Cal.App.4th at p. 575.) Those statements were indeed admissible, as statements against penal interest.

The pertinent legal rules are these. "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) "The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).)

Declarations against penal interest, however, may also contain self-serving and unreliable information, and " ' "a self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not." ' " (*Duarte, supra,* 24 Cal.4th at p. 611.) "Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, *also* be exculpatory or have a net exculpatory effect." (*Id.* at p. 612.) Because of such concerns, "section 1230's exception to the hearsay rule [is] 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.' " (*Ibid.*) Thus, a hearsay statement " 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.' " (*Ibid.*)

Mr. Mendoza contends that the portions of Mr. Arzate's statement implicating him (Mr. Mendoza) were not admissible under these principles. He is mistaken. As *Duarte* tells us, " 'whether a statement is self-inculpatory or not can only be determined by viewing it in context.' " (*Duarte, supra,* 24 Cal.4th at p. 612.) Here, no part of Mr. Arzate's statement to Cecilia C. was exculpatory. No part of it was "self-serving." (*Id.* at p. 611.) No part of it placed or tried to place "the major responsibility" on Mr. Mendoza. (*Id.* at p. 612.) No part of it was " '[an] attempt[] to shift blame or curry

favor.' " (*Ibid.*) Mr. Arzate's statement was inculpatory, and no part of it, "when considered in context, *also* [was] exculpatory or [had] a net exculpatory effect." (*Ibid.*)

In short, Mr. Arzate's "references to [Mr. Mendoza] were an integral part of the statement in which he implicated himself in . . . participating in the . . . murder[s] of [the Martinez brothers]." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 340.) When Cecilia C. told Mr. Arzate she had heard about the murders on Division Street, he replied "that that was them," "him and Johnny," and "that's why they were trying to stay low." His additional comment that Mr. Mendoza was scared and did not want to leave his house was an integral part of his statement, the entirety of which was "specifically disserving" to his interests. And the circumstances under which Mr. Arzate made the statements provided further indicia of reliability to guarantee their trustworthiness: he made them in a private setting, on the telephone to an intimate friend, and thus without coercion or reason to fabricate. Under these facts, there was no error in the trial court's admission of Mr. Arzate's statements to Cecilia C. implicating Mr. Mendoza.

Finally, Mr. Mendoza contends the admission of Mr. Arzate's statements violated his right to a fair trial and due process, even if there was no violation of the confrontation clause. That notion is mistaken, too. " 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." ' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Mr. Mendoza offers neither pertinent authorities nor facts to support the claimed violation of his fair trial and due process rights, and we see none.

2. Failure to Instruct on the Accomplice Corroboration Rule

Mr. Mendoza contends that, because the trial court admitted Mr. Arzate's statements implicating both defendants in the murders, the court was required to instruct the jury, sua sponte, on the accomplice corroboration rule. (§ 1111 ["A conviction can not 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; and the corroboration is not sufficient if it merely shows the commission of the offense or the

circumstances thereof."].) Mr. Mendoza is mistaken. The accomplice corroboration requirement does not apply in this case.

The governing principles appear in *People v. Brown* (2003) 31 Cal.4th 518 (*Brown*). "If sufficient evidence is presented at trial to justify the conclusion that a witness is an accomplice, the trial court must so instruct the jury, even in the absence of a request." (*Id.* at p. 555.) And, because an accomplice "has a natural incentive to minimize his own guilt before the jury and to enlarge that of his cohorts," the law requires that an accomplice's testimony "be viewed with caution to the extent it incriminates others." (*Ibid.*) So, "an accomplice's testimony must be corroborated before a jury may consider it." (*Ibid.*) The same rule applies to out-of-court statements of accomplices that are used as substantive evidence of guilt and " ' "are made under suspect circumstances," ' " such as " ' "when the accomplice has been arrested or is questioned by the police." ' " (*Ibid.*)

These principles do not apply when the accomplice's out-of-court statement is properly found to be a declaration against penal interest. (*Brown, supra,* 31 Cal.4th at p. 555.) *Brown* explains: " 'The usual problem with accomplice testimony—that it is consciously self-interested and calculated—is not present in an out-of-court statement that is *itself sufficiently reliable* to be allowed in evidence.' " (*Ibid.*; see also *People v. Williams* (1997) 16 Cal.4th 635, 682 [out-of-court statements made in the course of and in furtherance of a conspiracy "were not made under suspect circumstances and therefore were sufficiently reliable to require no corroboration"].)

Because Mr. Arzate's statements to Cecilia C. "were themselves made under conditions sufficiently trustworthy to permit their admission into evidence despite the hearsay rule; namely, they were declarations against his penal interest" (*Brown, supra,* 31 Cal.4th at p. 556), "no corroboration was necessary, and the court was not required to instruct the jury to view [Mr. Arzate's] statements with caution and to require corroboration." (*Ibid.*)

Even were we to assume the trial court erred, any error was harmless. " 'A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]" . . . The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." ' " (*Brown, supra,* 31 Cal.4th at p. 556.) Here, Mr. Arzate's statements were amply corroborated by Marvin G.'s identification of Mr. Mendoza, as well as by the testimony of April S. that she heard Mr. Mendoza tell Cecilia C., on the telephone the night of the murders, that "we got into some shit. Come pick me up."

3. Prosecutorial Misconduct

a. Defendants' claims

Both defendants assert that the prosecutor engaged in prejudicial misconduct in her opening, closing and rebuttal statements. The challenged misconduct consisted of photographs and graphics in a PowerPoint presentation accompanying the prosecutor's opening statement and closing arguments. Specifically:

In her opening statement, the prosecutor included photographs of defendants, identified with their gang monikers and outlined in red. The word "GUILTY" was stamped in large red letters over defendants' faces, and the photographs were juxtaposed with the seal of the District Attorney's office.

In her closing argument, the prosecutor used the same photographs again. In addition, the PowerPoint presentation included consecutive photographs of each of the three victims, with each photograph followed by audio of a gunshot and a "comic-book-style" yellow and red explosion graphic (which defendants describe as "obliterat[ing] [the victim's] photo").

In her rebuttal argument, the prosecutor repeated the gunshot-explosion sequence from the closing argument. She also showed photographs of the victims fading from

view as defendants' photographs appeared on the screen, and then the word "GUILTY" in red letters appeared over their faces.

According to defendants, the presentations just described constituted misconduct because they were designed to inflame the jury's passions, showed the jury "evidence not admitted at trial," and "express[ed] the prosecutor's and the District Attorney's personal opinions on [defendants'] guilt."

We reject defendants' contentions.

b. Forfeiture

As defendants acknowledge, neither of them objected at any time to any part of the PowerPoint presentations they now complain constituted prejudicial misconduct. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*) [" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' "].) Consequently, they have forfeited their claim on appeal.

Defendants contend the issue is preserved for appellate review because an admonition would have been useless. (See *Hill, supra,* 17 Cal.4th at p. 820 ["A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile," and failure to request an admonition "does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' "].) According to Mr. Arzate, after the jury learned in opening statement and closing arguments that the district attorney believed defendants were guilty, an admonition could not restore defendants' "mantle of innocent-until-proven-guilty." Further, an admonition "could not . . . quell the anger and emotion the use of the gunshot-explosion PowerPoint presentations . . . had aroused in the minds of the jurors."

