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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARQUISE CALIZ, Defendant and Appellant.	B265903 (Los Angeles County Super. Ct. No. BA393788)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The People filed an information charging Marquise Caliz and Rayvon Moreland with the murder of Andre Lockhart and the attempted murder of Steven Wade. The People alleged Caliz and Moreland committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by the gang, within the meaning of Penal Code section 186.22, subdivision (b)(1)(C).[1] The People further alleged a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e), a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1), and a principal personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (d) and (e)(1). The case was tried to a jury, which deadlocked (10-2 in favor of guilt for Caliz, 11-1 in favor of acquittal for Moreland), and the court declared a mistrial.

The People filed an amended information again charging Caliz and Moreland with the murder of Lockhart and the attempted murder of Wade, with associated gang allegations. The People also alleged firearm enhancements under section 12022.53, although instead of alleging enhancements under subdivisions (b) and (e)(1), (c) and (e)(1), and (d) and (e)(1), the People alleged the enhancement under subdivisions (b) and (e)(1) three times.[2] The amended information added a third count

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[1] Undesignated statutory references are to the Penal Code.

[2] The information summary on the cover page of the amended information included an allegation under section

against Moreland for being an accessory after the fact with knowledge of the murder and attempted murder committed by Caliz, in violation of section 32, with an associated gang allegation.

Prior to the retrial, Moreland entered a guilty plea to voluntary manslaughter and received a prison sentence of 10 years. The case against Caliz was tried again to a jury, which convicted Caliz on both counts and found true the gang allegation under section 186.22, subdivision (b)(1)(C), and the firearm allegations under sections 12022.53, subdivisions (b) and (e), (c) and (e)(1), and (d) and (e)(1). The trial court sentenced Caliz to 25 years to life for the murder of Lockhart, an indeterminate term of life in prison with a minimum eligibility of 15 years for the attempted murder of Wade, plus two terms of 25 years to life for the firearm enhancements under section 12022.53, subdivision (d). The court stayed execution of the sentence on the gang enhancement, but did not impose a term.

Caliz timely appealed. He argues the trial court erred in admitting Moreland's testimony from the first trial and statements by Moreland to a confidential jailhouse informant, excluding Caliz's eyewitness identification expert, admitting evidence of prior crimes and juvenile court adjudications, and imposing enhancements under section 12022.53, subdivisions (d) and (e)(1). We affirm.

12022.53, subdivision (d), against Caliz and Moreland in connection with the murder of Lockhart, and an allegation under section 12022.53, subdivision (b), against Caliz, and an allegation under section 12022.53, subdivision (d), against Moreland, in connection with the attempted murder of Wade.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The 51 Troubles and the Neighborhood Crips*

In 2011 the 51 Nothing But Trouble Gangster Crips criminal street gang claimed the territory east of Western Avenue and west of Hoover Street, and north of 54th Street and south of approximately 48th Street, in which its members manufactured, distributed, and sold drugs. The 51 Troubles also had an elaborate commercial theft and burglary ring, and committed street robberies, murders, and attempted murders. Members and associates of the 51 Troubles commonly dressed in red, white, and blue, and wore Texas Rangers athletic gear and baseball hats with a red or blue T.

The 51 Troubles were surrounded on three sides by rival gangs. To the south of the 51 Troubles were the 55 Neighborhood Crips (whom the Troubles derogatorily called "French fries"), the 57 Neighborhood Crips (whom the 51 Troubles called "five slates"), and the 58 Neighborhood Crips (whom the 51 Troubles called "five skates"), criminal street gangs that collectively referred to themselves as the Rolling 50's Neighborhood Crips or the Rolling 50's (whom the 51 Troubles collectively called "naps"). To the north of the 51 Troubles was territory claimed by the Rolling 40's Neighborhood Crips, who were friendly with the Rolling 50's Neighborhood Crips. And to the west of the 51 Troubles were the Six-Deuce Brims, a Blood gang. The 51 Troubles' only local ally was to the east, in territory claimed by the 52 (or Five-Deuce) Hoover Crips. The 52 Hoover Crips commonly dressed in orange and blue and wore Houston Astros baseball hats.

The rivalry between the 51 Troubles and the 55 Neighborhood Crips was an old one, arising from the fact that the southern border of the territory claimed by the 51 Troubles,

54th Street, was the northern border of the territory claimed by the 55 Neighborhood Crips. It was not safe for a member of the 51 Troubles to travel into 55 Neighborhood Crip territory except to drive down a major street like Normandie Avenue without stopping, flying colors, or flashing gang signs.

Caliz was a member of the 51 Troubles. His moniker was Tiny Crumb.[3] He wore an "EKG haircut" suggesting a person's heartbeat going across a monitor that stops and "goes flatline," meaning someone who makes "other people go flatline" by murdering them and indicating Caliz's affiliation with the Flatline Clique of the 51 Troubles. Rayvon Moreland was also a member or associate of the 51 Troubles. Moreland went to high school with Caliz's older brother, who was a Five-Deuce Hoover and whose moniker was Baby Fat Rat.

Andre Lockhart, whose gang moniker was D-Rocc, was 28 years old and a prominent leader or "the general" of the 57 Neighborhood Crips. Steven Wade was 16 years old and a member or an associate of the same gang, although he lived in territory claimed by the 51 Troubles. Wade's moniker was Tiny Draw Down (one of Lockhart's brothers was Baby Draw Down).

B. *Witnesses to a Killing*

On the afternoon of December 27, 2011 Lockhart and Wade were walking outside a market on the corner of 55th Street and Normandie Avenue. The two men were frequently at the market, which was a known hangout of the 57 Neighborhood Crips.

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[3] Gang members often take the moniker of more senior gang members who act as their role models. The hierarchy of gang monikers is Big, Little, Infant or Baby, and Tiny. Caliz's moniker, Tiny Crumb, or C4, suggests his gang had a Big Crumb, Little Crumb, and Baby or Infant Crumb before him. Caliz's brother was known as Baby Crumb.

A car driving south on Normandie Avenue turned right on 55th Street. Lockhart told Wade to watch the car because "it looked fishy, as if he knew something was about to happen." Wade turned and watched the car as it turned onto 55th Street. The car stopped near the market, and a man wearing a "fitted shirt" got out of the car from the back seat behind the driver, took a shooting stance, and fired multiple shots at Lockhart and Wade. The shooter then got back into the back seat of the car, and the car drove away westbound on 55th Street. Lockhart died from a gunshot wound to the head. Wade survived but suffered permanent injuries.

The shooting was captured on videotape. Police obtained video recordings from two cameras on the corner market, one facing west on 55th Street and one facing north on Normandie Avenue. The police could not tell from the video recordings who the shooter was, even though they attempted to enhance the quality of the video. The prosecutor played portions of the recordings from the two cameras for the jury.

There were two witnesses to the attack, in addition to the victims. Talitha Lockhart, Andre Lockhart's sister, was sitting in a parked car on 55th Street that afternoon. Her sister-in-law, Irene Mason, had driven the two of them to visit Talitha's parents, who lived on 55th Street, two buildings down from the corner market. As they drove by the market, Talitha waved to Wade and Lockhart on the corner. Mason made a U-turn on 55th Street and parked the car facing the corner store.

Mason got out of the car and went into the house, while Talitha stayed in the front passenger seat. A few minutes later Talitha saw, through the windows of the minivan parked in front of her, a car turn onto 55th Street and park in the middle of the street about 25 feet away from her, and a man get out of the back seat behind the driver and fire four or five shots. Although

Talitha could only see the shooter from behind, she saw he was a caramel-complexioned African-American male in his early 20's, approximately five feet eight inches tall, of medium build weighing approximately 130-140 pounds, and wearing jeans with a short-sleeve green shirt. She could see his arms and the side of his face.

Immediately after she heard the gunshots, Talitha ran to the Lockhart house. She later went back to the market, learned her brother had died, and observed Wade speaking on his cell phone. Talitha told a woman at the scene that the shooter was wearing a green shirt.[4]

Meanwhile, Mason had just stepped inside the Lockhart residence when she heard gunshots. She turned around because Talitha was still in the car parked in the street, and she saw a car driving by "really fast." She was able to see the driver had medium brown dark skin, and a white shirt, and was leaning over at a 45-degree angle to the right as he drove. Talitha ran up to the residence screaming about her brother, and Mason ran to the store and saw Lockhart on the ground with a gunshot to the forehead. Mason subsequently identified Moreland in a photographic lineup as the driver of the car she saw, and wrote, "Speeding, duck to the side while driving." Mason also identified Moreland in court.

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[4] Talitha testified that members of the 57 Neighborhood Crips told her not to testify in court because they wanted to retaliate against Caliz themselves, but she decided to testify because she witnessed the shooting and wanted justice for her brother. She acknowledged, however, that people in the area controlled by the 57 Neighborhood Crips generally believe it is wrong to testify in court against a gang member because "they want to handle it themselves."