We reject defendants' futility claim. It is supported only by rhetorical flourishes, not by legal authorities or reasoned exposition. As in *People v. Redd* (2010) 48 Cal.4th 691, the record does not establish any basis to excuse the failure to object. (*Id.* at p. 729,

fn. 18 & p. 745 [explaining the *Hill* case involved " 'unusual circumstances' " with multiple other instances of misconduct to which the defense had unsuccessfully objected].) This is not a case like *Hill*. Moreover, if an objection to the "GUILTY" slide in the opening statement had been well taken, an admonition would have avoided any repetition in closing and rebuttal arguments. The same is true of the gunshot sequence in closing argument that was repeated in rebuttal. We will not assume the jury would not understand and abide by an appropriate admonition from the court. In short, defendants cannot remain silent in the face of a presentation they now claim was "especially pernicious," and then assert on appeal that an objection or admonition would have been futile.

c. Ineffective assistance of counsel

Defendants assert that counsel's failure to object to the PowerPoint presentations constituted ineffective assistance of counsel. We disagree.

In assessing defendants' claim, "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." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211 (*Carter*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) Defendants "bear[] the burden of establishing constitutionally inadequate assistance of counsel." (*Carter*, at p. 1211, citing *Strickland*, at p. 687.) They have not done so.

Of course a prosecutor may not "express a personal opinion or belief in a defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial." (*People v. Bain* (1971) 5 Cal.3d 839, 848 (*Bain*).) But that is not what happened here.

The prosecutor prefaced her opening statement by expressly stating, twice, that her statement was not evidence, but was simply to tell the jury what she believed the evidence would show in the case. She concluded her statement by asking the jury "to

keep an open mind and listen to every witness's testimony very carefully and evaluate every witness's testimony and look at the totality of the circumstances. And once you do that, you will come back and convict both defendants of all the charges and the allegations in this case." As the prosecutor concluded this statement, the word "GUILTY" appeared across the photographs of defendants.

Counsel did not object, and we cannot say that prevailing professional norms in California required a reasonable attorney to object under the circumstances. There are no California authorities holding that a brief display of a defendant's face with the word "GUILTY" on it, standing alone, constitutes prosecutorial misconduct. In one case, where a prosecutor's laptop computer displaying the word "GUILTY" may have been briefly visible to the jury during closing argument, the court found no prosecutorial error and no abuse of discretion in the trial court's denial of a motion for mistrial. (*People v. Waldie* (2009) 173 Cal.App.4th 358, 367 ["unfortunate, but inadvertent and casual, display of a single word fairly characterizing the prosecutor's position does not qualify as intemperate, egregious, unfair, deceptive, or reprehensible conduct"].)

Further, under the circumstances here, it is hard to see any "substantial danger" that jurors would think the "GUILTY" photograph was "based on information at the prosecutor's command, other than evidence" that would be adduced at trial. (See *Bain, supra,* 5 Cal.3d at p. 848; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 502 [rejecting futility and ineffective assistance claims where counsel did not object to alleged prosecutorial misconduct; "deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance"].) Under these circumstances, we cannot say that counsel's failure to object was unreasonable.

The same is true as to use of the same PowerPoint slide in closing and rebuttal arguments. (Cf. *People v. Huggins* (2006) 38 Cal.4th 175, 206, 207 [counsel was not ineffective for failing to object to prosecutor's comment in closing argument (" '[n]one of this can be true. Please believe me. [The defendant] has lied through his teeth in trying to sell this story to you' "); "[i]t is not . . . misconduct to ask the jury to believe the

prosecution's version of events as drawn from the evidence," or "to make explicit what is implicit in every closing argument, and that is essentially what the prosecutor did here"].)

We reach the same conclusion with respect to counsel's failure to object to the gunshot explosion audio and related graphics in closing and rebuttal arguments. Defendants claim this was prosecutorial misconduct because it "was crafted to demonstrate facts not in evidence." The only California authority defendants cite is *People v. Duenas* (2012) 55 Cal.4th 1, where the court found no abuse of discretion in the trial court's admission into evidence of a computer animation. *Duenas* has no pertinence to defendants' claim of prosecutorial misconduct. *Duenas* merely tells us that a computer animation – namely, "demonstrative evidence offered to help a jury understand expert testimony or other substantive evidence" – is "admissible if ' "it is a fair and accurate representation of the evidence to which it relates . . . ." ' " (*Id.* at p. 20.) The PowerPoint presentation of which defendants complain was not a computer animation. It did not purport to be a "representation" of other evidence, or an attempt to replicate or recreate the crime, and it is difficult to see how anyone could view it as such.

Defendants also assert the gunshot-explosion sequence was misconduct because it was designed "to produce an emotional decision" on defendants' guilt. The gunshot-explosion graphics were banal compared with the evidence presented to the jury at trial, including recordings of the 911 calls, photographs of the victims with gunshot wounds in their heads, and other evidence of the gruesome crime scene.

But even if we were to find defense counsel was ineffective for failing to object to any or all the prosecutor's PowerPoint presentations, defendants have failed to demonstrate prejudice. To do so, they must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694.)

No such reasonable probability exists. This is not a case where defendants have asserted a pattern of misconduct by the prosecutor that could have infected the verdicts or

rendered the trial unfair. As we just observed, the evidence presented to the jury of these murders was far more grisly than the PowerPoint presentation, so it is unlikely to have aroused the jury's emotions. The jury's verdict included "not true" findings on the principal/firearm allegations as to Mr. Mendoza, suggesting the jury dispassionately considered the evidence on each charge and was not swayed by passion against defendants. And, in addition to the prosecutor's own caution to the jury in her opening statement to "keep an open mind," the trial court repeatedly told the jury that attorney statements, opening statements and closing arguments were not evidence. For example, before closing arguments, the court told the jury, "I just want to remind you another time, one more time, I cannot overly emphasize, closing argument is not evidence. It is merely what the attorneys believe the evidence has shown. [¶] . . . [¶] Again, closing argument is not evidence." In this case, the usual assumption that the jurors followed the court's instructions is fully warranted.

Further, this was not a close case, for either defendant. The evidence of their guilt was overwhelming. Mr. Mendoza had a shotgun shortly before the murders and gave it to his fellow gang member, Mr. Arzate, so he (Mr. Arzate) could assault April S., after accusing her of infidelity with a rival gang member. Defendants then proceeded to rival gang territory, where they waited until the unsuspecting victims happened along, at which time they emerged from the darkness, shouting "[w]here you from," and immediately shot the victims at close range with a shotgun. The surviving victim identified both defendants at trial. Mr. Mendoza called Cecilia C. just after the killings, from a place consistent with the murder scene, saying "we got into some shit" (which Cecilia C. knew from prior experience to mean "some type of trouble"), he was with Mr. Arzate, police were everywhere, and he wanted to be picked up. Mr. Arzate talked to Cecilia C. the next day about the murders and told her it was "him and Johnny," and "that's why they were trying to stay low."

We need not go on. Defendants have not shown a reasonable probability, or any probability at all, that the verdicts would have been different had it not been for defense counsel's failure to object to the prosecutor's PowerPoint presentations.

4. The "Equally Guilty" Instruction

Defendant Mendoza was tried as an aider and abettor, rather than the actual perpetrator, of the crimes charged. The jury was instructed on aiding and abetting with a version of CALJIC No. 3.00 that predated a 2010 amendment, as follows: "Persons who are involved in committing a crime are referred to as principals in that crime. [¶] Each principal, regardless of the extent or manner of participation, is equally guilty. [¶] Principals include: [¶] Number 1, those who directly and actively commit the act constituting the crime or; [¶] Number 2, those who aid and abet the commission of the crime."

Mr. Mendoza contends the "equally guilty" language in the instruction, which is no longer used but to which he did not object, was error. He contends the instruction as given required the jury to convict him "of the identical offenses and special circumstances that it found Arzate guilty of regardless of [Mr. Mendoza's] personal mental state . . . ." A similar contention was made and rejected in *People v. Johnson* (2016) 62 Cal.4th 600, 638-640 (*Johnson*). As will appear, we reject Mr. Mendoza's claims for the same reasons.[3]

The background and applicable principles are as follows. In *People v. McCoy* (2001) 25 Cal.4th 1111, 1122, the Supreme Court "rejected the notion that an aider and abettor cannot be found guilty of a greater offense that that committed by the perpetrator." (*Johnson, supra,* 62 Cal.4th at p. 639.) Subsequent decisions confirmed that "an aider and abettor's criminal liability may sometimes be greater than, or lesser

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[3] Respondent contends Mr. Mendoza forfeited his claim by failing to request modification of the instruction in the trial court. While there is authority to support respondent's contention, we follow the approach described by the Supreme Court in *Johnson* (62 Cal.4th at pp. 638-639) and therefore reach the merits of Mr. Mendoza's claim.

than, that of the perpetrator." (*Id.* at p. 638.) "[A]ider and abettor liability for a killing is based on the combined acts of all the principals and the aider and abettor's own mental state, which ' " 'float[s] free' " ' from the mental state of the perpetrator." (*Id.* at p. 639.) After Court of Appeal decisions concluding the "equally guilty" language was or could be misleading, the CALCRIM instruction containing that language was revised in 2010 to remove the word "equally" from the "equally guilty" language. (*Johnson*, at pp. 639-640.) The trial court should have given the CALCRIM instruction, but on the facts of this case we find no error.

In *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, the Supreme Court explained: CALJIC No. 3.00 "generally stated a correct rule of law. All principals, including aiders and abettors, are 'equally guilty' in the sense that they are all criminally liable. [Citation.] The instruction could be misleading if the principals in a particular case might be guilty of different crimes and the jury interprets the instruction to preclude such a finding." (*People v. Bryant, Smith and Wheeler*, at p. 433.) Here, however, as in *Johnson*, "the jury would not have been misled in this respect . . . ." (*Johnson, supra,* 62 Cal.4th at p. 640.)

First, in this case, as in *Johnson*, "there was no version of the evidence . . . suggesting that defendant's mental state was less culpable than that of the actual killer." (*Johnson, supra,* 62 Cal.4th at p. 640.) Mr. Mendoza was carrying a shotgun shortly before the murders, and gave it to Mr. Arzate, allowing Mr. Arzate to assault April S. The two defendants then went to rival gang territory and lay in wait together behind a wall, "popped out of the darkness" together, and asked "[w]here you from?" Moments after the murders, Mr. Mendoza called Cecilia C. and told her, "We got into some shit. Come pick me up." Mr. Mendoza's defense was that he was not present. No version of the evidence would allow the jury to conclude that Mr. Arzate acted with deliberation and premeditation but Mr. Mendoza did not.

Second, in this case, as in *Johnson*, there was nothing in the record "suggesting that the jurors may have believed the 'equally guilty' language . . . required them to

determine [Mr. Mendoza's] criminal liability based on [Mr. Arzate's] mental state at the time of the killing, rather than considering [Mr. Mendoza's] own mental state." (*Johnson, supra,* 62 Cal.4th at p. 640.) As in *Johnson*, after giving the "equally guilty" instruction, the trial court then described the requirements for establishing aider and abettor liability.[4] "The jury therefore was informed that for them to find [Mr. Mendoza] guilty of murder as an aider and abettor" (*id.* at p. 641), the prosecution had to prove that Mr. Mendoza *knew* of Mr. Arzate's unlawful purpose; *intended* to commit or encourage or facilitate Mr. Arzate's commission of the crime; and "by act or advice aid[ed], promote[d], encourage[d] or instigat[ed]" Mr. Arzate's commission of the crime. (CALJIC No. 3.01.) As in *Johnson*, this instruction "would have cleared up any ambiguity arguably presented by [CALJIC No. 3.00's] reference to principals being 'equally guilty.' " (*Johnson,* at p. 641.)

In short, in this case, as in *Johnson*, "there was no reasonable likelihood the jurors would have understood the 'equally guilty language . . . to allow them to base [Mr. Mendoza's] liability for first degree murder on the mental state of the actual shooter, rather than on [his] own mental state in aiding and abetting the killing." (*Johnson, supra,* 62 Cal.4th at p. 641.)

5. Admission of Gang Graffiti Posted on YouTube

Both defendants challenge the admission in evidence of a photograph purporting to depict Cypress Park gang graffiti. The photograph was extracted from a video that was uploaded and posted on YouTube on October 14, 2010, a few weeks after the murders. The identity of the person who posted the video is unknown.

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[4] The trial court instructed with CALJIC No. 3.01: "A person aids and abets the commission of a crime when he or she: [¶] Number 1, with knowledge of the unlawful purpose of the perpetrator and; [¶] Number 2, with the intent or purpose of committing or encouraging or facilitating the commission of the crime; [¶] And number 3, by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] Mere presence at the scene of a crime which does not itself assist in the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

Officer Castro testified that the photograph showed Cypress Park gang graffiti, specifically, "what's commonly referred to as a roll call for the gang." "So above will be the gang names, and right below the gang names is Cypress Park, and below that they wrote 'them boys,' meaning Cypress Park boys." Officer Castro identified the monikers of both defendants, as well as the other gang members on the list. He testified that the names of documented gang members who had moved out of the neighborhood or were no longer in the gang would "[d]efinitely not" be on the roll call, "because once they've moved on and left the gang, they kind of lose touch with the neighborhood, with the guys in the neighborhood." Officer Castro testified: "[I]n my professional experience the monikers that I see on the roll calls and gang graffiti, my opinion is that those members are the active members of that particular gang." Officer Castro did not know who wrote the roll call and put the moniker of Mr. Mendoza on it.

Defendants challenge the admission of the roll call photograph, contending it could not be authenticated and no foundation could be laid for its admission, resulting in a denial of their constitutional rights to confront their accusers and to due process and a fair trial. We conclude there was no prejudicial error.

The Supreme Court described the principles governing authentication of photographs in *People v. Goldsmith* (2014) 59 Cal.4th 258 (*Goldsmith*). "As with other writings, the proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.] The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible.

The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' " (*Id.* at p. 267.)

"A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location." (*Goldsmith, supra,* 59 Cal.4th at pp. 267-268.)