C. *Police Interviews and Jailhouse Informants*

The police interviewed Wade twice, first in the hospital on December 30, 2011, and then at the police station on February 1, 2012. At the first interview in the hospital, Wade was very medicated, uncomfortable, in pain, and "coherent but not very focused." Wade said he was walking to the store with Lockhart and just before they turned the corner to go into the store "somebody came and turned the corner and somebody just hopped out the backseat and just started shooting." Wade described the shooter and said it "probably was the Troubles," but he did not remember what clothes the shooter was wearing, and he did not give the police the shooter's name. Wade stated he remembered the shooter came out from behind the driver's back seat door, but he "couldn't really see who actually did it." Wade was not particularly forthcoming in the first interview, although he said he always had problems with the Troubles.

At the second interview on February 1, 2012 Wade said his memory was better than it had been during the first interview when he was in the hospital. Wade told the police that Tiny Crumb, or TC for short, was the one who shot him. Wade said he recognized Tiny Crumb because he had previously seen him four or five times, including on 51st Place where they both lived, and he had witnessed Tiny Crumb write his name in graffiti on a wall.[5] Wade stated he did not see Tiny Crumb when the car pulled up, but he saw him and recognized him "when he hopped

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[5] Five days before the shooting, Wade saw Tiny Crumb write "NHCK," which stands for "Neighborhood Crip Killer." Wade told the police this meant "he don't like us, and he want to kill us, and that's why he shot at us, and killed [Lockhart]."

out" of the car.[6] Wade stated, "I seen the dude shoot us when he -- when he shot us. I seen him. That's -- that's the truth. I mean, I really did see him shoot us."

Wade gave the police a description of the shooter and identified Caliz in a six-pack photographic lineup, stating Caliz was "the dude who shot me." Wade wrote, "The picture that I circled looks like the guy who committed the crime. And he came out of the back seat behind the driver and just started shooting. I seen my friend got shot in front of me. And that's when I turned and looked at him. And then he shot me, and I fell." At one point Wade also said, "If this is Tiny Crumb, that's him."

Consistent with his statements to the police, Wade sent Talitha a text message with a photograph of Caliz. He told her he had seen the shooter before and he remembered the shooter's face. Talitha asked Wade, "How do you know that's him," and Wade answered, "Because I remember his face." Wade said in his text message to Talitha, "He is going to get his. All the homies know his face." Wade also said "the Troubles did it." Talitha later identified Caliz as the person in the picture Wade had identified, and she said Caliz looked like the shooter "because of his facial expression and his ears, his skin complexion," and his earrings.

The police arrested Caliz on February 7, 2012 and interviewed him. The detective in charge of the investigation, Stacey Szymkowiak, tried to make Caliz believe the police had strong evidence against him by telling Caliz they had a video

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[6] Wade told the detectives, "I don't know how I missed that car. If I would have seen that car turn around, things would have been much different, if we would have seen it turn the corner." He testified, "I was just looking around, wasn't paying attention to what I was supposed to pay attention to," like "pay attention for people like hopping out cars and shooting at people."

recording of him shooting Lockhart on 55th Street and Normandie Avenue and showing Caliz a still photograph of Moreland's car at the scene of the crime. Caliz denied he was involved in the shooting. After interviewing Caliz for approximately an hour and a half, Detective Szymkowiak put Caliz in a cell with a confidential informant.

The confidential informant, a former Crip gang member with a criminal record, testified that law enforcement places him in locked cells with individuals to assist in murder investigations. The investigating officers tell the confidential informant nothing about the case other than, for security reasons, the suspect's gang affiliation.[7] The officers place audio and video wires on the confidential informant, and put him in a jail cell, followed by the suspect. The confidential informant receives $300 for each interview. For this investigation, the confidential informant decided he would say he was from the 74 Hoovers, who were allied with the 51 Troubles. The confidential informant engaged Caliz in conversation, which was recorded.

The prosecution played the recording of the conversation between Caliz and the confidential informant for the jury.[8] Caliz

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[7] The confidential informant needs to know the suspect's gang affiliation to determine whether and under what pretenses it is safe to go into the cell. The confidential informant usually poses as a member of a gang that is allied with the suspect's gang.

[8] The conversation is strewn with expletives, inaudible in some parts, and difficult to understand in others. The confidential informant testified Caliz appeared concerned about the camera in the cell, and would shout some statements loudly for the camera, and whisper others softly to the confidential informant. The confidential informant also had to explain to the jury some of the gang terminology he and Caliz used, such as

identified himself to the confidential informant as Tiny Crumb from the 51 Trouble Gangster Crips, and said he was in custody on a murder charge. Caliz admitted he committed the crime with a "burner" and had a "light green shirt on," but said he got rid of the clothes he wore that day and the "gizat" or murder weapon he used. The confidential informant responded that, as long as Caliz "got rid of that thing," Caliz would be "straight." Caliz also told the confidential informant that, although the police had witnesses, had pictures of him "on camera," and knew what kind of clothes he was wearing when he "did it," the police could only see his body type in the video recording and could not tell it was he. Caliz admitted to the confidential informant, however, he was concerned the police had pictures of him from a camera, and if the police had a video of him and knew his clothing, then it was "a wrap" and he was "done." Caliz also stated he knew the driver, who was one of his partners from his neighborhood.

After the conversation with Caliz in the jail cell, the confidential informant debriefed the detectives, who had been listening to the conversation. The confidential informant immediately asked the detectives, "Did the defendant have on a lime green shirt," and Detective Szymkowiak said he did. The confidential informant thought this was a particularly important piece of information he had learned from Caliz.

The police arrested Moreland on February 16, 2012. At the police station the detectives told Moreland his car was involved in the crime and they had another person in custody. Moreland refused to talk to the detectives, who subsequently also put Moreland in a cell with the confidential informant.

"Hoove" for a member of the Hoover Crips, "Hoods" for members of the Neighborhood Crips, "Cuz" for fellow Crip gang members, "Dog" or "Damus" for members of Blood gangs, and "gat," "gizat," "burner," "blower," or "disang" for a firearm.

In his conversation with the confidential informant, Moreland identified himself as Tiny Mickey Mouse from the Trouble Gangster Crips. He said he was in custody for a murder involving his car, and the police told him he was "the getaway driver." Moreland admitted he was the driver and "Marquise Caliz," known as Tiny Crumb, was the shooter. Moreland confirmed for the confidential informant it was just he and Caliz, "man-to-man, homie-to-homie," and no one else, involved in the shooting. Moreland said the police also had Caliz in custody. Moreland told the confidential informant he never touched the "burner" used in the shooting because he and Caliz each had a gun. Moreland told the confidential informant he did not get out of the car and use his gun but Caliz "got out and did his thing" with his gun. The confidential informant told Moreland he would "make a call in the morning" to someone "higher up" in Moreland's gang to try to get a "hit or something" on Caliz, who Moreland believed was implicating him in the crime.

D. *Social Media Posts and Jailhouse Calls*

Detective Szymkowiak obtained, in response to a search warrant, copies of statements and photographs posted by Caliz on a social media site. These materials included numerous photographs of Caliz and members of his family. On December 31, 2011 Caliz posted "Fuck all naps" and "Got to get my bitch out cuz on 50's." On January 1, 2012 Caliz posted a photograph of himself wearing a blue Texas Ranger hat, and a photograph of himself with smoke coming out of his mouth, with the caption, "Smoking on nothing but kill."[9] A few days later, Caliz posted

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[9] Caliz testified this referred to smoking "killer weed," a type of marijuana Caliz said "is highly known in Texas." Caliz stated that "a lot of people in South Central call it killer weed," and he

the following: "My New Years went up low key. You can say I started off my New Years with the shit shit an it ain't gone stop until these bitch ass nigga[s] get the point. Mr. C#4 is not to be played with." The records showed that Caliz opened this particular social media account on December 12, 2011, and his last post was on the morning of February 7, 2012, shortly before he was arrested at 10:45 a.m.

On July 24, 2012, the day of Caliz's preliminary hearing, Caliz made a telephone call from jail to a woman named Noel, who was a relative of Caliz's girlfriend. The telephone call was recorded, and the prosecutor played it for the jury. During the call, Caliz said to Noel, "Hey, I need you to do me a real big favor. [¶] I need you to be an alibi for me in my case. [¶] Because, shit is like getting real . . . . This shit is like hectic as fuck and . . . I need an alibi in my case because basically saying like saying where I was at that day." Caliz also stated, "I need you to talk to my sister for me. Call her and . . . get in contact with my lawyer because this is like really getting hectic, like this is my only chance at anything. And . . . I've got to basically get my story straight about my whereabouts that day. And they got to be the same with your story." Referring to witnesses at the preliminary hearing, Caliz stated, "[T]hey came to court or whatever crying and shit, pointing fingers, and all that extra shit, but I still got a chance to beat in my case. I just got to have an alibi and I was with you that day." Caliz emphasized to Noel, "No whereabouts we had in the 50s. Like I got to be exempt from that area." Caliz suggested, "We can start off by saying you came and picked me up from my sister's house. And if they ask you what I was wearing, remember I had them black and red Adidas on."

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looked it up on a website because he wondered why people called it that.