Here, the photograph of the gang "roll call" containing defendants' monikers was offered for the purpose of proving defendants were active members of the Cypress Park gang at the time of the murders. This evidence, if properly authenticated, and together with Officer's Castro's testimony about the meaning of such "roll calls," did just that. But while Officer Castro could attest that the video was posted to YouTube on October 14, 2010, after the murders, there was no evidence showing when the video was taken, who took it, where it was taken, or who posted the video.

There is authority for the admissibility of photographs and writings from social media web sites where, for example, the evidence connects the defendant to the web page containing the photographs. (E.g., *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1431, 1435-1436 [finding sufficient showing of authenticity of printouts of the defendant's MySpace social media internet page, "which the prosecution's gang expert relied on in forming his opinion [the defendant] was an active gang member"; "[a]lthough [the defendant] was free to argue otherwise to the jury, a reasonable trier of fact could conclude from the posting of personal photographs . . . that the MySpace page belonged to him"; evidence "strongly suggested the page was [the defendant's] personal site"]; see also *In re K.B.* (2015) 238 Cal.App.4th 989, 992, 993-994, 997-998 [incriminating photographs, showing minor and an associate (both on active probation) in possession of firearms, were sufficiently authenticated; the photographs were extracted from the companion's cell phone when the two were arrested, and testimony from an investigating

officer showed the photographs were the same as photographs the officer observed on the minor's own Instagram account earlier in the day]; but see *People v. Beckley* (2010) 185 Cal.App.4th 509, 517-518 [court should have excluded a purported roster of gang's members appearing on a web page that a detective printed from the internet, offered as evidence the defendants were gang members; evidence was insufficient to show the writing was what it purported to be, where detective admitted he did not know who created the list, or whether the author had any personal knowledge of the members of the gang or that the persons named were current gang members; information on roster was cumulative so error was harmless].)

We need not decide whether an adequate foundation was laid for admission of the photograph. If there was error, it was harmless, as the "roll call" photograph was cumulative. There was other evidence leaving no doubt that both Mr. Mendoza and Mr. Arzate were active gang members at the time of the murders. Both defendants admitted to multiple police officers on multiple occasions that they were members of the Cypress Park gang, and there was testimony from Cecilia C. and April S. to the same effect. Defendants shouted "Where you from?" just before shooting the Martinez brothers to death. In Mr. Arzate's case, he exposed gang tattoos to April S. when he threatened her in January 2011, and at trial he had additional tattoos not present when he was arrested.

In Mr. Mendoza's case, Officer Leo Perez testified that he had had 15 to 20 contacts with Mr. Mendoza while working with the gang unit, and identified Mr. Mendoza in court. During those contacts, Mr. Mendoza told him he belonged to the Cypress Park gang, and gave Officer Perez several different monikers. On June 29, 2010, a few months before the murders, Officer Perez filled out a field identification card on Mr. Mendoza, and Mr. Mendoza told him at that time that he belonged to the Cypress Park gang. Mr. Mendoza was with Mr. Arzate, who also admitted Cypress Park gang membership. In November 2010, after the murders, Officer Perez completed another field identification card on Mr. Mendoza, who told him again that he was a member of

the Cypress Park gang. On that occasion, Mr. Mendoza was with Andrew Moreno, another admitted Cypress Park gang member. There was no evidence suggesting that either defendant had left, tried to leave, or wished to leave the gang. Under these circumstances, defendants could not have been prejudiced by the admission of the "roll call" graffiti further confirming the uncontradicted and overwhelming evidence of their active gang membership.

6. The Gang-murder Special Circumstance

Defendants contend the evidence was insufficient to support the jury's true finding on the gang-murder special circumstance, specifically, that each defendant "intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . ." (§ 190.2, subd. (a)(22).) They argue the court improperly allowed six police officers "to offer unsupported opinion testimony" that they were active members, and that absent the "improper and inadmissible expert testimony," there was "no evidence that [defendants'] participation in the criminal street gang was more than nominal or passive." (The six officers (and Officer Castro) testified to their personal contacts with one or both defendants from 2006 to 2010, and to defendants' repeated admissions to them of gang membership. Several officers opined, based on their experience and those personal contacts, that defendants were active gang members.)

Defendants' argument has no support in the law, and it ignores the evidence as well.

"To prove that a defendant 'actively participates' in a gang," it is sufficient "if the evidence establishes that the defendant's involvement with the gang is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 745 (*Castenada*) [construing § 186.22, subd. (a), which penalizes active participation in a criminal street gang under specified circumstances].) The evidence here plainly did so with respect to both defendants – whether or not we consider the opinions expressed by gang officers.

First, there is no legal authority to support the claim that expert testimony was improper. Defendants offer no cogent rationale, merely pointing to *Castenada*'s

statement that, in construing the statutory language, courts give the words "actively" and "participates" their "usual and ordinary meaning." (*Castenada, supra,* 23 Cal.4th at pp. 747, 752.) From this they argue expert testimony is improper. The argument is specious. *Castenada* nowhere suggests it is improper for a gang officer, based on his own personal knowledge and his experience in gang-related matters, to opine that a defendant is an active gang member. (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 506-507 [agreeing that "the defendant's membership in a gang was a matter beyond the common knowledge of jurors and thus a proper subject of expert testimony"].)

Second, there was ample additional evidence of active gang membership. Cecilia C., who by the time of the murders had known Mr. Arzate for about a year and a half or so, testified she knew he was in the Cypress Park gang and saw gang tattoos on his body. By the time she testified at trial, Mr. Arzate had additional gang tattoos that he did not have during their relationship from 2009 to 2011. Officer Castro testified to the same effect; at trial, Mr. Arzate had gang tattoos on his face and neck that were not there between 2006 and 2011, or in March 2013. Cecilia C. also testified she had known Mr. Mendoza for about five years, and met Mr. Mendoza shortly after she met Mr. Arzate. She testified that "in the last five years that [she had known him]," she knew Mr. Mendoza was a member of the Cypress Park gang.

Then there was the evidence of multiple admissions of gang membership to the police officers, and photographs of Mr. Arzate and other gang members throwing gang signs. There was the testimony about events preceding the murders, when Mr. Arzate, accompanied by Mr. Mendoza, accused April S. of consorting with a member of a rival gang while her baby's father and defendants' fellow gang member was in custody. And there was the testimony described above about the circumstances of the murders – lying in wait in rival gang territory and calling out "where you from" before shooting two perfect strangers in the head and another in the back. As the court stated in *Castenada*: "To summarize, through evidence of the crimes defendant here committed, his many contacts on previous occasions with the . . . criminal street gang, and his admissions by

bragging to police officers on those occasions of gang association or membership, the prosecution presented sufficient proof that defendant 'actively participate[d]' in a criminal street gang . . . ." (*Castenada, supra,* 23 Cal.4th at p. 753.) The same is true here.

7. Cumulative Error

Both defendants contend the cumulative effect of the errors they assert deprived them of a fair trial, requiring reversal of the judgment. They are mistaken. While "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error" (*Hill, supra,* 17 Cal.4th at p. 844), that is not the case here. We have found no error that, either alone or in conjunction with others, prejudiced either defendant. "A defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.) We conclude defendants received a fair trial, and perceive no prejudice, cumulative or otherwise.