E. *Prior Testimony*

Wade and Moreland testified at the first trial, and the prosecutor, after the trial court found them both unavailable (which gives rise to one of the issues in this appeal), read that testimony to the jury in the second trial. In his trial testimony, Wade recanted many of the statements he made to the detectives in his February 1, 2012 interview at the police station. Wade stated he did not want to testify in court about what happened the day he was shot, but he came to court to stop the police from coming to his parents' house and looking for him.[10] Detective Szymkowiak testified "it took a lot of effort" to find Wade and bring him to court for the proceeding, and there were concerns about gang members in the courtroom audience. At the second trial, Detective Szymkowiak described a conversation he had with Wade's father: "His father told me numerous times that he did not want his son testifying in court, told me that he was not going to testify, said he wasn't going to bring him down here, said he was in fear for his son's life, said his son already had been shot. And he wanted him to have nothing to do with this case or with us."

Wade admitted he associated with the 57 Neighborhood Crips, but he denied his moniker was Tiny Draw Down, denied he knew who the rivals of 57 Neighborhood Crips were, denied he saw the shooter, denied he saw anyone get out of the car, denied he knew anyone named Tiny Crumb, and refused to identify Caliz in the courtroom. Wade testified he fell before he could see the shooter's face, but he did see three or four people in the car.

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[10] Wade also had a page on a social media site, on which he posted, a week before the first trial,"Fuck the police cuz. Y'all some bitches. Come catch me, bitches. I ain't going to go to no court, dumb ass."

Wade said he did not tell the truth during the December 30, 2011 hospital interview because he "was traumatized at the time," and he told the police on February 1, 2012 that he knew who shot him based on a photograph he had received in a text message.

Moreland admitted in his trial testimony that on December 27, 2011 he was driving a car from which Caliz emerged and fired shots. Moreland explained that Caliz came up to his car as he was talking with some women on 53rd street and said, "Give me a ride, give me a ride." Moreland initially refused, but he agreed when Caliz said he only needed a ride around the corner to his girlfriend's house on 55th Street. Caliz got in the passenger side back seat and told Moreland to drop him off at 55th Street and Normandie Avenue. After Moreland turned on 55th Street, Caliz said, "Stop. Stop. Stop." Moreland stopped, heard the back door open, and then heard gunshots. Moreland ducked because he did not know where the shots were coming from or who was shooting. Caliz got back into the car and said, "Go. Go. Go." Caliz said, "Just drive. Just drive. I got to drop this thing off. I got to drop this thing off. I got him. I got him," which Moreland understood meant Caliz "was the one was doing the shooting." Moreland became scared and said, "Man, you need to get out of my car. I don't want no part of this. You got to get out of my car." Caliz responded, "Man, shut up. Don't say nothing about nothing. Don't say nothing about nothing. Just drive. Just drop me off at 51st and Denker." Moreland complied. When they arrived, Caliz jumped out of the car while it was still moving. Moreland "drove directly home in shock not knowing exactly what to do." Later, Moreland learned someone had died on that street corner.

Moreland testified he felt terrible because "someone's life was taken" on December 27, 2011 and he "didn't have any intentions for that to happen at all." He denied he had any

advanced knowledge Caliz was going to shoot anyone when Caliz got into Moreland's car that day.[11]

F. *Caliz's Testimony*

Caliz testified in his defense at the second trial. He admitted he was a member of the 51 Troubles (but said he was "not [an] active member") and his moniker was Tiny Crumb, although he stated he was "not the only Tiny Crumb" in the gang.

Caliz denied he got into Moreland's car on December 27, 2011, denied he had a gun on that date, and denied shooting Lockhart or Wade. He testified he heard about the shooting from "gang . . . rumors going around," but that was all he knew. He denied knowing who Lockhart was: "Never seen him before. Never had interaction with him. Nothing." He conceded, however, that killing a rival gang member was one of the best things one could do for one's gang. He also said he did not own a green shirt.

Caliz acknowledged he was in the jail cell with the confidential informant and the video played for the jury accurately showed their conversation. Caliz denied he told the confidential informant he committed the crime. Caliz admitted he told the confidential informant he got rid of the gun, but said he was not "making reference" to any "specific gun." Caliz also denied he told the confidential informant he was wearing a green

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[11] Moreland went to the prosecutor's office with his attorney and provided this information several weeks before the first trial. During the first trial he was questioned extensively by his attorney, the prosecutor, and counsel for Caliz about whether he expected any leniency in exchange for coming forward with these facts. Moreland also testified he received threats from other inmates for testifying and felt threatened by gang members in the courtroom observing the trial.

shirt on the day of the incident, but was repeating what Detective Szymkowiak had told him about the shooter. Caliz said that when he was shown the video of the shooting he asked his attorney if she could make the picture clearer because it did not show him committing the crime.

DISCUSSION

A. *The Trial Court Did Not Err in Admitting Moreland's Testimony from the First Trial*

1. *Relevant proceedings*

Before the second trial started, the prosecutor advised the court she intended to call Moreland as a witness and she made an offer of proof regarding the subject matter of his testimony. Counsel for Moreland was present at the hearing and stated Moreland would "decline to testify based on his Fifth Amendment right not to incriminate himself." Because by then Moreland had been convicted on his plea of manslaughter and sentenced to 10 years in prison, the trial court stated, "I am at a loss as to how you believe that Mr. Moreland would be incriminating himself at this point." The prosecutor said "the court has an obligation to inquire and hold a hearing," and she offered to leave the courtroom for such a proceeding. After a brief hearing outside the presence of the prosecutor and Caliz (the transcript of which was sealed), the prosecutor returned and confirmed that Moreland, during the first trial, made certain statements the People did not believe were truthful.

The court stated, "Okay. So my understanding of the law is that if the court believes that there is a reasonable possibility, which is really quite small, that a witness could incriminate himself in response to questions, the court should sustain the

privilege. If there is a possibility that this witness would testify, your office would indicate that they don't believe what this person says, it could open up this witness to prosecution for perjury at some point. So based on what I have heard from [counsel for Moreland], I would tend to sustain the privilege." After some statements by the prosecutor suggesting the People's position was not "based on any particular evidence" or on "anything specific evidentiary-wise," counsel for Moreland (after accusing the prosecutor of lying to the court) stated, "Well, counsel, very specifically, it wasn't a general feeling. There was a very specific point of evidence [the People] asserted that my client was dishonest about, about who was in the car."

Moreland took the witness stand and, pursuant to the advice of his attorney, asserted his Fifth Amendment right not to incriminate himself. The court ruled, "I find that at the present time the witness is, in fact, unavailable in that he, with the advice of counsel, has testified under oath that he would exercise his privilege under the Fifth Amendment." The prosecutor then confirmed that she would not seek immunity for Moreland.

2. *Applicable Law*

"Although defendants generally have the right to confront their accusers at trial, this right is not absolute. 'If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.' [Citations.] The defendant 'must not only have had the *opportunity* to cross-examine the witness at the previous hearing, he must also have had "an interest and motive similar to that which he has at the [subsequent] hearing."'" (*People v. Seijas* (2005) 36 Cal.4th 291, 303; accord, *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1547; see Evid Code,

§ 1291.)[12] "As long as defendant was given the opportunity for effective cross-examination, the statutory requirements [are] satisfied; the admissibility of this evidence [does] not depend on whether defendant availed himself fully of that opportunity." (*People v. Zapien* (1993) 4 Cal.4th 929, 975.)

"A witness who successfully asserts the privilege against self-incrimination is unavailable to testify for these purposes, although in order to be unavailable the witness "'must not only intend to assert the privilege, but also be entitled to assert it.'" (*People v. Seijas*, *supra*, 36 Cal.4th at p. 303.) Thus, the trial court must determine whether the witness is properly asserting the privilege. "A witness may assert the privilege who has 'reasonable cause to apprehend danger from a direct answer.' [Citations.] However, 'The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination.' [Citation.] The court may require the witness 'to answer if "it clearly appears to the court that he is mistaken."' [Citation.] 'To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" (*Seijas*, at p. 304; accord, *People v. Smith* (2007) 40 Cal.4th 483, 510.) We review

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[12] Evidence Code section 1291, subdivision (a), provides in relevant part: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . . [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

the trial court's ruling allowing a witness to assert the privilege against self-incrimination de novo. (*Seijas*, at p. 304.)

3. *The Trial Court Did Not Err in Admitting Moreland's Testimony from the First Trial*

Caliz argues the trial court erred in ruling that Moreland's testimony from the first trial was admissible under Evidence Code sections 1230 and 1291 because Moreland "was not legally unavailable as a witness." Caliz does not argue he did not have an adequate opportunity to cross-examine Moreland at the first trial. Caliz argues only the court erred in finding Moreland unavailable based on his assertion of his Fifth Amendment privilege against self-incrimination because Moreland had no reasonable cause to fear his testimony would subject him to prosecution for perjury. Caliz's primary contention, which the People do not address, is that, because Moreland's attorney represented his client would testify "consistently with his testimony at the first trial," his testimony in the second trial "would not have given the prosecution any more ammunition" to charge Moreland with perjury. Caliz essentially argues that, because Moreland's testimony would have been the same, the People had everything they needed to charge Moreland with perjury and his testimony in the second trial would not have put Moreland in any greater danger of a perjury charge than his testimony in the first trial did.