8. Sentencing Issues – Mr. Mendoza

Defendant Mendoza was 17 years old when he committed the offenses for which he was convicted. His sentence included two consecutive terms of LWOP. He challenges his sentence on several grounds, claiming he was entitled to a jury trial at sentencing, cruel and unusual punishment, and ineffective assistance of counsel. We reject his claims.

a. The jury trial claim

Mr. Mendoza contends he had the right to a jury determination as to whether he was "irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*), quoting *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 2464] (*Miller*).) He is mistaken.

In *Gutierrez*, the court held that section 190.5, subdivision (b) (section 190.5(b)) "confers discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of

special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole." (*Gutierrez, supra,* 58 Cal.4th at p. 1360.) The court further held that, in exercising its sentencing discretion, *Miller* requires a trial court "to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." (*Gutierrez,* at p. 1361, quoting *Miller, supra,* 567 U.S. at p. ___ [132 S.Ct. at p. 2465].) Because the section 190.5(b) sentencing regime "authorizes and indeed requires consideration of the distinctive attributes of youth highlighted in *Miller*," the court found "no constitutional infirmity with section 190.5(b) once it is understood not to impose a presumption in favor of life without parole." (*Gutierrez,* at p. 1361.)

From these straightforward principles, and from the well-established principle that a judge may not impose punishment that a jury verdict does not allow, Mr. Mendoza reaches the incorrect conclusion that he is entitled to a jury trial as to whether he is "irreparably corrupt" and therefore deserving of a LWOP sentence. Nothing in *Gutierrez*, *Miller*, or any other authorities Mr. Mendoza cites supports that conclusion.

First, the jury found, beyond a reasonable doubt, three special circumstances, each of which makes Mr. Mendoza eligible for a sentence of LWOP. (§ 190.2.) Second, under section 190.5(b), when a jury has found special circumstance allegations true beyond a reasonable doubt, the court has the discretion to sentence the defendant to either LWOP or 25 years to life. Third, *Gutierrez* enumerates the *Miller* factors, in each case indicating that the "sentencing court" must consider those factors, and concludes with an explicit holding that "the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* . . . ." (*Gutierrez, supra,* 58 Cal.4th at pp. 1388-1390; cf. *People v. Sandoval* (2007) 41 Cal.4th 825, 839 [" 'so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to

select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury' "]; see also *Montgomery v. Louisiana* (2016) __ U.S.__ [136 S.Ct. 718, 735] ["*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility"].) Mr. Mendoza's assertion of a right to jury trial at sentencing is without merit.

b. Eighth Amendment and due process claims

Mr. Mendoza contends his LWOP sentences violated the Eighth Amendment and his right to due process of law, as well as the California Constitution's ban on cruel or unusual punishment. We find no merit in Mr. Mendoza's contentions, and no abuse of the trial court's sentencing discretion.

i. The sentencing proceeding

The sentencing hearing occurred on October 8, 2014, and began with the trial court's statement of its intention to undertake a *Miller* analysis "concerning the defendant's attribute[s] with respect to maturity, immaturity, capacity for change and what has also been alluded to as the distinct attributes of youth." Defense counsel then announced he would call only one witness, Daniel Vasquez, an expert on rehabilitation programs in state prison. The court said it would consider that testimony, but it would not help the court determine Mr. Mendoza's "suitability one way or the other as to whether he falls within the parameters of *Miller* . . . ." Counsel replied that "a juvenile's executive functions are presumed to be not that of an adult," and "so I am going to the issue of rehabilitation . . . ."

Mr. Vasquez then testified to his background at the California Department of Corrections and his expertise in corrections, including rehabilitation. After sustaining relevance objections to two questions, the court again observed that it "need[ed] information on why [Mr. Vasquez] believes that . . . Mr. Mendoza[] poses a threat or in the future would not pose a threat and so on. [¶] . . . [¶] . . . I need specific information to assist me in coming to a conclusion about Mr. Mendoza."

Mr. Vasquez then testified there are rehabilitation programs available in state prison, but that it is "much more difficult" for a person with an LWOP sentence to obtain access to those programs.

Defense counsel then argued that the trial court could take judicial notice that Mr. Mendoza had been in custody for about three years, "in juvenile until he was 18," and "now in the general population." In addition, counsel stated there was testimony in the record "that both the defendant and Mr. Arzate had been drinking and were drunk," and Mr. Mendoza was not the shooter but was "merely an accomplice." Further, Mr. Mendoza had no gang tattoos, and there was no evidence "that he is engaging in gang activity in the county jail."

The court then called counsel to a side bar, where this exchange took place:

"THE COURT: [¶] . . . [¶] I got this here that says [Mr. Mendoza] has a preliminary hearing pending for a murder, 245. And I looked at the probation and sentence report which is not exactly accurate in terms of the gun use allegation but they call him a guy –

"[THE PROSECUTOR]: Shot caller. [¶] He is, he is outside county jail.

"[DEFENSE COUNSEL]: But there is no evidence.

"THE COURT: I get that. I truly get it. [¶] But here's something, these are court records that indicate at least he is being held in custody right now in addition for other things for that charge, I am not saying true at all . . . . But that goes against, you see what I am trying to say?

"[DEFENSE COUNSEL]: But he is in the general population.

"THE COURT: Fine. But nevertheless, all I am saying is – this is what it is."

The proceeding continued, with defense counsel "just clarify[ing] that the thing the court could take judicial notice of is that the defendant is in the general population."

The prosecutor then argued there was "substantial evidence to show that the defendant was not immature; that the defendant knew exactly what he was getting

himself involved in." The prosecutor cited Mr. Mendoza's interview with Detective DiCroce, as to which "the court actually made a finding that Mr. Mendoza knew exactly the way to answer the questions and he acted very seasoned and very much intact with how to manipulate the interview by Detective DiCroce." The prosecutor stated the record contained no evidence that Mr. Mendoza has shown any kind of remorse, and "[h]e continued his gang activity after he got arrested and put in jail. [¶] He has not stopped doing what he is doing and what he loves to do, to be with the gang and now get elevated to a shot caller within the module." (Mr. Mendoza's confidential probation report contains a statement that "[i]t has been reported that the defendant is a 'shot caller' in the prison gang," and a synopsis of a pending case stating that he ordered his codefendants to assault another prisoner.)

Defense counsel responded by stating that, while the trial court "did find . . . there was some maturity . . . it couldn't be too mature where he denied being present where the evidence showed he was."

The court then found:

> "Number 1, these offenses were committed with at least one adult codefendant. However, the codefendant's age was 18 years, 8 months and 24 days.
>
> "Two, the evidence presented did not demonstrate or point to, with any sufficient specificity, that the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma or significant stress.
>
> "Three, the evidence presented did not demonstrate or point to, with any sufficient specificity, that the defendant suffers from cognitive limitations due to mental illness, developmental disabilities or other facts that did not constitute a defense but influenced the defendant's involvement in the offenses.
>
> "There was no evidence presented regarding capacity for change.
>
> "The court further finds, for purposes of this analysis and ruling:

"One, that the crimes involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness.

"Two, the victims were particularly vulnerable.

"Three, the defendant was not induced to commit or assist in the commission of these crimes.

"Four, the defendant threatened a witness, dissuaded a witness, thus interfering with the judicial process.

"Five, the manner in which the crimes were carried out indicates planning, sophistication or professionalism.

"The court notes that, in its opinion, these were senseless crimes on behalf of a criminal street gang."

The court referred to the side bar discussion described above, and observed that: "I am not admitting this, again, for fact, but the court is in possession, just came in possession recently, very recently, of court records indicating there is a case called VA135066 in which [Mr. Mendoza] is, in that case, defendant number 3. [¶] That case is pending, I believe, preliminary hearing. And at least one of the charges in that matter is homicide and murder. [¶] I believe there are also 245, 245(a)(2) and (a)(4) charges also. [¶] Again, it's simply being brought up just to say that [defense counsel] indicated . . . his belief his client was not involved in any . . . unlawful activity in the county jail itself and as a matter of fact, this case, I believe, arises out of, while your client, Mr. Mendoza, was in custody at county jail."

Having considered all the circumstances, the court concluded a LWOP sentence "would not raise an inference of gross disproportionality under the Eighth Amendment when taken into consideration with the factors previously mentioned." The court then denied the defense motion for a sentence other than LWOP.

ii. The law and its application here

We have already given a general description of the *Miller* and *Gutierrez* principles in part 8.a., *ante*. Specifically, and as summarized in *Gutierrez*, *Miller* requires the trial court to consider the juvenile offender's " 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' " (*Gutierrez, supra*, 58 Cal.4th at p. 1388.) The trial court must consider "any evidence or other information in the record" of " 'the family and home environment that surrounds [the juvenile],' " including "evidence of childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance"; " 'the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him,' " as well as "whether substance abuse played a role" in the commission of the crime; "whether the offender 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys' "; and " 'the possibility of rehabilitation,' " including the "extent or absence of 'past criminal history.' " (*Id.* at pp. 1388-1389.) "[N]ot every factor will necessarily be relevant in every case." (*Id.* at p. 1390.)

Mr. Mendoza contends the trial court "placed too much emphasis on the facts of the crime"; failed to apply "a presumption of immaturity"; "fail[ed] to consider available evidence relevant to the *Miller* factors"; and relied on facts that "were not true or supported by the record." He concludes that "[h]ad the sentencing court properly applied the *Miller* factors, it is probable that [defendant] would have received a different sentence . . . ." We disagree.

First, contrary to Mr. Mendoza's assertions, *Miller* did not establish "a presumption against juvenile life without parole sentences." The *Miller* decision "mandates *only* that a sentencer follow a certain process—considering an offender's

youth and attendant characteristics—before imposing a particular penalty." (*Miller, supra,* 132 S.Ct. at p. 2471, italics added.) Further, *Gutierrez* "did not suggest section 190.5, subdivision (b) evinces a preference *for* a sentence of 25 years to life. Rather, the court determined that '[u]nder *Miller*, a state may authorize its courts to impose life without parole on a juvenile homicide offender when the penalty is discretionary and when the sentencing court's discretion is properly exercised in accordance with *Miller*.' " (*People v. Palafox* (2014) 231 Cal.App.4th 68, 91 (*Palafox*), quoting *Gutierrez, supra,* 58 Cal.4th at p. 1379; *Palafox,* at p. 73 [finding a sentence of consecutive LWOP terms for murders committed at the age of 16 to be constitutional, "despite the trial court's inability to exclude the possibility of rehabilitation"].)

Second, neither the law nor the record supports Mr. Mendoza's claim that the trial court "placed too much emphasis on the facts of the crime." "[I]n making a decision under [section 190.5(b)], 'a sentencing court must consider the aggravating and mitigating factors enumerated in Penal Code section 190.3 and the California Rules of Court,' " including the defendant's age at the time of the crime. (*Palafox, supra,* 231 Cal.App.4th at p. 89, quoting *Gutierrez, supra,* 58 Cal.4th at p. 1387; *Gutierrez,* at p. 1388 [section 190.5(b) "authorizes and indeed requires consideration of the *Miller* factors"].) The court here did so, employing no presumption, weighing the factors, and concluding that LWOP was the appropriate sentence.

As *Palafox* states with respect to the *Miller* factors, "No particular factor, relevant to the decision whether to impose LWOP on a juvenile who has committed murder, predominates under the law. Hence, as long as a trial court gives due consideration to an offender's youth and attendant characteristics, as required by [*Miller*], it may, in exercising its discretion under Penal Code section 190.5, subdivision (b), give such weight to the relevant factors as it reasonably determines is appropriate under all the circumstances of the case." (*Palafox, supra,* 231 Cal.App.4th at p. 73.)

The record, just described at some length, shows the trial court urged defense counsel to address the *Miller* factors. We necessarily conclude – from the absence of

evidence concerning any adverse factors in his family and home environment, or of how familial and peer pressure may have affected his participation in the crime, or of substance abuse – that defense counsel determined there was no appropriate evidence to proffer. The trial court was well aware of Mr. Mendoza's role as "merely an accomplice," and that he had no criminal record. In the end, the essence of Mr. Mendoza's argument is that his age required a "presumption of immaturity" that in effect outweighs all other factors. That is not the law. (Cf. *Palafox*, *supra,* 231 Cal.App.4th at pp. 78-79 [trial court "found neither [the defendants'] conduct in the commission of the offenses nor anything about them exhibited an exceptional or unusual level of immaturity below that ordinarily experienced with juveniles"].) Here, the trial court, in connection with a defense motion during the trial, listened to Detective DiCroce's interview of Mr. Mendoza, and observed that Mr. Mendoza "may have been, at that time, young in age, but he did as well as almost anyone I have ever heard in terms of an interview to two investigators. [¶] There's no doubt in my mind that your client knew what was going on every instant that this interview was taking place." And: "[Mr. Mendoza] would be asked a question and . . . would give you a question back. [¶] This was cat and mouse."

In short, while certainly the trial judge must consider "youth and attendant characteristics," there is no basis for Mr. Mendoza's claim that the trial court did not do so.

Third, Mr. Mendoza contends the trial court "failed to consider mitigating facts." These were his aider and abettor role, lack of prior convictions, and "the fact that drinking alcohol could have contributed to [Mr. Mendoza's] participation in the offense . . . ." As to the last point, Mr. Mendoza points to "evidence that both [defendants] had been drinking alcohol" on the night of the murders, and the probation report's statement that defendant was arrested "while in possession of marijuana." He also argues the trial court should have considered Mr. Vasquez's report and testimony in determining whether Mr. Mendoza was amenable to rehabilitation.

Again, Mr. Mendoza's bald assertion that the trial court "fail[ed] to consider" this evidence finds no support in the record. The trial court expressly stated that "I am going to listen to and consider your expert [Mr. Vasquez]. I am going to do that, no doubt." And the evidence that defendants were drinking or that Mr. Mendoza was in possession of marijuana when arrested is hardly evidence that "substance abuse played a role" in the homicide offenses. (*Gutierrez, supra*, 58 Cal.4th at p. 1389.) In any event, the court heard that testimony at trial (from Mr. Mendoza's alibi witness, Josefina M.); heard Mr. Mendoza's statement in his interview with Detective DiCroce that he did not drink and had never been intoxicated; read the probation report; and expressly stated the evidence "did not demonstrate or point to, with any sufficient specificity, . . . factors that did not constitute a defense but influenced the defendant's involvement in the offenses." The further assertion that Mr. Mendoza "was likely induced to participate in the crime by the older, more sophisticated" Mr. Arzate is pure speculation.