Caliz's view of the privilege against self-incrimination is too narrow. "To deny an assertion of the privilege, 'the judge must be "'*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate.'"' (*People v. Trujeque* (2015) 61 Cal.4th 227, 267; see *Seijas*, *supra*, 36 Cal.4th at pp. 304-305 [under Evidence Code

section 940, which codifies the constitutional rule that "a person has a privilege to refuse to disclose any matter that may tend to incriminate him," the "'proffered evidence is inadmissible unless it *clearly appears* to the court that the proffered evidence *cannot possibly have a tendency* to incriminate the person claiming the privilege'"].) Even "basic questions about [the witness's] background and his relationship to defendant, though seemingly innocuous," may elicit incriminating information. (*Trujeque*, *supra*, 61 Cal.4th at p. 268.) "[T]he privilege against self-incrimination does not require, or even permit, the court to assess the likelihood of an actual prosecution in deciding whether to permit the privilege. The court may not force a witness to make incriminating statements simply because it believes an actual prosecution is unlikely. The test is whether the statement might tend to incriminate, not whether it might tend to lead to an actual prosecution or, stated slightly differently, whether the statement *could*, not *would*, be used against the witness." (*Seijas*, *supra*, at p. 305; see *id.* at p. 306 ["[t]he issue is not whether the testimony *does* incriminate but whether it *tends* to do so"].)

Here, the prosecution was investigating whether, while Caliz was in the back seat behind the driver, there was someone else sitting in the front passenger seat. The prosecutor's questioning of Moreland at the first trial suggested there was someone in the front passenger seat whom Moreland refused to acknowledge. Wade testified there were more than two people in the car. On cross-examination Moreland repeatedly denied there was anyone in the front passenger seat of his car the day of the shooting and, when shown a picture of his car at the scene, repeatedly denied seeing anyone pictured in the front passenger seat. The prosecutor even suggested she knew who else was in the car with Moreland and Caliz the day of the shooting when she

asked Moreland whether two specific gang members were with Moreland when he gave Caliz a ride that day. The prosecutor made it clear to the court and counsel for Moreland that the People did not believe Moreland's trial testimony, and she suggested Moreland was concealing the identity of someone else who was involved in the crime. Counsel for Moreland told the court the People "made a claim that they don't believe [Moreland's] testimony about who was in the car and how many people were in the car," and the prosecutor agreed, stating that "it does not make sense that an individual would get into the back seat of a vehicle if there was no one in the front seat of the vehicle." In response to the court's inquiry, counsel for Moreland represented that in his professional judgment and as an officer of the court his client was validly exercising his privilege against self-incrimination. (See *Seijas*, *supra*, 36 Cal.4th at p. 300 [trial court "asked [the witness's] attorney whether, in her 'professional judgment and as an officer of the court,' she believed [the witness] was validly exercising the privilege," and the attorney "said she did so believe"].)

As the trial court correctly found, Moreland and his attorney were not "'clearly . . . mistaken'" in asserting the privilege. (*Seijas*, *supra,* 36 Cal.4th at p. 304) The prospects of a perjury charge were very real, and Moreland had reasonable cause to fear that answering questions at the second trial could result in "'injurious disclosure.'" (*Ibid.*) Compelling Moreland to testify at the second trial could have required him to answer questions about how many people were in the car the day of the shooting, the very subject area about which the prosecution claimed Moreland had lied under oath in the first trial. This was not a case, as Caliz suggests, where a witness was trying to "escape testimony . . . on the possibility that the prosecution might perceive [his] testimony as perjurious." This was a case

where the witness knew the prosecution was interested in prosecuting him for testifying falsely about a "very specific point of evidence." It did not "clearly appear" that, had Moreland testified at the second trial, his testimony could not "*possibly* have" had a tendency to incriminate him. (*Ibid.*)

That Moreland testified at the first trial about the number of people in his car the day of the shooting did not mean the People could not obtain additional evidence to use against Moreland from his testimony, should the court compel it, at the second trial. Just because prosecutors had some evidence Moreland committed perjury at the first trial does not mean they could not obtain additional evidence from Moreland at the second trial to use against him. And, as Caliz concedes, "the statute of limitations for perjury had far from run by the time of the second trial." Indeed, even if Moreland testified in the second trial exactly as he had in the first trial, compelling Moreland to testify at the second trial may have created a danger of a second perjury charge. Knowing the People questioned the veracity of his testimony in the first trial, Moreland would only risk exposure to further criminal charges if he testified the same in the second trial. The trial court did not err in ruling Moreland had properly invoked his Fifth Amendment privilege against self-incrimination, and therefore was unavailable at the second trial.[13]

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[13] Caliz also contends that, by admitting Moreland's testimony from the first trial, the court violated Caliz's constitutional due process and confrontation rights. Where, as here, however, "the requirements of [Evidence Code] section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation." (*People v. Herrera* (2010) 49 Cal.4th 613, 621; see *People v. Roldan* (2012) 205 Cal.App.4th 969, 979.) Caliz does not argue

B. *The Trial Court Did Not Commit Reversible Error in Admitting Moreland's Statements to the Confidential Informant*

Caliz objected to the admissibility of the conversation between Moreland and the confidential informant.[14] The prosecutor relied on the hearsay exception for declarations against penal interest in Evidence Code section 1230. The court overruled Caliz's objection. Caliz argues the trial court erred in admitting Moreland's statements to the confidential information that Caliz "was the shooter [and] the gunman," Moreland never touched the gun, and Moreland "did not associate or communicate with" Caliz.

1. *Applicable Law*

"Although hearsay statements are generally inadmissible under California law (Evid. Code, § 1200, subd. (b)), the rule has a number of exceptions. One such exception permits the admission of any statement that 'when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.' (Evid. Code, § 1230.) As applied to statements

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the trial court's rulings violated his confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36.

[14] There were redactions in the transcript of the conversation between Moreland and the confidential informant, but Caliz did not object to the redactions. Caliz does not argue on appeal there were any errors in the redaction of the transcript.

against the declarant's penal interest, in particular, the rationale underlying the exception is that 'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements. [Citation.] [¶] To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he 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.' [Citation.] 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] [¶] We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion." (*People v. Grimes* (2016) 1 Cal.5th 698, 710-711; see *People v. Masters* (2016) 62 Cal.4th 1019, 1055-1056; *People v. Smith* (2017) 10 Cal.App.5th 297, 303.)

California law governing whether Evidence Code section 1230 allows "the admission of 'any statement or portion of a statement not itself specifically disserving to the interests of the declarant'" (*People v. Grimes*, *supra*, 1 Cal.5th at p. 713) has evolved somewhat over time. In *People v. Leach* (1975) 15 Cal.3d 419 the Supreme Court held "the exception to the hearsay rule relating to evidence of declarations against interest set forth in section 1230 of the Evidence Code to be inapplicable to evidence of any statement or portion of a statement not itself specifically

disserving to the interests of the declarant," and thus "evidence of any portions of declarations against interest—especially declarations against penal interest—not actually disserving to the declarant should be inadmissible." (*People v. Leach*, *supra*, 15 Cal.3d at pp. 439, 441; see *People v. Greenberger* (1997) 58 Cal.App.4th 298, 328 ["[o]nly those statements or portions of statements that are specifically disserving of the penal interest of the declarant were deemed sufficiently trustworthy to be admissible," while "[s]tatements not specifically disserving were characterized as 'collateral' statements and inadmissible"]; see also *Grimes*, *supra*, 1 Cal.5th at p. 713 [the reason for this rule was that "portions of a confession inculpating others are not as inherently trustworthy as those portions that are actually disserving to the declarant's interests"].) Under *Leach*, "[i]n order for a statement to qualify as a declaration against penal interest the statement must be genuinely and specifically inculpatory of the declarant . . . ." (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 329; see *People v. Duarte* (2000) 24 Cal.4th 603, 612 ["[u]nder the rule of *Leach*, 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'"].)

More recently, the Supreme Court has emphasized that California cases "have taken a contextual approach to the application of the *Leach* rule." (*People v. Grimes*, *supra*, 1 Cal.5th at p. 715; see also *People v. Smith*, *supra*, 10 Cal.App.5th at p. 307, fn. 3 (conc. opn. of Simons, J.) [the Supreme Court in *Grimes* "discussed the 'origins and purpose' of the *Leach* rule in depth, noting that 'the proper application of the *Leach* rule appears to have generated some confusion'"].) The Supreme Court has "applied *Leach* to bar admission of those portions of a

third party's confession that are self-serving or otherwise appear to shift responsibility to others," but has also "permitted the admission of those portions of a confession that, though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.'" (*Grimes*, *supra,* at p. 715; see *id.* at p. 716 [the *Leach* rule does not "in all cases require exclusion of even those portions of a confession that are inextricably intertwined with the declarant's admission of criminal liability"].) Thus, "the nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.'" (*Grimes*, *supra,* at p. 716.)[15]

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15 Thus, for example, "a statement is more likely to satisfy the against-interest exception when the declarant accepts responsibility and denies or diminishes others' responsibility, as in the example "'I robbed the store alone,'" as opposed to attempting to assign greater blame to others, as in the example, "'I did it, but X is guiltier than I am.'"" (*People v. Grimes*, *supra*, 1 Cal.5th at p. 716, quoting *U.S. v. Paguio* (9th Cir. 1997) 114 F.3d 928, 934.)