Finally, Mr. Mendoza contends the trial court relied on facts that "were not true or supported by the record." This refers to the trial court's comments that court records showed charges in a pending case against Mr. Mendoza included a murder charge. In addition, Mr. Mendoza challenges the trial court's finding that defendant "threatened a witness, dissuaded a witness, thus interfering with the judicial process."

As to the first claim, the court apparently misread the document in question, which, according to Mr. Mendoza, showed he was charged "with assault by force likely to produce great bodily injury on a person in county jail in violation of Penal Code section [245], subdivision (a)(4)," not murder. But the court very clearly stated that it was not considering the charges as true, but as "indicat[ing] at least he is being held in custody right now in addition for other things . . . ." The court further stated that "it's simply being brought up just to say," in response to defense counsel's "belief his client was not involved in any activity, criminal activity, unlawful activity in the county jail itself," while "as a matter of fact, this case, I believe, arises out of, while your client, Mr. Mendoza, was in custody at county jail." We see no possibility that, had the court

realized the only charge was assault by force likely to produce great bodily injury, its conclusion would have been any different.

As for the court's finding that Mr. Mendoza dissuaded a witness, the court did not state the basis for its finding on this aggravating factor. Defense counsel contends there is no basis in the evidence for the finding, while the prosecutor suggests the trial court was referring to Mr. Mendoza's presence with Mr. Arzate and two other gang members when Mr. Arzate slapped and threatened to kill April S. and displayed the Cypress Park gang tattoo on his stomach as he was walking away. We agree with respondent that, even though Mr. Mendoza was not charged in this incident, his presence with Mr. Arzate and other gang members, and his participation in the earlier assault on April S., justify the trial court's inclusion of this aggravating factor. In any event, in view of the five other aggravating factors the trial court listed, all fully supported by the evidence, any error in considering this factor would not have changed the result.

In short, here, as in *Palafox*, the trial court "thoughtfully weighed the applicable factors . . . and implicitly concluded defendant was unfit ever to reenter society. We cannot say it exceeded the bounds of reason, all of the circumstances being considered, under section 190.5, subdivision (b)." (*Palafox*, *supra*, 231 Cal.App.4th at p. 91.)

iii. The California Constitution

Mr. Mendoza also contends his sentence was cruel and unusual under article 1, section 17 of the California Constitution because it is "grossly disproportionate to the offense for which it is imposed." (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*); *id.* at p. 480 ["a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability"].)

" 'To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the

defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is "grossly disproportionate to the defendant's individual culpability" [citation], so that the punishment " ' "shocks the conscience and offends fundamental notions of human dignity" ' " [citation], the court must invalidate the sentence as unconstitutional.' " (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1300.) "Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment." (*Palafox, supra,* 231 Cal.App.4th at p. 82.)

Here, for the reasons given by the trial court, the LWOP sentences cannot be said to be disproportionate to Mr. Mendoza's culpability. The circumstances of the offense were ghastly. Mr. Mendoza, an admitted gang member, gave the shotgun to Mr. Arzate to assault April S., and they went together into rival gang territory, lying in wait and killing two innocent people and badly wounding another in a brutal fashion with no provocation whatsoever. There was no evidence of any deficit in Mr. Mendoza's mental capabilities, and indeed the record suggested the opposite to the trial judge. Contrary to his assertion, Mr. Mendoza "bears no semblance to the immature 17-year-old defendant in *Dillon* who shot and killed his victim in a panic and was sentenced to life in prison despite the views of the judge and jury that his sentence was disproportionate to his moral culpability." (*People v. Williams* (2015) 61 Cal.4th 1244, 1290.) It is Mr. Mendoza's conduct that offends fundamental notions of human dignity, not the punishment imposed.

c. Ineffective assistance of counsel at sentencing

Mr. Mendoza's final contention is that he received ineffective assistance of counsel at sentencing. We think not.

We have already noted the relevant standard (see part 3.c., *ante*), that is, Mr. Mendoza must establish that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and he was prejudiced as

a result. (*Carter, supra,* 30 Cal.4th at p. 1211; *Strickland, supra,* 466 U.S. at pp. 694, 687.) Mr. Mendoza has not done so.

We note some further principles guiding our analysis.

"Judicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " (*Strickland, supra,* 466 U.S. at p. 689.)

"We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citation.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*).)

As we have seen, defense counsel did not present evidence on several of the *Miller* factors, such as an unusual level of immaturity, an adverse family or home environment, substance abuse, or the possibility of rehabilitation (except for Mr. Mendoza's lack of criminal history and Mr. Vasquez's testimony about prison programs and the lack thereof). This failure to present mitigating evidence "about [Mr. Mendoza's] background and history, psychological problems, education problems or other facts which would show that [defendant] is not 'irreparably corrupt,' " Mr. Mendoza now argues, constituted ineffective assistance of counsel.[5] He asserts there can be no satisfactory explanation of

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[5] Mr. Mendoza also refers to counsel's failure to correct the trial court's erroneous belief, discussed in part 8.b.ii, *ante,* that the charges against Mr. Mendoza that arose in county jail after he was arrested included a murder charge. We have already observed the trial court did not consider that charge as true, and counsel's failure to point out it was

this failure, and that the record demonstrates "that counsel had access to such information," yet failed to present it to the court, and failed to obtain an expert to review the material and render an opinion. Mr. Mendoza cites the following information.

First, Mr. Mendoza cites an offer of proof defense counsel made during the trial. Counsel stated that Mr. Frank Saucedo, an official with a gang intervention program designed to work with "youth who had previously been active in a gang," would testify that Mr. Mendoza entered that program on September 10, 2010 (about two weeks before the murders) and completed all its requirements before his incarceration (in January 2012).

Second, Mr. Mendoza refers to information, some of which was lodged with the trial court on the date of the sentencing hearing. The documents consist of (1) about 430 pages of records from Aviva Family & Children's Services dating from March 25, 2005 to April 10, 2008, and (2) about 65 pages of records from Lincoln Heights Recovery Center, dating from October 18, 2010 (several weeks after the murders) to March 2, 2011 (when Mr. Mendoza was discharged from the program after withdrawing for unknown reasons). Mr. Mendoza's therapy at Aviva began after the death of Mr. Mendoza's father "to help him with grief and loss and anger management issues." The Lincoln Heights records show defendant was referred for treatment by his probation officer after an arrest for possession of a firearm and marijuana. Some excerpts from these documents appear in the margin.[6]

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not, given the presence of the assault charges, would have had no effect on the trial court's conclusion.

[6] Mr. Mendoza characterizes the Aviva records as containing, for example, "information that [Mr. Mendoza] suffers from mental illness and possible developmental/intellectual delays." The April 2008 discharge summary shows a diagnosis of "oppositional defiant disorder," but there is no indication of "developmental/intellectual delays." Mr. Mendoza says he was "part of the special education program" in school, and he was, but a March 2006 assessment indicated he was no longer eligible for special education services, as he was "a very capable young boy who has compensated for his learning disability" and "does not need any supports in the

Mr. Mendoza's claim of ineffective assistance of counsel fails, because he has not shown that " ' "there simply could be no satisfactory explanation" ' " (*Mendoza Tello, supra,* 15 Cal.4th at p. 266) for counsel's decision not to call Mr. Saucedo as a witness or to use the Aviva and Lincoln Heights records he cites. While the Aviva records show

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classroom to meet California grade level standards." It was "[Mr. Mendoza's] behavior that prevents him from being successful in the general education setting"; he "refuses to do any work."

The Aviva records show Mr. Mendoza, throughout the therapy, "fights in school and at home," "argues with siblings, peers and adults," and had mood swings and tearfulness after his father's death, and "lies [and] steals things." In his initial assessment in March 2005, his mother reported "anger problems for many years" that got worse after his parents divorced and "a lot worse" after his father died in February 2005. Mr. Mendoza's mother reported his father was verbally abusive to her during the marriage, but not to Mr. Mendoza, and both defendant and his mother denied ever being physically or sexually abused. Mr. Mendoza admitted to thoughts of suicide after his father's death. The therapist reminded mother of "the importance of setting consistent consequences for [Mr. Mendoza's] negative and defiant behavior," and mother spoke about her difficulty controlling Mr. Mendoza. There were visits from the Los Angeles County Department of Children and Family Services after a report from Mr. Mendoza's therapist (in June 2005) that Mr. Mendoza told her his mother had been hitting him.

Mr. Mendoza's case was closed in April 2008, with both mother and son concluding the therapy was not working. His mother stated that Mr. Mendoza "was not going to change anytime soon" and therapy should be discontinued because he had not changed anything since beginning treatment. The discharge summary stated Mr. Mendoza had received individual, family and collateral therapy; was often reluctant to participate; often expressed anger at others and minimized his own responsibility. His mother often expressed anger at Mr. Mendoza, minimized her own responsibility and would not apply therapist's suggestions in a consistent manner. Mr. Mendoza was argumentative, rarely complied with requests, was easily angered and aggressive physically and verbally, deliberately annoyed family members, and blamed others for his misbehavior.

In the Lincoln Heights records after the murders, Mr. Mendoza reported (in October 2010) that he currently had no thoughts or plans of suicide; his drug of choice was marijuana (but he had not smoked any since December 2009); his secondary drug of choice was alcohol; he drinks alcohol, about two beers once a week; and neither he nor his family have a history of drug abuse. In January 2011, his treatment team believed Mr. Mendoza was "developing a positive attitude towards self and sobriety," but he was discharged for excessive absenteeism on March 2, 2011.

Mr. Mendoza received therapy over the course of three years after the death of his father, and show a mother with whom he was at odds and who was unable to control him, they also show Mr. Mendoza was virtually impervious to treatment at an early age (11-14). The Lincoln Heights records show he was cooperative with the drug treatment program and tested negative on random tests, but he was discharged for excessive absenteeism. (This was after the murders, and the records do not reflect a serious substance abuse problem.) One might also conclude that the proffered testimony from Mr. Saucedo – that Mr. Mendoza entered a gang intervention program shortly before committing two murders – might not advance Mr. Mendoza's cause.

The record also shows defense counsel recognized his obligation to investigate and present mitigating evidence on the *Miller* factors. At an in camera proceeding in August 2014, counsel sought additional funds for further investigation "regarding *Gutierrez* and . . . *Miller*." At that hearing, defense counsel indicated he did not then "have enough facts to determine if I need an expert." (Counsel stated there was no indication Mr. Mendoza "had psychological problems that required an expert to examine" but that after *Gutierrez*, "it is pretty clear that at this stage of the case, the defense attorney could be I.AC. if we don't fully examine the kind of issues that come up under 190.3.")[7] On September 26, 2014, counsel sought a continuation of the sentencing

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[7] At the in camera hearing, the court described defense counsel's motion as mentioning "school records, jail records, psychological history[,] social history . . . ." The court asked if that would require expert interpretation, and defense counsel replied that "[i]t may," but he did not yet have enough facts, and "we have never asked those kinds of questions from the facts that we have." Counsel acknowledged that, after *Gutierrez*, it was necessary to fully examine the issues, "[b]ecause it goes directly to the information you are going to need in determining what kind of sentence you give. [¶] . . . [¶] But so the bottom line question is, as I understand *Miller* and I understand the *Gutierrez* cases, can this person be rehabilitated?" Defense counsel referred to the witness from the gang abatement program, and said "there are other people associated with that program who came in contact with my client. [¶] And so we are not just looking for the administrator of the program but the other witnesses who can talk to what my client did in that particular program along with other information that I don't know if I can disclose at this time." Defense counsel anticipated a hearing "at which [he would]

because "the investigative reports on the expected testimony of three witnesses the defense will call in support of mitigating factors will not be ready until Thursday, September 25th."

Under these circumstances, and given the requirement that our "scrutiny of counsel's performance must be highly deferential" (*Strickland, supra,* 466 U.S. at p. 689), we are not in a position to say that it was unreasonable for counsel not to present the evidence Mr. Mendoza now claims he should have presented. The record does not show what steps counsel took to assess the information he had, but given his comments at the in camera hearing, we can only assume he acted properly and determined the information as a whole would hurt more than it would help. To the extent Mr. Mendoza complains that counsel presented no evidence from family members or others "about [defendant's] life, trauma he may have suffered, difficulties he may have endured or about positive attitudes he may have had," he does not suggest who those witnesses were or what they would have said. In other words, the record sheds no light on why counsel did not present such witnesses, and "[a] claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267.)

9. Error in Mr. Arzate's Sentence

The court sentenced Mr. Arzate, on count three (the attempted murder), to a base term of seven years, plus a consecutive term of 25 years to life under section 12022.53,

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present all of these materials to the court for consideration," "after disclosure to the district attorney." Counsel indicated he would give notice "if we call a psychologist or some other expert with respect to the question of rehabilitative capability of this particular individual . . . ." The court and counsel then discussed the amount of funds requested, and counsel indicated that "[s]ome of the hours arguably have been spent with me already with trying to come up with maybe possible character issues." Defense counsel also mentioned possible factual testimony from Lillian R. to clarify whether Mr. Mendoza "was as drunk as she claim[ed] Arzate was," and other possible character testimony.

subdivisions (d) and (e)(1) (enhancement for personal and intentional discharge of a firearm causing great bodily injury, also applicable to any principal in the commission of the offense if that person committed the offense for the benefit of a gang and any principal in the offense used a firearm), and a consecutive 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)).

As Mr. Arzate points out and respondent concedes, a court may not impose a gang enhancement in addition to the firearm enhancement, "unless the person personally used or personally discharged a firearm in the commission of the offense." (§ 12022.53, subd. (e)(2).) In this case, the only jury finding was that a principal personally and intentionally discharged a firearm causing great bodily injury, not that Mr. Arzate did so. Accordingly, the consecutive 10-year gang enhancement imposed on count three was unauthorized and must be stricken. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238.)

DISPOSITION

Mr. Mendoza's judgment is affirmed. Mr. Arzate's judgment is modified to strike the consecutive 10-year gang enhancement imposed on count three, and as so modified, is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect the modification in Mr. Arzate's sentence and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.