2. *The Trial Court Did Not Abuse Its Discretion in Admitting Moreland's Statements to the Confidential Informant*

After listening to the recording of the conversation and reviewing the transcript, the court ruled the statements were admissible. The court stated, "I do find the statement trustworthy under the *Greenberger* line of cases. I think that this is exactly the type of situation that the *Greenberger* court anticipated. Clearly we have Mr. Moreland who is unavailable as a witness. So that portion of the declaration against interest is fulfilled. This is a non-coercive [setting]. It is not testimonial. It is obvious that Mr. Moreland thought he was speaking with a trusted fellow gang member. He, throughout the conversation with the confederate, implicates himself as being at the scene, as being there when Mr. Caliz jumps out of the car, [and also] not reporting anything afterwards and not going to . . . the police. There are numerous portions in the statement that are incriminating as to how the actual shooting went down, as to his gang, as to the gang connections and in talking with this person that he thought was . . . another gang member. Without even talking about corroboration and the fact that Mr. Caliz's statement matches what Mr. Moreland indicates happening, I think that there is plenty for the court to find that this is really . . . trustworthy. And those are the requirements of the declaration against-interest [exception]."

As noted, the trial court did not err in finding Moreland unavailable. (See *People v. Duarte*, *supra*, 24 Cal.4th at pp. 609-610 [witness who invoked Fifth Amendment right not to incriminate himself was unavailable for purposes of Evidence Code section 1230]; *People v. Leach*, *supra*, 15 Cal.3d 419, 438 ["under California law the declarant's assertion of the privilege against self-incrimination satisfies the unavailability

requirement of the against-interest exception"].) Caliz argues that, even if Moreland was unavailable, the trial court abused its discretion in admitting Moreland's statements to the confidential informant because they were not "specifically disserving" to Moreland's penal interests but instead were self-serving and "directly shifted the blame for the shooting" to Caliz. Caliz also argues the statements were not sufficiently reliable because they "placed the major blame for the shooting on" Caliz.

Moreland made several specifically disserving statements to the confidential informant, including that he was Mickey Mouse from the 51 Troubles, he was the driver of the car and Tiny Crumb was the shooter, Moreland waited in the car from which Tiny Crumb emerged and began shooting, and Moreland and Tiny Crumb were both armed with weapons (although Moreland said he did not use his). As Caliz suggests, these statements inculpated Moreland in the crimes, but to some extent they also minimized his role as (merely) the driver and placed more blame on Caliz as the (only) shooter.

Under the Supreme Court's analysis in *People v. Grimes*, *supra*, 1 Cal.5th 698, however, the statements describing Moreland's participation in the crime as the driver were "not practically separable" (*id.* at p. 717) from the statements naming Caliz as the shooter and were "inextricably intertwined with [Moreland's] admission of criminal liability" (*id.* at p. 716). There was no evidence and the People never argued Moreland fired any of the shots. He was always and only the driver, and his statements to the confidential informant inculpated himself in playing that role in the crime. Moreland's statements to the confidential informant admitting his involvement in the drive-by shooting of rival gang members were statements a reasonable person in Moreland's position would not have made unless he believed them to be true. (*Id.* at pp. 711, 715, 716; see *People v.*

Cortez (2016) 63 Cal.4th 101, 127 [trial court did not abuse its discretion under Evidence Code section 1230 in ruling the shooter's statements that the defendant was the driver in a drive-by shooting were specifically disserving where the shooter "knew that 'being linked to' defendant 'would implicate' him in a drive-by shooting for which defendant had been arrested"]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1252 [trial court did not abuse its discretion in concluding the witness's confession "he was an accessory to the crimes" "so far subjected him to the risk of criminal liability that a reasonable person in his position would not have made it unless he believed it to be true"], disapproved on another ground*, People v. Edwards* (1991) 54 Cal.3d 787, 833-834.)[16] The statements were sufficiently disserving to his penal interests under Evidence Code section 1230.

Whether Moreland's statements were sufficiently reliable under Evidence Code section 1230 is a closer question. Although "[t]here is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception," the courts have described a spectrum of reliability, ranging from "the least reliable circumstance . . . in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others," to "the most reliable circumstance . . . in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*People v. Greenberger*, *supra*,

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16 As the People note, Moreland did state he had no intention of participating in the shooting, he had no advanced warning there would be a shooting, and had he known Caliz was going to shoot someone he never would have let Caliz in his car. Moreland, however, made these statements in response to questioning by his attorney at the first trial, not to the confidential informant.

58 Cal.App.4th at pp. 334-335; accord, *People v. Tran* (2013) 215 Cal.App.4th 1207, 1217; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 175.)

For example, in *People v. Duarte*, *supra*, 24 Cal.4th 603 the Supreme Court held a declarant's postarrest statements incriminating both himself and the defendant were not sufficiently reliable under Evidence Code section 1230 because they "were made to police shortly after he had been apprehended, arrested, and taken into custody" and "from start to finish" attempted to blame others or curry favor by cooperating with the police. (*Id.* at pp. 614-617.) The Supreme Court explained that "the entire rationale underlying the against penal interest hearsay exception 'breaks down in a situation where a declarant in police custody seeks to exculpate himself by implicating another suspect.'" (*Id.* at p. 618; see *People v. Smith*, *supra*, 10 Cal.App.5th at p. 304 [inconsistent statements by the defendant's girlfriend in a driving under the influence case that she and not the defendant was driving the car, made nine months after the accident and before she understood she could be subject to criminal liability, were not reliable under Evidence Code section 1230].) On the other hand, the courts in *People v. Cervantes*, *supra*, 118 Cal.App.4th 162 and *People v. Arceo* (2011) 195 Cal.App.4th 556, concluded the witnesses' disserving statements implicating the defendant were sufficiently reliable under Evidence Code section 1230 because the declarant made the statement either "within 24 hours of the shooting to a lifelong friend from whom he sought medical treatment for injuries sustained in the commission of the offenses" (*Cervantes*, *supra*, 118 Cal.App.4th at p. 175) or in a conversation "'between friends in a noncoercive setting that fosters uninhibited disclosures.'" (*Arceo*, *supra*, 195 Cal.App.4th at p. 577; see *People v. Tran*, *supra*, 215 Cal.App.4th at p. 1220 [facts that the declarant made

the statement to "a trusted friend" in "a remote place" where the two individuals "could speak freely and in confidence" were "compelling indicia of reliability and trustworthiness" under Evidence Code section 1230].)

Moreland's statements to the confidential informant fall between these two extremes. On the one hand, Moreland had been arrested and was in the generally coercive environment of a jail cell. On the other hand, Moreland did not make his statements to a police officer in an attempt to shift blame to Caliz or (at that time) try to get a better deal for himself. Moreland made the statements to someone he believed was from the 74 Hoovers, an ally of Moreland's gang. Moreland also believed the confidential informant had contacts with people in the 51 Troubles whom he could call to get an "order" to stop Caliz from making statements that would implicate Moreland in the crime. Given these facts, the trial court did not abuse its discretion in concluding, in "the totality of the circumstances in which the statement[s were] made" (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 334), that the statements Moreland made to the confidential informant were sufficiently reliable under Evidence Code section 1230. (See *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1399-1401 [accomplice's jailhouse statements to "a paid confidential informant" that were "surreptitiously recorded" were sufficiently trustworthy under Evidence Code section 1230]; see also *People v. Edwards*, *supra*, 54 Cal.3d at p. 820 ["[a] reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion"].)

Finally, as further indicia of reliability and trustworthiness, and unlike the cases cited by Caliz, the declarant making the out-of-court statements against penal interest, Moreland, actually testified in court and was subject to

cross-examination about the statements, albeit in the first trial. Moreland's statements to the confidential informant were just as incriminating in the first trial as they were in the second, and counsel for Caliz had the opportunity to and did question Moreland at the first trial. In fact, Moreland was specifically questioned at the first trial about his conversation with the confidential informant, albeit by the prosecutor (counsel for Caliz, though he questioned Moreland on other issues, chose not to question Moreland on this topic). As the trial court observed, "There was an opportunity for [Moreland] to be questioned about it and to indicate whether or not he was telling the truth or not or whatever he was doing during that conversation" with the confidential informant, and "it's not as though it's coming in for the first time without any explaining by Mr. Moreland as to what was going on."

3. *Any Error in the Admission of Moreland's Statements to the Confidential Informant Was Harmless*

The standard of prejudice applicable to the erroneous admission of hearsay evidence is the standard in *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 887 ["the *Watson* standard is applicable to state law error in admission of hearsay"]; accord, *People v. Seumanu* (2015) 61 Cal.4th 1293, 1308.) Under this standard, "'[w]hen the court abuses its discretion in admitting hearsay statements, we will affirm the judgment unless it is reasonably probable a different result would have occurred had the statements been excluded.'" (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526.)

As noted, Caliz argues the trial court erred in admitting Moreland's statement to the confidential informant that he was

the driver and Caliz was the shooter. The jury heard this evidence anyway when the People read Moreland's testimony from the first trial, which, as explained, the trial court properly admitted. Caliz also argues the court erred in admitting Moreland's statement to the confidential informant that he never touched the gun and he did not associate with Caliz. The jury heard this evidence too from the reading of Moreland's testimony in the first trial. Moreland also told the confidential informant he was Tiny Mickey Mouse from the 51 Troubles, but the jury learned that as well from Moreland's trial testimony.

Moreover, even without Moreland's statements to the confidential informant, the evidence of Caliz's guilt was strong. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1222 [errors were harmless "[g]iven the overwhelming evidence of defendant's guilt"]; *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1535 ["harmless error standards met when the evidence of guilt is so strong that the jury would have reached the same verdict regardless of the error"].) Trial testimony by Wade and Moreland, and Wade's statements to the police, identified Caliz as the shooter.[17] Caliz's statements to the confidential

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[17] Caliz argues Wade's identification of Caliz "had serious problems" because Wade only identified Caliz "a month after the shooting and after having received a photograph of Mr. Caliz from a friend asking if the person in the photograph was the shooter," and Wade said during the photograph line up, "If he is Tiny Crumb, that's him." Wade did say to the detectives, "If he [is] Tiny Crumb, that's him. I think this is him. I need to get another picture because he look[s] different a little bit." But Wade also said to the detectives he saw and recognized Tiny Crumb, "I really did see him shoot us" and "that's the truth," and he was circling the picture of the person who "looks like the guy who committed the crime." Wade also stated he recognized the

informant, the admission of which Caliz does not challenge, included admissions that he had committed the crime, had disposed of the weapon, and had been caught on videotape. Caliz also said the driver, Moreland, was an associate from the neighborhood. The video evidence of the murder was consistent with the witnesses' statements and testimony, and Caliz's social media activity provided further confirmation. Thus, even if the trial court had excluded the jailhouse conversation between Moreland and the confidential informant, it is not reasonably probable the result would have been any different.

C. *The Trial Court Did Not Abuse Its Discretion in Precluding the Testimony of Caliz's Eyewitness Identification Expert*

The prosecutor objected to the admission of the proposed testimony of Caliz's expert on eyewitness identification, arguing Wade's percipient eyewitness testimony "is not really the type of testimony that an eyewitness ID expert would be able to weigh in on, the factors that an eyewitness ID expert would typically testify to regarding the opportunity to see, the circumstances under which the observation was made. How well people are recalling faces doesn't apply in the same way to someone who is familiar with an individual as Mr. Wade would be if we believe his second statement to the police and the text messages to the other witness, Ms. Lockhart." Counsel for Caliz, citing *People v. McDonald* (1984) 37 Cal.3d 351, argued the jury could disbelieve the statements by Caliz, Moreland, and the confidential informant, so that Wade would be the only person identifying Caliz and there would be no evidence corroborating Wade's

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picture his friend sent him as the person who jumped out of the car.

identification. Counsel for Caliz argued that, even if a witness has seen another person before, the expert would help the jury understand it is not necessarily true the witness would recognize the person when the witness saw the person at a later time.

After deferring ruling on the issue, the court stated its understanding of the law was that, even if Wade had not seen Caliz before, the court could exclude the eyewitness expert's testimony if Wade's identification was corroborated. The court stated, "If the defendant's description of what happened to the confidential informant fits together and dovetails with Mr. Moreland, to me, that is corroboration that, in fact, the . . . eyewitness is, in fact, giving an accurate account of what happened." The court indicated it did not see the case as "a true eyewitness case where the jurors would be helped by learning the factors that influence eyewitness identification."

Ultimately, the court ruled, "I do not see this case as being an eyewitness identification case at all, particularly after listening to the tape. An eyewitness identification expert would only be relevant if ID is a critical issue in the case. And . . . we have a situation . . . here where a co-defendant has already testified about what, in fact, Mr. Caliz did in exiting the car and shooting. In addition to which there is a surveillance video that corroborates, as I understand it, not necessarily his identification but the manner in which Mr. Moreland has indicated that the shooting occurred. And we have, additionally, Mr. Moreland talking to a confidential informant in the jail and indicating that Mr. Caliz is responsible, naming him by his name, his moniker . . . . It all fits together. They all corroborate each other, all of these various, these pieces. And they take the case totally out of the issue of eyewitness identification." The court concluded, "I don't know that . . . an eyewitness expert would add

anything to the case. So I am going to deny the use of an ID expert in this case."

"[T]he trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification." (*People v. Sanchez* (2016) 63 Cal.4th 411, 462; see *People v. McDonald*, *supra*, 37 Cal.3d at p. 377 ["the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion"], overruled on another ground by *People v. Mendoza* (2000) 23 Cal.4th 896, 914].) There are limits, however, to the trial court's discretion to exclude expert eyewitness testimony. The Supreme Court held in *McDonald*: "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*McDonald*, *supra*, 37 Cal.3d at p. 377.) Caliz relies on this passage from the Supreme Court's opinion in *McDonald* to argue the trial court erred in excluding Caliz's eyewitness identification expert to impeach Wade's identification of Caliz as the shooter.

Cases since *McDonald* have clarified the scope of the Supreme Court's holding in that case, emphasizing it is an abuse of discretion to exclude expert eyewitness testimony only when the identification is uncorroborated by other evidence. In *People v. Sanders* (1995) 11 Cal.4th 475 the Supreme Court, describing its decision in *McDonald*, stated, "We held that, *in the appropriate case*, exclusion of expert testimony concerning eyewitness identification would constitute error." (*Id.* at p. 508;

see also *People v. Jones* (2003) 30 Cal.4th 1084, 1112 ["this language from *Sanders* cannot be viewed as limiting the holding of *McDonald* . . . to cases in which, apart from the eyewitness identification, there is *no* other evidence whatever linking defendant to the crime: Exclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability"].) In *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254 the Supreme Court emphasized, "*McDonald* does not apply when an eyewitness identification is 'substantially corroborated by evidence giving it independent reliability.'" (*Id.* at pp. 290-291; see *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 725-727 [trial court did not abuse its discretion in excluding expert testimony on eyewitness identification where there was substantial evidence corroborating the eyewitness testimony].)

There was substantial corroborating evidence of Wade's identification of Caliz as the one who shot him. This evidence included Moreland's trial testimony, Caliz's admissions to the confidential informant, Caliz's contemporaneous postings on social media sites, and Caliz's and Moreland's association with the 51 Troubles, whose main rival was Lockhart and Wade's gang, the 57 Neighborhood Crips. While "[i]n *McDonald*, no evidence linked the defendant to the crime, apart from eyewitness identification" (*Sanders*, *supra*, 11 Cal.4th at p. 509), in this case there was plenty of evidence other than eyewitness testimony. (See *ibid.* ["[a]lthough eyewitness testimony was a key element of the prosecution's case, here, unlike *McDonald*, eyewitness testimony was not the *only* evidence linking the defendant to the crime"].) And as the trial court recognized, unlike the witnesses in *McDonald* and *Sanders*, Wade knew the defendant and what he looked like. Caliz has not cited any case

applying the language of the *McDonald* opinion to the situation where the eyewitness knew the defendant.

Finally, the probative value of an eyewitness expert's testimony in this case was minimal. Caliz argues "[t]estimony from an eyewitness identification expert was critical for the defense to explain to the jury how various psychological factors affected the accuracy of Mr. Wade's identification of Mr. Caliz during the photograph line up held over a month after the shooting," including the significance of the fact that "the shooter was visible for less than five seconds," during which time "multiple gunshots were fired, undoubtedly drawing attention to the gun used in the shooting." However, "[t]he jury did not need edification on the obvious fact that an unprovoked gang attack is a stressful event or that the passage of time frequently effects one's memory." (*People v. Plasencia* (1985) 168 Cal.App.3d 546, 555.) Jurors ordinarily can understand that a gang shooting is stressful and that memory fades over time (although Wade told the detectives his memory was better at the second interview in the police station than it had been during the first interview in the hospital).[18] As the trial court stated, "I think having an

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[18] The court also instructed the jurors pursuant to CALCRIM No. 315 to consider, in evaluating eyewitness testimony, these kinds of factors, such as whether the witness knew or had prior contact with the defendant, how well the witness could see the perpetrator, how closely the witness was paying attention, whether the witness was under stress at the time of the observation, how much time passed between the event and the identification, and whether the witness ever failed to identify the defendant or changed his or her mind about the identification. (See *People v. Goodwillie*, *supra*, 147 Cal.App.4th at p. 725 & fn. 22 [affirming exclusion of eyewitness identification evidence where "the court instructed the jurors as to the factors they could

eyewitness ID expert would be totally confusing to the jury because it would cause them to believe that, in fact, this is all about whether you can and cannot determine what happened in a five second burst of fire, which I think everybody naturally recognizes" because "a lay person knows that five seconds, it's very difficult to reconstruct what happened if you're directly involved in an incident."[19]

D. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence To Impeach Caliz's Testimony*

As noted, Caliz testified in his defense. The prosecutor sought to impeach Caliz with several sustained juvenile petitions for burglary, battery, robbery, sale of a controlled substance, and assault with a deadly weapon on a police officer. The prosecutor also said she wanted to introduce evidence that Caliz possessed a razor blade while in custody prior to a court hearing. Counsel for

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consider when weighing the credibility of eyewitness testimony" pursuant to CALJIC No. 2.92].)

[19] Caliz also argues the exclusion of his eyewitness identification expert violated Caliz's constitutional rights to due process and to present a defense. As the court in *People v. Smith*, *supra*, 10 Cal.App.5th 297 recently explained, however, "[a] similar argument was rejected in *People v. Cudjo* [6 Cal.4th 585]: "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] . . .' [¶] It follows, for the most part, that the mere erroneous exercise of discretion under such "normal" rules does not implicate the federal Constitution.'" (*People v. Smith, supra*, 10 Cal.App.5th at p. 305, fn. 4; see *People v. McNeal* (2009) 46 Cal.4th 1183, 1203.)

Caliz objected that the adjudication for assault on a police officer and the razor blade possession evidence were "more prejudicial than probative as to his credibility" under Evidence Code section 352. The court overruled the objection and allowed the prosecutor to impeach Caliz with all of this evidence.

Caliz admitted on direct examination by his attorney that he had suffered sustained juvenile petitions and he had been "arrested for or accused of" burglary, assault, assault with a deadly weapon on a peace officer, giving false information, and resisting arrest. Caliz stated he had also been convicted for sale of PCP and robbery and assault. On cross-examination by the prosecutor, Caliz testified he had been arrested for assaulting a police officer with a handgun that resulted in a sustained petition, and had suffered sustained petitions for burglary, robbery, and possession for sale of PCP.

Caliz states in his summary of the law regarding "the erroneous admission of other-crimes evidence" that "juvenile adjudications are civil in nature, not criminal, and do not constitute 'convictions,' they may *not* be used to impeach a witness." (See *People v. Jackson* (1980) 28 Cal.3d 264, 311, disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1739-1740; *People v. Jackson* (1986) 177 Cal.App.3d 708, 711-713.) Caliz does not argue, however, that the trial court erred by allowing the prosecutor to impeach him with the fact of his juvenile adjudications rather than limiting the impeachment to conduct involving moral turpitude underlying the juvenile adjudications. Instead, Caliz argues the trial court abused its discretion under Evidence Code section 352 in admitting one of the adjudications, for assault with a deadly weapon on a police

officer, and admitting evidence Caliz possessed a razor blade while he was in custody prior to a court hearing.[20]

In exercising its discretion under Evidence Code section 352, the trial court ruled, "I do believe that if Mr. Caliz did take the stand that while he was young when he committed these offenses, that they are highly probative with respect to whether or not he should be believed in his testimony. Each one of these related offenses involves a serious crime, and they're moral turpitude offenses. I think the assault with a deadly weapon on a police officer, while it is obviously very serious, I think it is important for the jurors to hear that, because I think that it does speak to whether or not somebody would have any problem with the truth when they testified, any regard necessarily for a court of law and taking the oath. And it bespeaks of a brazenness towards authority that I think is relevant here . . . . Counsel can, of course, bring out the fact that he was very young when these offenses occurred. But I think they're so closely connected in time to this event and are so highly probative as to how he has gone about his life and whether or not he's credible on the witness stand that I think the

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[20] Caliz also suggests the court should have excluded evidence of the assault with a deadly weapon and the razor blade incident under Evidence Code section 1101. Because Caliz did not object at trial to the admission of this evidence under Evidence Code section 1101, however, Caliz has forfeited any argument the court abused its discretion by failing to exclude this evidence under that provision. (See *People v. Alexander* (2010) 49 Cal.4th 846, 912 [failure to object to evidence regarding the defendant's prior commission of a criminal act under Evidence Code section 1101 forfeited the issue on appeal]; *People v. Bradley* (2012) 208 Cal.App.4th 64, 89 [failure to make a timely and specific objection to evidence under Evidence Code section 1101 forfeited the issue].)

probative value greatly outweighs any prejudicial effect. And I am going to allow them to be used."

Regarding evidence of the razor blade incident, the court stated it had reviewed the police report and "weighed under [Evidence Code section] 352 the relevancy versus the prejudicial effect," and concluded, "the probative value substantially outweighs any prejudicial effect." The court explained, "When Mr. Caliz is on the witness stand, he can give whatever explanation he chooses to give as to why he had it in his possession, whether it didn't belong to him, or whether he was using it for self-protection or whatever reason he is giving. It wasn't used. Thank goodness. And so I think that really decreases the level of prejudice. I do think it's highly relevant [and] is moral turpitude. It's also reflective as to his credibility. If it's for self-protection relating to a gang, it would go to whether or not he is or is not an active member of a gang, as he's trying to portray himself as not being active."[21]

The trial court, which on the record explicitly balanced the probative value of both pieces of evidence against the risk of undue prejudice (see *People v. Wash* (1993) 6 Cal.4th 215, 246, fn. 14 ["'on a motion invoking [Evidence Code section 352] the record must affirmatively show that the trial judge did in fact weigh

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21 The trial court instructed the jury pursuant to CALCRIM No. 316, "If you find that a witness has committed a crime or other misconduct, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair the witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." The court also instructed the jury pursuant to CALCRIM No. 303, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

prejudice against probative value'"]), did not abuse its discretion. Assault with a deadly weapon is a crime of moral turpitude and may be used to impeach a witness. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138-1139; *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381; see *People v. Cavazos* (1985) 172 Cal.App.3d 589, 595 ["[i]t is the use of the deadly weapon which elevates the assault to a moral turpitude crime"].) So is possession of a detached razor blade in prison or county jail, because such a blade is a deadly weapon. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1152-1153; *People v. Pollock* (2004) 32 Cal.4th 1153, 1178.) As the trial court recognized, Caliz's assault on a peace officer with a deadly weapon was probative of Caliz's credibility because it reflected on his respect for authority, the law, and the oath he would take in court to tell the truth. And the razor blade incident was relevant to Caliz's credibility in general and to impeach his testimony that he was not an active member of a gang. Although Caliz assaulted the peace officer when he was 14 years old (the possession of a razor blade incident occurred during trial), the court ruled that counsel for Caliz could introduce evidence of Caliz's age at the time of the incident and argue to the jury that Caliz was young when he committed assault.

The evidence of Caliz's conduct in assaulting a peace officer and possessing a razor blade in prison or jail was also admissible to rebut specific testimony by Caliz while he was on the witness stand. At the close of Caliz's direct testimony, Caliz testified:

"Q: On December 27, 2011, did you shoot Andre Lockhart and Steven Wade?

"A: No, sir.

"Q: Were you ever in possession of a nine-millimeter handgun on December 27, 2011?

"A: Never. Never been in possession of a weapon at all in my life."

The prosecutor's first question on cross-examination was, "Well, that's not true because you were actually arrested for assaulting a police officer with not just a deadly weapon, but actually with a handgun; correct?" Caliz answered, "Correct," but added "they didn't find no gun." Caliz also admitted on cross-examination he had brought a loose razor with him to court during the trial, but he said it was to trim his beard and he accidently "kind of forgot it was in [his] bible," which he had brought with him to court. The court was well within its discretion in allowing the prosecutor to ask Caliz about facts that contradicted his statement he had never been in possession of a weapon. (See *Portuondo v. Agard* (2000) 529 U.S. 61, 69 ["when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness'"]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 160 [trial court did not abuse its discretion "by allowing the prosecutor to question [the defendant] concerning a subject that [he] brought up in his own testimony"]; *People v. Chatman* (2006) 38 Cal.4th 344, 382 ["'[w]hen a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them'"]; *People v. Robinson* (1997) 53 Cal.App.4th 270, 282 ["'[a] defendant who takes the stand to testify in his own behalf waives the privilege against self-incrimination to the extent of all inquiries which would be proper on cross-examination and is subject to impeachment the same as any other witness'"]; see also *People v. Saddler* (1979) 24 Cal.3d 671, 679 ["when a defendant 'takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide'"].)

E. *Caliz Forfeited His Argument the Trial Court Erred in Imposing the Enhancement Under Section 12022.53, Subdivisions (d) and (e)(1)*

"[S]ection 12022.53 imposes progressive sentence enhancements of 10 years, 20 years, or 25 years to life, for progressively egregious firearm use applicable to certain enumerated felonies." (*People v. Yang* (2010) 189 Cal.App.4th 148, 154.) "These enhancements vary in length, corresponding to various uses of a firearm": 10 years for personal firearm use, 20 years for intentional and personal discharge of a firearm, and 25 years to life for intentional and personal discharge of a firearm that causes great bodily injury or death. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.)

"Section 12022.53, subdivision (e)(1), imposes vicarious liability under this section on aiders and abettors who commit crimes in participation of a criminal street gang." (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1171.) "Section 12022.53's subdivision (e)(1) has this effect: Ordinarily, section 12022.53's sentence enhancements apply only to personal use or discharge of a firearm in the commission of a statutorily specified offense, but when the offense is committed to benefit a criminal street gang, the statute's additional punishments apply even if, as in this case, the defendant did not personally use or discharge a firearm but another principal did." (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.) Thus, although "[o]rdinarily, a gun enhancement under section 12022.53 applies only to a defendant who *personally* used or fired a gun," when gang members "commit a crime for the benefit of their gang, section 12022.53, subdivision (e)(1) of the gun statute makes all principals to the crime subject to the gun enhancement if any principal used a gun." (*People v. Gonzalez*, *supra*, 180 Cal.App.4th at pp.1424-1425; see *People v. Salas* (2001) 89 Cal.App.4th

1275, 1281 ["[i]n a case where section 186.22 has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances"].)

As noted, although the original information alleged firearm enhancements for a principal's use of a firearm (§ 12022.53, subds. (b), (e)), personal and intentional discharge of a firearm (§ 12022.53, subds. (c), (e)(1)), and personal and intentional discharge of a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)), the amended information (perhaps mistakenly) alleged three identical enhancements for a principal's use of a firearm (§ 12022.53, subds. (b), (e)(1). The trial court, without objection, instructed the jury on all three allegations, and the jury found true all three allegations. The trial court, again without objection (by Caliz, who was representing himself for sentencing), imposed sentences of 25 years to life pursuant to section 12022.53, subdivision (d), on both counts against Caliz (who was the shooter and not just a principal).

Caliz argues that because "the prosecution failed to plead any firearm allegations under section 12022.53, subdivisions (c) or (d)—but only pled an allegation under section 12022.53, subdivision (b)—imposition of enhancements pursuant to section 12022.53, subdivisions (c) and (e)(1), or section 12022.53, subdivisions (d) and (e)(1), was inappropriate." Caliz points to section 12022.53, subdivision (e)(1), which provides for the enhancement if the two requirements are "*pled and proved*," and section 12022.53, subdivision (j), which provides that "[f]or the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the

accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

Caliz forfeited this argument by not objecting when the trial court instructed the jury on section 12022.53, subdivisions (c) and (d), gave the jury verdict forms asking the jury to make findings on section 12022.53, subdivisions (c) and (d), and imposed sentence on the enhancement under section 12022.53, subdivision (d). "Notice to an accused of the charges against him is required by due process . . . 'in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.] The general rule, however, is that a claim of unfair surprise at trial may not be raised for the first time after verdict." (*People v. Toro* (1989) 47 Cal.3d 966, 975, disapproved on another ground by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; see *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237.) "A defendant who acquiesces to have the trier of fact consider a nonincluded offense not alleged in the indictment "'cannot legitimately claim lack of notice, [and] the court has jurisdiction to convict him of that offense,'"" and ""'[w]hen the defendant acquiesces in conviction of an uncharged offense . . . no amendment [of the indictment or information] is necessary.'"" (*People v. Valenzuela, supra,* 199 Cal.App.4th at p. 1237; see *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438 [although "an accused cannot be convicted of an offense of which he has not been charged, regardless of whether there was evidence at his trial to show he committed the offense," an "exception exists if the accused expressly or impliedly consents or acquiesces in having the trier of fact consider a substituted, uncharged offense"].) "'The same rules apply to enhancement allegations.'" (*Valenzuela*, *supra*, 199 Cal.App.4th at p. 1237.) Thus, whether the People add a new charge or enhancement at trial by

amendment or, as here, by submitting jury instructions and verdict forms, "a failure to promptly object will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice." (*People v. Toro*, *supra*, 47 Cal.3d at p. 976; see *People v. Goolsby* (2015) 62 Cal.4th 360, 367.)

The trial court instructed the jury pursuant to CALCRIM Nos. 1402 and 3149 that, if the jury found Caliz guilty on count 1 or count 2 (or the lesser included crime of second degree murder), and found he committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang, then the jury had to decide whether the allegations that Caliz personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury or death were true. Counsel for Caliz did not object. (See *People v. Toro*, *supra*, 47 Cal.3d at p. 977 ["[n]o objection was made to the proposed instruction . . . nor was any objection thereafter raised to the jury's consideration of [the] uncharged offense"]; *People v. Whitmer* (2014) 230 Cal.App.4th 906, 920 ["[b]ecause appellant never raised any objection to the instructions before the trial court, he impliedly consented to the submission . . . to the jury"].) The trial court submitted verdict forms that asked the jury to make findings on the allegations under section 12022.53, subdivisions (b) and (e), (c) and (e)(1), and (d) and (e)(1). (See *People v. Whitmer*, *supra*, 230 Cal.App.4th at p. 920 ["defendant's counsel raised no objection to the instructions and verdict form . . . or to the jury's consideration of the offense"].) Counsel for Caliz did not object, and the jury returned true findings. By not objecting before the court instructed the jury, after the jury rendered its verdicts, or when the court imposed the enhancement at sentencing, Caliz "consented to the inclusion of the allegation without amendment of the information," and

therefore "forfeited the claim that notice was inadequate." (*People v. Valenzuela*, *supra*, 199 Cal.App.4th at p. 1237.)

The cases cited by Caliz are distinguishable. In *People v. Mancebo* (2002) 27 Cal.4th 735, "the jury had found that the defendant personally used a firearm in the commission of the offense, but the prosecution was forced to choose between using that fact to impose an enhancement under section 12022.5, subdivision (a), or a life term under the "One Strike Law" (§ 667.61, former subd. (e)(4)). [Citation.] Although the prosecution had intended to rely on the defendant's gun use to impose an enhancement under the One Strike Law, for the first time at sentencing the prosecutor sought to dismiss the gun-use allegation under the One Strike Law and substitute a multiple-victim circumstance (§ 667.61, former subd. (e)(5)) so that both the determinate-term enhancement and the life term could be imposed. [The Supreme Court in *Mancebo*] ruled that section 667.61, subdivision (f) 'precluded the trial court from striking those circumstances in order to free up gun use as a basis for imposing lesser enhancement terms under section 12022.5(a)' and held that the defendant did not forfeit the claim by failing to object at the sentencing hearing." (*People v. Houston*, *supra*, 54 Cal.4th at pp. 1228-1229.)]

Here, the People did not seek to impose enhancements under section 12022.53, subdivision (d), "for the first time at sentencing." (*People v. Mancebo*, *supra*, 27 Cal.4th at pp. 739, 745.) The People made clear during the trial they were seeking those enhancements, and the court gave jury instructions and verdict forms on the enhancement allegations. Moreover, while in *Mancebo* "[n]either the original nor the amended information ever alleged" the special circumstance (*id.* at p. 743), here the original information alleged all three enhancements under section 12022.53, subdivisions (e) and (b), (e)(1) and (c), and

(e)(1) and (d). Indeed, Caliz not only had notice from the jury instructions and verdict forms, he knew from the first trial the prosecution was seeking an enhancement under section 12022.53, subdivisions (e)(1) and (d), he knew how the prosecution was going to prove the allegation, and he had a prior opportunity to defend against the allegation.

In *People v. Arias* (2010) 182 Cal.App.4th 1009 the People charged the defendant with two attempted premeditated murders, and the jury found the defendant guilty on both counts. (*Id.* at pp. 1016-1017.) The trial court sentenced the defendant to consecutive life terms for the attempted murder convictions. (*Id.* at p. 1012.) The Court of Appeal held that the life sentences for the two attempted murder convictions were unauthorized because the charging document "did not allege the attempted murders were willful, deliberate, and premeditated." (*Id.* at p. 1017.) The court emphasized, "The jury's attempted murder verdicts did not include special findings as to premeditation and deliberation, but found 'first degree attempted murder' as to both victims." (*Ibid.*) In contrast, the jury here made explicit findings that a principal (1) personally used a firearm, (2) personally and intentionally discharged a firearm, and (3) personally and intentionally discharged a firearm causing death to Lockhart and great bodily injury to Wade. (See *People v. Houston*, *supra*, 54 Cal.4th at p. 1229 [distinguishing *Arias* because, unlike the jury in *Arias*, the jury in *Houston* "was properly instructed and made an express finding that the attempted murders were willful, deliberate, and premeditated"]; see also *People v. Botello* (2010) 183 Cal.App.4th 1014, 1021-1026 ["section 12022.53, subdivision (e)(1), cannot be used for the first time on appeal to save the imposed firearm enhancement under subdivision (d)" where the "jury was not provided with verdict forms on the uncharged

provision of section 12022.53, subdivision (e)(1), and returned no findings under that provision"].)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.